

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 86-49

In re Applications of

SEATTLE PUBLIC SCHOOLS File No. BRED-830922AQ

For Renewal of License  
For Station KNHC(FM),  
Seattle, Washington

and

JACK STRAW File No. BPED-840103AR  
MEMORIAL FOUNDATION  
Seattle, Washington

For Construction Permit  
for a New FM Station

#### Appearances

Sally Katzen, Esquire, Bruce Friedman, Esquire, and Margaret C. Tobey, Esquire, on behalf of Seattle Public Schools; Richard M. Riehl, Esquire, Michael H. Baker, Esquire, and John Crigler, Esquire, on behalf of Jack Straw Memorial Foundation; and Norman Goldstein, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

#### DECISION

Adopted: December 14, 1988; Released: January 19, 1989

By the Review Board: MARINO (Chairman),  
BLUMENTHAL, ESBENSEN. Board Member  
BLUMENTHAL:

#### I. INTRODUCTION

1. In this proceeding, Seattle Public Schools (SPS) is seeking the grant of its 1984 renewal application for noncommercial educational broadcast Station KNHC-FM, Seattle, Washington, whereas Jack Straw Memorial Foundation (Straw) has filed a mutually exclusive application for that same facility. Following the *Initial Decision (I.D.)* of presiding Administrative Law Judge Joseph Chachkin (ALJ), 3 FCC Rcd 3028 (released May 27, 1988), which granted the SPS renewal application, Straw filed exceptions with the Review Board and SPS and the Mass Media Bureau filed reply exceptions. We have reviewed the *I.D.* in light of the pleadings, the oral argument heard October 21, 1988, and our independent examination of the record. We adopt the findings of fact and conclusions of law of the ALJ, except as modified herein, and affirm his ultimate grant of the SPS renewal application.<sup>1</sup>

2. This case arose when, on January 3, 1984, Straw filed an application for a Construction Permit to operate a noncommercial FM radio station on 89.5 MHz in Seattle, Washington, a frequency currently occupied by KNHC-FM, licensed to the Board of Directors of SPS. KNHC-FM, which has operated on that frequency since 1971, is physically located at Nathan Hale High School, one of ten Seattle public high schools. Straw is a nonprofit corporation which, from 1964 to 1984, operated KRAB-FM on commercial frequency 107.7 MHz, a station it was inspired to sell because of severe financial difficulties. Straw intended to use the proceeds from its sale of KRAB-FM as an endowment with which to fund a new radio station it hoped to settle on a Seattle noncommercial frequency. The problem for Straw, however, was that of the two noncommercial FM frequencies established in Seattle, both were occupied by ongoing broadcast operations.<sup>2</sup> Straw was recently granted a broadcast Construction Permit to operate a noncommercial FM station on 90.7 MHz at Everett, Washington, a community approximately 25-30 miles north of Seattle, but that station appears to be not yet operational.<sup>3</sup> Thus, Straw filed its application for 89.5 MHz, Seattle, to be mutually exclusive with the renewal application for KNHC-FM filed by SPS on September 22, 1983.

3. Although Straw's mutually exclusive application of January 1984 "was technically for full-time operation of the station," *I.D.* at para. 2, "Straw's stated goal in filing its application was to obtain a share-time arrangement" with SPS for the joint use of the subject frequency. *Seattle Public Schools*, 103 FCC 2d 862, 866 (1986)(*Hearing Designation Order*). Under the Commission's rules governing noncommercial FM stations, a station "which does not operate 12 hours per day each day of the year, will be required to share use of the frequency" on which it operates." *Id.*, at 865-866 n.3 (quoting 47 CFR §73.561(b)). Because KNHC-FM had operated for an average of only 67 hours per week for seven months (September 1982 - April 1983) of the subject license term prior to the filing of Straw's January 1984 share-time application, the Commission designated Straw's application and the KNHC-FM renewal application for consolidated hearing to determine "whether the public interest would be served by a share-time arrangement between the renewal applicant and the share-time applicant rather than by the renewal applicant's continued, increased operating schedule." *Id.*, at 867.<sup>4</sup>

4. The *Hearing Designation Order* also specified financial and environmental issues against Straw. *Id.*, at 870. Straw petitioned for reconsideration of the Commission's designation order and argued that, although its January 1984 application was accompanied by its statement that "Jack Straw . . . is not seeking to displace the Seattle School Board as the licensed operator on the channel currently operated by KNHC," *Seattle Public Schools*, 60 RR 2d 1073, 1075 (1986)(*Memorandum Opinion and Order modifying Hearing Designation Order*), its share-time application was premised upon its view that Section 73.561(b) was a *per se* rule and that, with KNHC-FM having failed to operate for at least 12 hours per day each day during the license term, SPS would be required by the Commission to share-time on KNHC-FM with Straw. The Commission again rejected Straw's argument that Section 73.561(b) was a *per se* rule, but it did accept Straw's contention that its original application was tendered in alternative fashion; *i.e.*, if Straw was not granted time-

sharing on the subject frequency, then it was entitled, under the tenets of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), to a full comparative contest for the frequency itself. *Memorandum Opinion and Order*, 60 RR 2d at 1075. Accordingly, the Commission added the standard noncommercial comparative issue utilized when two competing applicants apply for a new noncommercial broadcast station. That issue, first contoured in *New York University*, 10 RR 2d 215 (1967), reads as follows<sup>5</sup>:

To determine: (a) the extent to which the proposed operation of Jack Straw and the proposed operation of the School System will be integrated into the overall cultural and educational objectives of the respective applicants; (b) the manner in which the proposed operation of the Jack Straw and the proposed operation of the School System meet the needs of the community to be served; and (c) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service.

And, citing past policy,<sup>6</sup> the Commission also retained the previously designated time-sharing issue, which reads as follows<sup>7</sup>:

To determine whether a share-time arrangement between the School System and Jack Straw would result in the most effective use of the specified channel and thus better serve the public interest, and, if so, the terms and conditions of the arrangement.

"The contingent environmental and financial issues were resolved in favor of Jack Straw in advance of the hearing." *I.D.* at para. 10. Neither SPS nor the Mass Media Bureau has excepted to the resolution of those two issues, and any such potential exceptions are therefore waived. 47 CFR §1.277(a). See also *Silver Star Communications - Albany, Inc.*, FCC 88R-60, released November 2, 1988 at para. 4 (and cases cited therein). Hence, those two issues are not before us.<sup>8</sup>

5. Upon consideration of the record as a whole, the ALJ determined that SPS was entitled to a renewal expectancy for KNHC-FM's "outstanding performance during the license term," *I.D.* at para. 294 (see also *id.*, paras. 268 *et seq.*). Under the standard noncommercial comparative issue, the ALJ found SPS superior to Straw on the question of which applicant would best integrate its proposed station into the educational and cultural objectives of each applicant. *Id.*, para. 308. He similarly favored SPS on the companion comparative question of which of the applicants would best meet the needs of the local Seattle community. *Compare id.*, paras. 309-311 (SPS "has diligently ascertained community needs" and its "promise to continue to ascertain needs and interests and to air programs responsive thereto is entitled to great weight) with *id.*, paras. 312-316 (Straw "has failed to establish that its proposal will meet the needs of the residents of Seattle for issue-responsive programming). In considering certain "other factors" under the comparative issue, the ALJ found that SPS was entitled to credit for its "community outreach" activities, *id.*, para. 317, and he refused to credit Straw for its proposal to provide a superior "com-

parative coverage" (first and second noncommercial service to 209 and 484 square miles, respectively, encompassing populations of 11,778 and 81,194 persons, respectively), because Straw failed to demonstrate that its technical proposal was feasible. *Id.*, paras. 318-319. The ALJ further held that, even if Straw's technical proposal were feasible, any ensuing "comparative coverage" advantage would not outweigh SPS's overall superiority on the standard noncommercial comparative issue, *id.*, para. 320, and certainly could not overcome - in the end - SPS's strong renewal expectancy accruing from its meritorious license term performance. *Id.* As to the time-share issue, the ALJ found that SPS requires its current hours of operation in order to meet its educational objectives, see *id.*, paras. 323-326, and he refused to prescribe a time-share arrangement between SPS and Straw. The Mass Media Bureau supports the ALJ's conclusion that SPS is entitled to a strong renewal expectancy for KNHC-FM, but it shoulders Straw's exceptions to the *I.D.* to the extent that the ALJ failed to credit Straw's "comparative coverage" proposal. Notwithstanding, the Mass Media Bureau believes that any such latter credit would not be of decisional significance in the face of the SPS renewal expectancy for KNHC-FM. Conversely, Straw's exceptions contend (1) that it should have been awarded a dispositive preference for its "comparative coverage" under either the standard noncommercial comparative or time-share issues; (2) that the ALJ misapplied the noncommercial comparative criteria and that Straw should have been awarded a decisive credit for its proposal to provide "alternative" programming; (3) that SPS is not entitled to a renewal expectancy for its past performance or comparative credit for its current proposal; and (4) that time-sharing would serve the public interest.

6. As the ALJ observed, this is a case of first impression. While both the Commission and this Board have experienced many comparative contests between applicants for new broadcast stations on frequencies specifically reserved for noncommercial applicants, see, e.g., *Cleveland Board of Education*, 87 FCC 2d 9 (1981); *New York University*, 10 RR 2d 215 (1967) (hearing designation order), 19 FCC 2d 358 (Rev. Bd. 1969) (decision); *Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34 (Rev. Bd. 1984); *Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981), *review denied*, FCC 82-271, released June 11, 1982; *Pacifica Foundation*, 21 FCC 2d 216 (Rev. Bd. 1970), as well as comparative contests between commercial renewal applicants and challengers for the same frequency, see, e.g., *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983); *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1984); *Tele-Broadcasters of California, Inc.*, 58 RR 2d 223 (Rev. Bd. 1985); *Pillar of Fire*, 99 FCC 2d 1256 (Rev. Bd. 1984), *review denied*, 2 FCC Rcd 519 (1987); *Intercontinental Radio*, 98 FCC 2d 608 (Rev. Bd. 1984), *modified*, 100 FCC 2d 817 (1985); *Kaye-Smith Enterprises*, 98 FCC 2d 675, *recon. denied*, 98 FCC 2d 670 (Rev. Bd. 1984), *review denied*, FCC 85-192, released April 19, 1985, *aff'd by judgment subnom. Hoffart v. FCC*, 787 F.2d 675 (D.C. Cir. 1986). There has been no prior case in which the Commission has been called upon to compare an incumbent noncommercial renewal applicant as against a new competing applicant for that same frequency, on either a total or a time-share basis.<sup>9</sup> Hence, whereas the briefs before us are uncommonly well-

drafted, some of the more fundamental decisional issues are not perfectly joined, owing no doubt to the absence of direct precedent which would provide an accepted analytical framework within which the contending parties might clash. There is, for conspicuous example, not the slightest agreement between the applicants on the elements to be considered toward a potential renewal expectancy for noncommercial broadcasters. Straw contends that the *sine qua non* for a noncommercial broadcaster is the provision of "alternative" programming, and it faults KNHC-FM for operating with a popular music entertainment format. For its part, SPS leans greatly on the use of its station as a vocational training classroom for students interested in future radio careers. There is also a sharp dispute over whether a "comparative coverage" advantage is even cognizable in a noncommercial comparative renewal setting, let alone the dispositive factor Straw submits. Because we find that both parties, as well as the ALJ in some respects, have misapprehended the Commission's regulatory policies regarding noncommercial stations and/or the appropriate elements for comparison, we attempt below to sort out the issues and imprint existing Commission policy and precedent on the principal matters in dispute. While we ultimately affirm the conclusion of the ALJ on the award of a strong renewal expectancy to KNHC-FM, we differ somewhat with his reasoning, and we differ as well with certain of his conclusions under the standard noncommercial comparative issue; the I.D., therefore, is modified as indicated herein.

## II. RENEWAL EXPECTANCY

7. Although neither the Commission's original *Hearing Designation Order* nor its reconsideration *Memorandum Opinion and Order* included a specific renewal expectancy issue, compare *Empire State Broadcasting Corp.*, 2 FCC Rcd 2793 (1987) (revised comparative hearing designation order adding specific renewal expectancy issue), the ALJ imputed a renewal expectancy issue into his comparative deliberations, based upon the reasoning of the Commission and the court in *Central Florida Enterprises, supra*. See *I.D.*, para. 268. In so doing, the ALJ found that the compound rationale for awarding a renewal expectancy to a noncommercial applicant that had rendered meritorious service in its past license term was as applicable here as in the commercial milieu: (1) to reward meritorious performance; (2) to encourage investments in quality service; and (3) to foster stability in the broadcast industry. *Id.*, para. 269. Moreover, as we recently observed in *Video 44*, 3 FCC Rcd 3587, 3592 (Rev. Bd. 1988), the courts have held for more than half a century that:

It is not consistent with true public convenience, interest, or necessity, that meritorious stations . . . should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of

the United States, and that the public convenience, interest, and necessity are the paramount considerations.

*Chicago Federation of Labor v. Federal Radio Commission*, 41 F.2d 422, 423 (D.C. Cir. 1930). More recently than that, the court has deduced that an expectancy of renewal for meritorious past service is derived directly from the dynamics of the Communications Act of 1934, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See also *Central Florida Enterprises*. Against the weight of this authority, Straw has not contended frontally that the renewal expectancy concept is any less apposite in the case at bar, *I.D.*, para. 270<sup>10</sup>; Straw simply challenges the factors considered by the ALJ, and the manner in which those factors were applied in this case.

### A. Factors To Be Considered

#### (1) Straw's "Alternative" Programming Argument

8. Pervading Straw's attack on the SPS stewardship, both in the past broadcast record of KNHC-FM and SPS's proposed continuation of that operation, is Straw's claim that in utilizing a popular music entertainment format which "mirrored" that of a commercial broadcast station, SPS failed in its "core" obligation to provide "alternative" programming to that offered by other stations in the community.<sup>11</sup> Straw charges that KNHC-FM "operates as completely as possible like a commercial station and simply adds to the glut of popular music available on the commercial FM band."<sup>12</sup> It complains: "The [KNHC-FM] format is popular 'dance music' rotated according to computer-generated 'plot sheets' or play lists. No attempt is made to provide any 'alternative' to popular music already available in the market."<sup>13</sup> In so doing, Straw maintains, SPS has defaulted on the obligation imposed directly under Section 396(a) of the Communications Act of 1934, 47 U.S.C. §396(a),<sup>14</sup> which, in pertinent part and with Straw's emphasis added, reads as follows:

(a) The Congress hereby finds and declares that--

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational and cultural purposes . . .

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation.

Straw further quotes the 1981 House Report amending Section 396(a) as evidence of a Congressional intent "to impose a duty on noncommercial broadcasters to provide diverse 'alternative' programming, in addition to their duty . . . to serve 'instructional, educational, and cultural purposes.'"<sup>15</sup> In contrast to the popular music entertain-

ment format programmed by KNHC-FM, Straw raises as an exemplar its own proposed entertainment format, summarized by the ALJ as follows:

Jack Straw's proposed program schedule consists of 131.5 hours per week. Elizabeth Sinclair, Jack Straw's principal programming witness, was asked about each of the programs in the schedule. She acknowledged that 95 hours of programming (72 percent of the total) involves music, with large blocks of time devoted to jazz (20.5 hours) and folk music (18 hours), and 56.5 hours consisting of "other" music, including music of other countries (e.g., India, Turkey and other countries), gospel music, blues, classical music, vintage rock, reggae, East Texas country music, and fusion jazz. An additional 15 hours of programming each week consists of repeats of some of the music programs, for a total of 84 percent music programming. The remaining 21 hours in the proposed schedule consist of a mix of readings, poetry, conversations, children's programming, news broadcasts, public affairs, and general informational programming.

*I.D.* at para. 212 (record citations omitted). Quoting from the Commission's 1984 order deregulating noncommercial radio, Straw asserts that its proposed entertainment format, but not KNHC-FM's, properly conforms to the Commission's view that the entertainment programming of noncommercial stations "will provide their communities with significant alternative programming designed to satisfy the interests of the public not served by commercial broadcast stations" and that such programming will be "very different, in programming terms, from their commercial counterparts," *Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 FCC 2d 746, 751 (1984) (*Deregulation Order*).

