

Advertising  
 Community, Ascertainment of Needs  
 Deregulation  
 Logs, Program  
 Programming Requirements

Report and Order adopted to deregulate commercial broadcast radio in the areas of nonentertainment programming, ascertainment, commercialization, and program logs. Changing conditions in the field of broadcasting warrants the reduction of Commission policies and rules to permit the discipline of the marketplace to play a more prominent role. BC Docket No. 79-219

FCC 81-17

BEFORE THE  
 FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of  
 Deregulation of Radio

BC Docket No.  
 79-219  
 RM-3099  
 RM-3273

## REPORT AND ORDER (PROCEEDING TERMINATED)

(Adopted: January 14, 1981; Released: February 24, 1981)

BY THE COMMISSION: COMMISSIONERS FERRIS, CHAIRMAN; AND QUELLO ISSUING SEPARATE STATEMENTS; COMMISSIONER WASHBURN APPROVING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER FOGARTY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER BROWN DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JONES CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

*I. Introduction*

1. On September 6, 1979, we adopted a *Notice of Inquiry and Notice of Proposed Rule Making* in this proceeding. In that *Notice* we indicated that we were "initiating a proceeding looking toward the substantial deregulation of commercial broadcast radio . . ." Today, having received, and analyzed the numerous comments, and having held panel discussions at which the questions raised by this proceeding were energetically debated, we are prepared to resolve the issues. We believe that our resolution of those issues assures that service in the public interest will continue without unnecessarily burdensome regula-

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tions of uniform applicability that fail to take into account local conditions, tastes, or desires.

2. As we stated in the *Notice*, it is our concern that regulation should be kept relevant to a technology and an industry that has been characterized from its beginning by rapid and dynamic change. In less than fifty years, broadcast radio has grown from an infancy of 583 stations in 1934 to a maturity of nearly 9000 stations today. Moreover, in the early days of radio, it was essential that a few stations provide a broad general service. Today, however, it has become essential in view of the proliferation of radio stations and other broadcast services that radio licensees specialize to attract an audience so that they may remain financially viable. Consequently, policies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all manner of segmented audiences. We believe, therefore, that the Commission is justified in reviewing its regulations in the face of such fundamental changes as have occurred since the dawn of radio regulation in this country. Indeed, failure to do so could constitute less than adequate performance of our regulatory mission.

3. We believe that the course of action which we are taking in this proceeding is warranted under, and consistent with, the public interest standard contained in the Communications Act. It is well settled that this standard was deliberately placed into the Act by Congress so as to provide the Commission with the maximum flexibility in dealing with the ever changing conditions in the field of broadcasting. Moreover, a wide latitude has been provided the Commission to modify its regulations in the face of such changes. We believe that it is entirely consistent with our authority, and our mandate, to consider the changes in broadcasting that have occurred, at an ever accelerating pace, over the past half century, and to adapt our rules and policies to those changes.<sup>1</sup>

## II. History of the Proceeding

4. While the Commission has always attempted to assure that its rules and regulations are kept appropriate to a technology and industry that are subject to rapid and fundamental change, this proceeding can be said to have had its genesis in October, 1978. At that time we instructed the staff to study the possibility of deregulating radio on either an experimental or general basis and to prepare recommendations. In May, 1979, the staff reported to the Commission which requested further study of the matter.

5. At a special Commission meeting on September 6, 1979, we

<sup>1</sup> A more extended discussion of the Commission's legal authority to reconsider its regulations under the public interest standard can be found at paragraphs 58-68 of Appendix E.

adopted the *Notice of Inquiry and Notice of Proposed Rule Making* (FCC 79-518) [hereinafter the *Notice* ] setting forth the proposals that were the subject of this proceeding.<sup>2</sup> In that *Notice*, we proposed changes to our regulations in four areas as they pertain to commercial radio broadcast stations. The four areas were: the nonentertainment programming guideline; ascertainment; the commercial guidelines; and program log requirements. For each area, we listed a number of options that would be considered ranging all of the way from outright elimination of all current requirements to the retention of current requirements. Comment was also sought on options not specifically listed so long as they pertained to one of the four areas under study. Thereafter staff personnel who participated in the drafting of the *Notice* and personnel from our Consumer Assistance Office conducted a series of five Public Participation Workshops. All seven of the Commissioners participated in these workshops, with one or more Commissioner participating in each. The workshops were held in Boston, Massachusetts; Detroit, Michigan; Houston, Texas; Sacramento, California; and Wheeling, West Virginia. They were intended to alert the public to the existence of this proceeding and to the proposals made in the *Notice*. Additionally, sessions were held to instruct members of the public as to how to find out about other Commission proceedings and how to go about filing comments in rulemaking proceedings.

6. On November 9, 1979, the American Civil Liberties Union and several other groups joined in filing a "Motion for Rescission and Other Procedural Relief" that requested that the Commission rescind the *Notice* or grant other specified relief. The Commission made available for public inspection data which were unavailable when the *Notice* was released, various materials utilized in preparing the *Notice*, and published a description of the methodology used in preparing the Tables attached thereto.<sup>3</sup> This was partially in response to the ACLU request; the remainder of that request was denied. (FCC 79-869).<sup>4</sup>

7. The NAACP and several other groups and individuals sought the extension of the comment deadline in this proceeding. Originally, comments were due on January 25, 1980, and reply comments were to be filed by April 25, 1980. On January 7, 1980, the Commission released an *Order Extending Time for Filing Comments and Reply Comments* (FCC 80-4). That *Order* extended the filing deadline for comments until March 25, 1980, and for reply comments until June 25, 1980.

<sup>2</sup> That *Notice* was released September 27, 1979, and was published in Volume 44, Number 195 of the Federal Register for Friday, October 5, 1979.

<sup>3</sup> *Public Notice*, "Release of Additional Material in Radio Deregulation Proceeding (BC Docket No. 79-219)," Report No. 15448, January 11, 1980.

<sup>4</sup> Later, the ACLU and other parties asked the Commission to reform the release date of the Commission's *Order* responding to their "Motion for Rescission and Other Procedural Relief." The Commission denied that request on June 11, 1980. (See, *Memorandum Opinion and Order*, FCC 80-345.

Although subsequent requests for extensions of the reply comment period were made, on June 23, 1980, the Commission denied those requests (FCC 80-354).

8. On August 7, 1980, the Commission sent out invitations to a number of organizations and governmental agencies to participate in panel discussions relative to the deregulation issues. These invitations went to a cross-section of broadcasters and industry organizations, citizens groups, charitable and religious organizations and government agencies representing a wide range of interests and views relative to the proceeding. The discussions were held on September 15 and 16, 1980, and are more fully described below. The identity of the participating organizations and their representatives is set forth in Appendix B, *infra*.

9. With the panel discussions over, the record submitted was analyzed. We are now able to resolve the issues confronting us and to take the following actions in the four principal subject areas:

A. *Nonentertainment programming guideline* - We are eliminating the guideline and retaining only a generalized obligation for commercial radio stations to offer programming responsive to public issues. Under certain circumstances, the issues may focus upon those of concern to the station's listenership as opposed to the community as a whole;

B. *Ascertainment* - We are eliminating both the *1971 Ascertainment Primer* and the *Renewal Primer*. New applicants must file programming proposals with their application and licensees seeking renewal are only obligated to determine the issues facing their community. They may do so by any means reasonably calculated to apprise them of the issues;

C. *Commercial Guidelines* - We are eliminating the commercial guidelines leaving it to marketplace forces to determine the appropriate level of commercialization;

D. *Program Logs* - We are eliminating programming logging requirements. The only record of programming that will be required will be an annual listing of five to ten issues that the licensee covered together with examples of programming offered in response thereto. This record must be placed in the public file.

10. We recognize that some of these changes remove the illusory comfort of a specific, quantitative guideline. The Commission was not created solely to provide certainty. Rather, Congress established a mandate for the Commission to act in the public interest. We conceive of that interest to require us to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork. The system of broadcasting that was established in this nation has always relied to the maximum extent on the good faith efforts and discretion of licensees in carrying out their obligations. In taking the actions outlined above we have relieved radio

broadcasters of substantial burdens but have also given them added responsibility—the responsibility to determine how best to serve their public without the Commission providing detailed requirements on how to go about doing so. We are confident that they are up to the task before them.

### *III. The Comments*

#### An Overview of the Comments

11. The Commission received an extraordinary number of comments in this proceeding. For instance, the Commission received approximately 20,029 comments including 3,247 formal and 16,782 informal comments. An additional 2,044 reply comments were filed consisting of 110 formal and 1,934 informal replies. These numbers are an approximation (but not an estimate) due to the fact that some comments may have been counted more than once given the number of personnel involved and the volume of comments received. By way of example, some commenters that filed formal comments also forwarded a copy of their comment to their Congressperson or Senator. Often the legislator forwarded these to the Commission and, when this copy was received, it may have also received consideration as an informal comment (and been counted as such). It would not have been practical, let alone possible, for each filing to be checked against those previously received to present such duplication.

12. A breakdown of the comments and replies has also been prepared. While this tally does not reflect the weight given to any individual comment, it does represent a reflection of sentiment among those filing comments. Of the formal comments: 1,415 were construed by the staff to be predominantly in favor of deregulation, 1,807 predominantly opposed, and 25 mixed in their position. The tally of informal comments was quite different. Of these, 654 predominantly favored deregulation, 16,005 were predominantly opposed, with 123 being more mixed in outlook. Virtually any filing received between the end of the initial comment period and the end of the reply comment period was considered to be a reply comment even if it did not specifically reply to a previously filed comment. Of the formal reply comments, 62 were in favor of deregulation, 41 were opposed and 7 were mixed. Of the informal replies, 122 predominantly favored deregulation with 1,812 being predominantly opposed. Of course, a large number of comments objected to the proposal while favoring some aspects, or, conversely, favored the proposal while having reservations over some aspects. The above breakdowns only refer to the predominant flavor of each comment. A more detailed breakdown of the comments is contained in Appendix C.

#### Common Misconceptions in the Comments

13. Several views were expressed in the written comments that we

feel merit attention at this point. These views were apparently the result of some misapprehension or misperception regarding the nature of current Commission requirements and proposals made in the *Notice* to alter them. For example, a great deal of concern was expressed that the elimination of the non-entertainment programming guideline would result in the elimination of Commission requirements for the presentation of public service announcements (PSAs), religious programs, "sustaining programming," and "community service programming." The Commission currently has no such requirements. Public service announcements must be logged and our current renewal forms ask applicants to state how many they propose to broadcast on a weekly basis in the coming license term. But there is no requirement for their presentation. In fact, the question of how the Commission can foster the presentation of PSAs has recently been the subject of another proceeding.<sup>5</sup> Similarly, the Commission does not require religious programming; rather, such programming can be counted towards meeting the non-entertainment programming guideline.<sup>6</sup> A station may obtain license renewal without any such programming. Additionally, as pointed out in the *Notice*, at paragraph 55, the requirement for the presentation of "sustaining programming" was eliminated in 1960, some twenty years ago.<sup>7</sup> Finally, in this vein, the Commission does not require the broadcast of regular weather reports or school closing announcements. Nor does the Commission have a "community service" programming category or programming guideline.<sup>8</sup> Thus, the Commission is not proposing to modify or to eliminate in this proceeding any such "requirements" as described above.

14. Numerous comments also objected to a perceived attempt by the Commission to deregulate television. By this we are not referring to those comments that feared that radio deregulation would inexorably lead to television deregulation. We concede that reasonable people could differ as to their conclusions in that regard. Rather, what we are referring to are a large number of comments that expressed positions either in favor of, or in opposition to, "our proposal to deregulate

<sup>5</sup> See, *Report and Order*, Airing of Public Service Announcements by Broadcast Licensees, BC Docket 78-251 (FCC 80-557) released October 27, 1980, permitting PSAs to be counted toward meeting nonentertainment programming guidelines for the first time since those guidelines were adopted.

<sup>6</sup> Based upon the data accumulated in preparation for the *Notice*, and subsequently compiled data released on January 11, 1980, most stations appear to meet the total nonentertainment programming guideline even without counting their religious programming. This raises a question as to whether or not the guideline has been responsible for the continued presence of substantial amounts of such programming on radio.

<sup>7</sup> See *En Banc Programming Inquiry*, 44 FCC 2303, (1960) (Programming Statement).

<sup>8</sup> In fact, a request by the United States Catholic Conference, the United Church of Christ, the National Council of Churches of Christ in the U.S.A., and 70 other church communicators for the adoption of a "community service" programming category was denied on September 25, 1980, in BC Docket 78-335.

television." This proceeding does not contemplate the deregulation of TV in any regard and none of the actions taken herein apply to television.

15. Numerous comments also contended that the Commission is attempting to replace the statutory "public interest" concept with the "marketplace" concept. We believe that this is an erroneous analysis of the proposals made in this proceeding. It is not the public interest standard that we proposed to eliminate. That standard is contained in the Communications Act of 1934, as amended, and could not be changed by us even if we wanted to. That is a job for Congress. Rather, since marketplace solutions can be consistent with public interest concerns, we sought to explore in this proceeding the question of whether or not in the context of radio the public interest can be met through the working of marketplace forces rather than by current Commission regulations. Again, that issue does not contemplate the elimination of the standard, only a debate over what the standard requires and what methods are best suited to meet that standard in the most efficient way and at the least cost to the public. As discussed in the *Notice*, the public interest standard has never been regarded as a static concept and was utilized by Congress in enacting the Communications Act so as to provide the Commission with the maximum flexibility in dealing with a rapidly and dynamically changing technology and industry.<sup>9</sup>

16. Similarly, many commenters feared that the Commission is proposing to eliminate the Fairness Doctrine, the Petition to Deny process, and periodic license renewal for commercial radio stations. Each of these requirements and procedures are mandated by statute<sup>10</sup> and, again, such statutory requirements cannot be modified by the Commission. They simply are not subject to deregulation by the Commission.

#### The Panel Discussions

17. In addition to the comments, the Commission conducted panel discussions on September 15, and 16, 1980. These were held to provide us with further information on the issues present. Individuals from 17 organizations, companies, radio stations and governmental agencies were invited to appear before us and discuss these issues. These discussions resulted in some 267 pages of testimony.

18. We found this procedure most helpful in focusing our thoughts on several crucial issues and in providing us with further information upon which to base our decision. While there was substantial disagree-

<sup>9</sup> *National Broadcasting Company v. United States*, 319 U.S. 190, 219-20 (1943); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>10</sup> See, Sections 315, 309(d) and 307(d) of the Communications Act of 1934, as amended, respectively.

ment among the parties on various issues, we found the procedure helpful in shedding light on many areas of concern to us in a constructive manner.

19. Principally, the presentations made by the panelists tracked faithfully the written comments submitted by their organizations. The transcript of the panel discussions has been made part of the record and is available for inspection. A recitation of the issues raised and arguments made in the course of the discussions will not be made herein except as indicated in the discussion of the written comments. We turn now to a discussion of the actions that we are taking in the four areas under consideration.

#### IV. *The Course of Action Being Taken*

##### Non-Entertainment Programming Guideline

###### The Proposals

20. The Commission set forth a number of options in the *Notice* for modifying or eliminating the current guideline on the amounts of non-entertainment programming that radio stations should air.<sup>11</sup> The current guidelines call for AM stations to offer 8% non-entertainment programming and for FM stations to offer 6%. Non-entertainment programming for the purposes of meeting the guideline includes news, public affairs, and "all other" non-entertainment programs. These guidelines are currently contained in Section 0.281 of the Commission's Rules which set forth the Commission's delegations of authority to the Broadcast Bureau. What the guidelines mean is that applicants proposing to offer less than the guideline amounts of non-entertainment programming cannot have their application routinely processed by the Bureau under its delegation of authority from the Commission; rather, the application must be brought to the attention of the Commission itself. The guidelines do not mean that a station proposing to offer less non-entertainment programming is absolutely barred from, for instance, renewal of its license. It does mean, however, that its application cannot be routinely processed, that it must be brought to the Commission's attention, and that it may be designated for hearing.

21. In the *Notice* the Commission listed six options for change in this area. They were:

- (1) To remove the Commission from all consideration of the amount of non-entertainment programming furnished by commercial broadcast radio licensees and to leave it to the marketplace to determine what levels of such programming would be offered;

<sup>11</sup> As in all of the areas under consideration in this proceeding, the Commission also indicated that it would consider alternatives not specifically set forth. See, paragraph 269 of the *Notice*.

