the policy and regulatory landscape

Since the beginning of the Republic, government policies have affected—sometimes profoundly—the evolution of the news media. What follows is a description and evaluation of FCC and other governmental policies that have shaped—and that continue to shape—the news media landscape and the provision of civically important information to citizens on a community level and nationwide. We focus on those policies that relate to the concerns raised in Part One, especially regarding the health of local information, news, and journalism.

We have tried to critically evaluate the FCC's own role. While some FCC policies have helped, some have not—and crafting sound policy going forward requires the Commission to understand why. Sociologist Paul Starr has argued that we are currently in a rare "constitutive moment," when today's decisions will shape media industry evolution for decades to come. Given the seismic nature of today's changes, it is imperative that we be conscious of what our policies are and what they are attempting to achieve.

In general, our review indicates that: 1. some current FCC policy is not in synch with the nature of modern media markets; and 2. many of the FCC's current policies are not likely to help communities and citizens get the information they need.

26 Broadcast Radio and Television

THERE IS NO DOUBT THAT FCC POLICIES have played a profound role in the development and growth of the modern broadcasting industry from its earliest days. Historically, some of the most significant Congressional and FCC policies were:

Promoting the creation of national radio networks: In 1928, the Federal Radio Commission, the FCC's predecessor, set aside national "clear channels" to allow for the creation of national radio networks. This allowed business models to develop more quickly since radio stations could attract national, not just local, advertising. These radio networks—the National Broadcasting Company and the Columbia Broadcasting System—later became the TV networks that set the course for the future of TV.

Licensing stations locally, creating a nationwide system: While allowing for the creation of national radio networks, Congress and the FCC decided to award TV licenses locally, not nationally (as has been done in many other countries). To do this, and ensure nationwide availability, FCC engineers worked for years to define the contours of lo-

cal stations and resolve interference issues. Licensing stations locally was intended to promote the availability of locally oriented content, competition, and control.

Setting aside spectrum for noncommercial use: In 1952, the FCC set aside 242 television channels for educational use, and historically the Commission has sought to reserve approximately 25 percent of television channels for noncommercial educational use. Had it not, the public broadcasting systems might never have developed.

Ownership rules: While some argue that FCC ownership rules have led to massive consolidation with baneful results and others insist that they have facilitated greater market efficiencies with beneficial results for the public, few disagree that they have had a significant impact.

Must-carry rules: In general, Congress required major cable providers to set aside up to one-third of their channel capacity for local broadcast stations. This dramatically increased the leverage of broadcasters in the cable industry's early days, and probably protected the primacy of local TV news shows.

Digital and high-definition television: Between 1987 and 1997, the FCC adopted a series of decisions that began a transition from analog to digital television, paving the way for reallocation of 108 MHz of spectrum from television to other valuable uses.³

In addition to these decisions that shaped the *structure* of the broadcasting industry, a parallel track of regulations, in some form or another, has affected how content is developed and distributed. The government has played a greater role in shaping content in the broadcast industry than it has in the print industry for a simple reason: While the printing press belongs to private owners, the airwaves belong to the public. Because there is a finite amount of spectrum, and a much greater demand for licenses than can be accommodated, policymakers beginning in the 1920s had to decide who would get the spectrum and for what use. After all, if one broadcaster received a license it meant

another could not have it, so it made sense to oblige those authorized "speakers" to meet broad community needs. Policymakers adopted a "trustee" model, in which, in exchange for public spectrum, broadcasters were required to serve public service goals. Companies that subsequently bought these stations did pay for them but that did not absolve them from having to fulfill the attendant public interest obligations.

Yet, even though broadcasting was born with government help—based on a grant of airwaves from the public—once it took its first breath, it in some ways became "the press." As such, broadcasters have, and should have,

special protections under the First Amendment, although these protections are less rigorous than those afforded other media such as newspapers. Hence, government regulation of broadcasting is sometimes appropriate, yet always circumscribed. Courts and Congress have, at various points, reaffirmed the FCC's authority to consider program content in the exercise of its licensing function but to what extent and in what manner has been open to near constant debate. Over time, the combination of new court rulings and changing market forces have made policymakers less and less comfortable with highly prescriptive requirements. One court described the balancing act:

"[T]he Commission walks a tightrope between saying too much and saying too little. In most cases it has resolved this dilemma by imposing only general affirmative duties—*e.g.*, to strike a balance between various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties, and on application for renewal it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made."

Questions abound. Among them: When, if ever, is it permissible or wise to regulate content? What are the limits? What governmental actions indirectly affect content? These questions have challenged media policymakers for decades. In some cases, governmental involvement is not appropriate; in others it may be unnecessary and unwise; and in yet other instances, it depends on the circumstances. We discuss three sets of rules that illustrate this point: We look at sponsorship identification and disclosure rules as an example of regulation that potentially promotes a vigorous and informative press by requiring transparency. We consider the Fairness Doctrine as an example of governmental action that would likely harm the development of a robust media. Finally, we delve even more thoroughly into the issue of the public interest obligations of broadcasters.

The Fairness Doctrine

The roots of the Fairness Doctrine go back to the Federal Radio Commission's 1929 *Great Lakes Broadcasting* decision, which denied licenses to a labor union-controlled radio station, on the grounds that "the public interest requires ample play for the free and fair competition of opposing views." In 1940, the FCC went further and decided that, because the public interest required stations to present "all sides of important public questions fairly, objectively and without bias," stations must agree not to editorialize. The FCC stated that, "radio can serve as an instrument of democracy only when devoted to the communication of information and exchange of ideas fairly and objectively presented." As a commenter has noted, "[l]icensees were thus put on notice that advocacy broadcasting would not be tolerated." This speech-restrictive approach lasted eight years.

In order to ensure that broadcasters covered important issues in their programming, and did so in a balanced manner, in 1949 the Commission introduced what has become known as the Fairness Doctrine. In its Report on Editorializing By Broadcast Licensees, the Commission stated, "the public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies to all discussion of importance to the public."

It established a two-part obligation for broadcasters:

- > provide coverage of vitally important controversial issues of interest in the community served by the station; and
- > afford a reasonable opportunity for the presentation of contrasting viewpoints.

Stations were given wide latitude in deciding how they would present contrasting views; for instance, they might air segments during news or public affairs programs or broadcast distinct editorials. No particular party had a right to reply to an issue covered by the station. Rather, the station simply had to ensure that contrasting views on the issue were aired. But, a party that believed that a station had failed to honor this obligation could file a complaint with the Commission, which would be decided on a case-by-case basis. In time, two related rules were adopted: the "personal attack rule," which required that when an attack was made on someone's integrity during a program on a controversial issue of public importance, the station had to inform the subject of the attack and provide the oppor-

tunity to respond on the air; and the "political editorial rule," which required a station that had endorsed a particular candidate for political office to notify the other candidates for that office and offer them the opportunity to respond on the air. These rules applied to broadcast TV and radio, but not to cable or satellite.