9. The SPS riposte to Straw's critique of its entertainment format is oblique, and - as with much else of its brief - couched deeply in its use of the station as a vocational classroom. The SPS thesis is that "a station that mirrored the operation of a commercial station would better prepare students for employment or further education in the field."<sup>16</sup> At hearing, SPS indicated that, from 1981-1983, KNHC-FM "featured a predominantly rhythm and blues sound," but it shifted to a "Top 40" format of "dance music" - music characterized by a strong and steady 4/4 beat, which creates a distinctive and 'danceable' sound that has been identified with Station KNHC" - after a local commercial station shifted to a rhythm and blues format. *I.D.*, para. 24. SPS further explained that its choice of "teen" music was intended to lure students to the school's vocational program, and to establish an audience of teens to whom a portion of its nonentertainment programming was directed. *Id.*

10. As a rudimentary matter, we reject Straw's doctrinal postulate that the term "alternative" programming has the talismanic potency ascribed to it by Straw. First, we do not construe the language of Section 396(a) of the Communications Act to establish either operational or license renewal standards for noncommercial broadcast stations. The language highlighted by Straw is contained in a 1981 amendment to the original Public Broadcasting Act of 1967, and sets forth the Congressional basis for establish-

ing and continuing to fund with public tax monies the Corporation for Public Broadcasting, see Section 396(b),<sup>17</sup> to which the declarative and rather precatory language is directed as a guideline for the Corporation's own funding activities. Cf. *Public Radio and TV Programming*, 87 FCC 2d 716, 736-737 (1981) (*Notice of Proposed Rule Making*). As Straw is no doubt aware, this Commission's reservation of broadcast frequencies for noncommercial broadcasters antedates the 1967 CPB Act by many years - 1952 for television stations<sup>18</sup> and 1945 for FM radio stations.<sup>19</sup> As will be demonstrated, the relevant statutory standard for renewing a noncommercial broadcast station is the "public interest, convenience, and necessity" language of Section 307(c) of the Communications Act, 47 U.S.C. §307(c), as that statutory standard has been interpreted and implemented by the Commission.

11. Which brings us to our second reason for rebuffing Straw's fixation on "alternative" entertainment programming. Over the years, the Commission has several times formulated the "public interest" requirements for noncommercial broadcast stations. In the main, these obligations have come to very much parallel those applied to commercial stations. Thus, in 1973, the Commission reviewed the history and purpose of noncommercial stations. Though recognizing that the "noncommercial broadcast service, by definition, differs markedly from the commercial service," *Educational Broadcast and Renewal Applications*, 42 FCC 2d 690, 694 (1973), the Commission also noted, even then, that:

When noncommercial frequencies were first allocated, applications by educational institutions seeking to meet their own institutional needs predominated. The present profile of noncommercial educational stations, however, is quite different, as petitioners have pointed out. Although many stations still devote a portion of their broadcast day to instructional programming, the major part of that day, particularly evening hours and weekends, is occupied by programming which is aimed at a broad spectrum of community problems, needs and interests.

*Id.* (footnotes omitted). After studying the evolution of the noncommercial broadcast service, the Commission concluded that:

[I]t is a mistake to regard the noncommercial service as something apart from, and outside of, the basic structure of the Communications Act and Commission policies. The Act and its legislative history and our own pronouncements make clear the obligations imposed on educational broadcasters and the authority of the Commission to examine whether educational broadcasters have sought to ascertain and to meet community needs and to contribute to the goal of an informed electorate through controversial issue programming.

\* \* \*

[T]he Commission agrees . . . that noncommercial educational broadcasters should be attuned to the problems, needs and interests of their service areas and should present programming in response thereto.

*Id.*, at 694-695 (footnote omitted).<sup>20</sup>

12. In 1976, the Commission revisited the essential obligations imposed on noncommercial broadcasters and restated:

that the role of noncommercial educational broadcasting has never been precisely defined . . . [We] declined to do so in this proceeding because we believed that "the flexibility and freedom of the service is, in large part, fundamental to its existence." *We recognized that it was not the legislative intent of Congress to limit these broadcasters solely to educational and cultural programming*, but that the Communications Act of 1934, as amended in 1967, expressed a Congressional finding "that expansion and development of noncommercial educational radio and television broadcasting and of diversity of its programming depend on freedom, imagination, and initiative on both the local and national levels." 47 U.S.C. 396(a)(2).

*Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 58 FCC 2d 526, 529 (1976)(emphasis added). And, it observed that "[i]t is evident that the role of the noncommercial educational service has grown from purely 'instructional programming' to include a broader variety of 'public programming.'" *Id.*, at 536. For noncommercial FM radio stations, the Commission there modified, but squarely reasserted, the core requirement that such stations respond to "the principal needs and interests" ascertained in the community. *Id.*, at 537. Still again in 1981, the Commission restudied at length the history of noncommercial broadcasting and held:

We believe that at least four matters are of primary importance when considering the programming responsibility of public broadcasters under the general "public interest" standard of the Act. We will outline each of these below. They are: (1) the intent of Congress in fostering the public broadcast service as evidenced in relevant legislation; (2) the Commission's traditional desire to avoid all unnecessary intrusion into the programming decisions of licensees, including those of public broadcasters; (3) the Commission's historical policy of allowing other forces to determine the character and content of the public broadcasting service[;] and (4) the Commission's recent policy of recognizing and relying upon social and market forces in broadcasting which lead to positive public interest results without specific Commission intervention.

*Public Radio and TV Programming*, *supra*, 87 FCC 2d at 730. It further distanced itself from a supervisory role over program content by stating:

*Character and Content of Public Broadcasting*. The basic role of the FCC in the history and development of public broadcasting has been to insure that spectrum space is available for its use *and to broadly classify its program service*. It has meant that the Commission has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming. From the perspective of the Commission, public broadcasting is characterized largely by a negative distinction, *i.e.*, public stations are not operated by profit seeking organizations nor supported by on-the-air advertising. The positive dimensions of public broadcasting are determined by social, political, and economic forces outside the Commission.

\* \* \*

Rather than imposing one unified and comprehensive standard for public broadcasting, the Commission has allowed those who operate, support, and consume public broadcasting to directly determine the nature of its service, *especially its programming*.

*Id.*, at 732 (emphasis added).

13. Having thrice in eight years detailed the maturation of noncommercial FM radio stations, and laid out the basic standards by which such stations would be judged at renewal time, it is instructive to peruse a sample of license renewal cases involving noncommercial broadcast cases to pinpoint the Commission's performance focus. For example, in renewing the license of Station WHYY-TV, Wilmington, Delaware, the Commission held that, like a commercial broadcaster, a noncommercial "licensee's prime and most important focus must be on the problems, needs, and interests of its community of license." *WHYY, Inc.*, 93 FCC 2d 1086, 1096 (1983). In renewing an earlier license for that same Station WHYY-TV, the Commission stressed that, "while a licensee is required to serve ascertained needs in its overall programming, the decision as to how much programming to present concerning which needs is largely within the licensee's reasonable good faith discretion." *WHYY, Inc.*, 53 FCC 2d 421, 425 (1975). *Accord*, *Community Television of Southern California*, 72 FCC 2d 349, 354 (licensee is afforded broad discretion to meet the diverse needs of groups within its service area), *recon. denied*, 46 RR 2d 1103 (1979); *Mississippi Authority for Educational Television*, 71 FCC 2d 1296, 1308 (1979), *recon. denied*, FCC 80-305, released May 29, 1980. In short, the Commission's historic function in gauging whether a noncommercial licensee has earned a renewal "is the very limited one of assaying . . . whether the licensee's programming, on an overall basis, has been in the public interest and . . . whether he has made programming judgments reasonably related to the public interest." *Pacifica Foundation*, 36 FCC 147, 149 (1964). *See also Georgia State Board of Education*, 70 FCC 2d 948, 949-963 (emphasizing duty of noncommercial licensee to ascertain needs and interests of its service area and to exercise its broad discretion to determine in good faith which needs will be met and the substance of programs to meet those needs), *recon. denied*, 71 FCC 2d 227 (1979).

14. Straw's jeremiad against KNHC-FM for its failure, in Straw's view, to concentrate on "alternative" or "niche" entertainment programming inspires us, in Shakespeare's lyric, to "summon up remembrance of things past" and find ourselves beset with "old woes new wail."<sup>21</sup> For it seems that the war between Straw's perception of the bedrock duty of a noncommercial broadcaster to provide "alternative" programming, such as the ethnic-oriented and foreign language fare that appears in its own proposal, and a more generalized obligation - within the wide boundaries of licensee discretion - to respond to ascertained community needs, problems and interests was a skirmish rehearsed at the Commission more than a decade ago. *Compare Puerto Rican Media Action and Educational Council, Inc.*, 51 FCC 2d 1178 (1975) with *Dissenting Statement of Comm'r Benjamin L. Hooks, id.*, at 1195. In that case, the Commission majority rejected a complaint that a noncommercial broadcaster had defaulted on its alleged basic duty to provide specialized "niche" programming. Its opinion stated that:

in assessing whether a licensee's programming has been responsive to the needs of its community, we have consistently held that programming which is responsive to the needs of a community in general, need not be shown to be responsive to the particular needs of each individual group within that community.

*Id.*, at 1181 (footnote omitted). The majority thereafter reiterated that, in assessing a noncommercial licensee's overall performance, "the Commission has always given its licensees great discretion in programming choice, so long as it meets the problems and needs of its community." *Id.*, at 1183-1184. As should be now be abundantly clear, the Commission's focus, and its renewal performance standard, for contemporary noncommercial broadcast stations is on a station's issue-responsive programming, much as it is for commercial broadcasters.<sup>22</sup> While noncommercial broadcasters may present these issues in a manner that differs from their commercial counterparts (as did SPS, *see infra* para. 51), it is upon such a licensee's issue-responsiveness that the klieg lights fall at renewal time.

15. An independent reason for resisting Straw's entreaty to review a licensee's performance from the standpoint of "alternativeness" is the omni-present force field of the First Amendment. With specific respect to noncommercial broadcasters, the Commission has observed:

*Programming Regulation.* The Commission's role in the programming decisions of all broadcasters has always been profoundly affected by its sensitivity to the First Amendment rights of the public and of broadcasters and the specific noncensorship provision of Section 326 of the Act. This reluctance to interfere with free speech as a matter of constitutional and statutory law also has been respected by this Commission as a matter of sound public policy.

*Public Radio and TV Programming, supra*, 87 FCC 2d at 731-732 (footnote omitted). *See also Puerto Rican Media Action and Educational Council, supra*, 51 FCC 2d at 1183-1184; *Deregulation Order, supra* para. 8, 98 FCC 2d

at 750-752. This is profoundly true insofar as Straw's lament is directed toward KNHC-FM's entertainment format, an area from which the Commission prudently evacuated many years ago. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). While Straw would have the Commission reenter this thicket and subjectively calibrate a noncommercial licensee's programming performance on the alternativeness, *vel non*, of a licensee's entertainment programming, its brief elsewhere recognizes that<sup>23</sup>:

The showings made by the incumbent must be objectively assessed by reference to verifiable standards of evaluation if the Commission is to avoid proceeding by "administrative feel" or some other "intuitional forms of decision-making, completely opaque to judicial review . . . ."

No "verifiable standard" is isolated by Straw's apotheosization of the term "alternative," as witness the fact that although Straw proposes a format largely consisting of "jazz," "folk," and "ethnic" music selections, the aforementioned KCMU-FM, another noncommercial station licensed to Seattle (*see supra* note 2), is reported as providing "Alternative music[,], rock/ ethnic."<sup>24</sup> It could be, therefore, that Straw's proposed programming might itself be considered insufficiently *outré*, were we to deploy Straw's "alternative" entertainment format standard. Furthermore, though Straw complains that KNHC-FM's dance music entertainment format mimics that of ordinary commercial stations, the Commission recently noted without disapprobation in a case relied upon in Straw's own brief that:

We recognize the fact that noncommercial educational FM stations may present a wide variety of programming including such matters as light entertainment, gospel or popular music, and sports.

*Way of the Cross of Utah, Inc.*, 101 FCC 2d 1368, 1371-1372 n.5 (1985)(quoting noncommercial eligibility licensing guidelines). In fact, following the Supreme Court's decision in *WNCN Listeners Guild, supra*, we are aware of no case in which the Commission or the courts have paid the slightest attention to the entertainment component of a licensee's programming.<sup>25</sup> The entertainment format of KNHC-FM is of no moment here. And, finally, although Straw elevates the term "alternative" mentioned in Section 396(a) of the Communications Act to an operational imperative, *but cf. Public Radio and TV Programming, supra*, 87 FCC 2d at 731 (Section 396 directives "not specifically directed to the role of this Commission in public broadcasting), it omits mention of a companion section of the Act, Section 398, which, in pertinent part, reads as follows:

(a) Nothing contained in this part shall be deemed . . . (2) . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or public telecommunications entity.

16. For all of the foregoing reasons, we find that to the extent that a noncommercial FM radio station is measured at renewal time by its programming performance, the Commission has signaled that it is upon efforts to respond to local community needs, problems and interests that we concentrate. *Expressum facit cessare tacitum*. We take up SPS's endeavors in this regard, *infra*, paras. 29-39.

### (2) SPS " Vocational Training " Argument

17. Straw next submits that SPS certainly should have received no bonus towards a renewal expectancy for its use of the frequency as a vocational training classroom for high school students. Quoting the Commission's language in *Multiple Ownership of Noncommercial Educational Radio*, *supra* note 16, 54 FCC 2d at 948,<sup>26</sup> Straw asserts that the Commission was there ambivalent about the reservation of such frequencies "for in-school instructional purposes 'when other means may well be available to do this without using a TV or FM broadcast channel.'" Straw Exceptions at 30-31 (footnote omitted). It recites the more recent language of *Way of the Cross*, *supra*, where the Commission rejected the argument of an unsuccessful applicant for a noncommercial TV channel that the Commission should consider that applicant's intended use of the station for vocational training. The Commission there stated:

The fact that [the noncommercial applicant] will offer on-the-job training does not distinguish it from any other broadcaster, commercial or noncommercial, and such training has never been considered as a factor in determining an applicant's eligibility to operate on a reserved channel.

101 FCC 2d at 1375 n.10.

18. The instant *I.D.* reflects that the ALJ considered a mountain of evidence regarding SPS's use of the station as a vocational training device and as a curricular component of the high school's course of instruction. *Id.*, paras. 22-50. Therein, the ALJ recounted testimony and other evidence of the following nature: that the students were taught the history of broadcasting, electronics theory, specific job functions common to commercial stations (e.g., announcing, station management, engineering, FCC compliance), cultural awareness, "team effort," and individual responsibility. In computing a potential renewal expectancy for SPS, the ALJ eschewed the proposal of the Mass Media Bureau that he utilize the performance standards generally applicable to commercial stations, *i.e.*, issue-responsive programming keyed to ascertained community needs, problems and interests, reputation in the community, compliance with FCC rules and regulations. *Id.*, para. 271. Finding the Mass Media Bureau's focus "too narrow" and "incomplete since it has completely overlooked the educational aspects of the School System's stewardship," *id.*, it is obvious that the ALJ's conclusion that SPS "is entitled to the greatest credit in terms of a renewal expectancy," *id.*, at para. 277, was influenced materially by his positive view of the school's vocational program. The ALJ also credited these vocational training facets of the SPS record in favoring SPS under the standard noncommercial comparative issue (Issue 4), *see id.*, paras. 278-280, a matter we review *infra*, paras. 61-62, in our analysis of the exceptions to the *I.D.*'s comparative evaluation.

19. SPS champions the *I.D.* in this respect, and pleads that the Commission language cited by Straw "cannot be read to preclude credit being given to an educational institution for doing what it is supposed to do - *train students*." <sup>27</sup> At oral argument before the Board, SPS counsel was quizzed as to whether SPS was aware of any Commission case or policy statement supporting the notion that curricular vocational training was a cognizable element in the agency's regard for noncommercial FM station renewal performance. Counsel offered that the Board's *New York University*, *supra*, did take notice of the fact that NYU had offered courses in radio for many years, that its proposed station would be a logical outgrowth of its past activities, and that station would function as a "valuable tool for putting into practice in an actual broadcasting operation the lessons of the classroom." 19 FCC 2d at 368. Counsel also propounded the commonly held view "that the training of teenagers in this nation at this time is a service to the community."<sup>28</sup>

20. After examining the skein of Commission policy statements directed to noncommercial FM licensees, and issued during the nearly two decades since the Board's dictum in *New York University*, we find ourselves in essential accord with the Mass Media Bureau that, for purposes of measuring a station's past performance, our basic renewal standards are virtually the same for noncommercial and commercial stations, and that no consideration, pro or con, be given to any vocational training element of a licensee's operation. In paragraphs 11-14, *supra*, we have traced the metamorphosis of noncommercial broadcasting, as seen through the eyes of the Commission, from a nascent medium in which the institutional needs of the licensee predominated, *see Educational Broadcast and Renewal Applications*, *supra*, 42 FCC 2d at 694, to a point where the Commission has lately perceived that the grand incident of contemporary noncommercial stations is that such stations "are not operated by profit seeking organizations nor supported by on-the-air advertising." *Public Radio and TV Programming*, *supra*, 87 FCC 2d at 732.