- (2) To relieve individual licensees of any obligation to present non-entertainment programming but, instead, to analyze the amounts of such programming being offered on a marketwide basis with the Commission intervening if the amount of non-entertainment programming being offered in the market as a whole fell below a certain level;
- (3) To free licensees from any specific responsibilities with respect to non-entertainment programming (and ascertainment and commercial minutes), but instead to require licensees to show, if challenged upon renewal, that they were serving the public interest. Such a showing could be made with reference to what other services were available in the market;
- (4) To impose quantitative programming standards for each non-entertainment programming category either in terms of a minimum number of hours per week that would have to be presented for each category, or a percentage of total programming time that each station would have to devote to each category;
- (5) To impose quantitative standards but, instead of setting such standards in terms of hours or percentage of time devoted to each category, to measure the adequacy of the programming on the basis of each station's expenditures thereon. This could take the form of the Commission mandating a certain proportion of revenue or profits that each station would have to reinvest in non-entertainment programming; and
- (6) To establish a minimum fixed percentage of local public service programming that would have to be presented which could be met by the broadcast of any of the following, alone or in combination: local news, local public affairs, local public service announcements; community bulletin boards; or any other locally produced non-entertainment programming demonstrably related to serving local community needs. The meeting of this minimum percentage would be a *sine qua non* of license renewals.

22. In the *Notice* we tentatively proposed to eliminate the guideline, placing our reliance upon marketplace forces to assure the continuation of non-entertainment programming. The data which were before the Commission indicated that stations were providing amounts of such programming, and at such times of the broadcast day, as to suggest a listenership desire in the programming that would assure its presence through the working of marketplace forces. Under this option Commission intervention would occur only when it had been determined that the market had failed. The Commission noted that it would also consider the other options listed above and, additionally, alternatives proposed by commenters that were not listed in the *Notice*. We also indicated that none of the proposals would diminish the Fairness Doctrine obligations of licensees.

## Discussion of the Action Being Taken

23. In this section, we will discuss the action that we are taking and the basic rationale for taking it. As with all four substantive areas under consideration, a discussion of the history of Commission involvement in the area, of the comments filed in this proceeding with regard to the area, and a discussion of the major issues raised in those comments are contained in Appendices.

24. We believe that the public interest warrants the elimination of our current non-entertainment programming guidelines for commercial broadcast radio. We are convinced that absent these guidelines significant amounts of non-entertainment programming of a variety of types will continue on radio. However, because of the growth of radio and other informational and entertainment services available to the public, we do not believe that it is necessary for the government to continue to assume, albeit indirectly, that every radio station broadcast a wide variety of different types of programming. Our review convinces us that the history of governmental involvement in non-entertainment programming has been driven by one overriding concern—the concern that the citizens of the United States be well informed on issues affecting themselves and their communities. It is with such information that the citizenry can make the intelligent, informed, decisions essential for the proper functioning of a democracy.<sup>12</sup> Accordingly, we believe the only non-statutory programming obligation of a radio broadcaster should be to discuss issues of concern to its community of license. This obligation can be fulfilled without resort to a guideline of limited effect and, we believe, of no substantial utility.

25. Furthermore, although we are eliminating the nonentertainment programming guideline, and taking the other actions discussed below, many other Commission policies and rules will remain intact so that, contrary to the fears of many commenters, all control over broadcasting is not being abandoned by the Commission. This proceeding leaves untouched our Equal Employment Opportunities rules for broadcast stations and our minority ownership policies.<sup>13</sup> Additionally, our technical requirements are not being changed herein so that absent the regulations that are being eliminated we will not see a return to that unregulated period prior to 1927 when:

chaos rode the air waves, pandemonium filled every loud-speaker and the twentieth century Tower of Babel was made in the image of the antenna towers of some

<sup>12</sup>“(S)peech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>13</sup> See Section 73.2080 of the Commission's Rules and *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), respectively.

thousand broadcasters who, like the Kilkenny cats, were about to eat each other up.<sup>14</sup>

Our network affiliation regulations<sup>15</sup> and general Commission policy prevent licensees from delegating their responsibility to assure that their stations are not utilized for purposes contrary to the public interest. So too will the public be protected. In short, the Commission is not abandoning radio to forces completely beyond its own, or the public's, control. Rather, the action taken herein is intended to assure that broadcasters will have the maximum flexibility to be responsive to issues important to their listeners, with the minimum amount of governmental interference.

26. While eliminating the current non-entertainment programming guideline, we will continue to have certain expectations of radio broadcasters. What we expect, and do not expect, of broadcasters is as follows. We do not expect broadcasters to fit their nonentertainment programming into a mold whereby each station has the same or similar amounts of programming. Other than issue responsive programming, stations need not, as a Commission requirement, present news, agricultural, *etc.*, programming. We believe the record, as discussed in Appendices D and E, demonstrates that stations will continue to present such programming as a response to market forces. We do not expect radio broadcasters to attempt to be responsive to the particular problems of each group in the community in their programming in every instance. We do not expect radio broadcasters to be responsive to the Commission's choices of types of programs best suited to respond to their community. What we do expect, however, is that marketplace forces will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster guided by the tastes, needs, and interests of its listenership. We do expect, and will require, radio broadcasters to be responsive to the issues facing their community. However, in determining which issues to cover, commercial radio broadcasters may take into account their listenership and its interests, and the services provided by other radio stations in the community to groups other than its own listenership. Of course, broadcasters cannot engage in intentional discrimination in their selection of issues to be addressed with programming. Stations in smaller communities, where few alternatives are available to listeners, will have to be more broadly based in their programming. This does not seem to us to be undue governmental interference into programming as good business sense dictates that stations in smaller communities must broadly base all of their programming to attract, hold and serve a large audience. In markets where a full complement of programming

<sup>14</sup> Emery, *Broadcasting and Government*, Michigan State University Press, 1971, pages 23-24, citing, Chase, *Sound and Fury*, New York, 1942, page 21.

<sup>15</sup> For an overview of these regulations see, *Review of Commission Rules and Regulations by Standard (AM) and FM Broadcast Stations*, 63 FCC 2d 674 (1977).

services are available in the totality of stations, broadcasters will have the flexibility to choose which issues they believe warrant coverage based on the existence of other radio services appealing to other segments of the community. The focus of our inquiry, in the case of a challenge, will be upon whether the licensee's judgment in this regard was reasonable. Also, we expect adherence to the Fairness Doctrine and to other statutory requirements regarding programming. In other words, radio broadcasters will have what we believe to be the maximum flexibility under the public interest standard as regards their nonentertainment offerings. They will be expected to address issues of concern to the community or, where programming serving many segments of the community is otherwise available, their own listenership. No station, however, will be forced into a rigid mold and we will not endeavor to dictate the types of programs that must be used to respond to community issues or, as will be discussed later, how to ascertain what issues are present and which of these warrant attention.

27. We base this resolution on the data compiled and included both in the *Notice* and the subsequently released *Public Notice* (Report No. 15448, released January 11, 1980), that data filed with comments, and our review of the law, the historical background and, indeed, the entire record of this proceeding. From the beginning of radio regulation, it has been thought that one of the principal purposes of mass communications should be the dissemination of information to the population. Indeed, the possibility of a single group controlling the radio medium and distorting that information was perhaps the chief spur for regulation.<sup>16</sup> As discussed in the *Notice*, in the 1920's, the so-called "Radio Trust" raised the specter of what was perceived to be a monolithic block controlling the means of the distribution of information to the American people. As was stated by Congressman Johnson of Texas, in debating the 1927 Radio Act, ". . . publicity is the most powerful weapon that can be wielded in a republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them."<sup>17</sup>

28. As has been concluded by the Supreme Court, in adopting the Radio Act, Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.<sup>18</sup> The reason for the concern with monopolization was obvious; the

<sup>16</sup> See, for instance, 67 Cong.Rec. 12352, 12358, 68 Cong.Rec. 2576, 3030 and 3031.

<sup>17</sup> 67 Cong.Rec. 5557, 5558.

<sup>18</sup> *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *National Broadcasting Company v. United States*, 319 U.S. 190, 219 (1943).

control of radio by a single group was thought to create the possibility that the public would receive only limited information in accordance with what the Radio Trust wanted the public to know. Rather, what was then, and has remained, among the primary concerns is that radio should present information on public issues so that the public may be informed and that this information should come from diverse sources.

29. Shortly after the Radio Act was enacted by Congress, the Federal Radio Commission was called upon to consider questions concerning the role of radio in addressing issues of public concern. It stated that the public interest requires "ample play for the free and fair competition of opposing views," and that it believed that "the principle applies . . . to all discussions of issues of importance to the public."<sup>19</sup>

30. The concern that issues be addressed by broadcasters continued unabated. In 1940, the FCC decided the *Mayflower Broadcasting* case<sup>20</sup> in which it noted:

Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain, the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias.<sup>21</sup>

Similarly, in 1945, the Commission spoke of:

The duty of each station licensee to be sensitive to the problems of public concern in the community . . .<sup>22</sup>

The next year, when the Commission issued its *Public Service Responsibility of Broadcast Licensees*, the so-called "*Blue Book*," it listed programming devoted to the discussion of public issues among those types felt to be desirable, and gave recognition to the need for adequate reflection in programming of matters of local interest, activities and talent.

31. In 1949, the Commission adopted its *Report on Editorializing by Licensees*,<sup>23</sup> in which it set aside some twenty-two years of precedent and permitted broadcasters to editorialize. In coming to its decision, the Commission addressed the issue of mass communications' impact upon and relationship to democracy. It stated that:

(i)t 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.

<sup>19</sup> *Great Lakes Broadcasting Company*, 3 FRC Ann.Rep. 32, 33 (1929), *Rev'd on other grounds, sub nom., Great Lakes Broadcasting Co. v. F.R.C.*, 37 F. 2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

<sup>20</sup> *Mayflower Broadcast Corp.*, 8 FCC 333 (1940).

<sup>21</sup> *Id.* at 340. It should be noted that as of the time this case was decided, broadcasters were still not permitted to editorialize. That restriction, was "deregulated" in 1949.

<sup>22</sup> *United Broadcasting Co.*, 10 FCC 515, 517 (1945).

<sup>23</sup> 13 FCC 1246 (1946); hereinafter referred to as the "Editorializing Report."

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 light of this basic purpose.

Accordingly, the Commission recognized the need for stations to offer, ". . . news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station." However, the Commission's role was to defer to the licensee in making the determination of what percentage "of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues rather than the other legitimate services of radio broadcasting . . . ."

32. Needless to say, this concern continued as indicated in the 1960 *Programming Statement*. In that *Statement* the Commission concluded that while the First Amendment forbids governmental interference asserted in aid of free speech as well as that repressive of it, broadcasters, because of the peculiar relationship between broadcasting and the First Amendment, had the obligation to offer programming relevant to the "tastes, needs and desires of the public they are licensed to serve."<sup>24</sup> Additionally, because of the then recent amendment of Section 315 of the Act,<sup>25</sup> the Commission noted the additional obligation of licensees to afford reasonable opportunity for the discussion of conflicting points of view on controversial issues of public importance.

33. The Supreme Court had the opportunity to address the impact of Section 315 in the landmark *Red Lion* case.<sup>26</sup> Justice White's opinion in that case spoke eloquently about both the goals of the First Amendment in a democracy and its relationship to the concept of the "public interest." Justice White spoke in terms of a First Amendment goal of producing an informed public capable of conducting its own affairs and stated that:

(i)t is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee. (Citations omitted)<sup>27</sup>

Broadcasting was to have a role in this constitutional scheme. The public interest standard applied to broadcasting was said to encompass "the presentation of vigorous debate of controversial issues of importance and concern to the public." It was suggested, in fact, that this obligation pre-existed the amendment of Section 315 of the Act

<sup>24</sup> *En Banc Programming Inquiry Statement*, 44 FCC 2303, 2314 (1960) (hereinafter to be referred to as the "*Programming Statement*").

<sup>25</sup> Act of September 14, 1959, §1.73 Stat. 557, amending 47 USC §315(a).

<sup>26</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>27</sup> *Id.* at 390.

and was an integral element of licensees' public interest obligations. While the manner in which the obligation is to be fulfilled (whether through the broadcaster's exercise of discretion or by the provision of right of access to assure the mandated type of presentation) has been settled,<sup>28</sup> the basic, underlying concern that radio broadcasting address issues with programming has been a constant theme at all times in the regulation of broadcasting. As discussed in the section on ascertainment, the broadcaster will have to place a listing of five to ten issues that it addressed with programming, together with a listing of examples of that programming, in its public file at least annually on the anniversary of the grant of authorization or license renewal.

34. Whether the obligation is described as one to serve the specific interests of the community,<sup>29</sup> to meet the tastes, needs and desires of the public,<sup>30</sup> or to address the needs and problems of the community,<sup>31</sup> the chief concern has always been that issues of importance to the community will be discovered by broadcasters and will be addressed in programming so that the informed public opinion, necessary to the functioning of a democracy, will be possible. Accordingly, we will require that stations program to address those issues that it believes are of importance to the general community or, depending upon the availability of other radio services in the community, to its own listenership.<sup>32</sup> In this fashion we believe that we will best assure that the bedrock obligation contemplated by the "public interest" will be fulfilled with the least government intrusion<sup>33</sup> and with the most licensee flexibility. This flexibility will allow radio broadcasters to address issues by virtually any means. This includes programming described under current definitions, and can consist of, by way of example and not limitation, public affairs, public service announce-

<sup>28</sup> *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1976), concluded that a right to access did not exist. What was held to be important was the public's right to be informed, not the right of any group or individual to broadcast its own particular views. Therefore, it was up to the licensee to determine which issues would be addressed and by whom.

<sup>29</sup> *P.B. Huff, et al.*, 11 FCC 1211, 1218 (1947).

<sup>30</sup> *En Banc Programming Inquiry Statement, supra*, at 2314.

<sup>31</sup> *Ascertainment of Community Problems*, 27 FCC 2d 650 (1971).

<sup>32</sup> Individual radio stations do not exist in a vacuum and should behave accordingly. In every community there are many possible issues worthy of discussion. It is appropriate for an individual licensee to take into account the coverage of issues by other stations, as well as the preferences of its particular audience, in determining which issues it should be addressing.

<sup>33</sup> One criterion of superior performance by broadcast licensees has been stated to be independence from governmental influence in promoting First Amendment objectives. *Citizens Communications Center v. F.C.C.*, 463 F. 2d 822 (D.C. Cir. 1972). We certainly agree that for the proper functioning of our system of government, and of broadcasting, such a goal is valid and extremely important. We view our action herein, in part, as furthering this objective.

ments, editorials, free speech messages, community bulletin boards, and religious programming.<sup>34</sup> Flexibility will also attach to the amounts of such programming to be offered. While we believe the record demonstrated that news programming is presented in response to the interests of listeners, other programming that may be necessary to comply with the requirement to address issues of public importance may not be. We feel that such programming is an important component of the public interest standard and should be available on radio. Nonetheless, we do not believe that it is advisable or necessary to specify precise quantities of programming that should be presented by all stations regardless of local needs and conditions. Therefore, we will eliminate our current guideline and will not specify any particular amount of total non-entertainment programming that should be presented. We believe that given the competition and number of stations now present in the radio broadcasting field, there is even less of a need now than there was twenty years ago for us to articulate any "rigid mold or fixed formula for station operation."<sup>35</sup> Rather, stations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented.<sup>36</sup> The renewal standard will be retrospective in application and will contemplate a showing that during the prior license term the licensee addressed community issues with programming. The licensee need not demonstrate that it provided news programs, agricultural programs, *etc.* It need only show that it addressed community issues with whatever types of programming that it, in its discretion and guided by the wants of its listenership, determined were appropriate to those issues. This will, of course, necessitate a change in various Commission forms. Those changes are set forth in Appendix J.

35. Having set forth the general nature of the requirements that will remain in this area in light of the elimination of the non-entertainment programming guideline, we now turn to two areas addressed in the comments that are intimately related to the elimination of the guideline. These are, the effect of the guideline's elimination upon comparative license applications, and upon the petition to deny process.

<sup>34</sup> We would like to reiterate at this point that our recent decision in BC Docket 78-335, Community Service Programming, (FCC 80-558) not to adopt such a category should not in any way be taken to reflect a determination on our part that nonprofit and religious groups do not play an important part in their communities. To the contrary, we believe that such organizations play an important role in their communities and can provide valuable insights to broadcasters with regard to identifying and responding to issues facing the community.

<sup>35</sup> *En Banc Programming Inquiry Statement, supra* at 2314.

<sup>36</sup> Such issues need not be controversial issues of public importance such as require coverage pursuant to the Fairness Doctrine. While station programming can, and must, include coverage of such issues, local issues that are not necessarily burning issues of a controversial nature should also be addressed.

## Comparative Applications

36. A number of commenters asserted that the elimination of the non-entertainment programming guideline would seriously interfere with the comparative application process and the licensee's asserted "legitimate renewal expectancy." When we adopted the *Notice* in this proceeding we, too, had serious questions as to the interplay between the proposed deregulation and the comparative proceeding process.<sup>37</sup> It is important that we discuss and resolve to the extent possible within this document the issues raised in that regard.