In 1969, in *Red Lion Broadcasting Co. v. FCC*, the Supreme Court ruled that the Fairness Doctrine was constitutional, concluding that the print and broadcast media were inherently different in terms of regulatory First Amendment considerations, especially given the scarcity of available broadcast spectrum. The Court held, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

As part of its 1980s deregulation of broadcasting, the Commission abolished the Fairness Doctrine, concluding after an inquiry that "the requirement that broadcasters provide balance in their overall coverage of controversial public issues in fact makes them more timid than they would otherwise be in airing programming that involves such issues." The Commission's inquiry had provided numerous examples of this "chilling" effect, including Dan Rather's recollection of his time as a young reporter working at a radio station owned by the *Houston Chronicle*:

"I became aware of a concern which I previously had barely known existed—the FCC. The journalists at the Chronicle did not worry about it: those at the radio station did. Not only the station manager but the news people as well were very much aware of the Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsroom has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost." Is

Since that time, lawmakers have periodically attempted—unsuccessfully—to enact legislation to reinstate the Fairness Doctrine. Furthermore, in 2000, the Commission eliminated the "personal attack" and the "political editorial" rules after the D.C. Circuit Court of Appeals had issued a *writ of mandamus* directing it to do so. ¹⁴ All of the current commissioners are on record as opposing its reinstitution. For instance, Chairman Genachowksi told a Senate Committee in 2009: "I don't support reinstatement of the Fairness Doctrine. I believe strongly in the First Amendment. I don't think the FCC should be involved in censorship of content based on political speech or opinion."¹⁵

Although the Fairness Doctrine is not in effect, it is referenced in the FCC's written rules. *Section 73.1910 of the Commission's Rules states* that:

The Fairness Doctrine is contained in section 315(a) of the Communications Act of 1934, as amended, which provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.¹⁶

It is unclear why the Commission did not eliminate this when it repealed the Fairness Doctrine policy. The sentence has no force of law or policy import, but, it should be said, the language remains "on the books."

It is our view that its reinstatement would most likely chill the robust broadcast discussion of critical issues, because stations would simply avoid addressing controversial issues in their programming rather than risk Commission sanctions for their failure to have allowed all interested parties an opportunity to respond. With the growth of additional media sources, such as cable, satellite, and more recently the Internet, Commission regulation in this sensitive area seems particularly unnecessary and unwise.

Disclosure Rules and On-Air Deception

The FCC has established as a central principle that "listeners are entitled to know by whom they are being persuaded." This concept is at the heart of several rules governing on-air disclosure.

Beginning with the Radio Act of 1927, Congress required broadcasters to identify their sponsors. In 1969, the FCC applied similar disclosure rules to cable operators for programming they create. Significantly, the rules do not prohibit the use of sponsored material; they only require identification of the sponsor.

Broadcasters and cable operators must identify sponsors and advertisers at the time of airing of any programming for which consideration has been received or promised. The relevant statute, section 317(a)(1) of the Communications Act, provides:

"All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person."²⁰

The Commission only requires that the announcement occur once during the programming and remain on the screen long enough to be read or heard by an average viewer, although somewhat more rigorous identification rules apply to sponsored political speech.² Other decisions are left to the "reasonable, good faith judgment" of the licensee.²

Stations are not required to post the disclosure on their website.²³

To make sure that broadcasters have the information necessary to decide whether sponsorship announcements are needed, station employees have a legal duty to notify the station management if they accept any gifts or compensation in exchange for agreeing to run programs.²⁴

A particularly troubling development in recent years has been the rise of sponsored news stories, characterized by some as "fake news stories" or "pay for play." (See Chapter 3, Television.) In the Television chapter, we saw some cases in which broadcasters appear to have entered into agreements with sponsors to run news stories promot-

ing the sponsors' products or services, without disclosing such agreements on the air.²⁵ The Enforcement Bureau recently entered into a consent decree with a broadcaster accused of airing particular news stories on behalf of a sponsor without appropriate sponsor identification.²⁶ "The evidence we've seen suggests that this is much more widespread than a few years ago," says Tom Rosensteil, director of the Pew Project on Excellence in Journalism. "That's what I'm hearing from news directors."

These cases often rely on the Enforcement Bureau getting written evidence of quid pro quo, which is hard to come by. The Bureau usually begins investigations on the basis of complaints filed. Those wanting to file a complaint can do so confidentially if they call

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the Enforcement Bureau, but the web-based complaint system currently has no way to ensure the confidentiality of emailed tips.

In addition, the penalties for such violations can be small. The base-level "forfeiture" per violation of the sponsorship-identification rules is \$4,000.²⁸ Moreover, the pay-for-play disclosure rules do not apply to most programming on cable. The only exception is programming that is directly controlled by a cable operator, such as a local all-news station.

Sponsorship identification rules also govern the airing of video news releases (VNRs), described in Chapter 3, Television. With VNRs, sponsors create video clips that look like news stories, though they may use actors to play reporters. Some studies have indicated that in many cases, stations do not identify the nature or provenance of the VNRs. The FCC recently issued two Notices of Apparent Liability against TV stations for violating sponsorship identification rules—one for a station that had aired a VNR produced by General Motors and another for the airing of a VNR by the maker of a cold remedy. In both cases, the stations were fined \$4,000.

However, some argue that such enforcement actions violate First Amendment rights. FOX argued that its running VNRs did not violate sponsorship ID rules since it did not get paid to air them. FOX also objected "to the issuance of the Commission's Letter of Inquiry and to the Commission's attempt to encroach upon broadcasters' discretion in making editorial choices about what news to cover and how to produce local newscasts." FOX continued:

"[ne]ws content lies at the very heart of the First Amendment...intrusive inquiries tread heavily on the core constitutional principles of freedom of speech and freedom of the press...Faced with invasive inquiries into the newsgathering process, broadcasters likely will self-censor and eschew perfectly legitimate speech." The Fox case remains pending.

Another type of disclosure rule attempts to force transparency regarding the origins of aired programming.³³ For instance, in 2007, the Enforcement Bureau issued a citation to the television personality Armstrong Williams and his production company for failing to disclose to TV stations that aired Williams' program that he had received

compensation from the U.S. Department of Education in exchange for his favorable on-air comments about the No Child Left Behind law.³⁴ Though the Bureau concluded that the stations airing Williams' comments had not violated any FCC rules, stations do have an obligation to exercise "reasonable diligence" to learn of financial arrangements affecting the content³⁵ and disclose those arrangements to the public.³⁶

Finally, FCC rules call for disclosure of any programming sponsorship, including "product placement" and "embedded advertising," that is done in exchange for money, service, or other forms of payment. A 2006 survey showed that out of 251 television news directors, 12.4 percent said they were either already doing or considering doing product placements within their newscasts.³⁷ FITM (Fairness and Integrity in Telecommunications Media) also provided research on embedded advertising (including references to McDonald's coffee being placed on local newscasts and Starbucks paying to have its products appear on an MSNBC cable newsmagazine show).³⁸ (See Chapter 3, Television.) The National Association of Broadcasters (NAB) and others responded that the public is not being deceived or misled because stations generally provide disclosures through on-air announcements and on-screen graphics.³⁹

The "Public Interest" Standard

The notion of imposing a public interest obligation on broadcast station operators was first put forth officially by Herbert Hoover in 1924. As secretary of commerce for Republican President Calvin Coolidge, Hoover argued that radio "is not to be considered as merely a business carried on for private gain.... It is a public concern impressed with the public trust and is to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our public utilities." In 1925, the Fourth Radio Conference, a gathering of congressmen, government officials, radio industry professionals, academics, and private citizens, accepted Hoover's "public interest" concept, and recommended that licenses be issued only to those who will "render a benefit to the public; or are

Radio, Herbert Hoover argued, "is not to be considered as merely a business carried on for private gain...[It] is to be considered primarily from the standpoint of public interest."

necessary in the public interest; or are contributing to the development of the [broadcast] art."⁴¹ NAB supported the idea, declaring, "The test of the broadcasting privilege [must] be based on the needs of the public served by the proposed station."⁴²