21. Starting in 1973, and incrementally thereafter, the Commission began to voice its concern that the dwindling inventory of noncommercial broadcast spectrum space be utilized to some reasonable degree for community-oriented service. *See, e.g., Educational Broadcast and Renewal Applications*, *supra* (42 FCC 2d 690); *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, *supra* (58 FCC 2d 526 (1976)). By 1978, the Commission was compelled to declare that:

The passage of time and resulting changes in spectrum needs requires us to examine all these matters anew. Although the noncommercial educational FM channels have long been reserved, it has only been recently that the demand for their use has increased greatly.

*Noncommercial Educational FM Broadcast Stations*, *supra* note 18, 69 FCC 2d at 243. It there for the first time adopted minimum operating schedules for noncommercial stations, and it specifically rejected the pleas of educational institutions (including high schools) that such minimum operating schedules were incompatible with the operation of those stations by students. The Commission contemplated these complaints:

A number of such stations pointed to their reliance on student staff members, most of whom, they said, would not be available during vacations and holidays. Other costs involved in extending the hours of operation such as maintenance, security, engineering supervision, tape rental costs and utility costs were also mentioned. Some felt that even if stations were not forced off the air, they could be put in the position of having to ask students to withdraw from their other activities if they were required to participate on the level required by a minimum operating schedule. In many cases, stations said volunteers are an important part of their staff and that it would be unrealistic to expect that their time at the station could be increased to meet a minimum schedule.

*Id.*, at 252. And, it further reflected:

*The proposal for a minimum schedule was also attacked as a hardship for high school stations. Since state law typically requires such students to be supervised at all times when participating in school activities, a minimum schedule, we were told, would mean a significant increase in cost to provide such supervision. We were warned that in times of severe budget restrictions, the necessary funds might not be available. This concern led one party to suggest exempting elementary and high school stations but not college stations from a minimum schedule requirement.*

*Id.* (emphasis added). But, the Commission countered:

The comments offer a great deal of insight into the preferences of individual stations and in particular to the desire of a number of them to avoid any requirements regarding the number of hours they need to operate. *However, these stations gave little attention to the public's right to expect that a station occupying a frequency would use it to a reasonable degree to provide a service to the public.* Spectrum space is scarce and is becoming more so. In fact, in many parts of the country, there is little or no spectrum space available to accommodate additional services.

*Id.*, at 254 (emphasis added).

22. The unmistakable inference to be drawn from the language of the host of policy documents relating to noncommercial broadcast service, including those directly relating to FM radio stations operated by high schools, is that irrespective of the nature of the licensee, the Commission's performance expectations center on the licensee's service to the listening (and viewing) community, and not on service to the licensee itself. As verified by this very case, the demand for noncommercial FM frequencies exceeds their availability, and not every high school, university, and/or educational organization that desires a broadcast frequency can obtain one. That is why the Commission has indicated that other methods of vocational training are available, short of allocating very scarce broadcast spectrum for that internal purpose.<sup>29</sup> SPS is implicitly aware of this alternative opportunity to train vocational students, since it has a classroom "devoted

continuously to television production activities," I.D. at para. 20, and it teaches courses in both radio and television, *id.*, para. 22, but it has no television station license.

23. Dissuading us further from judgmental pronouncement on the vocational training aspect of the SPS record, apart from the glaring fact that the Commission has never explicitly identified that activity as either a regulatory obligation or a renewal asset, is that this agency has never promulgated standards by which such an activity might be measured. For instance, SPS awards itself an "A+" for the quality of its vocational training program, whereas Straw grades it an "F." *Compare* SPS Reply at 22 with Straw Exceptions at 36-37. SPS would have it that adolescent vocational training is self-evidently in the public interest, a fact we do not deny, yet the Supreme Court has reminded that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976); cf. *Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498, 509 n.14 (1983). In the numerous policy statements we have referenced in the previous paragraphs, the Commission has limned, and refined, the "public interest" standard of the Communications Act with respect to noncommercial radio stations, and the case law narrowly frames the Commission's purview in the ambit of noncommercial license renewal. With neither expertise nor experience in assessing the quality of vocational training programs, this Board certainly has no pedagogic benchmark for assaying whether the SPS curriculum was superior, meritorious, or merely mundane. What the Board does have, however, is a record of station broadcast performance that can be measured objectively against the community-oriented program standards announced by the Commission in its many visitations.

24. None of this - *we are at pains to emphasize* - is to be read to imply that the use of a noncommercial broadcast station as a vocational classroom is discouraged by the Commission, which is well and contentedly aware of such utilization by many educational institutions holding FM broadcast licenses. *See Noncommercial Educational FM Broadcast Stations, supra*, 69 FCC 2d at 252. However, SPS-witness after SPS-witness testified that the crowning monument of the KNHC-FM vocational training experience is that it affords a "real" radio station environment to students, as opposed to an "electronic sandbox." *See, e.g., I.D.*, paras. 52-62, 310. It is, therefore, superfluous to monish SPS further that KNHC-FM is a *real* FM radio station, burdened by enforceable public interest duties to the Seattle listening community; and it would occur, in passing, that the vocational training of SPS students would in any event be *enhanced* by holding KNHC-FM to the same FCC performance and renewal requirements as all other broadcast stations, and *diminished* to the degree that occupational training, in and of itself, were considered a renewal performance "plus" available nowhere else in the "real" world of domestic broadcasting.<sup>30</sup>

### (3) SPS Hours of Operation

25. Straw next contends that the renewal expectancy awarded by the ALJ should have been pared for "SPS's failure to operate KNHC on a full-time [i.e., 24 hours per day] basis."<sup>31</sup> Straw would sculpt any such credit even closer in view of the fact that "[b]etween 1981 and 1983, SPS contracted away 28 hours a week of prime broadcast

time to Seattle Central Community College," and that during that period Nathan Hale High School's "use of the frequency was essentially limited to school hours and school days."<sup>32</sup> SPS rejoins that, but for the aforementioned seven month period when KNHC-FM averaged only 67 hours per week (*see supra* para. 3), "KNHC operated at or above 84 hours per week both before and after the temporary reduction in hours."<sup>33</sup> The Mass Media Bureau supports SPS in this feud, opining that "[t]o the extent that the station broadcast less than the required number of hours for a limited time during the license period, the I.D. properly concluded that the School System's overall performance was not diminished."<sup>34</sup> The Mass Media Bureau additionally maintains that the temporary reduction in hours was excusable, as it resulted from a reduction in state funding, a happenstance "beyond the control of the licensee."<sup>35</sup>

26. Without holding that a licensee's hours of operation, if truly minimal, can never be taken into consideration in computing a licensee's renewal expectancy,<sup>36</sup> we find that the operating schedule of KNHC-FM - averaging as it did more than 12 hours per day for the great percentage of the license term - was more than adequate under Commission standards to avert any diminution of renewal expectancy credit. First of all, the Mass Media Bureau misstates (as did the Board at oral argument, *see Tr. of Oral Arg. at 2793-2794*) the Commission's minimum operating strictures for noncommercial stations when it suggests that SPS "broadcast less than the required number of hours" for the said seven-month period. Section 73.561(a) of the Rules, 47 CFR §73.561(a), specifies:

(a) All noncommercial educational FM stations will be licensed for unlimited time operation except those stations operating under a time sharing arrangement. All noncommercial educational FM stations are required to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week; however, stations licensed to educational institutions are not required to operate on Saturday or Sunday or to observe the minimum operating requirements during those days designated on the official school calendar as vacation or recess periods.

At no time did SPS fall below that prescribed minimum.

27. Second, when SPS experienced budget difficulties that threatened its station's 84 hour per week operating schedule, SPS initiated discussions looking towards a potential time-sharing arrangement with another educational institution or organization. *I.D.*, para. 143. Although SPS held discussions in 1981 with, among others Straw itself, *id.*, it ultimately entered an arrangement with Seattle Central Community College (SCCC), whereby SCCC operated for 28 hours per week from SCCC's own remote studio, under the supervision of Gregg Neilson, an SPS employee at that time. *Id.*, para. 144. The SPS/SCCC arrangement was perfectly permissible under Section 73.503(c) of the Commission's Rules, 47 CFR §73.503(c) which, in pertinent part, reads as follows:

A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee.

Straw does not here insist that the SPS arrangement with SCCC amounted to an abdication of licensee control, as in *Trustees of the University of Pennsylvania*, *supra* note 33. Nor does it here contend that the SPS/SCCC arrangement transgressed any other Commission rule or policy. Actually, the gravamen of Straw's assault on the SCCC program sharing arrangement seems *not* to be that the arrangement was *not* in the public interest, but that the arrangement was with SCCC rather than with Straw.<sup>37</sup> Nothing in Straw's exceptions explains why the SPS arrangement with SCCC - a quasi-time-share of SPS's own choosing - should, standing alone, detract from SPS's renewal expectancy.<sup>38</sup>

28. Third, the Commission has deliberately chosen a very precise regulatory mechanism, in Section 73.561(b), for addressing noncommercial stations that operate fewer than 84 hours per week. In adopting that rule, the Commission made explicit that stations operating below that level would not suffer at renewal time, *see Noncommercial Educational FM Broadcast Stations*, *supra*, 70 FCC 2d at 982, but it did augur a licensee's susceptibility to FCC imposed time-sharing under such circumstances. *Id.* Hence, the time-sharing issue designated in this very case. While the Commission has considered substantial differences in hours of operations as a *comparative* factor in comparative renewal cases, *Simon Geller*, *supra* note 25, 90 FCC 2d at 275-276,<sup>39</sup> and we do touch upon the proposed hours of operation of the two applicants before us under the comparative issue, *see infra* para. 69, as well as under the time-share issue, *see infra* para. 78, we find nothing in the SPS record of hours of operation (12 hours per day for all but 7 months of license term) that would impact adversely on SPS's renewal expectancy. *Compare Simon Geller* (44 hrs., 27 min. weekly schedule considered on *comparative* basis only).

## B. SPS Broadcast Record

### (1) Issue - Responsive Programming

29. In paragraphs 70-79 of the *I.D.*, the ALJ described a variety of public affairs programs produced locally and broadcast by KNHC-FM at various periods during the relevant license term.<sup>40</sup> Such programs were: *Action Line* (October 1983 - end of license term); *Beyond Our Shores* (February 1981 - January 1982); *Chinese Radio Program* (February 1981 - October 1981); *Mid - East International (passim)*; *Spanish American Hour* (April 1981 - Summer 1982); *KNHC Public Affairs* (February 1981 - November 1982); *Community Calendar* (1981, 1983); *Briefs About Business* (March 1981 - July 1981); *Communique from Seattle Central Community College* (February 1981 - July 1981); *What's Happening In The Schools* (June 1982 - October 1983). In the referenced *I.D.* paragraphs, the ALJ described the content of these programs and found that many addressed, *inter alia*, the special needs and problems of foreign-speaking and ethnic populations within the Seattle community; local problems such as crime and

drugs, educational opportunities, environmental concerns, public health issues, local cultural events (movies, theater, museums), business news (career opportunities, international money matters, federal budget cuts, employee insurance plans). The program *What's Happening In The Schools* contained segments on the school's desegregation plan, vocational competency, and test scores. Straw's exceptions do not challenge the I.D.'s findings in the referenced paragraphs, and we have no independent basis for so doing. These findings are incorporated by reference in our decision.

30. In addition to the licensee-produced public affairs programs, KNHC-FM broadcast a plethora of public affairs offerings devised by other institutions, some of them local, and considered by SPS to be germane to the needs, problems and interests of Seattle. It is well-established that broadcasters, whether commercial or noncommercial in nature, are expected to serve local community needs, but may choose from non-local as well as local program sources to meet those needs. *Renewal of Broadcast Licenses*, 44 FCC 2d 405, 422 (1973) (It is not [the Commission's] intention to favor a particular program source or format, so long as the licensee's programming does, in fact, help to meet community problems and needs). The Commission has repeatedly recognized that national and institutional programming may acceptably meet local needs. See *WHYY, Inc.*, *supra*, 93 FCC 2d at 1094-1098; *Community Television of Southern California*, *supra*, 72 FCC 2d at 353-354; *Georgia State Board of Education*, *supra*, 70 FCC 2d at 956-957; *Regents of the University of New Mexico & Board of Education - Albuquerque*, 47 FCC 2d 406, 412 (1974). Such KNHC-FM programs, described more fully in the I.D., paras. 80-106, were: *Black Beat* (Spring 1983); *Black Report* (March 1982 to August 1982); *Israel Magazine / Israel Press Review* (February 1981 to August 1982); *Longhorn Radio Network* (February 1981 to June 1981); *Man and Molecules* (February 1981 to January 1983); *Science in the News* (February 1981 to June 1981); *Sounds of Listen* (February 1981 to August 1981); *U. S. Public Policy Forum* (April 1981 to August 1981); *Women Break Through* (March 1981 to May 1981); *American Physical Fitness* (April 1981 to May 1981); *Aware* (September 1983 to November 1983); *Blacks Before America* (Spring and Summer 1982, Fall 1983); *Business of Being a Baby* (February 1981 to September 1981); *Cornell University* (throughout license term); *Energy Watch* (February 1981 to June 1982; November 1982 to March 1983); *Everybody Can Be Somebody* (March 1981 to July 1981); *Farm and Foods Program* (February 1981 to August 1981); *For Your Information (August and November 1983)*; *Forest Productivity (March 1983 to May 1983)*; *Health File (February 1981 to March 1982)*; *Hemispheres (1981-1983 school years)*; *Labor News and Views* (1981 and 1983); *NASA* (throughout license term); *Popular Science* (June 1983 to October 1983 and in January 1984); *Spot News* (February 1981 to March 1982); *Washington Report with Senator Slade Gorton* (July 1983 to February 1984); *Working in the Sighted World* (February 1981 to May 1981). Straw has not challenged the ALJ's findings here either, and we incorporate his descriptions into this decision.

31. In paragraphs 111-124 of the I.D., the ALJ digested a number of other nonentertainment programs broadcast at various points during the license term, and regarded by SPS as being attentive to the needs, problems and interests of the community. These were: *American Gardner* (March 1982 to June 1982); *Astrofecha/Star Date* (September 1981

to December 1981); *Audio News Features (passim)*; *Gospel Music Program* (June 1982 to February 1984); *Horizontes* (September 1981 to March 1982); *Let's Talk* (February 1981 to June 1981); *Local Military Recruit of the Day* (1981-1982 holiday session); *One Minute Thoughts for Each Day* (February 1981 to August 1981); *Mother Earth News* (February 1981 to November 1983); *Pets and Vets* (February 1981 to June 1981); *Radio Nederland* (February 1981 to April 1981); *Tips for Home Gardeners* (April 1981 to June 1981); *What in the World Happened* (February 1981); *The Word* (March 1982 to February 1984).

32. Throughout the license term, KNHC-FM broadcast news programs (of 4-5 minute duration) "several times a day to hourly." I.D., para. 107. These newscasts were produced by the school's students, and were ordinarily aired prior to 2:00 PM when the school day ended; few, if any, newscasts occurred on weekends. *Id.* But see *Pillar of Fire*, *supra* para. 6, 99 FCC 2d at 1263-1264 (local newsgathering is but one facet" of measuring responsive programming).

33. KNHC-FM also broadcast Public Service Announcements for a considerable number of "local, regional and national public service organizations, governmental departments and agencies, and colleges and universities." I.D., paras. 108-109.<sup>41</sup> The ALJ found that the station featured the messages of 70 such organizations from February 1981 to August 1981; 100 such organizations from September 1981 to August 1982; 120 such organizations from September 1982 to August 1983; and 65 such organizations from September 1983 to February 1984. Each year, the station offered its facilities to numerous organizations whose messages had not been aired previously. Again, Straw disputes none of these basic findings, which are likewise incorporated.