37. The first focus of our attention in this subject area must be the claim by many commenters that the elimination of the guideline would, absent the publication of a programming policy statement or an optional guideline, impermissibly interfere with a broadcaster's "legitimate renewal expectancy." In requiring the periodic renewal of broadcast station licenses, Congress provided what has been called a "competitive spur" to licensees by permitting new parties to have the opportunity to apply for the same license.<sup>38</sup> Indeed, it has been asserted that the "public interest, convenience or necessity" test is, in fact, a matter of comparative reference and not an absolute standard when applied to broadcast stations.<sup>39</sup> To balance against this "competitive spur" licensees have been accorded a "legitimate renewal expectancy."<sup>40</sup> That is not to say that a license holder has an unassailable right to retain his license. The Communications Act clearly provides for periodic renewal [Section 307(d)] and prohibits a licensee from having any "right beyond the terms, conditions, and periods of the license." (Section 301 of the Act, emphasis supplied). Rather, what the expectancy contemplates is that a licensee serving the public interest should be able to expect that his license will be renewed and, if challenged by a competing applicant, he will be entitled to a comparative plus if he is able to make a showing of having provided substantial service.

38. Two critical questions arise with regard to the comparative application area. The first is whether or not the present guideline is necessary to provide the "renewal expectancy." The second is whether non-entertainment programming is a necessary element for evaluation in the comparative context.

39. As has been the general case with respect to programming

<sup>37</sup> See, paragraphs 263-266 of the *Notice*.

<sup>38</sup> See, Section 301 of the Communications Act of 1934, as amended.

<sup>39</sup> Federal Radio Commission, *Second Annual Report to Congress* 170 (October 1, 1928).

<sup>40</sup> *National Black Media Coalition v. FCC*, 589 F. 2d 578 (D.C. Cir. 1978); also see, *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); and *Greater Boston Television Corp. v. F.C.C.*, 444 F. 2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971). In *Greater Boston*, the court noted that such an expectancy is provided, ". . . in order to promote security of tenure and to induce efforts and investments furthering the public interest that may not be devoted by a licensee without reasonable security."

guidelines, the Commission has traditionally declined to adopt numerical standards that it would use in the comparative context as an indicator of substantial service. In fact, beginning in 1971, the Commission adopted a series of *Notices of Inquiry* looking into the advisability of instituting a proceeding to determine whether it should attempt to quantify by a percentage guideline the concept of substantial service in the comparative context.<sup>41</sup> In April, 1977, we adopted a *Report and Order* in which we declined to establish any such quantitative standards. At that time we noted that merely increasing the amount of programming did not necessarily improve the service provided or give any significantly greater certainty as to what constituted superior service. We concluded that guidelines would be, "a simplistic, superficial approach to a complex problem . . ." <sup>42</sup> We were sustained in this conclusion by the United States Circuit Court of Appeals for the District of Columbia in *National Black Media Coalition v. F.C.C.*, *supra*, which noted that:

(n)othing in the Communications Act imposes any requirement that the FCC promulgate quantitative programming standards. In granting broadcast licenses the FCC must find that the "public convenience, interest or necessity will be served thereby." (Citation omitted) Within these broad confines, the Commission is left with the task of particularizing standards to be used in implementing the Act.<sup>43</sup>

40. Having recently rejected the connection between the mere amounts of programming aired in response to a guideline and the quality of performance (sufficient to constitute substantial service and to thereby satisfy the licensee's "legitimate renewal expectancy"), we cannot find in the instant record any cause to modify that view. Simply speaking, whether or not the Commission were to retain the instant non-entertainment programming guideline, it would not serve the purpose claimed by several commenters with regard to their renewal expectancies and the *ad hoc* evaluation of programming would remain necessary. In fact, the present programming percentages are utilized by the Commission's staff in processing renewal applications. Meeting these guidelines does not assure a licensee of renewal but merely gives the staff a tool by which to judge but one aspect of an applicant's performance. As evidenced by the case law, the analysis of a renewal applicant's programming performance in a comparative renewal situation, even under our existing procedures, goes beyond an examination of programming percentages. Therefore, our determination to eliminate the guideline is not altered on this basis. Similarly, we decline the invitation to provide an optional guideline as to what

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<sup>41</sup> *Notice of Inquiry*, 27 FCC 2d 580 (1971); *Further Notice of Inquiry*, 31 FCC 2d 443 (1971); *Second Further Notice of Inquiry*, 43 FCC 2d 367 (1973); and *Third Further Notice of Inquiry*, 43 FCC 2d 822 (1973).

<sup>42</sup> 66 FCC 2d 419, 429 (1977).

<sup>43</sup> *Id.* at 581.

amount of non-entertainment programming would constitute substantial service as, in this context:

. . . quantitative standards do not appear to us to offer licensees, competing applicants, or the public any significantly greater certainty as to what level of performance would constitute substantial service. In addition, of course, even a clear history of substantial service would not guarantee renewal, since any preference awarded for it cannot terminate the hearing in favor of the incumbent licensee.<sup>44</sup>

41. There being no valid nexus between the current guideline and the rendition of substantial service in the comparative context, we do not see any reason on this ground to retain the current guideline or to eliminate it while substituting an optional guideline as an indicator of such service warranting a comparative plus in all situations if met. Rather, where the public "interest lies is always a matter of judgment and must be determined on an *ad hoc* basis."<sup>45</sup>

42. The second aspect of the elimination of the guideline and its impact on the comparative process is somewhat more problematical. To restate the question: in the absence of the guideline, and in view of our determination as set forth above, should quantity or quality of non-entertainment programming be a comparative criterion?

43. The history of non-entertainment programming's relationship to the comparative process over the past 15 years is somewhat involved. In 1965, the Commission issued its *Policy Statement on Comparative Broadcast Hearings*.<sup>46</sup> The *1965 Policy Statement* concluded that there were two principal objectives toward which the "process of comparison" should be directed: the best practicable service to the public and the maximum diffusion of control of the media of mass communications. Both objectives concern programming, the former because "the best practicable service to the public" necessarily means program service to the public and the latter because such diffusion of control would result in a multiplicity of voices being represented in programming. Indeed, among the factors set forth in the *1965 Policy Statement* as being significant to these two principal objectives were proposed program service and past broadcast record. However, under the policy, only if there were material and substantial differences between applicants' proposed program plans, or where a prior broadcaster had shown unusual attention (or inattention) to the public's needs would a programming showing be relevant in a comparative proceeding.

44. The *1965 Policy Statement* did not necessarily apply to a pure comparative renewal hearing. To clarify the issue of what standards would be applied in such hearings, in 1970 the Commission adopted the

<sup>44</sup> 66 FCC 2d 419, 428 (1977).

<sup>45</sup> *McClatchy Broadcasting Company*, 239 F. 2d 15 (D.C. Cir. 1956).

<sup>46</sup> 1 FCC 2d 393 (1965) (hereinafter referred to as the "1965 Policy Statement").

1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants.<sup>47</sup> The 1970 Policy Statement, too, addressed the issue of programming's relevance to the comparative proceeding. However, the 1970 Policy Statement was vacated in *Citizens Communications Center v. F.C.C.*, 447 F. 2d 1201 (D.C. Cir. 1971). In vacating the 1970 Policy Statement, the court, citing and reiterating its decision in *Johnston Broadcasting Co. v. F.C.C.*, 175 F. 2d 351, (D.C. Cir. 1949), stated:

The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only . . . It must take into account all the characteristics which indicate differences, and reach an evaluation of all factors, conflicting in many cases.<sup>48</sup>

Nevertheless, the court approved of a focus on the incumbent licensee's record of past performance where there is a material difference between applicants so long as other factors are also considered.

45. With the 1970 Policy Statement having been vacated, the Commission undertook case-by-case determinations relative to competing applicants. We also sought to bring more certitude to the process by adopting a series of *Notices of Inquiry*,<sup>49</sup> looking into the adoption of a quantitative programming guideline for utilization in assessing programming performance in the comparative proceeding context. As noted above, the Commission concluded that the adoption of such a guideline was unwarranted and unwise and declined to do so.

46. This difficult area continued to generate cases. For instance, in *Central Florida Enterprises, Inc. v. F.C.C.*, 598 F. 2d 37 (D.C. Cir. 1978), *cert. denied* 441 U.S. 957 (1979), the Court of Appeals determined that the Commission could utilize the 1965 Policy Statement to govern comparative renewal proceedings. However, the court concluded that in the particular case before it the Commission had misapplied the criteria set forth in that Statement. The court later amended its opinion and issued a *per curiam* Order<sup>50</sup> in which it noted the importance of programming determinations in the comparative renewal process, especially as such determinations have an impact upon renewal expectancies. More recently, the Court of Appeals indicated that a record of programming service must be considered in the comparative context when not to do so would automatically disadvantage the existing licensee, "in favor of untried newcomers."<sup>51</sup> It is not within the ambit of this proceeding to attempt to resolve the issue of how the various comparative criteria should be weighed in importance

<sup>47</sup> 22 FCC 2d 42A (1970) (hereinafter referred to as the "1970 Policy Statement").

<sup>48</sup> *Johnston Broadcasting Co. v. F.C.C.*, *supra* at 356-357.

<sup>49</sup> See footnote 41, *supra*.

<sup>50</sup> See, *Central Florida Enterprises, Inc. v. F.C.C.*, *per curiam* Order reprinted at 44 R.R. 2d 1568, 1569 (1979).

<sup>51</sup> *Julie P. Miner v. F.C.C.*, Case No. 78-1903, Slip Opinion issued December 1, 1980, p. 12. The *Miner* case itself did not involve a pure comparative renewal situation.

as between each other. Further proceedings will be necessary to that end. However, one thing does appear evident from the above. That is that programming has been an essential ingredient of the comparative renewal process. Where proposals indicate material differences between applicants, it has also been relevant to the comparative new applicant process. The extent to which nonentertainment programming has traditionally been considered in the comparative process is not being changed by this rulemaking although the underlying programming obligation is changed as indicated above. Any change in the relative importance of programming vis-a-vis diversification will have to await a further proceeding.

47. We must, however, set forth our policy relative to the question of the type of programming showings we will expect in the comparative new application and renewal application proceedings. Initially, we must note that we intend no departure from current procedures requiring the designation of a specialized programming issue only where substantial or material differences exist between proposals. In the comparative new application proceeding, where there is a programming issue, we will be concerned with comparing the proposals made by the applicants as to which would best provide a new service to a previously unserved significant segment of the community or would best improve upon existing services. We would expect that this showing would be made by reference to what is currently being offered in the market, an evaluation of what significant segments of the community are not receiving program service, and by a showing of how the applicant's proposed programming would serve this unfulfilled need. This will permit applicants to focus upon the needs (or more appropriately unmet wants) of significant segments of the community. As set forth above, our new approach will no longer seek to assure that each station present "well-balanced" or "something-for-everyone" programming. In the past, we have gone to great lengths to attempt to assure that well balanced programming was offered. In a continuing (although not unbroken) line of authority from the First Annual Report to Congress of the Federal Radio Commission, through the 1946 *Blue Book* and 1960 *Programming Statement*, and right up to our ascertained requirements, we and our predecessors have attempted to assure the presence of programming relevant to all significant segments of the community. Often this was to be accomplished by requiring each station to attempt to meet all such needs, sometimes by reference to other services available.<sup>52</sup>

48. Our new regulatory thrust is to attempt to permit the large number of stations currently operating (and commencing service henceforward) to each serve their own audience in the appropriate circumstances. It is based upon the recognition that more issues can be addressed through such specialized programming than through a

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<sup>52</sup> See paragraphs 61-65, *infra*.

generalized "something for everyone" requirement. In markets where there are a significant number of radio stations operating, each will be permitted to assess what other radio services are available in the market in determining its own service and in choosing which issues to address with programming. Of course, the smaller the number of stations and services available, the broader based each will have to be in its programming to assure programming for all significant segments of the community. But in communities with many stations each may make an assessment of the other services available and base its programming on that assessment and be more specialized in its offerings. With regard to competing new applicants, the programming showing should be made on how each intends to serve currently unmet needs; the hallmark of a superior proposal in that context will be based on an *ad hoc* evaluation of which proposal will best serve community needs. We believe that this approach can best serve the public interest objective of obtaining licensees, and programming, that address community issues with fresh voices and which will initiate, encourage and expand diversity of viewpoints and varieties of programs available with the least government oversight of, and intrusion into, programming decisions.

49. The Administrative Law Judge's decision on the programming issue in the comparative renewal setting will, on an *ad hoc* basis, determine whether the incumbent was providing minimal service or substantial service.<sup>53</sup> While minimal service would permit renewal had the licensee not been challenged by a competing applicant, it would not result in a comparative plus. The examiner will also weigh the challenger's proposal and determine whether it was anything more than a "blue sky" proposal. If it appeared to be a viable plan capable and likely of being effectuated by the challenger, it would receive a programming plus in the face of the incumbent's minimal performance. An incumbent found to have rendered substantial performance would have to be given a programming plus of major significance as the incumbent would have already faced the marketplace and provided substantial service to the listenership whereas the challenger, if granted the license, may not be able to effectuate his plans. In that

<sup>53</sup> Minimal performance is only that which would justify renewal in the absence of challenge by a competing applicant. It would consist of - performance of all statutory obligations (*i.e.*, Fairness Doctrine, access by candidates for federal elective office, etc.) and minimal, although adequate, attention to the issues confronting the licensee's community, primarily, and service area outside of its community, secondarily. Substantial performance would include this, but would additionally contemplate a showing that more or better programming than that which would be considered "minimal" is being devoted to addressing issues facing the community (or, where a number of stations are present, a significant segment of the community). That type of showing can be made by almost any means, including, but not limited to, any of the following: demonstration of amounts of programming, local production of programming, or by any other type of showing reasonably related to demonstrating service over and above what would be considered minimal.

case the Commission would have tossed aside a superior licensee for one that might not perform in such a fashion. This result is inherent in the concept of a legitimate renewal expectancy. We emphasize that we are not changing the procedure, the issues, or the showings necessary to support the specification of an issue. Rather, we are indicating the focus which any comparative consideration of programming should take.

#### Petitions to Deny

50. In the *Notice*, we cited as the tentatively preferred option in the nonentertainment programming area reliance on market forces, with government intervention occurring only in the event of market failure. Thus, a petitioner would have to have made out a showing of market failure before the Commission would intervene in this area. With the advantage of a complete record, it became clear that the analytical and administrative burdens and costs that this method would place upon petitioners, licensees, and the Commission could be enormous. Extensive data collection, public opinion sampling, and analysis would have to have been performed before the Commission could assess whether any individual market had failed. Given the number of markets in which such an analysis might have to be performed, this is not an appropriate area in which to go to a complete market solution. Additionally, there would be legal ambiguities in reconciling individual licensee responsibilities and obligations, on the one hand, and overall market responsibilities on the other. These problems are more fully discussed in Appendix E, *infra*. Given these difficulties, we have opted for the maintenance of individual licensee obligations to program to meet community needs. In this context, it is possible to discuss the relationship between nonentertainment programming and petitions to deny.

51. The petition to deny is a statutorily authorized process under Section 309(d) of the Act. The sorts of allegations that will be considered in a petition have not been codified and have changed over time. For instance, prior to 1949, a party with standing could legitimately have complained that a particular station was violating the public interest by airing editorials. Once the bar on editorializing by licensees was lifted, such an allegation would not have been appropriate in a petition to deny. Simply, the allegations relevant to a petition to deny change over time and depend upon whatever regulations are then in effect.

52. Given the elimination of the nonentertainment programming guideline, the specific amount of nonentertainment programming being offered by an individual station, standing alone as an allegation, will not be appropriate for petitions to deny. In view of the course of action that we are taking herein, the type of nonentertainment programming allegation that will be relevant for a petition to deny would consist of a showing that an individual station is doing very

little, or nothing, to address through its programming issues facing the community. The focus of such an allegation should not be on the mere amount of programming. We do not wish to return to a "numbers game" whereby 6% nonentertainment programming is sufficient to warrant renewal whereas 5% will result in, at least, delay, and, perhaps, designation for hearing with the possibility of the loss of the license. A station with good programs addressing public issues and aired during high listenership times but amounting to only 3% of its weekly programming may be doing a superior job to a station airing 6% nonentertainment programming little of which deals in a meaningful fashion with public issues or which is aired when the audience is small.

53. Similarly, petitioners may make allegations in petitions to deny that an individual station in the community is failing to address issues of particular relevance to a significant segment of the community. However, a station confronted with such a challenge will be able to respond by pointing not only to its own programming that may have addressed such issues, but also to other radio services available in the community that could reasonably have been relied upon to address such issues. It will not have to demonstrate that programming was available in the community in an amount proportional to the complaining group's representation in the community. Proportional programming has never been a requirement of the public interest.<sup>54</sup> In fact, since all individuals have some general interests as well as special interests, it is inappropriate to expect special interest programming to be proportional to special interest populations. Rather the licensee may demonstrate the sufficiency of its own programming and, in doing so, relate to other services available in its community. For instance, an individual licensee with, by way of example, a country and western music format must address public issues. If challenged in a petition to deny alleging a lack of programming directed towards issues faced by minorities, it may demonstrate that it did indeed offer such programming or, if it did not, that a local station oriented toward the minority audience was present in the community and that the challenged station was reasonable in its reliance upon that station to offer nonentertainment programming relevant to the issues facing the minority community. However, the same licensee confronted by a petition alleging that it offered no nonentertainment programming relevant to any public issues may not defend by showing the presence of an all news and public affairs station in the community or by showing that other stations are providing significant amounts of such programming. Individual stations retain the obligation to provide programming relevant to public issues, but which issues they address may be

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<sup>54</sup> See, *WKBN Broadcasting Corp.*, 30 FCC 2d 958, 970 (1971); *The Evening Star Broadcasting Co.*, 27 FCC 2d 316 (1971) *aff'd sub nom. Stone v. F.C.C.*, 466 F. 2d 316 (1972); *Miami Valley Broadcasting Corp.*, 48 FCC 2d 177, 178 (1974).

determined by the interests and nature of their audience and the availability of other program services. While the programming offered by a local noncommercial radio station may be taken into account as a factor in making choices such as this, licensees may not rely upon the mere presence of such a station to obviate their obligation to provide programming responsive to issues facing the community. Noncommercial radio stations simply cannot reasonably be expected to respond with programming related to all non-majoritarian related issues.