In response to complaints about scarce spectrum, Hoover attempted to remedy interference problems by reallocating some of the spectrum and denying some license applications.⁴³ Court rulings blocked these remedial efforts.⁴⁴ At the same time, intolerable levels of interference were experienced in many major urban areas, in some cases making transmission virtually impossible. Under these circumstances, Congress

passed the Radio Act of 1927, which created the Federal Radio Commission, giving it broad authority to classify stations, prescribe the nature of service to be provided, assign frequencies, determine transmitter power and location, and issue regulations to avoid interference.⁴⁵ What is more, it required that stations must serve "the public interest, convenience or necessity"—a phrase whose ambiguity would loom over communications policymaking for the next 80 years.⁴⁶

Although the Radio Act did not provide a public interest definition, it established a clear—and dramatic—principle for policymakers: these were "the public's airwaves"—and no person or corporation could own the electromagnetic spectrum flowing through the air, any more than it could own the air itself.⁴⁷

As a result, there would be a quid pro quo for the government's grant of spectrum use. The public, with the government as its agent, would hand over—*gratis*—a license to use its airwaves to operate a radio station for a fixed period of time. In exchange, the lucky recipient of this extremely lucrative asset would operate the station as a trustee for the public that owned its spectrum, with the obligation to perform certain functions for the greater good beyond merely airing entertainment programming. Congressman Wallace H. White, a sponsor of the Radio Act, commented, If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

In 1933, Franklin Roosevelt's administration sought to remedy deficiencies in the Radio Act by enacting the Communications Act of 1934, which created the Federal Communications Commission. The Communications Act announced the "criterion governing the exercise of the Commission's licensing power" using, once again, the phrase

"public interest, convenience and necessity." The Act also contemplated the application of this "public interest" standard, beyond licensing and interference issues, to also govern programming issues and those of licensee conduct. 22

Defining the Public Interest

During its early days, the Commission was quite prescriptive in defining how broadcasters should meet what came to be known as "public interest obligations." In a 1939 memorandum, the FCC listed 14 specific kinds of programming material or practices not deemed to be in the public interest, including defamation, racial or religious intolerance, obscenity, and excessive playing of recorded music to fill airtime.⁵³

On March 7, 1946, the Commission issued one of its first major policy statements on broadcast programming: a 59-page internal document entitled *Public Service Responsibility of Broadcast Licensees*. This so-called Blue Book encouraged stations to air programming of local interest and that stimulated public discussion, noting in particular the importance of news and information programming:

"American broadcasters have always recognized that broadcasting is not merely a means of entertainment, but also an unequaled medium for the dissemination of news, information, and opinion, and for the discussion of public issues.... Especially in recent years, such information programs and news and news commentaries have achieved a popularity exceeding the popularity of any other single type of program. The war, of course, tremendously increased listener interest in such programs; but if broadcasters face the crucial problems of the post-war era with skill, fairness, and courage, there is no reason why broadcasting cannot play as important a role in our democracy hereafter as it has achieved during the war years."54

The Commission concluded that it needed to look not only at technical issues but also "the broadcaster's service to the community" and that "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." The FCC emphasized the health of *local* media. Each station was licensed to a particular community and was required to provide service to that specific community. The process by which stations determined these local needs became known as "ascertainment." The Commission outlined 14 "major elements" of programming that are generally necessary in the service of the public interest, but noted that they "are neither all-embracing nor constant:"

"(1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs." ⁵⁸

A premise of all these rules is that the "trustee" obligations of broadcasters meant that they were required to provide programming beyond what the market would normally produce. Policymakers implicitly were taking the position that some types of programming ought to be provided—and are good for a community—even if there isn't a large enough consumer demand to lead to its provision in a pure free market.

"Ascertaining" Community Needs

Throughout the 1960s and 1970s, great emphasis was placed on prodding stations to *find out* community needs, so the stations themselves could then better serve them. The Commission's 1971 *Primer on Ascertainment of Community Problems by Broadcast Applicants* gave detailed instruction on how to determine community needs.⁵⁹ Notably, the *Primer* stated that the purpose of the ascertainment process was to help a station determine what the important issues were, which was different from determining what programming might be most popular.⁶⁰ The *Primer* got quite granular, requiring principals and management-level employees to personally speak with community leaders.⁶¹ The goal was not for the FCC to determine what the significant local problems were, but rather to insure that the stations themselves were doing so, and then, at their discretion, producing relevant programming.

Beyond "ascertainment," the FCC ultimately tried to encourage a minimal level of non-entertainment programming. In 1973, the Commission revised its regulations in order to place initial determination of license renewal

The National Association of Broadcasters supported the idea of public interest obligations: "The test of the broadcasting privilege [must] be based on the needs of the public served by the proposed station."

applications of TV stations maintaining 10 percent or more of "non-entertainment" programming in the hands of the chief of the Commission's Broadcast Bureau, thereby avoiding a more time-consuming and complex analysis by the Commission itself. So, if a station broadcast from 6:00 a.m. to midnight (18 hours), 10 percent would amount to one hour and 48 minutes per day. (The corresponding percentages were 8 percent for AM radio, 6 percent for FM. In 1976, the Commission amended these non-entertainment programming guidelines for commercial television, to require Commission action if the station had aired less than a total mix of 5 percent local and 5 percent informational (news and public affairs) programming per hour as part of its 10 percent non-entertainment programming. Set

Throughout this period, some broadcasters bristled at the detailed nature of the guidelines, for instance being forced to meet with particular groups. And, in hindsight, it seems the government proffered jarringly detailed judgments about how a station's management ought to do its business, interact with its community, and cover stories.

On the other hand, some who worked in the industry at the time argue that the requirement that stations make affirmative efforts to "ascertain" community needs had a positive effect. Steve Schwaid, who has spent three decades in broadcast news and is currently director of news and digital content at WGCL-TV in Atlanta, says ascertainment lunches were valuable:

"You listened to what people were talking about and hearing, what they wanted to discuss. That gave you an idea of what the stories were. The problem with newsrooms today is that we live in a bubble. We are in a newsroom all day long; we see the same sort of stuff all day long. Sometimes we try not to, but we worry more about what the other guy is covering. I think we have lost touch. Local stations as a whole can do a better job of being in touch with their communities. The ascertainment requirement forced them to do so."65

It is hard to conceive of it now, but media companies did not always expect news programs to turn a profit; they were viewed as part of the price of getting the license. Lee Giles, a 35-year broadcast pioneer who served as vice president and news director of WISH-TV in Indianapolis and is a member of both the Indiana Journalism Hall of Fame and the Indiana Associated Press Hall of Fame, puts it this way: "We all really felt that we were privileged to cover news for the public. I did operate in the public interest and necessity, and felt that was my mandate and charge to do so. Back then it made us conscious of our obligations. It kind of permeated all of what we were doing." 66

Gayle Eichenthal, who spent nearly 35 years with all-news commercial radio station KNX-AM and public radio station KUSC in Los Angeles, describes the impact of the ascertainment rules, from her firsthand perspective:

"We were so focused on the community. We were reporting every single aspect of the infrastructure of the city and surrounding cities...how do people live, what's happening with labor, what's happening with the arts, what's happening with housing, and every single aspect of the community. The assignment editor had a tremendous sense of responsibility in his position and he took it like it was a life's work to cover the people of the city and the city itself and to serve people by doing that." 67

In the 1980s, the regulatory tide dramatically shifted, first under Jimmy Carter's FCC chairman, Charles Ferris, and then under Mark S. Fowler, appointed by Ronald Reagan. In 1981, Fowler argued that television was "just another appliance. It's a toaster with pictures. We've got to look beyond the conventional wisdom that we must somehow regulate this box." In his view, the public interest would be determined by "the public's interest": if the public did not like the way a broadcaster was operating its station, people would stop watching or listening, and, without the sufficient numbers of eyes and ears, advertisers would stop providing the station revenue. The operation would fail without the need for government safeguards or intervention. By eliminating many broadcast regulatory requirements and instead providing licensees with flexibility, he believed that stations would experiment and innovate more. The Commission then initiated a series of changes, some of which went as far as Fowler's initial rhetoric, some of which did not.