34. Straw fires a dual salvo against the ALJ's favorable consideration of the above programming. First, it postulates "that a noncommercial licensee's obligations are fundamentally different from those of a commercial licensee" in that "the responsive programming to which such [a renewal] expectancy would attach must be based on the process of programming addressing needs and interests not being provided by other broadcasters in the community, particularly commercial licensees."<sup>42</sup> It argues that a noncommercial licensee's ascertainment of local needs and interests "is not limited to non-entertainment programming, but may include the need for a vast array of general educational, informational and cultural programming . . ."<sup>43</sup> Straw's second complaint is that the ALJ considered a great, undifferentiated mass of nonentertainment programming, but that "SPS provided no quantitative or numerical analysis of its non-entertainment programming, [and] made no effort to compare its non-entertainment programming with . . . commercial stations."<sup>44</sup>

35. Straw's first shot, that issue-responsive programming is invalid towards a renewal expectancy unless geared to needs and interests not addressed by other broadcasters, is, of course, a variation on its theme of "alternativeness" discussed earlier. It is true, as Straw maintains,<sup>45</sup> that the ascertaining of local needs and interests is a prerequisite to regarding a licensee's programs as issue-responsive. *Simon Geller*, 90 FCC 2d at 264-265. During the license period here under consideration (February 1981 - February 1984), the ascertainment procedures applicable to noncommercial broadcasters were contained in the Com-

mission's 1976 *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, *supra*,<sup>46</sup> where it announced that:

[W]e shall permit noncommercial educational radio applicants and existing licensees to ascertain by any reasonable methods designed to provide them with an understanding of the problems, needs and interests of their service areas. This process is to be documented by a narrative statement regarding the sources consulted, the survey methods followed and the principal needs and interests discovered. Additionally, educational radio renewal applicants are to complete an annual list of up to 10 problems found in the community during the preceding 12 months, together with examples of programs broadcast to meet these problems.

58 FCC 2d at 537 (emphasis added).

36. The ALJ records, at paragraph 31 of the I.D., that SPS followed an ascertainment process as outlined: (1) The Public Affairs Director of KNHC-FM was responsible for the station's ascertainment process; (2) The Public Affairs Director occasionally accompanied the station's General Manager to regularly scheduled meetings between Seattle broadcasters and community leaders for purposes of identifying the top ten issues of concern to the public, based upon a statistical analysis of interview notes with those leaders; (3) the Public Affairs Director compiled the annual list for issue-responsive programming; (4) students in the station's Public Affairs Department were assigned a broad topic taken from the list, as enlightened by ascertainment interview notes, and given a suitable subtopic for student-produced programs; (5) the programs thus produced were monitored before broadcast by the Public Affairs Director and the Program Director. There was further augmentation of this process: "[t]he station also commissioned a telephone survey of the general public during the license renewal period" to confirm the identification of problems and interests by community leaders. *Id.*, at para. 68. Potential Public Service Announcements, of which there were approximately 100 per week, were screened by the station's Continuity Director. *Id.*, para. 32. The ALJ reviewed this process, along with the programs produced thereunder, and concluded that "KNHC's public affairs programming covered a wide range of issues of community concern identified through the station's ascertainment efforts." *Id.*, at para. 288. The ALJ also recognized the station's efforts with respect to news, *id.*, para. 289, and Public Service Announcements. *Id.*, para. 290. We too find that SPS has complied fully and faithfully with the Commission's 1976 *Ascertainment* requirements, and that it followed a systematic course designed to assure that the problems, needs and interests thus elicited would be covered in KNHC-FM programming.

37. Straw's insistence that SPS failed in its duties because the station responded to the same top ten problems as other Seattle stations is bizarre. Had SPS dutifully compiled its annual top ten problems list, as required by the 1976 *Ascertainment* policy, and then ignored those locally pressing issues in favor of "alternative" programming, it would have been in apparent violation of regnant FCC ascertainment and responsive programming standards. *Catch 22*, as it were. Moreover, once having

ascertained those local problems, SPS could not have perfectly anticipated which of these other local stations intended to cover in the upcoming year, and any KNHC-FM future programming plans to avoid these same issues "might [as] well have been the product of omphalic inspiration, or orinthomancy, or haruspication, or aleatory devices . . ." *Old Colony Bondholders v. New York, N.H. & H.R. Co.*, 161 F.2d 413, 450 (2d Cir. 1947)(Frank, J. dissenting in part)(footnote omitted). We find that the Commission's operative ascertainment requirements were clear, and followed to the letter by SPS. That Straw has contrived an "alternative" standard in its own self-image, *see I.D.*, paras. 272-276, summons no mandate for this Board to ignore the ascertainment and responsive programming standards imposed by the Commission.

38. Straw's second round at the SPS issue-responsive programming record is that SPS furnished "no quantitative or numerical analysis" of its license term nonentertainment programming.<sup>47</sup> It compounds this criticism by alleging that "SPS has not provided any sort of program schedule reflecting a representative or typical week"; that SPS "has provided a 'descriptive' rather than [a] 'quantitative' analysis of its nonentertainment programming"; that "[n]o summary of news, other nonentertainment programming, or PSA's [Public Service Announcements] is provided"; that SPS is "only willing to characterize" those programs" listed in paragraphs 29-31, *supra*, as "typical and illustrative issue-responsive programming"; that such "programs ranged from 30 seconds to 15 1/2 minutes at various times on weekdays"; and, that by analyzing the SPS program exhibits, Straw demonstrated that "at best . . . KNHC broadcast no more than 2.5% nonentertainment programming."<sup>48</sup>

39. Filching another Shakespearean exclamation, "Zounds! I was never so bethump'd with words, Since I first call'd my brother's father dad."<sup>49</sup> Rather than respond discretely to each of the foregoing lamentations - for we are uncertain of the legal relevance or critical import of much of Straw's broadside - we will examine the content and character of the SPS program exhibits. The ALJ reports that:

For purposes of this proceeding, the School System prepared and submitted a study of its nonentertainment programming -- including public affairs, news and sports programs, public service announcements, and other non-entertainment programming -- based on an analysis of the programming presented in the first and third full broadcast weeks (Sunday through Saturday) of each month from February 1981 through January 1984. The study was based on "sample logs," admitted as exhibits in this proceeding, which were prepared by extracting from the station's program logs the information with respect to all of the station's nonentertainment programming (including date, day of the week, title of the program, source, start time, and duration) during the sample weeks. Based on the programming identified in the sample logs, the School System prepared a narrative description of its nonentertainment programming, including issue-responsive public affairs programming, presented in each school year since the start of the license renewal period. The School System also submitted its annual and quarterly Issues/Programs lists for the same period.

*I.D.*, at para 66 (citations omitted). As previously discussed, many of these programs were the product of SPS's systematic ascertainment effort. The ALJ examined these extensive programming exhibits, identified the correlation between ascertained needs and SPS's Issues/Programs lists, *id.*, and examined the logging practices of KNHC-FM to assure the accuracy of SPS's labeling procedure. We have, again, reviewed those exhibits and affirm the ALJ's finding that, over the license term, KNHC-FM broadcast a very substantial amount of programming specifically attuned to the pulse of the local community. Straw does not contend that KNHC-FM flatly ignored any obvious local need (except insofar as Straw's fixation on "alternative" programming). See, e.g., *Stone v. FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972); *Alabama Educational Television Commission*, *supra* note 33, 50 FCC 2d at 470-473. As to Straw's assault on SPS's failure to provide a quantitative analysis of its nonentertainment programming, we reiterate the point made in *Pillar of Fire*, *supra*, that both the Commission and the courts have evinced a "disinclination . . . to gauge, in any controlling degree, a station's responsiveness by a quantitative standard." 99 FCC 2d at 1261. And, that any such "statistical breakdown is merely one *prima facie* indicator of station performance; a quick starting point, but no more than that." *Id.* (quoting *Intercontinental Radio*, *supra*, 98 FCC 2d at 630). We next observed in *Pillar of Fire* that, "[t]o the extent that a quantitative index has been employed by the Commission," it has focused on two criteria: (1) a comparison with (then extant) "renewal guidelines", and (2) a licensee's "promise versus performance." 99 FCC 2d at 1262. Straw has not hinted at an SPS deficiency under either criteria. As to the more important qualitative indicia, Straw's condemnation rests, as all here concerned have made quite plain, on its remonstrance that SPS responded only to the same needs and problems that other local broadcasters had ascertained, and not to other "cultural and informational interests . . . given minimal attention by commercial broadcasters."<sup>50</sup> We have addressed this latter charge above, and stand on that disposition.

### (2) Reputation in the Community

40. In evaluating the broadcast record of an incumbent licensee, one factor regularly considered is the station's reputation in the community which it serves. E.g., *Pillar of Fire*, *supra*, where we repeated:

Although the Commission must assess a renewal applicant's record, our *Intercontinental Radio* decision found that the agency and the court have placed emphasis on the response of the licensee's consumers, its audience. See *id.*, [98 FCC 2d at 633]. *Inter alia*, we there cited (then) Judge Burger's invocation of "our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life." *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966) (emphasis added); see also *Central Florida Enterprises*, *supra*, 683 F.2d at 508; *Vicior Broadcasting*, *supra*, 722 F.2d at 762.

*Id.*, 99 FCC 2d at 1275 (footnote omitted). *Pillar* then considered the testimony of 7 public officials and 24 other members of the general public, as well as an evidentiary sample from some 1593 letters from the general public

received by the licensee during the license term. *Id.*, at 1275-1276. See also *Video 44*, 3 FCC Rcd at 3591 (83 viewer letters, including 21 complaints, considered); *Intercontinental Radio, Inc.*, 98 FCC 2d at 622-625, 633, 638, & 621 n.37 (consideration given to supportive testimony of 50 witnesses, 14 unsolicited commendatory letters, several listener complaints, and adverse community witness testimony); *Kaye - Smith Enterprises*, 98 FCC 2d at 684 (testimonials from various community leaders).

41. Straw asserts that SPS "provided virtually no evidence from community leaders that the station had contributed to the needs and interests of Seattle."<sup>51</sup> Although we have never held that a licensee's reputation in the community can only be vouchsafed by the testament of community leaders, particularly since ordinary listeners have standing to make their views known to the FCC, *Office of Communication of the United Church of Christ*, *supra*, Straw is correct that most, if not all, of the witness testimony described in the *I.D.* in support of KNHC-FM's record came from (1) SPS personnel involved in the school's vocational training activities (see *id.*, paras. 54-60), (2) Nathan Hale High School graduates who had later obtained jobs in broadcasting (*id.*, paras. 64-65), and (3) producers whose programs had been aired by KNHC-FM or parties for whom the station had broadcast Public Service Announcements (*id.*, paras. 129-133). For reasons more fully explained *supra*, paras. 20-24, we do not find relevant to the Commission's renewal oversight the school's vocational training activities, *simpliciter*. The questions of whether SPS ran a meritorious vocational training program, or even whether such a specialized activity is a productive use of scarce local educational resources (see *I.D.*, paras. 138-154), are beyond the ken of this civil licensing agency, and more appropriate for assessment by superintending educational authorities. Based upon our reading of the Commission's public policy statements on noncommercial broadcasting, a noncommercial station's license renewal would not be assured were it unanimously agreed that a licensee ran a superlative vocational training program, but failed abjectly in its regulatory duty to service the needs of the Seattle listening community, just as we would not downgrade a station at renewal time for a reputedly "poor" vocational training program, but where its program service to the community was otherwise meritorious. It is not gainsaid that vocational training and job placement by SPS is a salutary social byproduct of its operation of KNHC-FM, but this Commission's official federal charter encompasses neither educational curricula nor full employment. Consequently, we give scant weight to the witnesses in categories (1) and (2), above, in measuring this station's reputation in the Seattle listening community. The testimony of KNHC-FM's program producers (category (3) above) is patently self-serving, and likewise entitled to little weight, under the specific heading of community reputation. But see *infra* para. 51. That appears to leave the comments of Eddie Rye, *I.D.* para. 131, and Garcia Massingale, *id.*, para. 133, both of whom testified that KNHC-TV provided useful information to the community, as well as a forum for the presentation of their Public Service Announcements.

42. Compared to many other renewal applications we have scrutinized, the SPS showing of its reputation in the listening community was not very strong, in large part because SPS chose to rely heavily on testimony relating to

its vocational training. On the other hand, Straw concedes that the record here contains no complaints from the listening public (or local community leaders, for that matter),<sup>52</sup> a sounding read in prior comparative renewal cases. *E.g.*, *Central Florida Enterprises*, 683 F.2d at 508. In sum, however, we essentially agree with Straw that the record here does not prove, by substantial evidence, that KNHC-FM enjoys a reputation in the Seattle area for superior public interest programming to the local community. We do not speculate on just what that actual reputation is; we simply say "not proven."

### (3) Compliance with FCC Rules and Policies

43. In contemplating whether an incumbent licensee is entitled to a renewal expectancy, the Commission routinely checks to determine whether there has been full compliance with Commission rules and regulations. *See, e.g.*, *Central Florida Enterprises*, 683 F.2d at 509 (violation of main studio rule factored in); *see also Intercontinental Radio, Inc.*, *supra*, 98 FCC 2d at 646, 647 (record "unblemished" by violations); *Tele - Broadcasters of California, Inc.*, *supra*, 58 RR 2d at 233 (compliance record "pristine").<sup>53</sup> The instant record reveals no violations on the part of SPS; and apart from Straw's pandemic charge that KNHC-FM has failed utterly in its bedrock statutory duty to be "alternative", we are not made aware of any slight delict.

### C. Summary and Conclusions

44. The ALJ, as we have said, awarded SPS a strong renewal expectancy for its "outstanding performance during the license term." The Mass Media Bureau would concur based upon KNHC-FM's "substantial programming performance," *I.D.*, para. 271, but the ALJ's view was "that the proper test for measuring the School System's past performance during the license period . . . is the same as specified in the designation Order for evaluating the two applicants, namely, the *standard noncommercial comparative issue*." *Id.*, at 277 (emphasis added). On that predicate, the ALJ factored into his renewal expectancy award his personal view of the merit of SPS's vocational training program. *See id.*, paras. 45-50, 52-65. We, conversely, agree with the Mass Media Bureau and believe that SPS's renewal expectancy, if any, is to stem primarily from its program response to the Seattle community's ascertained needs, problems and interests, and we shall not attempt to evaluate, credit, or discredit, the SPS vocational training program. *Cf. Way of the Cross, supra*, 101 FCC 2d at 1375 n.10. Further, to the extent that the ALJ considered any post-license term activities in reaching his conclusion as to the SPS renewal expectancy, *see I.D.*, paras. 167-206, we shall disregard such evidence in our own review. *See supra* note 33 (citing, *e.g.*, *United Broadcasting Company, Inc.*, 94 FCC 2d at 948-949).

45. Our own deliberations over whether SPS has earned a renewal expectancy, and the strength of any such renewal expectancy to be ultimately weighed against the results of our comparative issue (*compare, e.g., Video 44, supra*, 3 FCC Rcd at 3591-3592 (moderate renewal expectancy weighed against weak comparative challenger) with *Intercontinental Radio, Inc.*, 98 FCC 2d at 644-647 (moderate renewal expectancy weighed against substantial comparative challengers) with *Tele-Broadcasters of California, Inc.*, 58 RR 2d at 233-234 (strong renewal expectancy weighed against weak comparative challenger)), concentrated upon the same record factors as consulted in the

aforecited comparative renewal cases. In so doing, we were acutely aware of the court's caveat in *Central Florida Enterprises* that the standards by which we measure the strength of any renewal expectancy may not be "opaque to judicial review," 'wholly unintelligible,' or based purely on 'administrative "feel".'" 683 F.2d at 508 (footnotes omitted). We also acknowledge that the Commission itself has recently conceded, in *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, supra* note 53, that "a program-based renewal expectancy, such as the present method of defining 'meritorious service,' has practical problems of administration." 3 FCC Rcd at 5193 (-5194).

46. With these compunctions firmly in mind, we shall nevertheless compare SPS's license term performance against the several criteria that have evolved out of *Central Florida Enterprises*, and thereafter applied in every comparative renewal case this Board has engaged since that decision, to wit:

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|--------------|--|
| Criterion 1. | <i>The licensee's efforts to ascertain the needs, problems and interests of its community;</i>                                     |
| Criterion 2. | <i>The licensee's programmatic response to those ascertained needs;</i>  |
| Criterion 3. | <i>The licensee's reputation in the community for serving the needs, problems and interests of the community;</i>                  |
| Criterion 4. | <i>The licensee's record of compliance with the Communications Act and FCC rules and policies;<sup>54</sup> and</i>                |
| Criterion 5. | <i>The presence or absence of any special effort at community outreach or towards providing a forum for local self-expression.</i> |

47. Under Criterion (1), we find as the ALJ did in *I.D.*, paras. 31, 67-68, that SPS conscientiously complied with the Commission's prevailing ascertainment requirements. Its efforts were thorough, diligent, and continuous during the license term.