54. The focus of our inquiry in the case of a challenge to license renewal will be whether the challenged licensee acted reasonably in choosing which issues to address. Licensees directing their nonentertainment programming to a narrow audience may defend their decision by demonstrating the presence of other stations in the community that reasonably were relied upon to address the issues confronting the other segments of the community. If the licensee can demonstrate that such other stations were present and that it acted reasonably in relying upon them to address issues pertinent to other segments of the community, the station will be permitted to be more narrowly focused. When called upon to assess the reasonableness of the licensee's decision, the Commission will have to undertake an *ad hoc* review which considers the circumstances in which the decision was made. For instance, a station in a market with a minority oriented station may be reasonable in not treating issues of particular relevance to the minority community. However, as with noncommercial stations, the mere presence of a minority station is not dispositive. If that minority oriented station, had, for instance, consistently not presented such programming, the licensee's judgment may not have been reasonable. Minority issues may have been ignored long enough for the Commission to determine that the licensee knew or reasonably should have known this and should have taken steps to correct it. Thus, whether a broadcaster's determination is reasonable will depend on the circumstances within which it is made. In all cases, however, the burden will be upon the licensee to demonstrate, if called upon to do so, that its determination was reasonable. Such evaluations have been made by the Commission in other areas of regulation. For instance, in Fairness Doctrine enforcement the focus of our inquiry is upon whether the licensee acted *reasonably*. See, *Fairness Doctrine Primer*, 40 FCC 2d 598, 599 (1964) and *Fairness Report*, 48 FCC 2d 1, 9 (1974). Similarly, the responsiveness of programming under ascertainment requirements has always been assessed on an *ad hoc* basis. Nonentertainment programming, therefore, remains a relevant issue for petitions to deny. Of course, all other potential grounds for petitions to deny that are not affected by this proceeding will also remain as valid subjects for petitions.

## Ascertainment

## The Proposals

55. In the *Notice* the Commission set forth four proposals relative to our formal ascertainment requirements. Briefly, the proposals were:

- (1) To eliminate both the ascertainment procedures and the general ascertainment obligation and to leave it to market-place forces to ensure that programming designed to meet the needs and problems of each station's listenership is supplied;
- (2) To require ascertainment to be conducted by licensees but to permit them to decide in good faith how best to conduct that ascertainment without formalized Commission requirements;
- (3) To retain our ascertainment requirements, but in a simplified form; or
- (4) To retain our ascertainment requirements as they currently exist.

## Discussion of the Action Being Taken

56. We believe that the public interest no longer requires adherence to detailed ascertainment procedures. Rather, in conformance with the programming obligations set forth above, radio licensees, applicants for new radio stations, for the assignment or transfer of existing stations or for major modifications of existing stations will be free to determine the issues in their community that warrant consideration and may do so by any reasonable means. To the extent that parties may wish to raise questions concerning those efforts, such questions should be directed to the realities of the program proposal of applicants, or the responsiveness of licensees, rather than to the ritual of ascertainment.

57. In reaching this conclusion, we recognize that ascertainment was never intended to be an end in and of itself. Rather, it is merely a tool to be used as an aid in the provision of programming responsive to the needs and problems of the community. We cannot stress this enough. Although we have been called upon to decide numerous cases revolving around issues of how an ascertainment was conducted, and whether it was sufficient, or if the correct community leaders were contacted by the requisite type of station employee, *etc.*, one should not let this obscure the underlying purpose of ascertainment—to foster relevant programming relating to community issues. The ascertainment process is merely a tool which the Commission has furnished to attempt to assure that all significant segments of a community are at least contacted so that the station can make an informed judgment about which issues it should cover and what needs exist and should be responded to. Ascertainment was never intended to become a “ritual dance.” It was intended, rather, to assure discovery of problems, needs, and issues and to generate some relevant programming responsive thereto.

58. As our means to this end, we adopted formalized ascertainment requirements. Ascertainment grew out of two concepts of the role of radio. The first is that radio is a local medium, where stations are licensed to a community and are obligated to program primarily to that community. The second is that each station should attempt to provide "well-balanced" programming so that all segments of the community obtain the benefits of the licensee's ability to utilize a public resource—a radio frequency. The concept of localism was part and parcel of broadcast regulation virtually from its inception. It can be inferred from the Act itself,<sup>56</sup> and, as stated in the *Blue Book*, the Commission has:

given repeated and explicit recognition to the need for adequate selection in programs of local interests, activities and talent. (Emphasis added)<sup>57</sup>

As noted above, this adherence to the concept of localism continued through the *Programming Statement*, *supra*, and remains a consideration to this day.

59. The concept of well balanced programming is not quite so firmly entrenched. A bit of the history of the concept is instructive. Early in its history, the Federal Radio Commission, predecessor agency to the F.C.C., asked broadcasters applying for license renewal to list the average amount of time weekly devoted to: (1) entertainment; (2) religious; (3) commercial; (4) educational; (5) agricultural; and (6) fraternal programs. This indicates a concern that broadcasters should be responsive to the needs of these various significant segments of the community. While these elements may in retrospect appear to ignore what today are considered significant segments of the community, in the context of 1928, this list of program types may be seen as representing well-balanced programming. In 1929, the FRC, in its Third Annual Report to Congress stated that service in the public interest should include:

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.

Again, the FRC was listing programming types representing "well-balanced" programming.

60. This concept remained vital and in the *Blue Book* the Commission expressly endorsed the importance of well balanced programming. Jumping ahead to 1960 and the *Programming Statement*, the Commission listed fourteen programming elements necessary to service in the

<sup>56</sup> Section 307(b) provides in part:

. . . the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

<sup>57</sup> *Blue Book*, p. 37.

public interest. That list included: opportunity for local self-expression; the development and use of local talent; programs for children; religious programs; educational programs; public affairs programs; editorialization by licensees; political broadcasts; agricultural programs; service to minority groups; and entertainment programs. Certainly, this too indicates the Commission's continuing concern with well-balanced programming. Needless to say, the *Ascertainment Primer* [27 FCC 2d 650 (1971)] and *Renewal Primer* [57 FCC 2d 418 (1975), *recon. granted in part*, 61 FCC 2d 1 (1976)] continued the concept. However, ascertainment of all significant segments of the community became the watchword rather than well balanced programming elements.<sup>58</sup>

61. The balanced program concept has never had quite the same force as the concept of localism. For instance, at the beginning of modern radio regulation, Stephen Davis, the Solicitor of the Department of Commerce (wherein the regulatory authority over broadcasting first resided) stated that:

The character of the programs furnished is an essential factor in the determination of public interest but a most difficult test to apply, for to classify on this basis is to verge on censorship. Consideration of programs involves questions of taste, for which standards are impossible. It necessitates the determination of the relative importance of the broadcasting of religion, instruction, news, market reports, entertainment, and a dozen other subjects. *It may require the determination of preferences as between stations devoted to service of the public generally and those servicing only special groups, however, important.* (Emphasis supplied.)<sup>59</sup>

From the outset it was contemplated that some stations, depending on circumstances, could present well-rounded programming to the "public generally" while others served "only special groups," and that, therefore, not all stations would offer well-balanced programming.

62. By 1946, and the publication of the *Blue Book*, the Commission recognized that especially in metropolitan areas, where a number of stations existed and the listener could therefore choose among several stations, a balanced service to the listeners could be achieved:

. . . either by means of a balanced program structure for each station or by means of a number of comparatively specialized stations which, considered together, offer a balanced service to the community. (Emphasis supplied.)<sup>60</sup>

In 1946, when the *Blue Book* was published there were but 1,005 stations on the air.

63. As society changed over time, it became more aware of the need for programming by groups that were not being adequately

<sup>58</sup> This is not to say that the *En Banc Programming Inquiry Statement* has ever been repudiated by the Commission. It merely is to suggest that the emphasis has shifted from programming types to a process intending to assure that the content of the programming reflects responsiveness to groups comprising the community.

<sup>59</sup> Davis, *The Law of Radio Communications, 1st Edition*, McGraw-Hill Book Company, Inc., New York, 1927, p. 62.

<sup>60</sup> *Blue Book*, page 13.

served by broadcasting. Chiefly, this awareness grew out of the civil rights struggle that illuminated a segment of society that had previously been ignored in many ways, among which was by lack of relevant broadcast programming. Accordingly, when the *Programming Statement* was issued in 1960, it stated that the broadcaster should ascertain the needs of *all* segments of the community and:

should reasonably attempt to meet all such needs and interests on an equitable basis.<sup>61</sup>

No longer did it appear that balanced programming could be achieved through a number of comparatively specialized stations. Should that be permitted, those segments of the community that had been left unserved, or underserved, would be likely to remain unserved or underserved.

64. Eleven years later, when the original *Ascertainment Primer*, *supra*, was adopted, we set forth a procedure for ferreting out problems of all significant elements of the community, but, nevertheless, did not necessarily require programming responses to all ascertained needs. Even in adopting the ascertainment requirements we noted, in response to question 25 ("Must an applicant plan broadcast matter to meet all community problems disclosed by his consultations?"), the following:

Answer: Not necessarily. However, he is expected to determine in good faith which of such problems merit treatment by the station. In determining what kind of broadcast matter should be presented to meet those problems, the applicant may consider his program format and the composition of his audience, but bearing in mind that many problems affect and are pertinent to diverse groups of people.

However, as we have stated in applying this programming requirement to particular cases:

In serving the needs of his community, the broadcaster is not required to meet all community problems; rather, a licensee may determine in good faith which problems merit treatment by the station. In making this determination, it may consider the particular format of the station, the composition of its audience and the programming offered by other stations in the community. *Taft Broadcasting Company*, 38 FCC 2d 770, 790 (1973).<sup>62</sup>

Thus, the broadcaster has been given some latitude to take into account the particular needs of its listeners, and the nature of other available programming in the market, in determining what its own programming responses should be.

65. Accordingly, at several times in the past, the Commission has recognized the possibility that stations could be more narrowly focused in their programming, especially when market factors (*i.e.*, "the particular format of the station, the composition of its audience and

<sup>61</sup> *Programming Statement, supra*, at 2314.

<sup>62</sup> *Miami Valley Broadcasting Corp.*, 48 FCC 2d 177, 187 (1974).

the programming offered by other stations in the community") permitted service to the entire community to be provided on a market-wide basis rather than by each individual station.

66. Given this background, the principal focus of ascertainment has been to uncover issues facing the community that go beyond those that might be discovered through the licensee's ordinary contacts, which might be limited to, "a rather narrow range of persons or groups."<sup>63</sup> Whether referred to as problems, needs, or interests, some of which should be addressed with programming. All of the procedural requirements that have grown up around this basic obligation may have obscured this purpose. That never was our intention. As we stated:

Moreover, the performance that concerns us is not the degree of sophistication used by the applicant in obtaining the data. Rather, it is his proposed programming.<sup>64</sup>

As noted above, localism has been, and continues to be, an important element of service in the public interest. However, the concept of well-balanced programming has not held such a continuing and elevated status. Given the factors present today in radio, where nearly 9000 stations provide service to the American people, we believe, as stated above, that well-balanced programming need not be required on each station in all instances. What is important is that broadcasters present programming relevant to public issues both of the community at large or, in the appropriate circumstances, relevant primarily to the more specialized interests of its own listenership. It is not necessary that each station attempt to provide service to all segments of the community where alternative radio sources are available.

67. The principal arguments made in the comments against the outright elimination of ascertainment were that: (1) stations would not seek out information regarding the needs and problems of their communities absent ascertainment; (2) even if broadcasters did attempt to find out about such needs and problems, they would only do so with regard to economically significant segments of the community; and (3) as purportedly demonstrated by a study filed by the WNCN Listeners Guild, absent the ascertainment requirement, stations would make woefully incomplete or inaccurate assessments regarding the problems facing their community. We have significant questions concerning the validity of these concerns in the present radio environment.

68. As discussed in the section dealing with the nonentertainment programming guideline, we have concluded that stations should be permitted to tailor their programming to conditions present in their

<sup>63</sup> *Ascertainment Primer, supra* at 658.

<sup>64</sup> *Id.* at 662. While the passage refers to demographic, nevertheless it exemplifies our original and constant concern that the procedural aspects not overshadow the underlying purpose of ascertainment.

market and the nature of their particular listenership. To reiterate, where there are few stations in the community, each station must be more general in its coverage of issues. However, in communities having a large number of radio services available, the public interest is not offended by permitting each station to base its service, including the issues to which it will be responsive with programming, upon the nature of the radio services otherwise available in the community and the interests of its own listenership. In this way all will continue to obtain the benefits of radio without regulations that straight-jacket all stations into the same mold.

69. This being the case, what is important is that licensees utilize their good faith discretion in determining the type of programming that they will offer and the issues to which they will be responsive. It would be inconsistent with the exercise of good faith judgment for a broadcaster to be "walled off" from its community. Rather, broadcasters should maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station's attention. What is not important is that each licensee follow the same requirements dictating how to do so. Accordingly, formal ascertainment will be eliminated.

70. In certain hearing cases involving competing applications for new stations, major modifications of existing stations or renewal of licenses, material differences in program proposals can result in comparative consideration as between various mutually exclusive applicants before the Commission. In such instances, the only proper focus of our inquiry should be the responsiveness of the program proposals before us. We see no continuing reason to burden applicants, licensees or the Commission with detailed inquiries into which or how many community leaders were contacted, by whom, *etc.* This is not to say that the coverage of issues in a community would not be a relevant consideration in making such judgments. Rather, the methodological approach to those problems only obscures the issue of responsiveness and exhausts otherwise valuable resources in meaningless minutiae.

71. Similarly, in situations where applicants are being considered without comparative challenge, any interested party will have the applicant's program proposal and be in a position to judge the responsiveness of that proposal. For renewal applicants, the public will have access to their programs/issues list to aid in assessing the station's responsiveness. Thus, broadcasters will be provided with the maximum in flexibility while, at the same time, programming relevant to a variety of significant issues present in the community will be available in that community on the radio airwaves. We see no reason to require the broadcaster to engage in the current sort of renewal ascertainment if community issues can be determined in a less burdensome manner. Again, it is the programming and not the process that is the most important component of the broadcaster's efforts, the public's attention, and the Commission's concern. The only paperwork

requirement that will attach to this obligation will be for each new, assignment or transfer applicant, or each applicant proposing to greatly expand its coverage area to file a programming proposal and for each licensee seeking renewal to annually place (on the anniversary date of the grant of authorization for a licensee's first license term and thereafter on the anniversary date on which the station's renewal application would be due for filing) in its public file a listing of five to ten issues responded to with programming together with examples of such programming offered. The list should, in narrative form, contain a brief description of from five to ten issues to which the station paid particular attention with programming, together with a brief description of how the licensee determined each issue to be one facing his community and of how each issue was treated (i.e., a series of public service announcements, a call-in program with the relevant public official, *etc.*). Additionally, the licensee should list the date, time and duration of listed programming utilized to address these issues. We continue to be concerned that stations serve their local communities. This might often mean that stations use locally produced programs to meet their community issue obligation. This does not preclude, however, the use of other programs which address issues of importance to the community.

72. The list required of renewal applicants need not be exhaustive or, indeed, be a complete recitation of either all of the issues covered or all of the programming offered in response to these issues. Rather, the list is intended to provide examples of both. If challenged at renewal, the licensee may point to both listed and unlisted programming to support any claim of compliance with the Commission's requirements. However, any programming upon which the licensee wishes to rely that was not contained on the issues/programs list must be supported by documentation that was prepared reasonably contemporaneously with the subject programming. Unsupported recollection that the station broadcast or probably broadcast other programming will not be considered by the Commission. Such documentation, in addition to the issues/programs list, need not be maintained in the public file. Given the above, ascertainment will not be an issue in either comparative or renewal proceedings. The focus of our inquiry will relate to the programming proposed or offered, as the case may be, and not the process utilized to identify issues. It would be of no concern to the Commission how the applicant or broadcaster became aware of issues facing his community (or, in the appropriate circumstances, his listenership) so long as programming was being proposed, or offered, in response to such issues.