Two broad exceptions to the deregulatory policies Commission rules regarding political programming and children's television. FCC guidelines provide that commercial broadcasters can satisfy their duty to serve the needs of their child audiences by offering at least three hours a week of programs that serve the educational and informational needs of children aged 16 and under. Broadcasters must file quarterly reports describing the children's educational programming they offer. FCC rules also limit the use of commercials during children's programming.

Radio Deregulation

In 1981, led by Charles Ferris, the chairman appointed by Democratic President Jimmy Carter, the FCC deregulated radio. It determined that the public interest would be served by eliminating what it characterized as "unnecessarily burdensome regulations of uniform applicability that fail to take into account local conditions, tastes or desires." Specifically, the Commission moved to:

- > eliminate the license-renewal guideline requiring that stations have a certain percentage of non-entertain-ment programming, while retaining a general licensee obligation that stations offer programming responsive to local issues.[™] It agreed that citizens needed to "be well informed on issues affecting themselves and their communities. It is with such information that the citizenry can make the intelligent, informed decisions essential to the proper functioning of a democracy." But, it concluded, "stations will continue to present such programming as a response to market forces."
- eliminate its formal ascertainment requirements, while stressing that "broadcasters should maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station's attention. What is not important is that each licensee follow the same requirements dictating how to do so."" Accordingly, in place of formal ascertainment, it required that new stations explain in their license application how they would carry out their obligation to determine issues facing their communities "by any means reasonably calculated to apprise them of the issues." Thus, ascertainment changed its stripes but did not disappear.

In 1996, policymakers
lengthened the license term
from three years to eight
and effectively eliminated
competition for licenses
between existing and would-be
broadcasters as an important
element.

> conclude that while all radio stations were expected to continue to air non-entertainment programming that addressed community needs, each station's programming need not be all things to all people. If station X was providing news, station Y need not:

"We do not expect broadcasters to fit their non-entertainment programming into a mold whereby each station has the same or similar amounts of programming. Other than issue responsive programming, stations need not, as a Commission requirement, present news, agricultural, etc., programming.

"We believe the record...demonstrates that stations will continue to present such programming as a response to market forces.... We do not expect radio broadcasters to attempt to be responsive to the particular problems of each group in the community in their programming in every instance. We do not expect radio broadcasters to be responsive to the Commission's choices of types of programs best suited to respond to their community. What we do expect, however, is that marketplace forces will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster guided by the tastes, needs, and interests of its listenership. We do expect, and will require, radio broadcasters to be responsive to the issues facing their community."

The Commission would defer to broadcasters' judgments about what actions best met community needs and limit itself to determining whether such judgments were 'reasonable':

"In other words, radio broadcasters will have what we believe to be the maximum flexibility under the public interest standard

- > eliminate its renewal guidelines on the maximum number of commercials that could be aired, again largely on the grounds that if a station went overboard with commercials, listeners would punish them it by changing the channel.81
- eliminate its requirement that licensees maintain and make available to the public and to the FCC detailed programming logs, which provided a comprehensive record of the amount, nature, and timing of every specified program type. ⁸² Broadcasters had complained that "the logs posed a tremendous record keeping burden...." ⁸³ Instead, the Commission would require stations to file annual issues/programs lists, noting five to 10 issues that the licensee had covered, along with examples of the related programming it aired.

When a station failed to meet these stripped down obligations, members of the public would bring the station's shortcomings to the attention of the FCC in petitions to deny their renewal applications and by registering complaints with the Commission.

A number of parties, including the Office of Communication of the United Church of Christ, objected to the new rules. In 1983, the United States Court of Appeals for the D.C. Circuit largely upheld the Commission's order—but asserted that even the new deregulatory rules required stations to meet public interest goals. With regard to the elimination of the renewal application processing guidelines, it found that, "contrary to the dire intimations of some petitioners, the Commission has not effectively foresworn all regulation of non-entertainment programming in favor of total reliance on marketplace forces." It concluded that the Commission had retained "an obligation to provide programming responsive to community issues," which it characterized as "a reasonable interpretation of the statutory public interest standard." The court similarly found that the Commission was within its jurisdiction in eliminating ascertainment procedures and commercialization application processing guidelines.

However, the Court did find fault with the Commission's elimination of the requirement that stations maintain programming logs and make them available to the public, especially given that the FCC was relying on private citizens to police the behavior of local stations:

"Th[e] proposed renewal scheme would place a near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations. That the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a *prima facie* case in such petitions seems almost beyond belief."⁸⁷

The court and the Commission went back and forth until the FCC ultimately modified its rule to require that radio licensees maintain "quarterly lists of programs, which in the exercise of the broadcaster's good faith judgment represent the most significant treatment by the station of the issues that the licensee believed to be a community concern."

Television Deregulation

Mark Fowler, the FCC chairman appointed by President Reagan, sought to further the deregulatory efforts begun under Ferris. In 1984, the Commission deregulated TV in much the same manner it had radio: It eliminated programming guidelines, commercial limits, ascertainment, and the program logging requirement, replacing the latter with a quarterly issues/programs list requirement. As it had with radio, the Commission stressed that TV stations were still required to "provide programming that responds to issues of concern to the community." However, as it had in the *Radio Deregulation Order*, it reiterated its belief "that the market demand for informational, local and non-entertainment programming will continue to be met as the video marketplace evolves." In this regard, as it had for radio, the Commission held that not all TV stations had to offer a full complement of non-entertainment programming:

"[T]he failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations. In this respect, market demand is determining the appropriate mix of each licensee's programming.... We believe that licensees should be given the flexibility to respond to the realities of the marketplace by allowing them to alter

the mix of their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but poses no real risk to the availability of these types of programming on a market basis. This is particularly true in view of the continuing obligation of all licensees to contribute issue-responsive programming and their responsibility to ensure that the strongly felt needs of all significant segments of their communities are met by market stations collectively."91

It added that the issues/programs lists would provide the public and the FCC with the information needed to assess licensees' performance under this new regulatory scheme, and that "procedures such as citizen complaints and petitions to deny will continue to function as important tools in this regard." The FCC extended the same policy changes to public radio and TV broadcasters. (See Chapter 30, Nonprofit Media.)

Over the years, the FCC developed a "comparative renewal" system for when more than one party wanted a license. In theory this added a healthy element of competition. But the process had its limitations. Incumbent licensees' actual performance records were being judged against the non-binding promises of prospective future license-

Under the heading of "community involvement," one station listed, "America's Next Top Model Casting Call at Seven Sushi Ultralounge sponsored by Sunny's Hair and Wigs." holders. This led to concern that competing applicants were gaming the system to extract "greenmail" settlement payments from incumbent licensees.⁹⁴

In the Telecommunications Act of 1996, Congress addressed license renewal issues by taking two important actions. First, it lengthened the license term from three years to eight years for both radio and television stations,⁹⁵ thus providing tremendous security and stability to incumbent licensees. Second, Congress eliminated the comparative license renewal process for commercial stations and formally required the Commission to consider competing applications only after first finding, pursuant to certain statutory factors, that the incumbent's license should

not be renewed. Through these actions, policymakers effectively *eliminated competition* for licenses between existing and would-be broadcasters.

Its license renewal application, FCC Form 303-S, asks applicants to certify that they filed their issues/programs lists as required, ⁹⁷ but it does not ask for any programming information itself.