48. Under Criterion (2), we find that SPS assigned students to prepare public affairs programs based upon the Issues/Programs lists compiled as a result of its ascertainment efforts, *I.D.*, paras. 31, 68-71, 75-76, 79, 126, and that "KNHC[-FM] aired its issue-responsive programming throughout the broadcast day, including periods of high listenership, rather than relegating them to so-called ghetto blocks of time." *Id.*, at para. 127. It carried during the license term a wide spectrum of other public affairs programs selected by its Network Director, *id.*, at para. 33, to be of particular interest to the station's audience. *See id.*, paras. 80-106. It regularly broadcast its own news programs, *id.*, para. 107, and it broadcast numerous other nonentertainment programs it believed to be of relevance to its local audience, *see id.*, paras. 111-124. What is missing, as Straw says, is a quantitative breakdown of its nonentertainment percentages or a quantitative comparison with other local stations. As the Commission has just lately observed, "some cases have compared the percentage of time that an incumbent has devoted to total nonentertainment programming and to various categories of such programming -- such as news, public affairs, and local programming -- with the average percentage of such programming done by similarly situated stations in the

same market." *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, supra note 53, 3 FCC Rcd at 5193 (footnote omitted). While nothing estops a licensee seeking a renewal expectancy from preparing such an elaborate showing, and though the Board has noted such statistical analyses in other comparative renewal cases,<sup>55</sup> we made clear in *Pillar of Fire* (and in prior cases) that raw numbers are not at the heart of the story.<sup>56</sup> Numbers alone cannot and do not correlate to the more critical qualitative inquiry: *Did licensee programming respond to ascertained community needs?* Whereas SPS has not supplied a separate quantitative analysis, it has supplied its ascertainment process, its method of assigning broadcast coverage of the ascertained needs and problems, its program logs for every alternate week throughout the entire license term, and it has accompanied this showing with a list of typical and illustrative programs contained therein that responded to ascertained needs and problems. From this extensive material, both the ALJ and we have gleaned that KNHC-FM has solidly met the demands of Criterion 2.

49. Under Criterion 3, we find that SPS relied essentially on self-interested testimony as to the efficacy of its vocational training program, a matter the Commission has not identified as a renewal "plus" (or "minus"). Nor has it published objective standards by which such training might be adjudged by this agency. We decline to fabricate our own. Our reluctance to credit this activity is also influenced by the Commission's many noncommercial broadcast policy statements, which have over time gently nudged such broadcasters into community-oriented service, and by the *Central Florida Enterprises* court's understanding that "renewal expectancy will be factored for the benefit of the public, not for incumbent broadcasters," 683 F.2d at 507 (emphasis and footnote omitted), as well as its reminder that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* (footnote citation omitted; emphasis added). We are not so Philistine as not to recognize the important social value of public school education and SPS's insistence that its primary job is to "train students." As a public educational authority, that proposition is incontestable; but in its trustee role as a broadcast licensee, the primary job of SPS is to use scarce broadcast spectrum space to serve the local listening community in the fashion described by the Commission's pertinent policy statements. By the standards of our comparative case law precedent, the SPS reputation showing here was weak.

50. Under Criterion 4, we find full compliance with the Communications Act and Commission rules and policies. Nothing here would obliterate or offset this licensee's renewal expectancy. Compare, e.g., *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982), recon. denied, 93 FCC 2d 789 (1987)(misrepresentation and rule violations; license lost to competing applicant); *KQED, Inc.*, supra (station license lost to challenger).

51. In prior comparative renewal cases, the Board has also looked to see whether a licensee "has reached out beyond the station into its community with offers of station help and support." See, e.g., *Intercontinental Radio*, 98 FCC 2d at 643. The Commission has also declaimed that "noncommercial broadcasters have . . . [a] duty to serve, to a significant extent, as outlets for local expression." *Educational Broadcast and Renewal Applications*, supra, 42 FCC 2d at 694. Hence, Criterion 5. The record

here shows that SPS has reached out into the community with regular offers of help and support. See *I.D.*, paras. 108-109, 131, 133. But, it was in SPS's use of its facility as a megaphone for local self-expression that SPS truly excelled. For example, in conjunction with the University of Washington, it produced a local program on international affairs (*id.*, para. 71); hosted by the students of Seattle's Cleveland High School, it broadcast Chinese language programming and focused on the large Chinese population of Seattle (*id.*, para. 72); and it aired locally-produced public affairs programs on Mid-East culture (some in Arabic language)(*id.*, para. 73), Hispanic culture (some in Spanish language) (*id.*, para. 74), local business (*id.*, para. 77), local education (*id.*, paras. 78-79), the Black community (*id.*, para. 131), and on other local community problems and interests (see, e.g., *id.*, para. 133). What is more, a prominent function of KNHC-FM was to permit local teenagers to consider local problems, and to then express their own views on serious adolescent concerns such as crime, alcohol and drug addiction, race relations, education and employment opportunities, etc., etc., in a manner that might be meaningful and helpful to the teenage audience it sought specially to entice by the "attractive nuisance"<sup>57</sup> of its "dance music" entertainment format. See *I.D.*, paras. 31, 49, 68-69, 72, 75-76, 276, 287-289. In other words, KNHC-FM was not a network pipeline or satellite clone, set on automatic and retransmitting only remotely preassembled material; nor was it a noncommercial simulcast sister. KNHC-FM was by, of, and especially for young persons of the city of Seattle. In that, the station was a forum for local self expression *par excellence*.

52. In light of all of the foregoing, the Board concludes that, while precise grading levels are elusive (see *Central Florida Enterprises*, 683 F.2d at 508 & n.27), SPS has painstakingly earned a strong renewal expectancy for overall service that "was in fact "substantial," i.e., "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." *Id.*, at 508 (footnote omitted). Compare, e.g., *Simon Geller* (no news, public affairs, ascertainment or issue-responsive programming; "minimal" service warrants renewal, but no earned renewal expectancy).

53. As opposed to the SPS renewal expectancy, Straw asks the Board to consider the renewal application it had filed for its formerly-owned KRAB-FM, and to award it the functional equivalent of a renewal expectancy, on the theory that Straw would have (if it had not sold the station) carried through on its past programming.<sup>58</sup> The ALJ had rejected an evidentiary submission based on the past programming of KRAB-FM, but Straw argues that if we do not consider that submission and award to Straw the functional equivalent of a renewal expectancy, SPS will have been granted a "vested property right" that would illegally defeat its *Ashbacher* right to a full and equitable comparative hearing.<sup>59</sup>

54. Properly awarding an incumbent licensee a renewal expectancy for meritorious performance does not invest a property right or deny a license challenger a full and fair hearing. *Central Florida Enterprises*. Straw is not the incumbent licensee in this case, but a challenger. As the ALJ accurately observed, the Commission has stated, and the courts have concurred, that awarding a renewal expectancy where deserved has three purposes:

(1) to reward the incumbent's proven performance;

(2) to encourage investments to ensure quality of service; and (3) to foster stability in the broadcast industry.

*I.D.*, at para. 269. Here, Straw had sold the station on which it now rests its novel claim to the functional equivalent of a renewal expectancy, and SPS aptly retorts that "[a]llowing a licensee to sell its rights and still claim a 'plus of major significance' against an incumbent which has continued to serve the community would hardly reward incumbents for their proven performance, encourage investments to continue to provide quality service, or foster stability in the industry."<sup>60</sup> Just so, and no greater rebuttal is necessary to Straw's extraordinary hubris in this regard.

55. Despite our general affirmation of the ALJ's award of a strong renewal expectancy to SPS, the contest is not ended. A renewal expectancy "takes the form of a comparative preference" to be weighted against the other comparative factors, *Central Florida Enterprises*, 683 F.2d at 506 (citation omitted), to which we next turn our attention. The time-sharing issue will follow our review of the exceptions under the standard noncommercial comparative issue.

### III. COMPARATIVE ISSUE

56. Upon Straw's request for reconsideration of the original *Hearing Designation Order* issued in this case, the Commission added the standard noncommercial comparative issue that has come to be employed in contests between two or more new noncommercial applicants seeking the same reserved frequency. Distinct from the prosaic standard comparative issue that commands the choice between commercial applicants, an issue that compares applicants on the several criteria set forth in the venerable *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (such principal criteria being diversification of media control, integration of ownership with management, local residence and civic activities, comparative signal coverage),<sup>61</sup> the standard noncommercial comparative issue is comprised of a three-pronged inquiry: (a) which applicant will best integrate the operation of the proposed station into the overall educational and cultural objectives of the applicant (*New York University*, 10 RR 2d 215 (1967)); (b) the manner in which the proposed operation of the competing applicants will meet the needs of the community to be served (*Pacifica Foundation*, 21 FCC 2d 216 (Rev. Bd. 1970)); and (c) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service (*New York University*, *supra*).

57. In a recent case, the Board once again relayed the criticism of many noncommercial applicants that what has evolved as the standard noncommercial comparative issue is "vague," "amorphous," and "meaningless." *Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34, 35 (Rev. Bd. 1984) (late printing). We there chronicled the many Commission policy statements directed to noncommercial broadcasters that have been released since the issuance of *New York University* and *Pacifica Foundation*, and we suggested that "a cohesive, comprehensive, and up-to-date policy synthesis is needed." 65 RR 2d at 36. In the meantime, this case comes before us on the

older, unrevised comparative issue; and, as anticipated, the instant applicants clash vehemently on the construction and the application of that comparative issue.

#### A. FACTORS TO BE CONSIDERED

##### (1) *Integration of Cultural and Educational Objectives*

58. In finding and concluding that SPS had successfully shown the integration of its educational and cultural objectives into its station, the ALJ accepted that SPS's primary "educational" objective was the vocational training of students, *I.D.*, paras. 19-50, and he determined that the SPS operation would help students "to acquire and develop the technical as well as the interpersonal skills required for success in the broadcast field." *Id.*, at para. 301 (see also *id.*, paras. 300-303). By contrast, the ALJ found that Straw had no cognizable "educational" program beyond its desire to broadcast the "alternative" programming typified in paragraph 212 of the *I.D.* (and reprinted *supra*, para. 8). Invoking the Commission's noncommercial application processing guidelines,<sup>62</sup> the ALJ faulted Straw under this initial prong for its failure to propose either "instructional" or "general educational" programming as defined in the application processing guidelines, *I.D.*, paras. 212-213, 295-299, despite the fact SPS appears to have proposed neither category of programming itself. The ALJ explained his disparate approach this way:

A major issue in this proceeding, therefore, is to determine the extent of integration of each of the proposed stations into the cultural and educational objectives of the respective applicants. *Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981), *review denied*, FCC 82-271 (released June 11, 1982). Where, as here, one of the applicants is an educational *institution* and the other an educational *organization*, the issue is the same for each party, but the required showings are different.

*Id.*, at 296 (emphasis in original). He amplified by opining that, whereas SPS was an educational *institution* and had shown how its vocational training program was integrated into its station operation:

Jack Straw, on the other hand, is an educational organization. The showing required of an educational organization under the standard noncommercial comparative issue is to "demonstrate that [it has] an educational goal and [is] committed to the advancement of an educational program." *Processing Guidelines*, 43 Fed. Reg. at 30845. The Commission has stated that educational organizations serve the public interest through educational programming, the suitability of which is measured with primary emphasis on programming categorized as "instructional" and "general educational."

*Id.*, at 298. Straw grieves that the ALJ applied a double standard that denied it an even-handed comparative appraisal, and complains<sup>63</sup>:

According to the *ID*, an institutional applicant will receive maximum credit under the comparative issue merely by proving that it is an educational institution, *i.e.* that it will carry out educational "objectives" or "functions," regardless of what its programming may be. An educational organization, by contrast, must demonstrate that it will advance an educational "program" by broadcasting some unspecified quantum of "instructional" and "general educational" programming. This reasoning is patently flawed and highly discriminatory.

SPS defends the ALJ's mode, and rejoins<sup>64</sup>:

Jack Straw is wrong. Neither type of applicant is automatically preferred. As the ALJ held, once the institutional applicant has established that it operates an educational facility and the organizational applicant has established that it has an educational program, *both* applicants must establish that the proposed operation of the station will be integrated into that applicant's stated educational objectives. (*ID*, para. 296) The showings required of the two are not the same, but one is not more onerous than the other; it is merely different. In any event, Jack Straw's claim that it was denied "its right to a 'full hearing'" because each applicant was not evaluated on the same basis is without merit. Each applicant had the opportunity (and the burden) to establish that it met the relevant criteria; Jack Straw simply did not try to (or perhaps could not) do so.

By applying one comparative standard to SPS, because it is an educational *institution*, and another to Straw, because it is an educational *organization*, Straw generally asserts that "[t]he results are topsy-turvy because the comparison is higgledy-piggledy."<sup>65</sup>

59. "Well roared, Lion!"<sup>66</sup> For we find more than a trace of legitimacy in Straw's lament. The Board again readily admits that the dimensions of this prong of the standard noncommercial comparative issue lack lapidary facets. In soliciting the Commission's review of the entire sphere of noncommercial comparative cases, the Board's *Black Television Workshop of Santa Rosa* decision posed the rhetorical question at live conflict here: "If the 'overall cultural and educational objectives' of applicants are to be compared, what criteria should be used?" 65 RR 2d at 36. In the earlier *Southeastern Bible College*, *supra*, the there-presiding ALJ also stumbled over this initial prong. *See id.*, 85 FCC 2d at 956-957. Nonetheless, this ALJ's use of the Commission's basic licensing eligibility guideline as a comparative standard has produced an anomalous result. First, we note that the Commission's original *Hearing Designation Order* in this case pointedly questioned Straw's basic eligibility to operate on a reserved noncommercial frequency, and it specially required Straw to "submit an exhibit stating how the proposed station would be used for the advancement of an educational program." *See* 103 FCC 2d at 867-868. Presumably, Straw's submission satisfied the Commission, because its reconsideration *Memorandum Opinion and Order* does not again question Straw's basic eligibility. Second, the ALJ himself mediated a subsequent attack at hearing on

Straw's basic eligibility for its alleged lack of "instructional" or "general educational" programming, yet he staunchly decreed:

In order to qualify as an educational organization, it is not necessary that the proposed programming be exclusively educational. Section 73.503 also authorizes the transmission of cultural and entertainment programs. *See Lower Cape Communications, Inc.*, 47 RR 2d 1577 (1980); *see also Florence Bridges*, 44 RR 2d 667 (1978). *Way of the Cross*, 58 RR 2d 455, 457 (1985), cited by School System does not lend support to School System's position.

*Memorandum Opinion and Order*, FCC 86M-2665, released August 29, 1986, at para. 3. But, when he subsequently reached the *ID*., the ALJ rejected Straw's proffered menu of "cultural" programming, and he comparatively downgraded Straw for its lack of "educational" programming, *ID*., paras. 210-214. There, citing *Way of the Cross* (as well as the noncommercial eligibility processing guidelines), the ALJ held that "Straw's proposed 'educational program' does not satisfy the Commission's requirements for the licensing of educational organizations to operate on reserved frequencies." *ID*., at para. 304; *see also id.*, paras. 305-308.

60. While we do not necessarily disagree that, based on this record and by the strict reckoning of *Way of the Cross*, Straw's basic noncommercial eligibility waxes somewhat dubious, we believe that once the Commission and the ALJ refused to add this threshold issue, it was inconsistent to reapply the basic eligibility standards under the first prong of the standard noncommercial comparative issue. In any event, SPS has filed no exception to the ALJ's refusal to add a basic eligibility issue against Straw, so the matter is not before the Board in an adversary posture. Assuming *arguendo* that Straw is basically qualified,<sup>67</sup> we find that - unless and until the Commission further clarifies the truest intent of this prong of the noncommercial comparative issue - Straw's proposed programming exhibit embraces all that can be said about that organization's cultural and educational objectives (*see ID*., paras. 213-214), and mutely suggests the manner in which Straw's objectives, such as they are, would be met by the station. As rehearsed in the previous section of this decision, the Commission has formally recognized that noncommercial broadcasters come in a legion of shapes and sizes, and it has refused to straitjacket such an entity into specific types of programming, once it finds that entity basically eligible. If Straw is basically eligible, we cannot say definitely that its showing under this prong was innately deficient.