## The Commercial Guidelines

### The Proposals

73. The Commission's guidelines regulating maximum amounts of

commercial minutes per hour are contained in Section 0.281 of our Rules. That section sets commercial limits that prevent the Broadcast Bureau from routinely processing a license application pursuant to its delegation of authority when an applicant proposes more advertising than the applicable guideline, generally 18 minutes of commercials per hour. Most simply, if a licensee proposes less than the guideline he or she avoids full Commission review of the application on that issue.

74. In the *Notice* we proposed four options for change of this procedure, and invited comments and other suggestions. The four proposed options were:

- (1) The elimination of all rules and policies dealing with the amount of commercial time and reliance on marketplace forces to regulate levels of commercialization;
- (2) The setting of quantitative standards that, if exceeded, would result in some sanction being imposed against the licensee;
- (3) The elimination of all rules specific to individual licensees, but reserving Commission power to intercede if heavy levels of commercialization occur market-wide; or
- (4) The retention of quantitative guidelines, but only with regard to the Broadcast Bureau's delegation of authority.

In our "preferred options" section we said that it appears that marketplace forces can better determine appropriate commercial levels than can the Commission, and that these forces will limit these levels. Thus, we said that our preference was to eliminate all rules and policies dealing with commercial time and to leave it to the marketplace to determine appropriate advertising amounts and to deter commercial abuses.

#### Discussion of the Action Being Taken

##### Introduction

75. The outstanding features of the history of commercial limitations have been the Commission's persistent concern that advertising not become the superseding force in broadcast service and programming, and our concurrent reluctance to set definitive and rigid standards that would cause all broadcasters to operate in the same mold. Because of these sometimes inconsistent concerns it is not surprising that the current restrictions are not part of a definitive rule but instead take the form of processing guidelines allowing the Broadcast Bureau to process applications, with regard to the issue of commercialization, if the licensee's advertising amounts are below the guideline maximums.

76. With processing guidelines rather than rigid rules by which every licensee would be bound absent an express waiver, the current system apparently was designed to give licensees some flexibility in fulfilling their public interest responsibility in the advertising area.

The flexibility was to be accomplished largely by allowing licensees who wished to propose more advertising time to submit their proposals for full Commission consideration.<sup>65</sup>

77. Commenters in this proceeding have almost unanimously made the assumption that as a practical matter the guidelines nearly extinguish alternative proposals, and thus have had a greater tendency than might have been intended to discourage diversity and experimentation in the advertising area.<sup>66</sup> Some commenters, including NTIA, have gone so far as to charge that although the limitations are not rules, they have that practical effect. Although it seems unnecessary to assume the merits of such assertions, the Commission fully appreciates that these guidelines are not impotent and here takes seriously its administrative duty to assess their effects and to reconsider their continuing value in our regulatory scheme.

78. Against this background, it appears that our most important line of inquiry is the determination of whether, within the Commission's legislative mandate to regulate in the "public interest, convenience and necessity," the commercial processing guidelines serve appropriate public interest goals, and, if so, whether the guidelines are needed to achieve those goals. One preliminary question is whether the Commission has any power to regulate the advertising practices of licensees. The history of regulation in the advertising area extends from the early days of the Federal Radio Commission,<sup>67</sup> and it appears safe to assume that the Commission's power to consider advertising excesses as part of the broadcast licensing process is without significant question.<sup>68</sup> In fact, as chronicled in the *Notice* in paragraphs 41-50 and reviewed here in Appendix G, the Commission has considered

<sup>65</sup> The guidelines themselves provide for some flexibility, allowing an excess of 18 minutes of advertising per hour in response to considerations such as seasonal markets and political campaigns. The guidelines are set out in 47 CFR Sec. 0.281(a)(7) and reprinted in Appendix G.

<sup>66</sup> See, for example, Testimony of Andrew Schwartzman, Transcript of September 16, 1980, Panel Discussion, pp. 140, 193-196.

<sup>67</sup> Advertising practices were, at least from 1928, considered as part of the "public interest" responsibility of licensees. See, 2 FRC Ann.Rep. 166 (1928).

<sup>68</sup> This issue was raised and discussed in considerable detail in a memorandum by the Commission's General Counsel submitted to the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee in December 1963. That memo reviewed the history of the Communications Act, the applicable provisions of the Act, and the applicable judicial and administrative precedent and found that the Commission not only had the power to regulate based on past commercial excesses of licensees, but also the power to limit by rule the commercial amounts allowed broadcasters. That proceeding by the Congress ended without the adoption of legislative guidelines or more clearly specified rule making authority in the area for the Commission. Later, the Commission also declined to adopt such rules, but incorporated the memo into the final *Report and Order* in that proceeding. *Amendment of Part 3 of the Commission's Rules and Regulations with Respect to Advertising on Standard, FM and Television Broadcast Stations*, 36 FCC 45 (1964). For a further history of this subject area, see Appendix G.

commercial abuses and has imposed administrative penalties from time to time throughout its history.

79. Stated broadly, the public interest concern of the Commission has been to avoid allowing the commercial use of stations to supersede their public interest use. Congress having opted for a private rather than a governmental system of broadcast operations, revenues from commercial time sales are necessary to enable the vast majority of stations to remain in business, and thus provide the service intended. However, the Commission is charged with insuring that the interests of the listening public are being served, as well as the institutional and financial needs of the private license holder. Having allocated a large amount of spectrum space to commercial stations, the Commission can insure that their commercial aspect does not become so important as to frustrate the purpose of the allocation.<sup>69</sup>

80. But the existence of the authority to prevent commercial abuses has never driven the Commission to broadly exercise that authority absent a rather significant showing of interference with the public interest. And a recent but pronounced trend by the Supreme Court granting significant First Amendment protection to "commercial speech" indicates that the Commission's caution in this regard may have been appropriate not only as a matter of administrative and regulatory policy, but also a matter of constitutional policy. The scope and policy implications of the most important "commercial speech" decisions of the Supreme Court are discussed in Appendix G.

81. Against this background of the scope of Commission power, the effect of the processing guidelines, and the historical reluctance of the Commission to be more intrusive than necessary in this regard, the following discussion of elimination of the commercial guidelines is divided into two major sections: (1) the likelihood of excessive commercialization and (2) the potential advantages of elimination. The excessive commercialization section reviews the data and arguments relating to the likelihood of vast increases in commercial time by broadcast stations in light of the competitive pressures facing radio broadcasters. The final section outlines several potential advantages of guideline elimination, including greater commercial flexibility and diversity, less regulatory burden, and greater citizen opportunity for exposure to commercial information.

#### Commercial Excesses and Marketplace Forces

82. The record of this proceeding provides convincing evidence

<sup>69</sup> One of the first expressions of this idea came in a 1928 statement by the Federal Radio Commission stating its interpretation of the public interest, convenience, or necessity clause of the Federal Radio Act: "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public." 2 FRC Ann.Rep. 166 (1928).

that marketplace forces have a significant impact on the amount of advertisements aired by commercial radio licensees. These forces appear more effective in curbing advertising excesses than our own rules, and are so significantly less intrusive and less expensive as to convince us to place greater reliance on them in our regulatory scheme.

83. As indicated in Appendix G, the economic data contained both in the *Notice* and in the comments show that most licensees not only meet the present guidelines but also that their pattern of advertising amounts is generally so far below the guidelines as to demonstrate that it is competition and other forces operating in the marketplace, not regulation, that most effectively restricts the advertising loads of radio licensees. The reasons for this situation are in some instances obvious but at other times not so obvious, prompting us to review them in some detail below. But in nearly every case, the trend appears to be in favor of greater and more effective competition in this area rather than against it, giving us substantial assurance that the policy choices we make herein are warranted.

84. First, as detailed in the *Notice*, the number of radio stations has shown a steady and striking increase over the past few decades. In 1934 there were 583 radio stations. In July of 1979, while the *Notice* was in preparation, there were 8,654 stations, and 15 months later there were 8,921 stations. Also, preceding and since adoption of the *Notice*, the Commission has both proposed and approved various plans to increase the use of the radio spectrum and thereby add a significant number of new competing stations.<sup>70</sup>

85. Although the increase in the number of radio outlets indicates a significant increase in the number of competitive outlets for radio advertisers, it may still significantly understate the amount of increased advertising competition encountered by radio licensees. Radio has faced considerable intermarket competition from its inception when it competed with the already established informational outlets of the print media such as newspapers and magazines, and other established advertising media such as outdoor and specialty advertising. While virtually none of these competing advertising vehicles has disappeared, the radio industry has continued to face additional competition, especially from other broadcast-related media such as VHF and UHF television, and now increasingly from cable television. Other such competitors continue to appear on the horizon, not the least of which are the low powered television stations and even direct broadcast satellite communication media.

86. Perhaps both because of and in spite of this increased competition, the radio industry has continued to prosper as an effective medium. Both the *Notice* and several of the comments in this

<sup>70</sup> See, e.g., *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345 (1980); and *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 45 Fed. Reg. 17602, published March 19, 1980.

proceeding noted that because commercial radio is almost exclusively an advertiser supported industry, advertisers can in some ways be considered the "buyers" of the radio product. Although this may have some undesirable effects, it was noted in the comments and elsewhere that advertisers have become more sophisticated in their ability to identify potential consumer groups and are more successful at "positioning" their products, *i.e.*, setting them apart from competing products and appealing to specific market segments within the mass consumer market.<sup>71</sup> Advertisers, in turn, have utilized advertising media with compatible specialized audiences.<sup>72</sup>

87. This desire of advertisers for more specifically segmented audiences has been one of the forces that has facilitated the movement of the commercial radio industry, especially in the past decade, toward greater specialization and diversity in program formats, paralleling a somewhat earlier trend of the magazine industry. As both audiences and advertisers sought more specific media for editorial and commercial information, magazines decreased in average circulation but increased in number and specificity while retaining a largely national character.<sup>73</sup> Likewise, a great number of radio stations now deliver more specialized services.

88. Against this background, we view with some skepticism the assertions by some commenters that elimination of our guidelines will lead to widespread increases in the commercial loads of radio stations. Indeed, absent our own intervention—which, of course, would continue to be possible—there appear to be at least three major sources of market pressure that will inhibit commercial abuses: audiences, advertisers, and individual station owners. Together, these appear to create a largely self-regulating system and one wherein correction of commercial abuses by the system's own forces may be more swift and more efficient than those ordinarily imposed by the Commission.

89. The commercial clutter issue was discussed by several of the commenters in this proceeding. Most simply, the idea is that stations with commercial excesses are attractive neither to listeners nor to advertisers. Audiences exposed to highly concentrated ads don't listen attentively, retain less of what they do hear, and become decreasingly responsive to commercial appeals.<sup>74</sup> In other words, each ad tends to

<sup>71</sup> "The power of [market segmentation] is that in an age of intense competition from the mass market, individual sellers may prosper through developing brands for specific market segments whose needs are imperfectly satisfied by the mass market offerings." Kotler, *Marketing Management: Analysis, Planning and Control*, 1976, p. 144.

<sup>72</sup> See also, *Notice*, paragraphs 71-85.

<sup>73</sup> The trend toward more specificity in magazines has also manifested itself in the emergence of many regional, state, and local magazines. These have also provided competition with radio for advertising dollars.

<sup>74</sup> "The kaleidoscope of clutter in commercials produces confusion among viewers and listeners . . ." Kleppner, *Advertising Procedure*, 7th ed., 1979, p. 118.

get lost in the "clutter" and thus is less effective, leading advertisers to seek stations with less advertising clutter. Meanwhile, audiences avoid stations with too many commercials. Stations with excessive commercials will often find themselves with smaller audiences and fewer advertisers.<sup>75</sup>

90. Additionally, reply comments of NTIA suggest that station owners who may wish to increase profits will have other incentives to restrict the number of ads they accept. One reason is that increased availability of advertising has a depressing effect on the unit price of every ad sold.<sup>76</sup> Thus, although they may be able to increase the number of ads they sell, their total profits will not necessarily increase and, in fact, will likely decrease.

91. One potentially troublesome situation suggested by some commenters is that raised by those stations which may be less susceptible to market forces. These stations are said to have unusual "market power" either because they face little local competition in a small community or because they have a unique format or audience in a larger community. In both cases, these commenters suggest that the stations with this "market power" will increase their levels of advertising time.<sup>77</sup> NTIA cast considerable doubt upon the extent and intensity of such "market power" in both situations. In small markets, there are not typically many purchasers of advertising time.<sup>78</sup> Hence, the ability to find purchasers of additional time is not great. In larger markets, specific format stations apparently face the considerable "cross format" competition discussed in the comment summary in Appendix G, and also competition from other advertising media.

92. These countervailing forces lead us to conclude that "market power" may be more a theoretical concern than an actual one. Our own data in the *Notice*, for example, confirm this conclusion by showing that the lightest advertising loads are usually found in the small markets with little or no local radio competition, and in the large markets with presumably the greatest amount of format specification. In any case, if it becomes obvious that a certain class of stations (*e.g.*, specific format or small market stations) have significant market power and exert that power to the detriment of the public interest, the Commission can always revisit the area in a general inquiry or rulemaking proceeding.

<sup>75</sup> See, J. R. Dominic, "The Effects of Commercial Clutter on Radio News," *Journal of Broadcasting*, Spring 1976, at pp. 169-176.

<sup>76</sup> This is only relevant where changes by any one station have a significant effect on the total advertising time available in a market.

<sup>77</sup> That is, they would sell a greater amount of advertising time than would be true in a competitive market. Economic theory suggests that the incentive would be the opposite—the station that has "market power" would want to restrict its advertising time.

<sup>78</sup> This is true both because the numbers of advertisers in small markets is limited, and because the value to listeners of the advertising messages is likely to be small.

## Potential Advantages of Elimination

93. We think that the data and economic analysis indicating that marketplace forces will effectively regulate commercial excesses and the analysis of other issues discussed in Appendix G indicating that elimination of the guidelines will not otherwise harm the public interest provide sufficient cause for us to eliminate the commercial processing guidelines. No government regulation should continue unless it achieves some public interest objective that cannot be achieved without the regulation. Further, we think it would be irresponsible to ignore both the direct and indirect burdens of unnecessary regulation on this Commission and the broadcasters (and ultimately the public). The most direct of these costs are the unnecessary record keeping, reviewing, and monitoring required by the stations and the Commission pursuant to the regulation. We do not consider these trivial, especially in light of the fact that they undoubtedly contribute to the recent conclusion of the Small Business Administration<sup>79</sup> and the General Accounting Office<sup>80</sup> that the Commission is a major source of government paperwork burdens.

94. But the paperwork burden of the commercial guidelines according to the record of this proceeding appears only to be a small part of the burden the guidelines impose. Other burdens are less direct, though no less real, and often take forms that are nearly impossible to measure or to predict accurately. Elimination of the guideline may well reduce these burdens and have substantial advantages. The potential advantages include: (1) the reduction of any anti-competitive impact of the current rules, and (2) an increase in commercial flexibility for broadcasters and diversity for audiences.

95. First, as NTIA and other commenters suggest, the commercial guidelines may have serious economic consequences. NTIA says that to the extent that the commercial guidelines depress the amount of commercial time below the advertiser demand for such time, they may be anticompetitive. And, to the extent that such limits decrease the advertising available to consumers, they can result in higher prices for many consumer products.<sup>81</sup> When commercial levels are restricted, the price of each commercial is likely to rise, thereby restricting its availability to larger and better established businesses. Conversely, an increased supply of advertising time can be expected to decrease unit price, allowing smaller businesses to use the medium to reach potential consumers. This point is made by the National Black Media Coalition (NBMC) which states that the guidelines increase the prices of spot

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<sup>79</sup> Advocacy Paperwork Measurement and Reduction Program, U.S. Small Business Administration, September 30, 1979. *See especially*, Appendix 4.

<sup>80</sup> "Federal Paperwork: Its Impact on Small Business," General Accounting Office, November 17, 1978, p. 43.

<sup>81</sup> *See, Virginia State Board of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976).

advertisements, "which hurt[s] small businesses generally and Black businesses particularly by making access to radio time more difficult to obtain than would otherwise be the case."<sup>82</sup>

96. NTIA also asserts that the restrictions have adverse competitive effects within the radio broadcasting industry: "Large, well established radio stations can prosper despite limitations on commercial time because they tend to sell time to businesses with large advertising budgets. They thus can compensate for decreased quantity by increasing the cost of commercial time. Small stations (many of which are minority owned) may need quantity, however to survive."<sup>83</sup> The joint comments of Dow, Lohnes, & Albertson reinforce this point, suggesting that larger commercial loads on minority owned stations could strengthen their revenue base.<sup>84</sup> NBMC suggests that the present guidelines also weaken the "ability of marginal Black stations to attract capital needed to support news and public affairs programming."<sup>85</sup>

97. These observations lead to our second major point here, *i.e.*, without the guidelines stations may show an increased willingness to experiment with advertising formats that might exceed present limits but could serve the public interest. NBMC again provides a major point suggesting that the present guidelines restrict general consumer use of the radio medium, and saying that the guidelines are responsible for the current "absence of programs on which Black consumers may themselves advertise, such as want-ad shows or consumer sell-a-thons."<sup>86</sup> Others note that our present policy discourages the use of "program length commercials" which may be very useful to consumers where products or services cannot be adequately explained in the usual spot advertisement. Although we are mindful that some such advertising procedures are subject to abuse, we think that it is preferable to encourage experimentation and diversity in this area. To encourage such experimentation, we will no longer adhere to our policy against "program length" commercials. We also understand that what might appear to us at first blush as an abuse may be a significant service to a substantial portion of the market's radio audience. Thus, we prefer to allow the interplay of good faith discretion of licensees and the competitive forces of the marketplace to determine which advertising policies better serves the needs and interests of particular listening audiences. If prolonged and blatant excesses occur in defiance of the

<sup>82</sup> Comments of National Black Media Coalition, p. 17.