Enforcing "Public Interest" Rules: Theory and Practice

In reviewing the history of the public interest obligation, we found that the deregulatory principles espoused were not always put into practice.

Some Stations' "Issues/Programs" Lists Are Impressive, Some Are... Not

As noted above, after radio and television deregulation, all stations, even those that do not do news, have one concrete obligation. They are required to file an issues/programs list each quarter describing their "programs that have provided the station's most significant treatment of community issues during the preceding three month period." In theory, the existence of this requirement might encourage stations to offer non-entertainment programming—such as news, public affairs, and governmental coverage—that is relevant to the local community.

But several factors have conspired to make this unlikely.

First, the FCC rarely sees these lists, which licensees *do not file with the FCC*. Stations are required to prepare and file them in their public inspection files, ostensibly so members of the public can review them. In its renewal application, a station must certify that its public file is in order, was updated in a timely manner, and contains all required materials, including the issues/programs lists.⁹⁹ If it checks that box, and no filings have been received from the public challenging the licensee's public interest performance, it is deemed to have met this basic obligation. In other words, in almost all cases, what FCC officials see is not the issues/programs list but a sheet saying that such a list exists.

And, in cases in which the box is not checked or someone complains or the licensee otherwise discloses that it has not included all of the required lists in the public file, a nominal monetary forfeiture is imposed and the renewal is then granted.

Second, in part because it almost never sees the lists, the FCC has given stations little ongoing guidance on what is supposed to be included in them.¹⁰⁰ As a result, the range of quantity and quality is absurdly broad.

Third, stations are not required to post these lists online. Citizens can view them only if they drop by the station's main studio and ask to see the public file. Few do. And, the main studio can be a substantial distance from its community of license.

Stations that do not produce newscasts sometimes describe almost any local activity as constituting "programs that have provided the station's most significant treatment of community issues." For instance, one Midwestern station included in its issues/programs file, under the heading "Community Involvement":

"America's Next Top Model Casting Call...an open casting call for Cycle 14 of America's Next top Model on July 11th from 2–4 pm at Seven Sushi Ultralounge sponsored by Sunny's Hair and Wigs.

"[C]reate a fun and innovative contest for our viewers to win an 8" Dairy Queen ice cream cake from Dairy Queen for their birthdays.

"[The local station]s and Little Caesars Pizza teamed up together and created a great way for viewers and their customers to join the Little Caesars text club.

"The [station] and Spalon Montage teamed up together and created a great way for viewers and their customers to join the Spalon Montage text club."

When an FCC researcher asked a New England station for its issues/programs list, an employee provided copies of the station's programming schedule ("12:30 p.m., Frasier; 1:00 a.m., That 70s Show; 1:30 a.m., Family Feud...").

Some stations get creative by listing stories they happened to run under categories that sound as if they have to do with important community issues. For instance, in a filing otherwise full of substantive news mentions, a station in Texas created the category "High Tech education," which turns out to include only one piece—about Google considering the launch of a music service.

Some stations list stories of national importance as if they addressed issues of local importance. For instance, under the community-coverage "Crime" category, a station in New Hampshire, listed a story entitled "Authorities in Los Angeles revealed that crime rate in 2008 was the lowest in 40 years!"

Stations often list the public service ads (PSAs) they run. Many are worthwhile but many are not local in nature—and some do not appear to be charity related. For instance, in 2010 one station noted that it ran "Media Com Retran Notice (286591)" 84 times in one month—a PSA that turns out to be about a fight between broadcasters and a local cable operator over fees. Similar problems exist in radio. A New York radio station listed "a 15 second PSA furnished by the National Association of Broadcasters that discusses the harmful affects [sic] of a performance tax on local radio," clearly more of a priority issue for the station airing the PSAs than for its listeners.

In contrast, some stations take the reporting requirement quite seriously and detail news and public affairs programming addressing local issues. For instance, KNBC-TV in Los Angeles filed a 112-page report describing every minute of public affairs and news programming it broadcast during the third quarter of 2009, listing the date and time each program aired and the community issue addressed. [10]

The FCC Almost Never Denies License Renewals

A telling statistic: during the FCC's more than 75 years in existence, it has granted well over 100,000 license renewals; only in four cases was a renewal application denied because the licensee failed to meet its public interest programming obligation:104

- > In 1965, a federal appeals court forced the FCC to deny a license renewal to a TV station in Jackson, Mississippi, that had been shown to give less coverage to African-Americans.¹⁰⁵
- > In 1970, the FCC denied a license to a radio station in Media, Pennsylvania, after a program host "made false and misleading statements and deliberate distortions of the facts relating to various public issues such as

race relations, religious unity, foreign aid" and failed to air a program on interfaith issues, even though the station had made a commitment to the FCC to do so. 106

- > In 1972, public TV stations in Alabama were denied license renewal because they excluded African-Americans from programming decisions and avoided programming oriented toward their community.¹⁰⁷
- > In 1980, in West Coast Media, Inc., the FCC denied a license renewal to a San Diego radio station after finding that the station broadcast almost no public affairs, news, or other public service programming.¹⁰⁸

In the last 30 years *not one* license renewal has been denied on the grounds of a station failing to serve the community with its programming.

Why?

It is not for lack of effort from citizens groups. Over the years, through petitions to deny license renewal applications, public interest groups have tried to make the case that particular stations did not merit renewals. But, in each case, the FCC either rejected the petition or declined to rule on the petition on procedural grounds. In some cases, the FCC has concluded that, when it comes to subjective judgments about appropriate quality or quantity, it is wise to defer to the discretion of the station. For example, various groups petitioned to deny six television stations (in 1990) and 10 radio stations (in 1993) serving Philadelphia, Pennsylvania, 109 arguing that the licensees had failed to provide a sufficient amount of general issue-responsive programming to address the concerns of minority groups and maintain the required issues/programs lists. 100 But the Commission held, "the stations have provided programming to the extent and in a manner well within their broad discretion."

In 2004, the Chief of the Media Bureau's Audio Division denied the renewal application of WZFM in Narrows Virginia, after concluding that the station had violated section 312(g) of the Communications Act when it aired no programming from February 8, 1996 to February 8, 1997. WZFM filed a petition for reconsideration, along with a Declaration from H. Edward Hale, Vice President of Old Dominion Communications, WZFM's parent company. Hale explained that on ten occasions between November 3, 1996 and June 3, 2003, he "turned on the transmitter and spoke into it." Hale further elaborated:

"On every occasion..., I broadcast the station's call sign, community of license and authorized frequency. On every occasion..., I broadcast my name and stated that Old Dominion was testing the facilities of WZFM....In addition, on every occasion..., I broadcast additional remarks to the public, for example, commentary on the weather and view from the mountaintop and other observations. Sometimes I broadcast jokes. The broadcasts...typically lasted about fifteen minutes in duration."

Old Dominion argued that these fifteen minute "broadcasts" satisfied the requirement of section 312(g) that it transmit a broadcast signal continuously for 12 months. Based on this record, the division granted WZFM's petition for reconsideration and renewed its license in a summary public notice that did not contain any discussion of whether the station served the community or met its public interest obligations.¹¹⁴

The most recent broadcast renewal cycles ran from 2003 to 2006 for radio stations and from 2004 to 2007 for television stations. A total of 1,772 television stations (1,389 commercial and 383 noncommercial educational), and 15,168 radio stations (12,360 commercial and 2,808 noncommercial educational), sought renewal of their licenses. Of the television stations, the Commission received 224 challenges to the license renewals of 213 stations (153 petitions to deny against 144 stations, and 71 informal objections to the renewals of 69 stations).

The Commission's staff has ruled on all but 45—and in every case has rejected the license challenges. In fact, in no case did the Commission even designate a challenge for hearing, the normal next step if there are concerns about the advisability of granting renewal.