61. In bold relief was the ALJ's treatment of SPS, upon whose vocational training function the ALJ relied mightily in holding that it was superior under this initial prong. *ID*., paras. 300-303. Although, as we have stressed, an educational institution may surely use its frequency for such purposes, and we emphatically do not discourage such use, it appears from all that has been written that the Commission's meaning, when discussing a noncommercial licensee's "educational and cultural objectives," is that such objectives are assumed to be directed outwardly to the station's listening community, and not directed exclusively to the licensee itself. Put another way, based upon our interpretation of the Commission's ap-

plication processing guidelines and the other germane material, the Commission conclusively presumes that an educational "institution" is possessed of an organic mission to use the frequency to educate the masses and to disseminate cultural enlightenment to the general populace, *i.e.*, those that do not physically attend the institution. This Commission insight is evidenced not only in the many policy statements we have referenced in paragraphs 11-15, *supra*, but in the way agency adjudicators have conventionally applied the noncommercial comparative standard. Thus, in evaluating competing applicants under this first prong of the comparative issue in *Southeastern Bible College*, that ALJ observed that one applicant (Glen Iris) intended - like SPS here - to have its students operate the station as part of the school's curriculum. But, he favored the competing applicant (Southeastern) which would "extend to the community at large the resources of the institution." 85 FCC 2d at 957 (emphasis added); *accord*, *New York University*, 19 FCC 2d at 368 (school's programming would "bring to the metropolitan community the resources of the university).

62. SPS's vocational training curriculum, by itself, does not transport the school system's educational resources to the listening community, and its primary "educational" objective is inward-looking rather than outward-looking. The Board acknowledges that much the same may be said of a noncommercial licensee that occupies its facility chiefly for "in-school instructional purposes," but even there the "educational objective" is tied to the programming that comes out of the radio receiver, rather than on the internal process behind the transmission. Here, we believe that though the term "educational objectives" may be ambiguous (as are many other aspects of this issue, see *Black Television Workshop of Santa Rosa*), we do not consider the SPS vocational training function, as such, to be a satisfactory response to this first prong of the comparative issue.

63. At the same time, the SPS past and proposed operation does regularly utilize its students to prepare and present programs of special interest and relevance to the community-at-large. The ALJ found that SPS's other "educational objectives" include "communicating with young people" through the propagation of teenage perspectives on common problems "and reaching, through its programming, a racially and ethnically diverse audience." *I.D.*, at para. 302. These collateral goals, we believe, are much more in keeping with the Commission's purpose in examining whether an applicant's "educational objectives" will be integrated into the operation of the station.

64. Consequently (and assuming *arguendo* Straw's threshold eligibility), we find that both applicants have explained as best they can the manner in which they intend to integrate their disparate educational and cultural objectives into station operation. Because, as in *Southeastern Bible College*, "[t]he two proposals are quite different . . . in terms of the service being offered," 85 FCC 2d at 957, a stable comparison is difficult, we hold that neither proposal is perspicuously superior under this exceedingly blunt prong. Straw's objectives appear more community-oriented, but not "educational" in the strict sense that the Commission has customarily defined that term, while SPS's primary "educational objectives" are rather internalized. Both would thus seem to have their idiosyncratic frailties and neither will be preferred on this first prong.

## (2) Meeting Community Needs

65. In paragraph 36, *supra*, we described the process by which SPS ascertained the needs of the local community and planned programming to respond to those needs. At *I.D.*, para. 311, the ALJ relates the SPS "promise to continue to ascertain needs and interests and to air programs responsive thereto." Having found no problem with SPS's ascertainment and response reflexes during the subject license term, we agree with the ALJ that SPS's promise to monitor community needs by similar methods in the future portends an operation continually attuned to local needs, problems and interests.

66. Straw's proposal for meeting community needs was discredited by the ALJ, who found that Straw conducted no widespread survey of community leaders or the general public, and had not identified pressing issues facing the community. *Id.*, para. 216. He also found that Straw's proposed programming responded to entertainment preferences rather than local issues, as that term is used by the Commission, *id.*, para. 217, and that even Straw's proposed public affairs programs were not linked to ascertained local needs and problems. *Id.*, para. 219. In his comparative evaluation, the ALJ concluded that "Straw has failed to meet its burden of demonstrating that its proposal will meet the needs of the community as that phrase is traditionally understood," *id.* at para. 315, and he thus favored SPS decisively under this second prong.

67. Straw submits that the ALJ myopically misconstrued this second prong by limiting its scope to nonentertainment programming keyed to an ascertainment process, and it asserts that it may here include "the need for a vast array of general educational, informational and cultural programming . . ." <sup>68</sup> Straw claimed at hearing that its proposed programming (derived from a 1983 program guide for its former KRAB-FM) was selected by way of its "regular contact with a variety of ethnic, cultural, arts, and 'cause' organizations in Seattle," *I.D.*, at para. 217, as well as through a perusal of the newspapers and other media to see what other stations were programming. It is true that, under the 1976 *Ascertainment* standards in effect at the time of Straw's application filing, the Commission afforded noncommercial radio applicants great leeway in adducing community needs, and it expressly permitted the use of "any reasonable methods designed to provide them with an understanding of the problems, needs and interests of their service areas." See *supra* para. 35. Paradoxically though, while Straw's critique of KNHC-FM's past programming relied directly upon *Simon Geller* for the proposition that a prerequisite to issue-responsiveness is "a determination of community needs and interests through previous ascertainment," <sup>69</sup> Straw's own exceptions replicate in remarkable degree *Simon Geller*'s error of confusing entertainment programming preferences with ascertained local problems and needs. It is recalled to Straw that, in *Simon Geller*, the licensee likewise interposed his continuous contact with regular listeners and consultation of newspapers in selecting his programming. See 90 FCC 2d at 252. *Geller*, much as Straw here, also asserted that his entertainment format satisfied a demonstrable local demand, *id.*, at 262, but the Commission found *Geller*'s entertainment format irrelevant to the deeper question of local community needs. See *id.*, at 255-257, 264-267. And, like the two noncommercial applicants in *Southeastern Bible College* who were given little acclaim under this second prong of the

noncommercial comparative issue. Straw's assessment of community needs "rest[s] on untested presumptions rather than on evidence of record." 85 FCC 2d at 958.

68. Ergo, we concur with the ALJ that Straw has not linked its proposal to reasonably ascertained community needs. While we certainly do not suggest that a noncommercial applicant cannot meet this second prong of the comparative issue with "cultural" and "general educational" programming, it must at least show that it has broadly surveyed (in a flexible fashion) its community, and that its proposal is responsive to that survey, not simply to its own esthetic proclivities or to the entertainment preferences of a select few. Entertainment formats freely come and go, and audience preferences wane. Local problems and needs also change, and an applicant or a licensee must demonstrate a reasonable method of monitoring and responding to those immediate matters. *Compare Pacifica Foundation, supra*, 21 FCC 2d at 219-220 (noncommercial applicant satisfactorily surveys community). The Board appreciates that, shortly after the filing of these two competing applications, the Commission's 1984 *Deregulation Order, supra* para. 8, removed the requirement of a formal ascertainment process for noncommercial broadcasters. Howbeit, the Commission did "retain the basic issue-oriented programming responsibility" on all noncommercial licensees. *See supra* note 30.<sup>70</sup> Although the Commission's then-prevailing ascertainment requirements for Straw were not rigid, they were not vapor, and Straw's showing here was seriously flawed. *See Committee For Community Access, supra*, 737 F.2d at 77-78. SPS was correctly favored on this second prong.

### (3) Other Factors

#### (a) Proposed Hours of Operation

69. As indicated earlier, the Commission has reviewed proposed hours of operation on a comparative basis, *Simon Geller*, as has the Board, *Minneapolis Star & Tribune Co., supra* note 39, to determine whether the competing applicants propose substantial operating differences. Unlike our discussion in paragraphs 25-28, *supra*, our focus here is on applicant proposals for the future and not upon past performance. The *I.D.* is somewhat unclear as to SPS's 1984 proposal: the ALJ wrote that, by March 1983, KNHC-FM was regularly operating more than 84 hours per week, and at hearing the station's General Manager testified:

By mid-March [1983], the station was operating consistently more than 84 hours per week, although we did not consistently operate 12 hours a day until April 8, 1983. The station currently operates from 8:00 am to 11:00 pm Sunday through Thursday (15 hours) and from 8:00 a.m. to 12:00 midnight or later on Friday and Saturday (at least 16 hours) for a minimum of 107 hours per week.

SPS Exh. 1 at 14.<sup>71</sup> At the time of the hearing, SPS was regularly broadcasting approximately 107 hours per week, a figure both the Mass Media Bureau and SPS counsel confirmed at oral argument. *See, respectively*, Tr. of Oral Arg. at 2792, 2812. Other witness testimony reflects that SPS's proposal was to maintain that schedule. *See, e.g.*, SPS Exh. 3 at 1, 15 (testimony of T.J. Vassar).<sup>72</sup>

70. Straw's proposed hours of operation are embodied in its time-share proposal, and are therefore wrapped around the ordinary 8:00 AM - 3:00 PM school day. As we discern its proposal, Straw seeks to operate the station from 6:00 AM to 8:00 AM and from 3:00 PM to 3:00 AM weekdays, as well as from 6:00 AM to 3:00 AM at all other times. *See* Straw Application, FCC Form 340, refiled May 22, 1984, at Section 1, Question 4 & Exhibit No. 1 thereto; *see also I.D.*, para. 227; Straw Exh. 35. Because Straw's proposed hours of operation (approximately 112 hours per week during the school year) were not intended to wholly displace SPS, to whom Straw would routinely cede 35 hours per week, the usual comparison of proposed hours of operation is neither equitable nor possible. That is, if we hypothetically compared SPS's 107 hours per week with Straw's raw 112 hour per week proposal, no significant difference arises. However, we believe it is only fair and appropriate to consider Straw's proposal on its own terms, *viz.*, as a supplementary time-share proposition, which we do *infra*, paras. 78-82.

#### (b) Comparative Signal Coverage

71. Straw excepts to the ALJ's refusal to award it a decisive preference for superior comparative signal coverage. The *I.D.* held that Straw was not entitled to any credit for its coverage proposal since it had not demonstrated that it could implement its technical proposal and, in any event, because coverage "is of only minor import" in noncommercial educational cases. *I.D.*, paras. 318-321. Straw maintains that it would provide substantially greater service to underserved areas and superior overall coverage,<sup>73</sup> and that the ALJ's denial of credit is contrary to the mandate of Section 307(b) of the Act and the holdings in *New York University*, 10 RR 2d 215 (1967); 10 FCC 2d 53 (Rev. Bd. 1967); 19 FCC 2d 358 (Rev. Bd. 1969). It submits that Section 307(b) factors are applicable in noncommercial cases, that reception service superiority may be determinative under a Section 307(b) issue, and that its coverage proposal should have resulted in a dispositive comparative preference. It goes so far as to argue that the decisive coverage preference it warrants under the mandate of Section 307(b) would outweigh the purely comparative factor of any renewal expectancy earned by the School System, because "otherwise determinative standard comparative advantages cannot overcome such a fundamental licensing objective."<sup>74</sup> We agree with the ALJ that Straw is entitled to no credit whatever for its particular coverage proposal.

72. While it is true that a clear Section 307(b) preference will normally outweigh standard comparative considerations, *see FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360-62 (1955); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135 (D.C. Cir. 1985), Straw errs fundamentally in seeking to apply this general principle in the unprecedented setting of the case at bar. In its recent holding in *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988), the Commission summarized the cardinal mandate of Section 307(b) as follows:

Section 307(b) requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide fair, efficient and equitable distribution of radio service . . ." 47 U.S.C. §307(b). *Thus, whenever applicants specify different communities of license for their proposed sta-*

tions, the Commission first compares the needs of the respective communities for radio service . . . . The need for service concerns both the number of stations that can be received in a given area (reception service) and the availability of local outlets for self-expression in the community (transmission service).

*Id.* at 5376 (emphasis added). Thus, Section 307(b) is normally invoked only where competing applicants specify separate communities, and it becomes necessary to determine which community has the greater need for a new station. It is not surprising, therefore, in this case where both applicants seek to serve the same community - Seattle - that the Commission did not specify a Section 307(b) issue in either of its two hearing designation orders, and that no party has petitioned to add such an issue. Straw's strenuous arguments to the contrary notwithstanding, Section 307(b) in its pure form is simply not part of this case.

73. Despite this seemingly irreducible obstacle to its contention that it is entitled to a determinative Section 307(b) preference, Straw argues that the holdings in *New York University* support its position. Not so. *New York University* involved two noncommercial applicants seeking to serve separate communities -- New York City and Teaneck, New Jersey -- on the same frequency. The Commission there stated that the fact that the competing applicants were located in different communities "on its face, raises in the traditional sense a 307(b) issue," and the issue was therefore designated. 10 RR 2d at 216. Nevertheless, the Commission narrowed the customary 307(b) focus. Because it was "not persuaded that our traditional areas and populations, and other available services criteria are appropriate" when dealing with competing noncommercial educational applicants, the Commission modified its designation order so that only other noncommercial services would be considered under the 307(b) analysis. *Id.*, at 216-217. Although Straw points out that the Board's subsequent decision in *New York University* stated that it did not consider that the "factors relating to 307(b) have no or little significance," 19 FCC 2d at 371, the Board, cognizant of the Commission's non-traditional approach to 307(b), also held that "[w]e do not believe that this fundamental [noncommercial comparative] issue should be contingent on the outcome of the areas and populations issue" in view of "[t]he diminished importance of the traditional Section 307(b) concepts" in a noncommercial case. 10 FCC 2d at 56.

74. Apart from prime Section 307(b) considerations, we must next consider whether Straw's claim to a coverage preference is impeded by the fact that there is no explicit comparative coverage issue designated in this case. The Commission, in modifying its designation order in *New York University*, not only altered the traditional 307(b) issue, but it also stated with reference to the comparative issue: "nor are we persuaded that the factors involved in the usual standard comparison [under the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393] are appropriate in the context of this proceeding." 10 RR 2d at 216. Accordingly, in adopting new comparative issues to govern noncommercial comparative cases, the Commission held: "In adopting these issues in a case of first impression, we further note that our standard comparative criteria (local residence, integration, broadcast experience, diversification, etc.) are virtually meaningless in a case of this type." *Id.*, at 217. The new comparative

issues it substituted have been applied, with some modifications, in all noncommercial comparative cases designated to date, including this one. Comparative signal coverage, a factor routinely considered under the 1965 commercial *Policy Statement*, normally comes into play when the designation order specifically declares that there are substantial differences in the proposed service areas which may be considered at the hearing. *See, e.g., Barton Broadcasting Co.*, 104 FCC 2d 785, 799 (Rev. Bd. 1986); *Northern Sun Corp.*, 100 FCC 2d 889, 897 & n.2 (Rev. Bd. 1985); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 644 & n.2 (Rev. Bd. 1983). Despite the readily apparent differences in the coverage proposals in this case, however, the instant hearing designation orders provide no instructions in this regard. On the other hand, the designated comparative issue does contain the broad "other factors in the record" language, pursuant to which the ALJ considered coverage evidence. While we are mindful of the Commission's two-decade old admonition that its standard commercial comparative criteria are "virtually meaningless" in the context of a noncommercial proceeding, we will assume, *arguendo*, in view of the potential coverage differences in the record and our duty to weigh all decisional factors, *see Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949); *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981), that a significant signal coverage advantage should be considered under the "other factors" prong of the standard noncommercial comparative issue. *Cf. Noncommercial Educational FM Broadcast Stations*, 70 FCC 2d 972 (1979)(increased FCC concern with spectrum efficiency on noncommercial FM frequencies).

75. Assuming, then, that Straw is entitled to claim a coverage preference, we must address the ALJ's additional and independent ground for rejecting Straw's particular proposal as also being technically unacceptable. In its application, Straw proposed to locate its transmitter site on Cougar Mountain in King County. It developed at the hearing, however, that in May 1985 King County had imposed a total moratorium on the issuance of permits for the construction of radio facilities on the Cougar Mountain site pending the adoption of new more stringent RF radiation standards. Tr. 2268-2271; *see also* Straw's April 6, 1987 Memorandum in Support of Coverage Evidence, Att. 1, Exh. A at 2. In view of this circumstance, the ALJ afforded Straw an opportunity at the hearing to make a showing that King County would permit it to implement its technical proposal. Tr. 2701-2703. In response, Straw submitted a "Memorandum in Support of Coverage Evidence" on April 6, 1987. The ALJ found, however, that Straw had not obtained a statement from the county that, even in the absence of the moratorium, it would receive the requisite use permit, nor had it shown that it could implement its proposal consistent with the 110 uW/cm<sup>2</sup> radiation standard currently in effect for Cougar Mountain or the 200 uW/cm<sup>2</sup> radiation standard expected to be adopted for King County as a whole. Having failed to show that its present proposal could be implemented, and not having amended its application to offer an alternative proposal, Straw's coverage proposal was not credited. *I.D.*, paras. 225-226, 319. Straw's exceptions argue that its proposed antenna location on Cougar Mountain is available; that denying it coverage credit because it could not obtain advance approval of a King County conditional use permit contravenes Commission precedent holding that local approval to use a site will be presumed in the absence of

evidence that local authority has denied such a request, citing, *inter alia*, *Arizona Number One Radio, Inc.*, 103 FCC 2d 550 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 44 (1987), *aff'd sub nom. Interstate Broadcasting System of Arizona, Inc. v. FCC*, 836 F.2d 1408 (D.C. Cir. 1988)(table), and *Alden Communications Corp.*, 3 FCC Rcd 3937 (1988); that once the moratorium is lifted, it believes its use application will be granted; that it could not have amended its application previously because it does not know what radiation level will eventually be found acceptable; and that it was therefore unreasonable for the ALJ to impose an obligation on it that was impossible for it to meet.