<sup>83</sup> Comments of National Telecommunications and Information Administration, p. 8.

We also note in this regard that the Justice Department has filed an action against the National Association of Broadcasters alleging that a section of the NAB Code, since revised, dealing with amounts of advertising time violated antitrust laws. *United States v. National Association of Broadcasters*, Doc. Number, 79-1549.

<sup>84</sup> Joint comments submitted by Dow, Lohnes, & Albertson, p. 39.

<sup>85</sup> Comments of National Black Media Coalition, p. 17.

<sup>86</sup> *Id.*

best interests of the public, then again, we can revisit the area and take appropriate action in another rulemaking proceeding.

98. In summary, the current processing guidelines for maximum commercial amounts are herein eliminated. We expect that this change will promote licensee experimentation in the commercial area, and result in a greater range of commercial radio choices for both advertisers and audiences. Based on information in this record, we believe that commercial levels are more effectively regulated by audience selection and other marketplace forces, and therefore will not consider petitions to deny or informal objections based on allegations that an individual station has offered an "excessive" amount of commercial matter. Should events demonstrate that these competitive forces are not effective for all markets and instances, we can revisit this issue in detail in a general inquiry or rulemaking procedure at a later date.

### Program Logs

#### The Proposals

99. The present program logging requirements applicable to radio stations are found in Sections 73.1800, 73.1810, and 73.1850 of the Commission's Rules. These rules, *inter alia*, specify the general design of the logging system, the manner for entering and correcting data, and the details of how the logs are to be made available to the public. Thus compiled, the logs provide a rather comprehensive record of the level and timing of programming for every specified program type. The *Notice* in paragraph 293 listed three of the possible options for change if the commercial and nonentertainment programming rules were changed as envisioned in this proceeding: (1) eliminate the logs; (2) eliminate the present requirements, but require public inspection of those associated records voluntarily kept by licensees in their ordinary course of business; or (3) keep the present system of logs. The second of these was considered the preferred option, largely because it was believed it would substantially decrease the regulatory burden while allowing public inspection of many important records.

#### Discussion of the Action Being Taken

100. Perhaps the most important area of agreement among commenters in this rule making was dissatisfaction with the current log keeping requirement. Broadcasters were especially concerned that the logs posed a tremendous record keeping burden, and other commenters such as the National Black Media Coalition often agreed with the broadcasters' contentions that the logs contain very little useful information considering their pervasive and complex nature.

101. The most stunning statistic relied upon by those who discussed the great burden of the logs comes from a General Accounting Office (GAO) report on federal paperwork requirements. That GAO

report says that compliance with the logging rules for AM and FM stations require a total of 18,233,940 hours per year by the industry.<sup>87</sup> Although the burden seems highly exaggerated, especially in light of the fact that these rules largely operated only to standardize industry record keeping that is necessary in the ordinary course of business, the paperwork burden of the logs nonetheless seems just too great to be taken lightly.

102. Broadcasters also suggest that the current programming logging requirements have the secondary effect of facilitating Commission concentration on technical compliance with its rules rather than on substantial compliance by broadcasters. One such incident, involving a forfeiture against Station WMAL(AM), Washington, D.C., for inaccurate logging of commercial matter, was cited in comments and raised in the panel discussions as an example of the inherent difficulty such detailed rules can create for both the licensees and the Commission. Also, the technical specificity of the rules is said to inhibit stations from developing more efficient means of compiling and retaining the logs, and thus discouraging the use of modern computer based systems of recordkeeping.

103. Program logs as presently required by the Commission will no longer need to be maintained or made publicly available. However, broadcasters still will be required to maintain their public files, which contain much relevant programming information. The information in station public files should be sufficient for routine Commission and public monitoring of the public interest programming performance of licensees. EBS announcements will now all be logged in the radio stations' operating logs.

104. The Commission will not require other records of programming or commercial matter, although some such records may be kept by licensees in the ordinary course of business. As stated in the comments of the National Radio Broadcasters Association (NRBA), stations will continue to maintain commercial records if only for billing purposes. Stations may voluntarily wish to compile and maintain other records, including files on most public service programming. We decline to require such records because to do so would create a burden much greater than warranted by our infrequent need for them. And, as NRBA says:

There is a difference, however, between records kept voluntarily in format designed for utility, and records kept pursuant to a strict and detailed government regulation. The difference is particularly striking when it is emphasized that a failure to maintain the former may simply result in some lost billings, while failure to maintain the latter can result in a fine, a hearing, or even loss of license.<sup>88</sup>

<sup>87</sup> "Federal Paperwork: Its Impact on Small Business," General Accounting Office, November 17, 1978, p. 43.

<sup>88</sup> Comments of National Radio Broadcasters Association, p. 24.

105. Public inspection files will continue to be maintained by each licensee, and will provide considerable information of value to citizens making public interest programming inquiries of licensees.<sup>89</sup> Items contained therein which have had and will continue to have great value include copies of the license application with all accompanying materials, and the political file. In addition, the most important programming document in the public inspection file will likely be the annual issues-programs list. There, each licensee will list five to ten of the important issues in its service area, examples of its public service programs aired over the past year which responded to those issues, and related information.

106. We wish to stress here that the continued reliance on the public file as an index to the general programming responsibility of licensees does not constitute a significant departure from our present system. As the record in this case reveals, our past program logging requirement has served primarily as an index to the *quantity* of nonentertainment and commercial programming aired by individual licensees, and has been of very little value as an index of performance in the more general programming areas. The Commission has never imposed a general requirement that stations supply extensive textual data on the *content* of their programming, and doing so would raise significant First Amendment questions. Our experience also has shown that such information is not necessary to meet our public interest oversight and other statutory responsibilities. Instead the Commission has developed a history of successful programming oversight through various means, including staff and public investigations. In so doing, the Commission has relied not only on logs or other record keeping devices but on the experience of those with the most extensive knowledge and greatest interest in each station's programming, its listening audience.<sup>90</sup>

107. In sum, while elimination of the logs will decrease the public availability of some quantitative information on program service, that information will now be largely irrelevant based on other rule changes on this *Report and Order*. Other program information, especially that relative to the general public interest responsibilities of licensees, will continue to be available to the public much as in the past.

## V. General Issues

### The Experimental Option

108. As indicated in the Introduction, on October, 1978, we instructed the staff to study the possibility of deregulating radio on either an experimental or general basis and to prepare recommendations. In the *Notice*, at paragraph 267, it was indicated that, based on

<sup>89</sup> The public inspection file rules are contained in Section 73.3526.

<sup>90</sup> See, e.g., *Alan C. Phelps*, 21 F.C.C. 2d 12 (1969).

the information then available, the experimental option was not the preferred course to take because:

First, there is a substantial likelihood that the findings we would be seeking from an experiment are already available. We refer to data showing that the marketplace provides more nonentertainment programming and fewer commercials than our current guidelines. Second, and most importantly, because of the nature of such an experiment—one in which the subjects would have a strong interest in achieving a particular outcome—the results would be subject to considerable question. Finally, if we eliminate our noncommercial and nonentertainment program guidelines, we are prepared to take whatever steps are necessary in the public interest should the marketplace fail. We invite comments on any course of action that might be taken with respect to any experiment.

Several commenters took the opportunity to address the issue of an experimental option. In general, those who favored deregulation asserted there was no need for an experimental period; those who opposed deregulation asserted that if deregulation were to occur it should be implemented on an experimental basis. Unfortunately, none of the commenters addressed the substance of the arguments put forth in the *Notice*. It therefore appears that the findings still hold that the experimental option should be rejected.

#### Monitoring Deregulation

109. The steps we are taking here in no way will reduce our responsibility, ability, and determination to provide a regulatory framework that assures radio broadcast programming in the public interest. We shall continue to be concerned that broadcasters be responsive to the public. It is our expectation that the added flexibility that broadcasters will have to respond to their audiences will indeed produce such results. There remains the possibility that, at least in some isolated cases, this might not happen. Fortunately, there are built-in mechanisms to allow us to detect such an occurrence. Part of the public interest obligation of any licensee is to address issues of importance to the community as a whole or, in larger markets with many stations, to the station's listenership. If a station is not addressing issues, citizens will be able to file complaints or petitions to deny. We continue to encourage citizens to meet with their local broadcasters to discuss their concerns, but if they do not receive satisfaction, they should take the complaint or petition to deny routes. These long standing channels will allow the Commission to continue to monitor the performance of licensees, and indeed will better indicate the responsiveness of licensees than do fixed guidelines.

110. Citizens' complaints will also provide the basis for monitoring commercialization policy. Although there will be some additional burden placed on citizens to undertake such monitoring, in fact highest levels of commercialization tend to occur during predictable peak hours and therefore the burden is not overwhelming. The Commission in general will not be concerned with isolated incidents of stations with high levels of commercialization. If, however, there tends to be a

pattern of serious abuse among certain classes of stations, the Commission could revisit the area through an inquiry or rulemaking proceeding. In monitoring such problem areas, the Commission might survey particular markets and use the data as the basis for fashioning appropriate remedies.

#### Administration of Deregulation

111. The policies enunciated herein, along with the relevant rule changes set forth in Appendix A, will become effective April 3, 1981, unless a stay of the effectiveness is requested and granted. After the effective date of these policies, applications for new stations, as well as applications for the assignment, transfer, renewal and/or modification of existing stations, will be modified as set forth in Appendix J, and all such applicants will be required to file only the information requested therein.

#### New Applications

112. Because the policies enunciated herein will affect the future operation of radio broadcast stations, we believe that they should also be applied to applications filed before the effective date of this *Report and Order* but still before the Commission for consideration.<sup>91</sup> Therefore, upon the effective date of this *Report and Order*, those portions of applications for new facilities which have been obviated by this action will be considered immaterial to the Commission's determination of that application. We will not physically return those portions of the applications, and it will not be necessary for applicants to file amendments to conform with the revised wording of the applicable form. For example, the ascertainment and programming portions of applications already on file should adequately respond to the revised questions. If additional information is needed, especially with regard to proposed programming, the Commission's staff will contact the applicant. Thus, modifications of applications already on file will not be necessary.

113. We further believe that when these policies become effective they should apply to pending applications for new facilities that have been designated for hearing at all stages of the hearing process. Therefore, if issues which are obviated by this action have been specified and/or tried, Administrative Law Judges and the Review Board are directed to resolve those issues in accordance with the policies enunciated herein. Thus, the issues should be deleted in either an interlocutory order or in the decision, as appropriate. In directing this course, we wish to emphasize no intention to foreclose consideration of related issues not directly affected herein. Thus, issues

<sup>91</sup> These procedures cover application for new facilities, applications for modifications of existing facilities and the buyer's portions of applications for assignment or transfer of existing stations.

concerning alleged misrepresentations relating to ascertainment will not be extinguished. However, there would be no need to resolve issues on the sufficiency of ascertainment based upon alleged failure to follow the steps detailed in the *Primer*.<sup>92</sup>

#### Renewal Applications

114. The administration of these policies to renewal applications is complicated by the fact that such applications encompass both the licensee's past performance and proposals for the future. Certainly, the portions of renewal applications which relate to future proposals should be treated in the same manner as new applications. Accordingly, the procedures and directions set forth above will govern the consideration of the prospective portions of renewal applications.<sup>93</sup>

115. The retrospective portions of renewal applications and the seller's portion of assignment and transfer applications relate to conduct during the time when the licensee was expected to adhere to rules and policies which have been eliminated herein. It is not our intention to relieve licensees of those obligations after the fact. On the other hand, we do not believe it would be reasonable to continue to require licensees to file information on the ever diminishing portion of the past license term which was governed by the old policies. Accordingly, we will continue to require the filing of, and we will consider, the retrospective portions of renewal applications until the effective date of the *Report and Order*. Thereafter, licensees will file renewal applications in accordance with the reformed application described in Appendix J. Thus, although we will not require routine filing of materials related to past ascertainment, commercialization or programming performance, these issues could be raised in a petition to deny or on the Commission's own motion. This is the case because violations of a past regulation at the time when it was in effect may be relevant to a licensee's qualifications to retain its license, even if the subject regulation was modified or eliminated in this proceeding.

#### VI. Conclusion

116. Some fifty-four years ago, during Congressional debate on what was to become the Radio Act of 1927, precursor to the Communications Act of 1934, Congressman Free of California stated:

I think there is one monopoly in this thing and I think it is the individual listener. The minute he turns off his set and refuses to listen, just that minute the radio is gone so far as the sellers of sets are concerned.<sup>94</sup> Because of that fact they must put

<sup>92</sup> In this regard we note that for "new" applicants, ascertainment is a prospective process by which the applicant determines the community problems it will cover in its programming. Thus, the mere failure to follow previously prescribed procedures would no longer be relevant.

<sup>93</sup> This will also apply to the buyer's portion of assignment and transfer applications.

<sup>94</sup> This referred to the so-called "Radio Trust," some of whose members were engaged

on good programs; they must maintain the public interest because the public is their asset. When they sell time to an advertiser they have got to show that you and other people are listening, and if they cannot show that they cannot get money for broadcasting.<sup>95</sup>

117. We believe that given conditions in the radio industry, it is time to heed that sentiment and to reduce the regulatory role played by Commission policies and rules, and to permit the discipline of the marketplace to play a more prominent role. It is our conclusion that the regulations that we are retaining and the functioning of the marketplace will result in service in the public interest that is more adaptable to changes in consumer preferences and at less financial cost and with less regulatory burden. While savings to the public, the Commission and broadcasters cannot be accurately or exactly quantified, it is only reasonable to assume that if any reduction in costs to broadcasters and/or the Commission (and accordingly, and foremost, to the public) is achieved by the action taken herein, with no degradation in service, the public interest will be well served. It may well be that the removal of these regulations will allow broadcasters to be *more* responsive to listeners, thus improving service while reducing costs.

118. Our role will continue to be one of oversight. But in most instances we believe that generalized requirements that permit licensees to respond to market forces within broad parameters are warranted in radio broadcasting. Simply stated, the large number of stations in operation, structural measures, and listenership demand for certain types of program (and for limitations on other types of programming, to-wit: commercials) provide an excellent environment in which to move away from the content/conduct type of regulation that may have been appropriate for other times, but that is no longer necessary in the context of radio broadcasting to assure operation in the public interest.

119. Accordingly, IT IS ORDERED, That Sections 0.281, 73.112, 73.282, 73.1212, 73.1225, 73.1800, 73.1810, 73.1840, 73.1850, and 73.3526 of the Commission's Rules ARE AMENDED as set forth in Appendix A.

120. IT IS FURTHER ORDERED, That the *Ascertainment Primer* and the *Renewal Primer* shall no longer be applicable to commercial radio broadcast applicants or licensees and that in their place the above

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in the manufacture of receivers and transmitters as well as in broadcasting itself. It was fear of the potential monopolistic aspects of the Radio Trust that was in large measure responsible for the adoption of the Radio Act, and, indeed, the adoption of a requirement that stations operate in the public interest rather than in their own interest. As the Supreme Court has stated, "Congress (in adopting the Act) moved under the spur of widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 137 (1940).

<sup>95</sup> 67 Cong.Rec. 5491 (1926).

stated policy regarding ascertainment of issues shall apply to such stations.

121. IT IS FURTHER ORDERED, That FCC Forms 301, 303-R, 314, and 315 ARE AMENDED as set forth in Appendix J, *infra*.

122. Authority for the adoption of this *Order* is contained in Sections 4(i), 5(d), and 303(r) of the Communications Act of 1934, as amended, and Section 1.412(b)(5) of the Commission's Rules.

123. IT IS FURTHER ORDERED, That this action SHALL BECOME EFFECTIVE on April 3, 1981.

124. For further information concerning this *Order*, contact Roger D. Holberg, Broadcast Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION,  
WILLIAM J. TRICARICO, *Secretary*.

#### Appendix A

1. 47 CFR Part 0 is amended by removing Sections 0.281(a)(7)(i)-(iii), redesignating 0.281(a)(7)(iv) as 0.281(a)(7)(i) and revising that Section and Sections 0.281(a)(8) and 0.281(a)(10), as follows:  
§0.281 Authority delegated.

\* \* \* \* \*

(a) \* \* \*

(7) *Programming: commercial matter.*

(i) Commercial TV applicants for a new station, or assignment or transfer, or renewal of license, proposing to exceed 16 minutes of commercial matter per hour, or during periods of high demand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10% or more of the station's total weekly hours of operation.

(8) *Programming: program content and ascertainment of community needs.*

(i) Applications for new stations or assignments and transfers.