The story is the same for radio. The Commission received 191 challenges to the renewal applications of radio stations (62 petitions to deny and 121 informal objections). Thirty-one of these challenges remain pending. Although 10 were granted in part, with the Commission assessing forfeitures for the violations, each license was renewed.

These results are consistent with the conclusions reached in a 2010 study conducted by Georgetown University Law Center's Institute for Public Representation, of the 2004 to 2007 television renewal application cycles. The study found that more than half of the challenges to applications either alleged that the station had failed to provide

sufficient coverage of local issues in its programming or a sufficient amount of children's programming. It found that the Commission failed to act on a third of the filings and has denied all the others.¹¹⁵

In most cases, the FCC's Media Bureau denied the petition or objection by a brief letter to the filing party. Moreover, the Georgetown study concluded that it took the Commission a long time to render its decisions: from 114 to 1,543 days after a petition was filed (an average of 568 days). The study found that denial letters were relatively brief, disposing of the allegation of failure to air sufficient locally responsive programming by concluding that the petitioner had failed to show the station had shown "bad faith" in exercising its editorial discretion. Each letter typically closed by urging the petitioner to make any future concerns known directly to the station.

The Georgetown study concludes, "The fact that the FCC did not designate a single application for hearing during the entire renewal cycle suggests that relying on the public to bring license renewal challenges to ensure that television stations serve the public interest is not working well." It notes that the problem is not lack of public participation, but concludes that "[i]f the FCC is not going to do anything when citizens complain, then citizens will lack

the incentive to monitor and participate." It also notes that the incentive for public participation is further reduced by the eight-year license term and delays in FCC action on petitions. ¹⁶ Accordingly, the study urges that stations be required to provide the public more information about their programming, reduce license terms, act more promptly on petitions, and take well-documented petitions more seriously. It suggests that "the Commission should also consider whether it is realistic to place so much reliance on public participation in meeting its statutory public interest obligations."

To be clear, this record does not result from negligence or lethargy on the part of career staff. The unwillingness to press license denials—which has characterized Democratic- and Republican-led commissions—likely stemmed from a growing discomfort with the FCC making In 1984, the FCC deregulated television as it had with radio, but stressed that television stations were still required to "provide programming that responds to issues of concern to the community."

content judgments and/or an uncertainty about the Commission's constitutional authority to do so. On top of that, some Commissioners no doubt feared denying licenses would trigger contentious battles with broadcasters.^{III}

Some Stations Do No Local News at All

The scores of unsuccessful petitions and other renewal challenges have sometimes involved the claim that particular existing news shows have done a poor job covering local communities in their news and other local programming. Worthy though that discussion is, the question of whether local newscasts do a good enough job may obscure an even more glaring issue: a large number of stations do not air news programming at all. A 2011 FCC staff analysis of data from Tribune Media Services found that there are 520 local stations that air no local news at all—258 commercial stations and 262 noncommercial stations. Adding in those stations that air less than 30 minutes of local news per day, 33 percent of commercial stations currently offer little or no local news. Most of those that do not offer local news are independent stations with no affiliation with a broadcast network. A separate analysis by the Media Bureau's Industry Analysis Division, based on reviewing public schedule listings, came to similar numbers: 42.6 percent of all television stations do not air any local news (30.2 percent of commercial stations and 81.9 percent of noncommercial educational stations). (See Chapter 3, Television.)

Industry Self-Inspection

Prior to 1995, the FCC's Field Offices inspected broadcast stations as part of the commission's broadcast station license renewal process. After the FCC discontinued these routine licensing-related inspections, Field Offices conducted random inspections of broadcast stations to check for compliance with Commission rules. For staffing reasons, the Commission later shifted more of its inspection methodology to a complaint-based approach, whereby a complaint (e.g., from a competitor or a consumer) would trigger an inspection of the particular station at issue. Today, in addition to conducting complaint-based inspections and certain random inspections, the Commission utilizes the Alternative Broadcast Inspection Program (ABIP).

Under ABIP, a private party, usually a state broadcast association, enters into an agreement with the Enforcement Bureau to arrange inspections (and re-inspections, where appropriate) of participating broadcast stations to determine compliance with FCC regulations. ABIP was originally envisioned as a way for the Commission to focus its limited resources on other significant violations, rather than visiting all 30,000 broadcast stations. As the Commission noted in 1996, ABIP "allows private entities to perform inspections of broadcast stations and certify compliance with technical rules, obviating the need for random inspections by Commission staff and freeing them to focus on problem areas." The inspectors assess technical issues, such as compliance with power limits and transmission control, as well as antenna painting, fencing and lighting, Emergency Alert System (EAS) compliance, and the completeness of the issues/programs and campaign advertising records.

The Enforcement Bureau executed ABIP agreements with each of the state broadcast associations in 2003, followed by a small number of agreements with individual inspectors in 2004 and 2006. ¹²⁰ As of December 2010, about 26 percent of AM and FM radio stations and 48 percent of television stations participate in the program. ¹²¹ Under the agreement, the association or individual inspector has full discretion as to the rates it charges broadcast stations that choose to participate in ABIP. Inspectors are required to conduct a standard FCC Enforcement Bureau full-station inspection, ¹²² with very limited exceptions. The association or private inspector must then notify the local FCC District Office or Resident Agent Office, in writing, of those stations that pass the ABIP inspection and have been granted a Certificate of Compliance, which is then valid for three years.

They are not required to inform the FCC, however, if they find stations out of compliance. Rather, the inspectors work with stations to make improvements until they fulfill the rules.

Significantly, stations that have been certified compliant under ABIP are exempt from certain FCC inspections. During the period for which its compliance certificate is valid, a participating station is generally not subject to inspection, investigation, or audit by the FCC, except for tower safety issue investigations, complaint-driven inspections, and inspections involving EEO or political file issues.

Because the FCC has limited resources, ABIP continues to be a useful means to promote broadcaster compliance with FCC rules, while conserving agency resources to focus on other priorities. However, it is not clear whether ABIP inspections are always as detailed as the full-station inspections conducted by FCC staff, whether ABIP inspectors are sufficiently independent of the stations they inspect, and whether ABIP inspectors adequately confirm that stations have fixed noncompliance observed during inspections before issuing a Certificate of Compliance.

Moreover, the standard ABIP agreement raises other concerns, including its prohibition on audits of broadcast stations that participate in the program, making it difficult for the FCC to gauge the quality of ABIP inspections and the efficacy of the program. ABIP also appears to prohibit the Commission from including ABIP stations in "targeted inspections" that are part of broader Commission projects, for instance, to evaluate compliance with a specific Commission rule like the requirement for operational Emergency Alert System equipment.

Although ABIP appears to have many advantages, the Enforcement Bureau has not conducted a comprehensive review of the program since its inception. The ABIP agreements have three-year terms that automatically renew absent action by the Bureau or the other signatory party. The next agreements are set to expire in 2012. In the mean-time, the Bureau is engaged in ongoing discussions with broadcasters, inspectors, and others about the program, and is examining ways to revise ABIP to improve broadcaster accountability and compliance.

Among other things, the Bureau is considering:

- > measuring and improving the effectiveness of ABIP; for example, by implementing record-keeping requirements and/or auditing the program;
- > ensuring the independence of ABIP inspectors: for example, by requiring disclosure of conflicts of interest;
- > reserving the Commission's right to conduct certain "targeted inspections," as discussed above; and
- > evaluating whether inspectors have sufficient guidance, binding and non-binding, regarding the Bureau's expectations about inspections, inspection follow-up, and re-inspections.