76. To begin with, there is little question that Straw has reasonable assurance of its proposed Cougar Mountain site (*qua* site). See *I.D.*, para. 319. The unusual glitch is whether Straw will ever be able to provide its claimed superior coverage from that site, in view of the yet-existing moratorium and the uncertainty regarding precisely what radiation standards will eventually govern even if the moratorium is lifted. Straw analogizes its situation to the so-called zoning cases, which hold that zoning objections to proposed transmitter sites will not be considered absent a "reasonable showing that the applicant will not be able to obtain approval of his plans from the local authorities." *Lester H. Allen*, 20 FCC 2d 478, 481 (Rev. Bd. 1969). These cases are predominantly concerned with the more basic question of a site's availability, rather than whether, as here, reliance on that site for a dispositive comparative preference is too speculative and remote. The local approval problem here, unlike the zoning cases, presents a unique double barrier. Despite Straw's sanguine speculation that it could meet *whatever* standards are eventually imposed on its site, and we read the letter from King County attached to Straw's hearing submission as completely noncommittal on this point (see Straw Memorandum in Support of Coverage Evidence, Att. 1, Exh. B), we know absolutely that a complete ban on issuance of any use permits for radio facilities now exists. We also know that Straw's proposal of record concededly fails to meet the radiation standard even now in place on Cougar Mountain. Straw argues that it cannot reasonably be expected to amend its application proposal to meet an undetermined standard. By the same token, Straw has been on notice since before the hearing commenced that its proposal could not satisfy the present radiation limits, and that more exacting standards could be expected once the moratorium is lifted. Thus, unlike the situations presented in such cases as *Alden Communications Corp.* and *Arizona Number One*, *supra*, where applicants took the steps required by government agencies in applying for land use, King County here will not even accept further applications for use of Cougar Mountain until its moratorium is lifted and specific radiation standards are adopted. In short, even if coverage evidence was properly taken in this case, it is entirely too speculative and uncertain to award a comparative coverage preference to an applicant where an absolute moratorium exists on the issuance of use permits at Straw's chosen site, and the standards to be adopted for permissible levels of radiation from that site are indefinite. In these circumstances, Straw's bald assurances that it could meet whatever standards are imposed are equally speculative, and were rightly rejected by the ALJ.<sup>75</sup>

#### B. Summary and Conclusions

77. Under the standard noncommercial comparative issue, we have determined that neither party is superior under prong (a), that SPS is to be favored under prong (b), and that, were Straw's comparative coverage advantage not so hypothetical, it would receive a substantial preference under prong (c). However, even assuming we were to credit Straw's comparative coverage, that is only one factor under the tripartite noncommercial comparative issue. We have agreed with the ALJ that Straw has shown insufficient attention to the underlying public purpose of its potential signal by failing to properly ascertain the needs and problems of its community, see *Southeastern Bible College*, and relied too simply on the entertainment preferences of itself and its select followers. See *Simon Geller*. Overall, then, and even assuming a comparative coverage preference, the best Straw would achieve is a moderate preference under this comparative issue, taken as a whole. If its signal coverage is not credited, and we do not believe it should be, SPS would have a slight preference under this comparative issue, taken as a whole.

#### IV. TIME-SHARING ISSUE

78. The ALJ refused to impose an involuntary time-sharing arrangement on SPS, because he found (1) that Straw had not justified "its proposed schedule based on the hours it need[ed] to achieve its educational objectives," *I.D.*, at para. 235; (2) that Straw's proposal "was based on the premise that the School System 'authorized funding for and used' the station only for vocational training carried out 'when students and teachers were at school,'" but Straw had not corroborated that (erroneous) premise, *id.*, at para. 236; and (3) that Straw claimed it needed morning and afternoon "drive time" hours to survive, but the record evidence did not substantiate that claim. *Id.*, para. 237. He concluded also that SPS needs its current hours of operation for its vocational training objectives, *id.*, para. 324, and that "its current hours of operation are essential to enable it [to] continue to meet the needs and interest of its listen audience *id.*, at para. 325. In that latter connection, the ALJ adverted to "lengthy student-produced public affairs programs during after-school hours," and he held (*id.*):

Moreover, community leaders who want to reach teens and young adults have come to KNHC because they know their target audience is listening. Loss of the after-school and weekend hours would jeopardize the ability of the station to reach these young people.

79. Straw first contends that the time-share issue (Issue 3) designated by the Commission is superior to the comparative issue (Issue 4), and that "[t]he *I.D.* errs by subordinating the time-sharing issue to the comparative issues and by failing to consider that time-sharing is favored under Commission policy because it tends to increase the diversity and efficiency of a channel's use."<sup>76</sup> Second, Straw submits that "for a considerable portion of its last renewal term SPS operated at less than the minimum schedule which the Commission has set,"<sup>77</sup> and that Section 73.561(b) therefore mandates the imposition of time-sharing. And, third, Straw asserts that the *I.D.* makes no findings "that support the conclusion that time-sharing

would not be a more 'effective' use of the channel."<sup>78</sup> Straw thus concludes that the ALJ defaulted in his duty to order a time-sharing arrangement from one of the four Straw-devised plans<sup>79</sup>:

(1) an arbitrary division of time such as that ordered by the Review Board in *Southeastern Bible College, Inc.*, 85 FCC 2d 936 (1981); (2) SPS's proposal to allow Jack Straw only those hours during which SPS does not currently operate; (3) Jack Straw's proposal to use the channel at all hours other than school hours on school days; and (4) a division of time which would license SPS during those hours during which *students* operate the station (8:00 a.m. to 8:00 p.m. weekdays) and license Jack Straw at all other hours.

Straw quickly discounts its own options (1) and (2), favors option (3), but would reluctantly accept option (4).

80. SPS replies to Straw's "issue-inversion" argument by citing the Commission's revised designation language which states that any potential time-sharing requirement turns upon "whether the grant of either the School System's renewal application or Jack Straw's full time application will better serve the public interest."<sup>80</sup> It answers Straw's second exception by noting that the Commission directed the ALJ to consider whether the seven-month, reduced operating period was merely temporary. As to the third, SPS maintains that, even if time-sharing were to be ordered, any such order would be limited to those hours the existing licensee has not been regularly using. The Mass Media Bureau excuses SPS's temporary reduction in operating hours from the 84 hour per week level as "beyond the control of the licensee" because of a lacuna in state funding.

81. We will dispose of the Mass Media Bureau's comments first. We agree, as a general matter, with Straw that lack of funding is not a basis for failing to meet Commission operating standards. This was made clear in *Simon Geller*, see 90 FCC 2d at 265, and epitomized in the noncommercial case of *KQED, Inc.*, where the Commission's refusal to consider that public station's funding problems provoked the licensee into misrepresenting the real financial reason for a temporary cessation in operations. If anything, insufficient operating funds - if persistent - would seem a valid reason *for* ordering time-sharing, not *against*. However, SPS's reduction in license-term hours below 84 per week was evanescent, and Straw's insistence that the seven-month dip requires a time-share order is no more than a rehash of its prior assertion that Section 73.561(b) is mandatory rather than permissive, a contention flatly rejected by the Commission in both hearing designation orders. Further, we accord with SPS that even if time-sharing were ordered because of temporal underutilization of the frequency, we would do no more than permit Straw to operate during the hours SPS was not then regularly using. See *Noncommercial Educational FM Broadcast Stations, supra*, 69 FCC 2d at 254-256, *on reconsideration*, 70 FCC 2d at 972-973, 982. Nothing in that document adopting Section 73.561(b), or in the rule itself, promotes Straw's intrepid *tour de force*, whereby it would unilaterally tailor the licensee's regular operating hours to fit Straw's desired form.

82. But for SPS's seven-month hiatus from its ordinary 84 hour per week schedule, no time-sharing issue would have been designated. *Hearing Designation Order*. Once the ephemeral nature of that dip was established, and SPS's regular 107 hour per week proposal established, no further consideration of Straw's preferred arrangement was necessary. Section 73.561(b) bespeaks solely of quantitative frequency utilization, not of qualitative comparisons. The latter evaluation is subsumed under the standard noncommercial comparative issue. Finding SPS's past and proposed hours of operation sufficient under the rule, this issue all but decides itself in favor of the licensee. While nothing enjoins Straw from continuing to negotiate with SPS towards a cooperative shared-use of its frequency, the choice remains with the licensee so long as it maintains an 84 hour per week operating schedule.

## V. ULTIMATE CONCLUSIONS

83. In the prologue to its exceptions, Straw vexes<sup>81</sup>:

This case opens Pandora's box, and out come the dreaded questions. What is noncommercial broadcasting? What determines whether a noncommercial broadcast station should receive a renewal expectancy? How should that renewal expectancy be weighted against Section 307(b) or comparative factors? What do the noncommercial comparative factors mean? How can they be applied in an even-handed fashion? When should time-sharing be ordered? What factors should be considered in setting the terms and conditions of a time-share arrangement? What ascertainment methods are required for noncommercial broadcasters?

This proceeding, as Straw fairly muses, has compelled us to burrow extensively into the various Commission policies covering noncommercial broadcasting. What we have found is that resolution of Straw's prefatory queries are not, in most instances, as perplexing as Straw portends, albeit not convenience-packaged in any single noncommercial comparative renewal case. The controlling law and policies are largely in place, if not in one place. We cumulatively recapitulate our determinations.

84. The Board has affirmed the ALJ's award of a strong renewal expectancy to SPS. The licensee has systematically ascertained the local needs and problems of its community of license, and it duly established a reasonable procedure for responding thereto with programming throughout the subject license term. Moreover, KNHC-FM served as an electronic outlet for local self-expression for several Seattle schools, its students, and others, including those catering purposefully to minority segments of the population. Its operating record is free of rule or policy violations. One contrapositive is the total replacement option offered by Straw. Like the ALJ, we have found that Straw has failed to thoroughly ascertain local needs and interests, as that term has been used consistently by the Commission, and greatly based its comparative candidacy upon mere "alternative" entertainment program preferences. This ranks it below SPS on prong (b) of the standard noncommercial comparative issue. Next, for the reasons we and the ALJ have discussed, the Board shall not credit Straw's requested comparative coverage preference; its technical proposal is, even at this

very late juncture, entirely too speculative to register. See also *supra* note 75. If, however, we were to register Straw's potential signal coverage advantage, Straw would be entitled to a moderate preference overall under the standard noncommercial comparative issue.

85. Even so, we have declined to impose either of the two time-sharing arrangements sought by Straw, which would coerce SPS to abandon up to 72 hours of the 107 hour week it has proposed, leaving SPS with only a 35 hour per week operating window. Although SPS did dip below 84 hours per week for seven months of the subject license term, this was a relatively brief interlude; and, since March 1983, SPS has operated regularly for more than 84 hours per week. Consequently, we do not believe that the triggering mechanism of Section 73.561(b) should be fired against the will of the licensee, especially in the illiberal manner proposed by Straw. That regulatory mechanism is tethered fast and solely to hours of operation, and not to extrinsic qualitative considerations. See *Hearing Designation Order*.

86. In the end, we have before us the periodically-filed license renewal application for KNHC-FM. In its initial installment of a pivotal comparative renewal contest, the court etched a governing principle for the edification of license renewal applicants, license challengers, and the Commission:

The only legitimate fear [of nonrenewal] which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

*Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61-62 (D.C. Cir. 1978). Where a noncommercial renewal applicant has not met Commission standards, we have replaced the incumbent with a license challenger. *KQED, Inc.*, *supra*. Here, we might by no objective appraisal grade the SPS license-term performance as "substandard"; it has kept faith with Commission canon, and could not have anticipated an afflictive treatment.

87. Furthermore, at the court's express invitation, *Pillar of Fire* has declared that even an otherwise wholly dispositive Section 307(b) advantage cannot defeat a well-earned license renewal expectancy. See 2 FCC Rcd at 520-521 & n.21. *A fortiori*, any lesser comparative signal coverage preference to Straw would be insufficient on this record to uproot KNHC-FM from the frequency it has occupied since 1971. As the ALJ reports, SPS has invested an enormous level of money and effort in its FM radio station, see *I.D.*, paras. 20-21, and no licensee that has utilized its investment in virtuous accord with Commission rules and public service policies should bear the unacceptable risk of consummate loss, simply because it might be technically trumped at renewal time. No reasonable person or entity would invest a dollar or a moment's labor were that a perpetually pregnant possibility. See *Chicago Federation of Labor, supra*; *Central Florida Enterprises*. Taken nearly at its most favorable, Straw's comparative proposal does not outweigh the SPS record of proven performance.

88. ACCORDINGLY, IT IS ORDERED, That the Joint Motion to Correct Transcript of Oral Argument filed on November 30, 1988 by Seattle Public Schools, Jack Straw Memorial Foundation and the Mass Media Bureau IS GRANTED; and

89. IT IS FURTHER ORDERED, That the application of Seattle Public Schools (File No. BRED-830922AQ) for renewal of license for noncommercial broadcast Station KNHC(FM), Seattle, Washington IS GRANTED, and the application of Jack Straw Memorial Foundation (File No. BPED-840103AR) IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal  
Member, Review Board

#### FOOTNOTES

<sup>1</sup> At the conclusion of the Board's oral argument, the parties were afforded two weeks within which, and under the auspices of the Mass Media Bureau, to reach an amicable settlement of this proceeding. Tr. of Oral Arg. at 2826-2829. However, by letter dated November 17, 1988, the Mass Media Bureau informed the Board that no settlement appeared feasible.

<sup>2</sup> In addition to SPS's KNHC-FM, the Commission has licensed KCMU-FM, 90.3 MHz, to the Regents of the University of Washington. BROADCASTING/ CABLECASTING YEAR-BOOK, 1988 at B-301-302. It appears that the University of Washington is also licensed to operate KUOW-FM, Seattle, on commercial frequency 94.9 MHz. *Id.*, at B-302.

<sup>3</sup> BROADCASTING/CABLECASTING YEARBOOK, 1988 at B-299.

<sup>4</sup> The Commission there noted that KNHC-FM had operated at least 12 hours per day from January 1, 1980 through August 31, 1982, and from April 7, 1983 through the pleading cycle in that decision. See 103 FCC 2d at 867 n. 4. The ALJ presiding over this case reported that, "since December 1983, the station has regularly broadcast 15-17 hours a day or 109 hours per week." *I.D.*, at para. 204 (citation omitted). *But see infra* notes 33 and 72.

<sup>5</sup> *I.D.* at para. 7 (quoting 60 RR 2d at 1076).

<sup>6</sup> See 60 RR 2d at 1075 n.8 (and cases cited therein).

<sup>7</sup> *I.D.* at para. 7 (quoting 60 RR 2d at 1076).

<sup>8</sup> Nor is a misrepresentation issue added by the ALJ against Straw based upon its representations concerning its transmitter site. *I.D.*, para. 263. That issue also was resolved in Straw's favor. *id.*, para. 266, and no exceptions have been lodged against the ALJ's conclusion on that issue. Any such potential exceptions are likewise waived.

<sup>9</sup> The recently decided *KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988) (applications for Comm'n review pending), did pit a noncommercial challenger against the incumbent noncommercial renewal applicant for Television Channel 32, San Francisco, California. However, in that case the incumbent licensee was disqualified on a misrepresentation issue, and there was no occasion to compare the competing applicants under the standard noncommercial comparative issue or to consider any renewal expectancy.

<sup>10</sup> See also Tr. of Oral Arg. of October 21, 1988 at 2735. However, Straw counsel qualified its acceptance of the renewal expectancy concept in this case by arguing that, if it is established that a share-time arrangement is warranted under 47 CFR §73.561(b), it is neither necessary nor proper to reach the

question of a renewal expectancy. Tr. at 2737-2738. We address this contention in our discussion of the time-share issue, *infra* para. 79.