(A) Commercial AM and FM proposals of applicants for new stations and of assignees and transferees that have not submitted a narrative statement of their proposed programming, commercial TV proposals of applicants for new stations and of assignees and transferees (except those made by UHF stations not affiliated with major networks) which project for the hours 6:00 a.m. to 12:00 midnight less than the indicated percentages in one or more of the following categories: 5% total local programming; 5% informational (news plus public affairs) programming; and 10% total non-entertainment programming.

(B) Commercial TV proposals of applicants for new stations and of assignees or transferees which contain substantial ascertainment defects which, for any reason, cannot be resolved by further staff inquiry or action. (See 1971 Ascertainment Primer: 27 FCC 2d 650 (1971), 36 Fed. Reg. 4092.

(ii) Applications for renewal.

(A) Commercial TV proposals (except those made by UHF stations not affiliated with major networks) which project for the hours 6:00 a.m. to 12:00 midnight less than the indicated percentages in one or more of the following categories: 5% total local

programming; 5% informational (news plus public affairs) programming; and 10% total non-entertainment programming.

(B) Commercial TV proposals containing substantial ascertainment defects which, for any reason, cannot be resolved by further staff inquiry or action. (See 1976 Ascertainment Primer: 57 F.C.C. 2d 418 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976).

(9) \* \* \*

(10) *Programming: promise versus performance.*

(i) Applications for assignments and transfers.

TV applications for assignment or transfer which vary substantially from the assignor's or transferor's prior representations with respect to commercial practices (as set forth in paragraph (a)(7) of this Section), or from the programming categories (as set forth in paragraph (a)(8) of this Section), and for which variation there is lacking, in the judgement of Broadcast Bureau, adequate justification in the public interest.

(ii) Applications for renewal.

Commercial TV applications for renewal which vary substantially from prior representations with respect to commercial practices (as set forth in paragraph (a)(7) of this Section), or from the programming categories set forth in paragraph (a)(8) of this Section, and for which variation there is lacking, in the judgement of the Broadcast Bureau, adequate justification in the public interest.

\* \* \* \* \*

2. 47 CFR Part 73 is amended by removing from "Contents - Part 73" and "Alphabetical Index - Part 73" the following entries:

§73.112 Program log  
§73.282 Program log

3. 47 CFR Part 73 is amended by removing Section 73.112 in its entirety as follows:  
§73.112 [Deleted]

4. 47 CFR Part 73 is amended by removing Section 73.282 in its entirety as follows:  
§73.282 [Deleted]

5. 47 CFR Part 73 is amended by revising Sections 73.1212(g)(2) and 73.1212(g)(3) as follows:  
§73.1212 Sponsorship identification; list retention; related requirements.

\* \* \* \* \*

(g) \* \* \*

(1) \* \* \*

(2) Attach the list to the program log, if the station is required to keep such log, for the day when the broadcast was made; or retain separately if the station is not required to keep program logs, and

(3) Make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list. Such list must be retained for a period of two years after broadcast.

\* \* \* \* \*

6. 47 CFR Part 73 is amended by revising Section 73.1225(c), and by adding Section 73.1225(d) as follows:  
§73.1225 Station inspections by FCC.

\* \* \* \* \*

(c) The following records shall be made available upon request by representatives of the FCC.

(1) *For commercial and noncommercial AM stations:*

- (i) Equipment performance measurements required by §73.47.
- (ii) Copy of the most recent antenna resistance or common-point impedance measurements submitted to the FCC.
- (iii) Copy of the most recent field strength measurements made to establish performance of directional antennas required by §73.151.
- (iv) Copy of the partial and skeleton directional antenna proofs of performance as directed by §73.154 and made pursuant to the following requirements:
  - (A) Section 73.67, Remote control operation.
  - (B) Section 73.68, Sampling systems for antenna monitors.
  - (C) Section 73.69, Antenna monitors.
  - (D) Section 73.93, Operator requirements.
- (v) Chief operator agreements and contracts with first-class operators employed part-time for maintenance duties.

(2) *For commercial and noncommercial FM stations*

- (i) Equipment performance measurements required by §73.254 and §73.554.
- (ii) Chief operator agreements and contracts with first-class operators employed part-time for maintenance duties.

(d) The following logs shall be made available upon request by representatives of the FCC:

(1) *For commercial AM and FM stations:*

- (i) Operating and maintenance logs.

(2) *For noncommercial educational AM and FM stations:*

- (i) Program, operating and maintenance logs.

(3) *For commercial and noncommercial educational TV stations:*

- (i) Program, operating and maintenance logs.

7. 47 CFR Part 73 is amended by revising Section 73.1800(a) to read as follows:  
§73.1800 General requirements relating to logs.

(a) The licensee of each station shall maintain logs as set forth in §§73.1810, 73.1820 and 73.1830. Each log shall be kept by the station employee or employees (or contract operator) competent to do so, having actual knowledge of the facts required. The person keeping the log must make entries that accurately reflect the operation of the station. In the case of program and operating logs, the employee shall sign the appropriate log when starting duty and again when going off duty and setting forth the time of each. In the case of maintenance logs, the employee shall sign the log upon completion of the required maintenance and inspection entries. When the employee keeping a program or operating log signs it upon going off duty or completing maintenance log entries, that person attests to the fact that the log, with any

corrections or additions made before it was signed, is an accurate representation of what transpired.

\* \* \* \* \*

8. 47 CFR Part 73 is amended by revising Section 73.1810(a) to read as follows:  
 §73.1810 Program logs.

Commercial Stations

(a) Commercial TV stations shall keep a program log in accordance with the provisions of §73.1800 for each broadcasting day which, in this context, means from the station's sign-on to its sign-off.

(1) Commercial AM and FM stations are *not* required to keep program logs.

(b) \* \* \*

\* \* \* \* \*

9. 47 CFR Part 73 is amended by revising Section 73.1840 to read as follows:  
 §73.1840 Retention of logs:

(a) Any log required to be kept by station licensees shall be retained by them for a period of 2 years. However, logs involving communications incident to a disaster or which include communications incident to or involved in an investigation by the FCC and about which the licensee has been notified, shall be retained by the licensee until specifically authorized in writing by the FCC to destroy them. Logs incident to or involved in any claim or complaint of which the licensee has notice shall be retained by the licensee until such claim or complaint has been fully satisfied or until the same has been barred by statute limiting the time for filing of suits upon such claims.

\* \* \* \* \*

10. 47 CFR Part 73 is amended by revising Section 73.1850(a) to read as follows:  
 §73.1850 Public inspection of program logs.

(a) The program logs of commercial TV and noncommercial AM, FM and TV licensees shall be made available for public inspection and reproduction at a location convenient and accessible to the residents of the community to which the station is licensed. All such requests for inspection shall be subject to the procedural requirements in paragraph (b) below. Where good cause exists, the licensee may refuse to permit such inspection. (See paragraph 64, the *Public and Broadcasting Procedural Manual*.) The licensee shall remain responsible for the safekeeping of the logs when permitting inspections.

\* \* \* \* \*

11. 44 CFR Part 73 is amended by adding Section 73.3526(a)(14), and by amending Sections 73.3526(a), (a)(10), (11) and (12) and Note 2, and 73.3526(e) as follows:  
 §73.3526 Local public inspection file of commercial stations.

(a) *Records to be maintained.* Every applicant for a construction permit for a new station in the commercial broadcast services shall maintain for public inspection a file containing the material described in (1) of this paragraph. Every permittee or licensee of an AM, FM or TV station in the commercial broadcast services shall maintain for public inspection a file containing the material described in (1), (2), (3), (4), (5), (6), and (7) of this paragraph. In addition, every permittee or licensee of a TV station shall maintain for public inspection a file containing the material described in (8), (9), (11), (12), and (13) of this paragraph; every permittee or licensee of an AM or FM station shall maintain for public inspection a file containing material described in (14) of this paragraph. The material to be contained in the file is as follows:

(10) Although not part of the regular file for public inspection, program logs for TV stations will be available for public inspection under the circumstances set forth in §73.1850 and discussed in the Public and Broadcasting Procedural Manual, Revised Edition.

(11) Each licensee or permittee of a commercially operated TV station (except as provided in Note 2, below) shall place in the station's public inspection file appropriate documentation relating to its efforts to interview a representative cross-section of community leaders within its service area to ascertain community problems and needs. Such documentation shall be placed in the station's public inspection file within a reasonable time after the date of completion of each interview, but in no event later than the due date for filing the station's application for renewal of license and shall include:

- (i) \* \* \*
- \* \* \* \* \*

(12) Each licensee or permittee of a commercially operated TV station (except as provided in Note 2, below) shall place in the station's public inspection file documentation relating to its efforts to consult with a roughly random sample of members of the general public within its city of license to ascertain community problems and needs. Such documentation shall consist of:

- (i) \* \* \*
- \* \* \* \* \*

Note 1: \* \* \*

Note 2: Subparagraphs (a)(11) and (a)(12) above shall not apply to commercial TV stations within cities of license which (1) have a population, according to the immediately preceding decennial U.S. Census, of 10,000 persons or less; and (2) and are located outside all Standard Metropolitan Statistical Areas (SMSA's as defined by the Federal Bureau of the Census).

\* \* \* \* \*

(14) To be placed in each commercial radio station's public inspection file every year on the anniversary date of the grant of authorization (for new licensees' first license term) and thereafter on the anniversary date on which the station's renewal application would be due for filing with the FCC, a list of five to ten issues to which the station paid particular attention with programming during the preceding year. A brief narrative should be included describing how the licensee determined the issues to be ones facing its community, and how each issue was treated (i.e., a series of public service announcements, call-in programs, etc.). In addition, illustrative examples of programs responsive to each issue should be provided, including the time, date and duration of each such program.

\* \* \* \* \*

(e) *Period of retention.* The records specified in paragraph (a)(4) of this Section shall be retained for periods specified in §73.1940 (2 years). The manual specified in paragraph (a)(6) of this Section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this Section shall be retained for the period specified in §73.1202 (3 years). The records specified in paragraph (a)(1), (2), (3), (5), (8), (9), (11) and (12) of this Section shall be retained as follows:

\* \* \* \* \*

12. The "Primer of Ascertainment of Community Problems by Broadcast Renewal Applicants," Appendix B, First Report and Order, Docket No. 19715, 41 F.R., January 7, 1976, is amended to revise the "Introduction" and add a new Question 34 and headnote thereto. As amended, the "Introduction" reads as follows:

## Introduction

The principal ingredient of a licensee's obligation to operate in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the problems, needs and interests of the public within the station's service area. Statement of Policy Re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 20 RR 1901 (1960). In the fulfillment of this obligation, the licensee must consult with leaders who represent the interests of the community and members of the general public who receive the station's signal. 1960 Programming Policy Statement, *supra*. This Primer provides guidelines for the licensee of a commercial TV station to follow in conducting these consultations. (The guidelines do not apply to commercial AM and FM licensees. See Question 34 below.) The types of consultations required can best be summarized in a question and answer format.

\* \* \* \* \*

## E. Applicability

**QUESTION 34** - Have the Primer guidelines been eliminated for commercial AM and FM stations?

**ANSWER:** Yes. The guidelines were eliminated by a Report and Order in BC Docket No. 79-219, adopted January 14, 1981, and released 1981; 46 F.R. . However, a commercial AM or FM licensee has the obligation to determine issues facing its community and to broadcast programming responsive to such issues. Any means reasonably calculated to apprise the licensee of community issues may be used for this. A licensee may determine which issues to cover based upon the other radio services available in its community. A list of from 5 to 10 community issues and the programming broadcast by a station in response to those issues must be placed in the licensee's local public inspection file annually by the anniversary date of the deadline for filing the renewal application.

13. The "Primer on Ascertainment of Community Problems by Broadcast Applicants," Appendix B, First Report and Order, Docket No. 18774, 36 F.R., March 3, 1971, is amended to revise Answer 1 to read as follows:

A. General

\* \* \* \* \*

Answer: With applications for:

- a. Construction permit for new television stations;
- b. Construction permit for a change in authorized facilities when the television station's proposed field intensity contour (Grade B contour) encompasses a new area that is equal to or greater than 50 percent of the area within the authorized field intensity contours;
- c. Construction permit or modification of license to change television station location;

\* \* \* \* \*

- e. The assignee's or transferee's portion of applications for assignment of television license or transfer of control, except in *pro forma* cases where Form 316 is appropriate. Educational organizations filing applications for educational noncommercial stations and applicants for commercial AM and FM radio stations are exempt from the provisions of this Primer.

## Appendix B

## Radio Deregulation Panels

*PANEL I - September 15, 1980*

National Association of Broadcasters - Erwin Krasnow  
 National Citizens Committee for Broadcasting - Samuel A. Simon  
 American Broadcasting Companies, Inc. - Robert W. Coll  
 National Public Radio - Walda Roseman  
 National Telecommunications and Information Administration - John F. Lyons  
 WNCN Listeners Guild - Kristen Booth Glen  
 Department of Communications of the United States Catholic Conference -  
 Father Donald Mathews, S.J.  
 United States Department of Justice - Carolyn Alden  
 National Black Media Coalition - Pluria Marshall

*PANEL II - September 16, 1980*

Law Firm of Dow, Lohnes and Albertson - Thomas H. Wall  
 Citizens Communications Center - Nolan A. Bowie  
 National Association of Black Owned Broadcasters - Nate Boyer  
 Office of Communication of the United Church of Christ - Dr. Ralph Jennings  
 National Radio Broadcasters Association - Thomas Schattenfield  
 Media Access Project - Andrew J. Schwartzman  
 United States Office of Consumer Assistance - Mark Goldberg  
 American Civil Liberties Union - Charles M. Firestone

Appendix C	Individuals	Broadcast groups, Organizations, and individuals	Religious groups, Organizations, and individuals	All others	Totals
<b>Formal Comments</b>					
For	257	1,125	10	23	1,415
Against	1,132	5	499	171	1,807
Mixed	6	9	6	4	25
<b>TOTALS</b>	<b>1,395</b>	<b>1,139</b>	<b>515</b>	<b>198</b>	<b>3,247</b>
<b>Informal Comments</b>					
For	163	407	1	83	654
Against	14,945	2	779	279	16,005
Mixed	91	0	3	29	123
<b>TOTALS</b>	<b>15,199</b>	<b>409</b>	<b>783</b>	<b>391</b>	<b>16,782</b>
<b>Formal Reply Comments</b>					
For	0	62	0	0	62
Against	4	0	19	18	41
Mixed	0	3	1	3	7
<b>TOTALS</b>	<b>4</b>	<b>65</b>	<b>20</b>	<b>21</b>	<b>110</b>
<b>Informal Reply Comments</b>					
For	2	119	0	1	122
Against	1,677	0	98	37	1,812
Mixed	0	0	0	0	0
<b>TOTALS</b>	<b>1,679</b>	<b>119</b>	<b>98</b>	<b>38</b>	<b>1,934</b>

## Appendix D

## The Economic Model and Discussion of Comments Filed Relative to It.

1. As the text of the *Report and Order* indicates, we have relied partially but not entirely, on the economic model presented in the *Notice* in reaching our final decision. This has led us to permit licensees to be able to take into account the programming of other stations in their markets when determining which issues to address in meeting their public interest obligations. Each licensee nonetheless will have its own individual obligation to provide some programming responsive to community issues. As will be discussed in greater detail below, we have not rejected a pure marketplace solution because of any inherent weakness in the marketplace theory as applied to broadcasting. Rather, we have determined from a reading of the full record that the implementation of a pure market approach would not be in the public interest at this time due to administrative complexities and possible legal difficulties involving individual vs. market-wide responsibilities.<sup>1</sup> Nonetheless, since we do rely on the marketplace theory for part of our decision, it is appropriate to discuss the comments concerning the economic model.

2. We received many comments on the economic analysis that served as a basis for the deregulation proposal. These comments fell into two general categories. First, and most fundamental, there are comments directed toward the economic model itself.<sup>2</sup> Second, there are comments on and additional empirical studies related to, our proposals regarding nonentertainment programming, ascertainment, commercial time, and logging requirements. The first set of comments, addressing the basic economic model outlined in the *Notice*, will be discussed in this appendix. The other set of comments will be discussed in the appendices that address the particular proposals for rule changes.<sup>3</sup> Before examining specific comments it is useful briefly to summarize both the rationale for our use of a market model in the *Notice* and the assumptions underlying that model.

## The Economic Model

3. There are three basic systems for the allocation of resources—direct government operation, government regulated private operation, and unregulated private operation. None of these systems is perfect. The United States has chosen the middle ground for its broadcast system in an attempt to exploit the advantages of both marketplace forces and government intervention. Because of both First Amendment considerations and a disinclination toward centralized decisionmaking, however, there has been a general preference for the avoidance of government intrusion wherever the marketplace by itself could attain public interest objectives.