We expect that the Enforcement Bureau's continued outreach and examination, and resulting program changes, can enhance ABIP's reliability and effectiveness, while preserving its substantial benefits.

Reform Proposals

From among the many reform proposals that have been considered over the years, 123 we highlight the four that have been most discussed. (In Part Three, we suggest a fifth approach).

Spectrum Fees

In a February 1982 article titled "A Marketplace Approach to Broadcast Regulation," then-FCC Chairman Mark Fowler and Daniel Brenner, his legal advisor, proposed moving broadcast regulation in a new direction that was consistent with free-market principles. The Commission, they wrote, should "focus on broadcasters not as fiduciaries of the public, as their regulators have historically perceived them, but as marketplace competitors." [24]

In addition to proposing deregulation,¹²⁵ the authors also suggested two other ideas that might have more resonance today. First, recover and re-auction broadcast spectrum.¹²⁶ Second, charge broadcast licensees a spectrum usage fee in exchange for exclusive rights to use their assigned spectrum, which should be considered a property right.¹²⁷ The proposed spectrum fee could either be a percentage of the station's profits or a flat fee based upon bandwidth.¹²⁸ In Fowler's view, the fee would recognize that broadcasters receive something of value in the exclusivity that the government provides them, similar to government franchises for offshore oil rights or food concessions in public parks, and analogous to the franchise fees that cable operators pay to local authorities.¹²⁹

Fowler proposed that these fees be applied, in part, to funding public broadcasting. In light of the value that public stations provide society in offering unique types of programming that commercial stations may decline to offer due to marketplace forces—such as cultural, locally oriented, and children's programming—he concluded that,

A Georgetown University study concluded that it took the Commission a long time to render its decisions: from 114 to 1,543 days after a petition was filed (an average of 568 days).

although such value may not fit into his marketplace-oriented system, it is nevertheless desirable to have a source for such socially valuable alternative fare. 130

Noting the traditional opposition from broadcasters and others to the imposition of spectrum fees, Fowler observed, "Given the choice, many broadcasters might prefer the security of current regulation to true competition and a charge for their frequency exclusivity."

[13]

President George W. Bush repeatedly proposed assessing "user fees." As his 2006 budget put it, "To continue to promote efficient spectrum use, the Administration also supports granting the FCC authority to set user fees on un-auctioned spectrum licenses based on public-interest and spectrum-management principles. Fee collections are estimated to begin in 2007 and total \$3.1 billion in the first 10 years." Some conserva-

tives prefer this approach because it is more market-oriented. Rather than proscribing certain behaviors, it simply acknowledges that TV stations have received something of value from the public and asks them to pay for it, and allows the funds to be targeted toward public purposes. They also believe that it would allow the market to drive spectrum toward the "highest and best use," which in some cases might mean low-performing stations putting spectrum up in an incentive auction, wherein they receive a cash payment and the spectrum can be applied toward broadband wireless use. Every White House budget proposal since 2006 has made this proposal.

Some liberal experts—who previously had been lukewarm to cool on the idea—have recently come around to join the conservatives. Henry Geller, general counsel at the FCC under President Kennedy and FCC Chairman Newt Minow—and formerly a strong supporter of the traditional public interest guidelines—now advocates giving up on that system and switching instead to a spectrum fee system, with proceeds going to public broadcasting. "The broadcast public trustee regulatory content system is anomalous in this century and will become more so in light of developments in electronic media, has difficult First Amendment strains if and when implemented quantitatively, has been very largely a failed regulatory scheme for seven decades," Geller stated at a Future of Media workshop.¹³² Rather than forcing stations to do public affairs programming, he argued, let them pay a spectrum fee to do what they

want, and use the revenue to fund those who are more committed to that kind of programming. "If you fund the organizations which *want* to do high-quality informational programming or children's programming, you now have the structure working for you. When you try to do behavioral content regulation to make somebody who's not interested in that, he's got an awful lot on his plate because of all this fierce competition. You're not going to get very far..." [13]

Norman Ornstein had co-chaired Advisory Committee on Public Interest Obligations of Digital Television Broadcasters in 1998, which recommended a series of public interest guidelines.¹³⁴ Recently he switched positions, saying that such guidelines would inevitably be watered down. He now supports assessing a spectrum fee and using the proceeds for public media.¹³⁵ Writing in the November/December 2009 issue of the *Columbia Journalism Review*, Steve Coll, president of the New American Foundation, endorsed a similar approach.¹³⁶

Opposition to this approach comes from a few quarters. Commissioner Michael Copps has equated this with paying one's way out of the draft—in other words, avoiding obligations by paying a fee. And, tellingly, the broadcasters themselves have opposed this. Others argue that station owners have invested in the community by airing local news and should not have to pay additionally.

Enhanced Disclosure

On September 14, 2000, the Commission adopted a Notice of Proposed Rulemaking, entitled "Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations." It proposed replacing the issues/programs lists that television stations have to include in their public files with a standardized form seeking detailed programming information and requiring that the completed form be posted on the Internet, as well. On November 27, 2007, the Commission approved a Report and Order [adopting] these requirements.¹³⁸

But this approach has not worked either. The form the Commission had proposed was eight pages long, with hundreds of programming-related data boxes that would need to be filled in. ³⁹ It required broadcasters to list detailed information about "local civic affairs" as distinct from programming about "local electoral affairs," not to be confused with general "local news." And they would have to do this comprehensively, covering 365 days a year. "Form 355" drew complaints from broadcasters that it would be unnecessarily burdensome. ¹⁴⁰ Beyond its being overly complex, there were other concerns, including that the rules did not require that the data be put in a format that would make it easy to analyze online, as advocates of government transparency recommend. Five parties appealed the action, and the FCC received nine petitions for reconsideration, including one from the National Association of Broadcasters— and it has not received the necessary approvals of the Office of Management and Budget under the Paperwork Reduction Act. As a result, these changes have not gone into effect.

Localism

In August 2003, FCC Chairman Michael Powell launched an inquiry into "broadcast localism" by explaining: "Fostering localism is one of this Commission's core missions and one of three policy goals, along with diversity and competition, which have driven much of our radio and television broadcast regulation during the past 70 years." In the Notice of Inquiry, the Commission elaborated on why localism has been a policy emphasis:

"The concept of localism derives from Title III of the Communications Act, and is reflected in and supported by a number of current Commission policies and rules. Title III generally instructs the Commission to regulate broadcasting as the public interest, convenience, and necessity dictate.... When the Commission allocates channels for a new broadcast service, its first priority is to provide general service to an area, but its next priority is for facilities to provide the first local service to a community.... Indeed, the Supreme Court has stated that '[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece....

"A station must maintain its main studio in or near its community of license to facilitate interaction between the station and the members of the local community it is licensed to serve. For similar reasons, a station 'must equip the main studio with production and transmission facilities that meet the applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence." The main studio also must house a public inspection file, the contents of which must include 'a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." The purpose of this requirement is to provide both the public

and the Commission with information needed to monitor a licensee's performance in meeting its public interest obligation of providing programming that is responsive to its community."¹⁴⁸

Localism—specifically in terms of preserving the benefits of free, over-the-air local broadcast television—is one of the guiding principles of the must-carry rules. ¹⁶⁹ Congress made the judgment that a broadcaster's duty to provide local news and public affairs programming was so critical that cable operators must be required to carry local channels; even though cable operators objected and fought all the way to the Supreme Court, the law was upheld. ¹⁵⁰ In 1992, the Cable Act declared: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." ¹⁵¹

Chairman Powell's 2003 effort came in response to complaints that many stations were not adequately addressing local needs and problems with their programming. The Commission held six field public hearings and reviewed over 83,000 comments. On January 24, 2008, under Chairman Kevin Martin, the Commission released its *Report and Notice of Proposed Rulemaking*, which suggested that some rules and procedures could be changed to help encourage localism efforts by stations. For example, it said that since the Commission relied on the public to scrutinize station behavior, stations ought to note on their websites when they have filed a renewal application. While some of the recommendations made sense, others were overly bureaucratic. For instance, the Commission asked for comment on a proposal that would require stations to set up community advisory boards, and on one that would require staff to be on site whenever a station was on the air; and it inquired whether it should require licensees to provide reports on the quantity of local music played.