<sup>11</sup> Straw Exceptions at 21, 25-26.

<sup>12</sup> *Id.*, at vi.

<sup>13</sup> *Id.*, at 26 (footnote omitted)(citing *I.D.*, paras. 24, 30).

<sup>14</sup> The italicized language was added by P.L. 97-35, August 13, 1981, 95 Stat. 357, 725. See Straw Exceptions at 21.

<sup>15</sup> Straw Exceptions at 21.

<sup>16</sup> SPS Reply at 21. *But cf. Multiple Ownership of Noncommercial Educational Radio and Television Stations*, 54 FCC 2d 941, 948 (1975)(Commission "would be concerned if a [noncommercial] station were used to simply mirror another station in a community). In context, however, it is apparent that the Commission was there discussing the problem of a single noncommercial licensee using several co-licensed frequencies for the identical programming, thus making inefficient use of the spectrum.

<sup>17</sup> See P.L. 90-129, November 7, 1967, 81 Stat. 365.

<sup>18</sup> See *Noncommercial Educational FM Broadcast Stations*, 69 FCC 2d 240, 241 (1978).

<sup>19</sup> See *Revision of FM Rules*, 21 RR 1655, 1657 (1961).

<sup>20</sup> Earlier in that same document, the Commission made plain that the essential statutory obligations of noncommercial broadcasters derive, as we suggested *supra*, para. 10, from Section 307 of the Communications Act. It repeated:

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility.

42 FCC 2d at 694 (quoting *En Banc Programming Inquiry*, 20 RR 1901, 1912 (1960)).

<sup>21</sup> *Sonnet 30*, l.1.

<sup>22</sup> See also *Deregulation Order*, *supra* para. 8. Because we are now reviewing the performance of KNHC-FM for the license period running from February 1, 1981 -January 31, 1984, we do not measure that station's performance by the deregulatory standards later adopted in June 1984. Our reference here is to that portion of the 1984 order detailing, yet again, the history of FCC regulation of noncommercial broadcasting and the wide latitude accorded on programming choices. See *id.*, at 750-752 (no changes in programming requirements which would impinge on First Amendment; Comm'n recognizes that "programming formats of these stations, as with many of their commercial counterparts, have become increasingly specialized, particularly in the case of radio).

<sup>23</sup> Straw Exceptions at 30 (citation omitted).

<sup>24</sup> BROADCASTING/CABLECASTING YEARBOOK, 1988 at B-301.

<sup>25</sup> In reviewing the Commission's decision in the comparative renewal case of *Simon Geller*, 90 FCC 2d 250, *recon. denied*, 91 FCC 2d 1253 (1982), the court noted that the incumbent licensee had broadcast virtually no issue-responsive programming

keyed to ascertained community needs, but it seemed to brush incidentally against the licensee's entertainment format in the following passage:

Focusing on the programming Geller proposed, the FCC concluded that Geller would not offer a new voice to the community because he offers "no voice at all." Therein must lie the conclusion that Geller's programming is of no value to the community, despite extensive testimony to the contrary. This type of *content evaluation* is exactly what we prohibited in *Central Florida I* [598 F.2d 37, 58-54 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979),] and *TV 9* [495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974)].

*Committee for Community Access v. FCC*, 737 F.2d 74, 80 (D.C. Cir 1984)(emphasis added). In context, however, it is clear that the court's critique was directed to the Commission's consideration of the licensee's past programming under the *structural* comparative criterion of diversification of media control; and the court's language, we believe, was not intended to be a comment, favorable or unfavorable, on that licensee's entertainment format.

<sup>26</sup> Again, however, the Commission's *Multiple Ownership* document was discussing the situation in which an educational institution was licensed to operate more than one facility in a single community (educational licensees are exempt from the FCC's ordinary multiple ownership rules, see 54 FCC 2d at 942-943), and the referenced language expressed the agency's concern that none of the frequencies held by the same licensee become a "step-child," as in *KQED, Inc.*, *supra* note 9. See also *supra* note 16. Here, SPS holds only one broadcast license, KNHC-FM.

<sup>27</sup> SPS Reply at 21 (footnote omitted; emphasis added).

<sup>28</sup> *Tr. of Oral Arg.*, *supra* note 10, at 2798.

<sup>29</sup> Many schools, for example, operate carrier current radio stations under Section 15.7 of the Commission's rules, 47 CFR §15.7. See *New York University*, 19 FCC 2d 378, 425 (ALJ 1968); see generally *Carrier - Current Radio Systems*, 28 FCC 2d 357 (1971). In addition, the Instructional Television Fixed Service provides channels for "a wide-range of educational and instructional service to . . . student populations." *School District No. 1 - Denver, Colorado*, FCC 88-332, released November 1, 1988, at para. 11.

<sup>30</sup> SPS's use of KNHC-TV as a "vocational training" classroom is not to be confused with the use made of noncommercial stations by some educational licensees for "in-school instructional programming." As iterated in our text, a great many educational institutions, including state educational authorities, early-on acquired noncommercial broadcast stations to disseminate instructional programming to matriculating students and to members of the public who might audit such programming. The Commission's noncommercial broadcasting rules expressly recognize this "in-house" instructional function in 47 CFR §73.503(b), which reads:

(b) Each station may transmit programs directed to specific schools in a system or systems for use in connection with the regular courses as well as routine and administrative material pertaining thereto and may transmit educational, cultural, and entertainment programs to the public.

The Commission has described such "instructional programming" as follows:

"Instructional (I) includes all programs designed to be utilized by any level of educational institution in the regular instructional program of the institution. In-school, in-service for teachers, and college credit courses are examples of instructional programs.

*Way of the Cross*, *supra*, 101 FCC 2d at 1371-1372 n.5 (citation omitted). SPS did not use KNHC-FM for "instructional" purposes as defined above, but as a laboratory classroom. The Board recognizes that "nice" renewal expectancy questions might someday arise where a noncommercial licensee has utilized its facility almost exclusively for "in-school instructional purposes." While the Commission has significantly deregulated noncommercial broadcast stations and has eliminated formal ascertainment requirements for all such licensees, *Deregulation Order*, *supra* para. 8, the Commission did "retain the basic issue-oriented programming responsibility" on all noncommercial licensees. *Id.*, 98 FCC 2d at 752. Noncommercial licensees that utilize their stations primarily for "in-school instructional programming" should be reminded that the Commission, long ago, published its expectation that "a station occupying [such] a frequency would use it to a reasonable degree to provide a service to the public." *Noncommercial Educational FM Broadcast Stations*, *supra*, 69 FCC 2d at 254 (emphasis added).

<sup>31</sup> Straw Exceptions at 32.

<sup>32</sup> *Id.*

<sup>33</sup> SPS Reply at 21-22 (footnote omitted). At oral argument, SPS counsel advised that KNHC-FM is currently operating 24 hrs. per day. Tr. of Oral Arg. at 2813. We do not here consider such post-term performance and agree with Straw's Exceptions (at 38) that, insofar as the ALJ might have considered the station's post-term performance in awarding a renewal expectancy, this was error. Straw is correct that, in general, a licensee's post-term performance cannot be considered to upgrade license term performance. See *Alabama Educational Television Commission*, 50 FCC 2d 461, 475-476 (1975); *Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1423-1424 (1978). In *United Broadcasting Company, Inc.*, 94 FCC 2d 938, 948-949 (Rev. Bd. 1983) (emphasis in original), the Board applied this principle in a comparative renewal case and held that "evidence accruing after the filing of a competitive application is *post litem motam* and thus entitled to reduced weight." Straw's competing application was here filed on January 3, 1984; evidence concerning SPS's performance after that date is entitled to scant recognition as regards past performance. However, the proposals of both applicants proffered under the standard noncommercial comparative issue are, necessarily, forward-looking, and we do take cognizance of those respective proposals in the comparative section of this decision.

<sup>34</sup> Mass Media Bureau Reply at 7.

<sup>35</sup> *Id.* As discussed *infra*, para. 81, we do not wholly agree with this latter contention.

<sup>36</sup> At some point, a severely truncated operating schedule could not but impact on the question of a licensee's overall service to its community.

<sup>37</sup> See Straw Exceptions at 1-2.

<sup>38</sup> In fact, to the extent that Straw complains that "SPS contracted away 28 hours a week of prime broadcast time" to SCCC, the Commission's policy statement in *Part - Time Programming*, 82 FCC 2d 107 (1980), also suggests that such ar-

rangements are now perfectly acceptable for commercial broadcasters, and noncommercial stations as well. See *id.*, at 118-119.

<sup>39</sup> Substantial differences in hours of operation are also considered, on a comparative basis, in contests for new broadcast stations. *Minneapolis Star & Tribune Co.*, 88 FCC 2d 1604, 1612 (Rev. Bd. 1982)(and cases cited therein).

<sup>40</sup> In footnote 8 of the *I.D.*, the ALJ indicated that the programming exhibits entered by SPS contained showings of material broadcast "through August 1986, the end of the last complete school year before the [exhibit] exchange date in this case." For reasons discussed more fully *supra*, note 33, no programming evidence arising after the filing of Straw's competing application (January 3, 1984) should have been given any extended consideration. The Board's review of the SPS past programming record concentrates on the 3-year license period, February 1981 - February 1984, and we therefore give no decisional attention here to the evidence summarized in paragraphs 167-206 of the *I.D.*

<sup>41</sup> Paragraph 108 of the *I.D.* samples such organizations:

Alcoholics Anonymous, American Cancer Society, American Heart Association, American Red Cross, CARE, King County (Seattle) Extension Services, King County (Seattle) Library System, Parent Teacher Student Association, Puget Sound League of Women Voters, Seattle Aquarium, Seattle Area Association of Black Accountants, Seattle Central Community College, Seattle Children's Theater, Seattle City Attorney, Seattle Commuter Pool, Seattle Consumer Action/Protection Network, Seattle Parks Department, Tacoma Youth Symphony, UNICEF, United Way, Washington Lung Association, Washington State Art Commission, and West Seattle Mental Health Center.

<sup>42</sup> Straw Exceptions at 26.

<sup>43</sup> *Id.* (emphasis added). This seems not to be so much a criticism of SPS's ascertainment efforts, but a defense of its own which the ALJ found deficient in his comparative analysis, see *I.D.* paras. 312-316, a matter we discuss *infra*, at paras. 67-68.

<sup>44</sup> Straw Exceptions at 33.

<sup>45</sup> *Id.*, at 27.

<sup>46</sup> As noted earlier (*supra* note 22), it was not until 1984 that the Commission completely eliminated its formal ascertainment requirement for noncommercial broadcasters.

<sup>47</sup> Straw Exceptions at 33.

<sup>48</sup> *Id.*, at 33-34 n.52.

<sup>49</sup> *King John*, act II, sc. 1, l. 466.

<sup>50</sup> Straw Exceptions at 27 (quoting 1976 *Ascertainment policy*).

<sup>51</sup> Straw Exceptions at 33 (citation and footnote omitted).

<sup>52</sup> Tr. of Oral Arg. at 2818-2819.

<sup>53</sup> So much so does the Commission regard regulatory compliance as a useful indicator of licensee performance, that it is currently mulling over a potential policy change whereby it would no longer consider at all a licensee's program performance, but would base any renewal expectancy entirely on "a licensee's overall record of compliance with the Communications Act and the Commission's rules and policies." See *Formulation of Policies And Rules Relating to Broadcast Renewal Applicants*, 3 FCC Rcd 5179, 5195-5196 (1988). It has also suggested that parties to ongoing comparative hearings might motion to apply its proposed renewal standards in any ongoing

renewal case, *see id.*, at 5197. We have received no such motion here, and do not apply any potential renewal policies proposed in this recent notice.

<sup>54</sup> We would also consider violations of any other laws or predictive character flaws, in consonance with the Commission's *Character Policy Statement*, 102 FCC 2d 1179 (1986).

<sup>55</sup> *See, e.g., Tele-Broadcasters of California, supra*, 58 RR 2d at 226-227 & n.11; *Pillar of Fire, supra*, 99 FCC 2d at 1261-1263 & n.16; *Intercontinental Radio*, 98 FCC 2d at 619, 620, 622-623, 625, 629-630, 635-636 & n.77, 643 & n.114.

<sup>56</sup> Indeed, inasmuch as the Commission has abrogated its program percentage guidelines, *Deregulation of Radio*, 84 FCC 2d 968, 975-983 (1981)(subsequent history omitted), and renewal applicants now merely file postcards without a proposed programming breakdown, *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49RR 2d 740 (1981), *recon. denied*, 87 FCC 2d 1127 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984), two of the key quantitative profiles we have consulted in prior comparative renewal cases will be difficult, if not impossible, to examine.

<sup>57</sup> In the atmospheric sense - of course.

<sup>58</sup> Straw Exceptions at 27-29.

<sup>59</sup> *Id.*, at 28-29.

<sup>60</sup> SPS Reply at 17 (footnote omitted).

<sup>61</sup> The court is familiar with the interplay between an incumbent licensee's past broadcast record and the standard comparative criteria applied in commercial contests. *See, e.g., Committee for Community Access, supra*.

<sup>62</sup> *Eligibility for Noncommercial FM and TV Broadcast Station Licenses*, 43 Fed. Reg. 30842, July 18, 1978 (*Notice of Proposed Rulemaking*). *See also Way of the Cross, supra*, applying these eligibility standards.

<sup>63</sup> Straw Exceptions at 24.

<sup>64</sup> SPS Reply at 13-14 (footnote omitted).

<sup>65</sup> Straw Exceptions at 45.

<sup>66</sup> Again, Shakespeare, *A Midsummer-Night's Dream*, act V, sc. i, l. 272.

<sup>67</sup> As did the ALJ, *see I.D.*, para. 305.

<sup>68</sup> Straw Exceptions at 26.

<sup>69</sup> *Id.*, at 27.

<sup>70</sup> In light of the Commission's 1984 *Deregulation Order*, and particularly that portion eliminating the need for formal ascertainment, *see* 98 FCC 2d at 752-754, we regenerate our suggestion that the Commission revisit the noncommercial comparative issue with an eye towards reconciliation. In this case, we are operating under the 1976 noncommercial *Ascertainment* regime; in any future cases, the *Deregulation Order* language could create even further confusion as to the current intent of the second prong of the noncommercial comparative issue.

<sup>71</sup> This testimony is supported by the station's logs. SPS Exh. 1, Attachment D, at 37-38.

<sup>72</sup> As discussed at note 33, *supra*, SPS counsel represented that KNHC-FM has been most recently operating 24 hours per day, but SPS made no such proposal with its application, and this later figure will not be counted for comparative or time-share purposes.

<sup>73</sup> Straw will provide a first noncommercial educational service to 11,778 persons and a second such service to 81,314 persons whereas the School System will provide no first service

and a second service to 15,378 persons. Overall, Straw will serve a population of 1,878,765 as compared to 1,261,824 by the SPS. *I.D.*, paras. 223-224.

<sup>74</sup> Straw Exceptions at 18; *see id.*, at 13-20.

<sup>75</sup> At the very most, we believe that Straw would be entitled to the type of "conditional" coverage preference we have sanctioned in the recent cases of *Newton Television Ltd.*, 3 FCC Rcd 553 (Rev. Bd. 1988), and *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240 (Rev. Bd. 1987), *rev. granted in part and denied in part*, 3 FCC Rcd 4522 (1988). In both, the Board awarded coverage preferences, subject to the potential consent of unrelated government agencies that had not yet approved of the applicants' respective technical proposals. While we have awarded "conditional" comparative coverage preferences in contests for new broadcast stations, where the risks of a failure of the condition subsequent are delay and a possible vacation of our Construction Permit award, *see Newton Television*, at 557, the risks to the public and burden on an otherwise satisfactory incumbent licensee, based on a "conditional" comparative coverage preference to its challenger, are manifest. Only in highly unusual situations should a "conditional" comparative coverage preference be contemplated in a comparative renewal setting.

<sup>76</sup> Straw Exceptions at 39.

<sup>77</sup> *Id.*, at 40.

<sup>78</sup> *Id.*, at 41.

<sup>79</sup> *Id.*, at 41-42. It is represented, however, that three of Straw's time-share options were not proffered to the ALJ. SPS Reply at 24.

<sup>80</sup> SPS Reply at 23 (quoting *Memorandum Opinion and Order, supra* para. 4, 60 RR 2d at 1075).

<sup>81</sup> Straw Exceptions at vi.