4. Although the public interest has many elements, the primary objective is broadcast

<sup>1</sup> This proceeding was undertaken with the assumption that all current statutory requirements must be taken as given. We do believe, however, that the analysis and information developed in this proceeding would be useful for any legislative efforts that Congress might consider. In particular, the general marketplace approach to radio regulation has been placed under close scrutiny. No fundamental weaknesses were exposed, though possible administrative or legal difficulties that would arise in its implementation were indicated. Some of these difficulties stem from the current particulars of the Communications Act. Should Congress consider legislative action, in this direction, the full record of this proceeding would provide a good initial basis for decisionmaking.

<sup>2</sup> Including comments regarding the data.

<sup>3</sup> Because of the volume of comments, we cannot address each comment individually. Rather, representative comments are addressed. Also, in order to avoid redundancy, generally we have not repeated the arguments of those commenters whose viewpoints were adopted and are therefore already found in the text of the *Report and Order*. In this appendix we focus on criticisms of the economic model.

service responsive to the wants and needs of the public—what economists call consumer satisfaction. In this regard, one of the major responsibilities of the FCC is to determine what kind of regulatory framework would yield a broadcast system most responsive to the public's diverse wants and needs. The Commission, of course, can only act as a catalyst in the provision of such service; it is the licensees that actually offer the programming. The Commission's limited role in this regard is to determine what actions it should—or should not—take to foster responsive programming. Accordingly, the key issues to consider in this proceeding are who is best able to determine the wants and needs of radio audiences and, once these wants and needs are recognized, what forces are most likely to lead licensees to be responsive to them. The economic model suggests that, given the status of radio broadcasting today, the marketplace and competitive forces are more likely to attain these public interest objectives than are regulatory guidelines and procedures. Universally applied rules or guidelines cannot take into account differences among communities; therefore, they often will be unresponsive to the wants or needs of the public in individual markets. Also, the administrative procedures that must be followed to change rules in light of changes in circumstance are often cumbersome.

5. In general, competitive markets are responsive to consumer wants because there are natural forces (*i.e.*, the profit motive) that induce the entrepreneur to discover what consumers want and that penalize him if he fails to respond to these wants. While advertiser-supported systems utilize different adjustment mechanisms than direct-pay systems, the same basic forces are at work in each. Commercial broadcasters, like all businessmen, seek to maximize profits. They receive revenues from advertisers, who want to reach as many *receptive* consumers as possible with their commercial messages. To maximize the number of receptive listeners, the advertiser (and hence the broadcaster) is concerned with both audience size and certain audience characteristics. Two key audience characteristics are income and brand consciousness. That is, other things being equal, advertisers prefer larger audiences, higher income audiences, and more brand conscious audiences. In addition, advertisers prefer audiences that could be expected to have a special affinity for their product, perhaps due to some age or ethnic characteristic. In general, increasing the level of any of these factors will increase the value to the advertiser of his commercial message and will therefore allow the broadcaster to increase his advertising rate. However, to the extent that any two of these factors are inversely related, they may tend to counterbalance one another. In particular, as will be discussed in paragraphs 34-35, *infra*, income and brand consciousness tend to be inversely related—higher income households tend to be less easily swayed than lower income households by brand names and more likely to purchase generic products. As a result, advertisers and broadcasters are not likely to target only high income audiences (unless they are trying to sell luxury items). In order to reach as many receptive consumers as possible with their commercial messages, advertisers demand that broadcasters provide the programming that is most sought by listeners. In pursuing this, licensees will program to maximize either total audience or a specific targeted group.

6. The exact strategy employed by the individual broadcaster to maximize his profits will vary according to his particular market situation. In small markets, where there is a small potential total audience and where there are few competing broadcasters, both advertisers and licensees will have the incentive to reach as broad an audience as possible with programming of general interest. In large markets, where there are diverse audiences and many competing broadcasters, an advertiser will want to target that portion of the total potential audience that is most likely to be interested in his product rather than expending money for non-receptive listeners. Hence, he will seek out the broadcaster whose programming is most likely to attract the desired audience segment. In markets with many stations, the individual licensee cannot expect to capture a large share of the total audience; thus, he will have an incentive to seek out specialized audiences. As market size and the number of competitors increases, there will be a tendency on the part of both advertisers and broadcasters to seek smaller, more narrowly defined audiences. The broadcaster who fails to attract an audience will lose advertising

revenues. In this fashion, licensees responding to natural market forces will have every motivation to be responsive to the demands of the public. Although advertisers provide the direct source of station revenues, in order to attract advertisers licensees must attract listening audiences. Ultimately, the listening public is the arbiter of programming choices.

7. Advertiser-supported markets differ from direct-pay markets in that they provide no pricing mechanism to measure the intensity of demand of individual listeners for particular programming. Hence, audience size may be more important than strength of demand. For example, a program that is strongly desired by a small audience may be less likely to be aired than a program that is weakly desired by a slightly larger audience, although consumer satisfaction might be greater from the former. However, as indicated in the economic literature that addresses this issue,<sup>4</sup> the negative public interest consequences are largely eliminated as the number of stations in the market increases. As the number of stations increases, each station can expect to reach a smaller audience share. In making its programming decisions, the licensee is more likely to seek specialized audiences. In this manner, small audiences with intense demands are increasingly likely to have their demands met as the number of stations increases. The data in the Tables appended to the *Notice* provide corroborating empirical evidence that just such a phenomenon has occurred in commercial broadcast radio.

8. Small broadcast markets behave much like all small markets. In markets that can support only one or a few stations, the licensee—like its furniture store—or restaurant-owner counterpart—will tend to cater to general tastes rather than to specialized interests. In fact, the specialized radio-listening public in these small markets generally has an advantage over small market consumers of other specialties, such as restaurant meals. The costs to the listener for continued reception of specialized programming from a distant source may be quite low—the one-time cost of the purchase and installation of a good receiver or antenna. In contrast, the seeker of gourmet food would have to pay the travel costs to the distant restaurant *each time* he sought such a meal.

9. In most cases, what the public needs it will demand.<sup>5</sup> It has been alleged, however, that there are situations in which the public either fails to recognize or to reveal its needs or chooses not to demand services that address them. For example, there may be a societal need for a well-informed citizenry, and thus for nonentertainment broadcast programming, that is nonetheless not heavily demanded. Presumably, such needs are not specific to each individual, but rather relate to society as a whole. Therefore individuals may fail to take them into account when making their marketplace decisions. In such situations, the marketplace might fail to respond to these needs and government intervention might be necessary to assure that the public interest is met. This argument has been raised specifically in defense of maintaining nonentertainment programming guidelines.

10. In our *Notice*, we explicitly noted that services responsive to needs might not be demanded by the public. More exactly, we questioned whether relevant programming would be demanded at a level sufficient to meet the needs of the public. There was a lengthy discussion of whether regulation would be appropriate or whether reliance on marketplace forces would be superior to regulatory intervention. We noted that such regulation of necessity would be standardized nationwide, would be relatively inflexible, and would be likely to impose costs without compensating benefits. These problems combined with the fact that other mechanisms exist to deal with the same problem (*e.g.*, National Public Radio, the Fairness Doctrine) led us to the conclusion that the

<sup>4</sup> For a brief review of that literature, see paragraphs 140–150 in the *Notice* in this proceeding.

<sup>5</sup> For example, even though leafy green vegetables generally lack the popularity of ice cream, they are demanded because they provide essential vitamins. Or, those essential vitamins are demanded in other, more palatable, forms, *e.g.*, from vitamin tablets.

Commission should shy away from intervention unless the market produced a demonstrable shortfall of programming responsive to the needs of the public. The very extensive data collection and analysis presented in the *Notice* suggested that, in fact, marketplace forces would provide such programming. The one area of possible concern involved public affairs programming. With this brief recapitulation of the underlying economic model, we now address the specific criticisms of it made by commenters.

#### Criticisms of the Model

11. A number of commenters criticized the proposed rulemaking on the ground that the assumptions underlying the economic model are not consistent with the conditions found in the radio broadcasting industry. One set of criticisms was based on the argument that the radio spectrum is a "unique" resource, which, because of this "uniqueness," cannot be allocated in a market.<sup>6</sup> Related to this were concerns regarding the role of scarcity in the rulemaking proceeding. Second, at least one commenter argued that in an advertiser-supported system there is no market for radio programming; there is only a market for advertising time.<sup>7</sup> Third, many commenters argued that consumer satisfaction is not the appropriate criterion for judging performance of radio markets.<sup>8</sup> Rather, they argue, public "need" as distinguished from public "want" should be the criterion for evaluating performance of the industry. Also, some argue that, even assuming the model is in some sense an appropriate way to view the radio broadcast market, the market is not responsive to consumer (listener) wants.<sup>9</sup> At the same time, several other commenters expressed the view that the economic policy model outlined in the *Notice* was appropriate.<sup>10</sup>

#### The Radio Spectrum as a "Unique" Resource

12. Several commenters argue that because spectrum is either "unique" or scarce, a market is unable to function in the manner assumed by the *Notice*. Dr. Dallas Smythe, writing on behalf of the United Church of Christ, argues that radio regulation developed as a result of the "peculiarly public property" attributes of the electromagnetic spectrum.<sup>11</sup> Smythe asserts that:

The unique characteristics are: (1) The radio spectrum's original and still its principal use is the act of *sharing* information between transmitter and receiver, *i.e.*, communication. Minor exceptions prove the rule, *e.g.*, radar, geodetic exploration. For no other resource is the principal function the transmission *and* reception of information or anything else. (2) For one nation or class of user to use it, all nations and classes of users must also be able to use it, with equipment built to compatible standards. World-wide cooperation is therefore necessary for the radio spectrum to be used by anyone and everyone. (3) It is non-depletable and

<sup>6</sup> Comments of Dr. Dallas W. Smythe on behalf of the Office of Communications of the United Church of Christ (UCC).

<sup>7</sup> *Id.*

<sup>8</sup> See, *e.g.*, Comments of UCC or Comments of ACLU, *et al.*

<sup>9</sup> These commenters generally argue that only certain groups would be represented in a nonregulated radio market, *i.e.*, demographically attractive groups. See, *e.g.*, Comments of the New York Chapter of the National Organization for Women; ACLU, *et al.*, Committee for Community Access; and Public Media Center.

<sup>10</sup> See, *e.g.*, the comments of Department of Justice, Council on Wage and Price Stability, National Association of Broadcasters, Steven Wing, and Walton Francis.

<sup>11</sup> Dr. Dallas W. Smythe comments on behalf of The Office of Communications of the United Church of Christ at 2. Although his portion of UCC's comment was filed subsequent to the close of the reply comment period, we will accept it for filing. UCC demonstrated good cause for the late filing and, as no right to reply to reply comments exists, no other party will be prejudiced by our acceptance of Dr. Smythe's study.

self-renewing. To be sure, there is interference between users (which international regulation minimizes), but this "pollution" disappears immediately the interfering transmitters cease interfering. (sic) (4) Measurement of rights to use the radio spectrum are probabilistic rather than discretely specifiable.<sup>12</sup> This alone is a major bar to establishment of a free market in transferable rights to use the spectrum. (5) Because the radio spectrum is used to communicate information and because control of the flow of information is the basis of political power, the control of the use of the radio spectrum lies close to the seat of sovereignty in the nation state. No other resource has this order of political significance. At the same time, the necessary joint decisionmaking by all nations at the world level has for almost a century substantiated the fact that by international and national law, title to the radio spectrum rests not with individuals or nations but in all humanity.<sup>13</sup>

13. The first four properties appear to involve economic issues and can be examined using economic analysis. The last property is concerned with political power; if true, it could represent, in our constitutional system, a rationale for removing allocation from government control altogether rather than requiring the government to allocate the resource. Focusing on the economic analysis, Dr. Smythe draws a distinction between the spectrum and other resources based on the first four characteristics. He argues that, because of these characteristics, property rights for spectrum cannot be developed, and that, absent such property rights, a market to allocate spectrum cannot operate. In fact, as we shall show below, it is possible to construct property rights involving spectrum. However, that is not the purpose of the instant proposed rulemaking. Our concern is not whether the marketplace can allocate spectrum, define property rights, or set technical standards, but whether, given the allocation of spectrum to broadcasting and the assignment of frequencies to licensees, marketplace forces would provide programming in the public interest absent certain guidelines. Dr. Smythe's discussion of uniqueness does not address this issue. Therefore, that part of his analysis is not pertinent here.<sup>14</sup>

<sup>12</sup> By this Smythe means that the strength of an electromagnetic wave at any given location can take on any one of a number of values each of which has some probability (however small) of occurrence. If, on the other hand, it could be determined to take on a particular value with certainty it would be discretely specifiable or deterministic. [Footnote added.]

<sup>13</sup> Smythe comments, at p. 2.

<sup>14</sup> It must be noted in passing, however, that these "unique" characteristics have been successfully incorporated into property rights or lease rights in other markets. (1) Transportation systems as well as communication systems provide a means to transmit and receive (*i.e.*, to distribute) commodities—though in the former, goods are transmitted; in the latter, services. The primary distinction is the speed with which the process occurs. (2) Compatibility, including international coordination, need not cover anything more than interference protection. Coordination of spectrum use is not inherently different from coordination of land use, for example. Real estate is bought, sold, and leased subject to constraints on use (imposed by zoning laws, *etc.*) that are either spelled out explicitly in the deed or supercede the legal authority of the deed. Interference constraints could be handled analogously. (3) Similarly, the fact that spectrum is both non-depletable and instantly renewable does not make it unsuitable for market allocation. With careful management such resources as forests and fisheries are renewable. The only difference between these and spectrum are that the former require a longer period for regeneration between harvests. Yet, property rights that allow trading in a market have developed for both forests and fisheries (including fishing rights in international waters). These markets differ from those for spectrum not because of inherent differences but because they are regulated differently. (4) Finally, Dr. Smythe's concern with probabilistic measurement *i.e.*, that we must rely on *predicted* rather than *actual* service contours (Grade A, Grade B, *etc.*) for radio, is not a barrier to market

## Scarcity as a Rationale for Regulation

14. The scarcity theory has been relied upon for over 50 years as a major basis for public interest regulation of broadcast radio. The first pronouncements of the theory can be found in the legislative history of the Federal Communications Act. Because of changed circumstances in the industry that have altered some of the assumptions underlying the scarcity theory, we reviewed the theory—and its implications for policy—in the *Notice*. Several commenters,<sup>15</sup> most particularly the ACLU, took strong issue with our analysis. It is appropriate to review that analysis and then to address the criticism.

15. The scarcity theory as developed in the 1920's largely was based upon the then existing problems of interference and of markets containing only one or a few stations. Both problems were assumed to be nonremediable. At that time, it was decided that in order to control interference, the Commission must assign licenses that guaranteed broad protection to licensees. Further, it was believed at that time that the system would result in only a few stations operating in a given market. This seems to have been based upon the fact that there were thought to be only a small number of frequencies that could be utilized for radio broadcasting. Thus, it was believed that only a limited number of radio stations would come to exist and compete.<sup>16</sup> Because of a lack of competition among the small number of stations and because of the existence of the "Radio Trust," it was feared that broadcasting in the public interest would be forthcoming only if it were required—that otherwise neither diversity nor responsiveness would be assured. As a result, a system of regulation was implemented to assure the provision of certain types of programming that met public interest objectives. The *Notice* in this proceeding provided overwhelming evidence that the assumption that there would be only a few stations in any market was not borne out. Not surprisingly, the decisionmakers of the 1920's and 1930's could not forecast developments in FM radio and directionalized AM antennas that allowed for the vast increase in the number of radio stations as demand for radio service grew, or the technological advances that allowed more noninterfering stations to coexist. Noncompetitive markets did not become the norm. Further, evidence was presented in the *Notice* that market forces exist to assure the provision of programming in the public interest—to provide nonentertainment programming, to provide diverse programming, and to limit commercial levels. Neither a preordained limit on the number of competing stations nor a lack of public interest programming was inevitable, or even likely. Empirical evidence was presented in the Tables in the *Notice* refuting the argument that in modern broadcast radio there exists some unique scarcity situation that inherently renders markets noncompetitive and unresponsive to the public, thereby necessitating government regulation of radio programming. In fact, most commodities are scarce, but that fact does not of itself trigger the need for regulation. There might still be public interest considerations that call for regulation, but these

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allocation. In many markets, final outcomes are not definite, but the probability of different outcomes occurring can be estimated. Fishing is necessarily probabilistic, yet firms bid for fishing rights. The existence of insurance policies is proof that claims, contingent upon probabilistic outcomes, are commodities that can be defined and traded in markets. Radio spectrum can be treated similarly. It is clear that economic forces do exist for spectrum allocation and it appears that there is no natural impediment to the use of a market to allocate spectrum. This is not to say that such a market would necessarily operate perfectly. The relevant issue is whether such marketplace forces would better achieve public interest objectives than would the regulatory alternatives. In the instant matter, the issue is even narrower—whether marketplace forces or government regulation would yield programming most responsive to the public's wants and needs.

<sup>15</sup> Comments of ACLU, *et al.*, WNCN Listeners Guild; and Committee for Community Access.

<sup>16</sup> Indeed, at one time the then Secretary of Commerce, Herbert Hoover, advocated that there should be "fewer stations rather than more . . ." 68 Cong.Rec. 4110.