The Copps Proposal

FCC Commissioner Michael Copps proposes creating a "public value" test that broadcasters would need to pass in order to get their licenses renewed. The test would include more disclosure of information about political ads, enhanced disclosure of information about broadcasters, greater efforts to promote diversity, greater broadcaster commitment to preparing for emergencies, and these programming related requirements:

"Meaningful Commitments to News and Public Affairs Programming: These would be quantifiable and not involve issues of content interference. Increasing the human and financial resources going into news would be one way to benchmark progress. Producing more local civic affairs programming would be another. Our current children's programming requirements—the one remnant of public interest requirements still on the books—helped enhance kids' programming. Now it is time to put news and information front-and-center. At election time, there should be heightened expectations for debates and issues-oriented programming. Those stations attaining certain benchmarks of progress could qualify for expedited handling of their license renewals. This requirement would have, by the way, important spill-over effects in a media environment where many newspapers are owned by broadcast stations—although such cross-ownership is something I hope the Commission will put the brakes on.

"Community Discovery: The FCC, back when stations were locally-owned and the license holder walked the town's streets every day, required licensees to meet occasionally with their viewers and listeners to see if the programs being offered reflected the diverse interests and needs of the community. Nowadays, when stations are so often owned by mega companies and absentee owners hundreds or even thousands of miles away—frequently by private equity firms totally unschooled in public interest media—we no longer ask licensees to take the public pulse. Diversity of programming suffers, minorities are ignored, and local self-expression becomes the exception. Here's some good news: Community Discovery would not be difficult to do in this Internet age, when technology can so easily facilitate dialogue.

"Local and Independent Programming: The goal here is more localism in our program diet, more local news and information, and a lot less streamed-in homogenization and monotonous nationalized music at the expense of local and regional talent. Homogenized music and entertainment from huge conglomerates constrains creativity, suppresses local talent, and detracts from the great tapestry of our nation's cultural diversity. We should be working toward a solution wherein a certain percentage of prime-time programming—I have suggested 25 percent—is locally or independently-produced. Public Service Announcements should also be more localized and more of them aired in prime-time, too. And PEG channels—public, educational and government programming—deserve first-class treatment if we are to have a first class media." 156

Copps argues that the main defect in our current system is an unwillingness to enforce the rules. With the emphasis on quantitative standards, he argues, regulators can avoid having to make subjective judgments about programming. Such an approach would set broad requirements but allow stations flexibility on coverage decisions. It would clearly re-establish and clarify the quid-pro-quo, and would lead to greater commitment of journalistic resources to local communities.

There are other ways of envisioning behavioral rules, too. For instance, one could say that for constitutional reasons it would be problematic to impose detailed behavioral rules on commercial broadcasters, but that is less true for public TV, as it receives public funds. One might therefore require each public TV station to have a few hours of local programming—news, public affairs, local entertainment, high school sports. This may have the added benefit of stimulating local journalistic activity, as public TV stations are likely to seek partnerships with nonprofit websites, public radio, and the local newspaper to produce the content.

Taking Stock of the Failure of the Public Interest Obligation System

As noted earlier, even during the peak period of deregulation, the basic requirement that all stations must serve the public interest endured. Instead of detailed formal ascertainment procedural and documentation requirements and preparation of programming logs, the Commission required stations to update their public files every quarter with issues/programs lists that documented the "programs that have provided the station's most significant treatment of community issues during the preceding three month period." So while the Commission—in deference to the First Amendment—did not prescribe detailed and specific guidance on the programs broadcasters had to air in order to meet their public interest obligation, it never officially abandoned the concept that there needed to be some quid pro quo for the granting of the license—nor that providing "significant treatment of community issues" was part of the bargain.

Yet it is clear that the current system does not work.

It is entirely up to stations to define what it means to serve their community. Some produce news and public affairs programming, while others argue that sponsoring an America's Top Model event counts. Some believe that serving local communities means offering programming of relevance to the area; others have fulfilled their obligations entirely through occasional public service ads. It is tempting to ascribe cynical motives to some of the stations, but the truth is that the FCC has not made it clear, either through policy or enforcement, that any particular way is more desirable than any other.

The FCC relies on people in the community to challenge licenses—and yet has rejected those challenges in almost every case. Given that record, why should a community group or would-be broadcaster invest time and money in challenging a license?

What we have is neither a free market nor an effectively regulated market—but rather one that operates almost on autopilot to the benefit of current license holders. Sometimes that is good for a community; sometimes it is not.

In the last 30 years not one license renewal has been denied on the grounds of a TV station failing to serve the community with its programming.

Some argue that the deregulated system best advances the public interest because of the power of free markets, yet advocates of that position rarely grapple with the ways in which the current system *does not* resemble a free market. A true free market would operate more akin to the spectrum management system applied to newer technologies like mobile. That spectrum is auctioned off to the highest bidder, with proceeds going to taxpayers. Broadcast licenses initially were given, for free, to various companies. Over the years, other companies have purchased them, but the taxpayers have not seen any of that money. Moreover, broadcasters do not pay any ongoing rent to use the spectrum—another practice that free-market-oriented economists have recommended as a means to instill market principles. Finally, there is little opportunity for a competitive company to challenge licensure rights of an incumbent broadcaster.

But while it is not a free market, it is also not a sensibly regulated system. The FCC requires stations to keep lists of programs—but the regulators do not read those lists. The FCC invites community groups to challenges to licenses—and then rejects nearly 100 percent of those challenges. The FCC says that stations have an obligation to serve their communities but then offers no definition of what that means.

Part of the paralysis stems from some genuinely difficult constitutional issues. Yes, it is the case that the spectrum belongs to the public, and the public lent it to broadcasters. In that sense, taxpayers (through their governmental representatives) have every right to demand certain behavior—the quo that was supposed to be part of the original quid pro quo. But the challenge is this: once that spectrum becomes the property of a living, breathing broadcaster, how that broadcaster chooses to use it becomes, at least in part, an issue of free speech. Regardless of the origins of the license, once a broadcaster has it the broadcaster then becomes part of the fourth estate. When a slice of spectrum becomes an element of a "media operation" or "the press," the ability for the government to do much about it becomes much more limited—by the First Amendment--as it should. Monitoring to make sure that stations do an adequate amount of local news and public affairs would likely draw the FCC into difficult issues of defining what counts as "adequate," "local," and "news."

That does not mean the government cannot or should not do anything. Indeed, we believe the government can and should do better. But we should acknowledge that at least part of the disappointing history of the public interest obligations stems from the inherent difficulty of finding the right balance between constitutional principles and other public interest goals. One can both accept the idea that there *are* public interest obligations and still be vexed by the question of who, exactly, gets to decide how those goals are defined and met.

We are left with a difficult situation. The public has granted stations something of huge value—but because of the supreme importance of maintaining a free press, the public cannot actually use government to do all that much to make sure those licenses are well used.

This leads to another question: Does it matter? Some broadcasters argue that, by virtue of their commercially-driven need to produce popular programming, whatever the stations decide to do will be more attuned to local needs than any regulatory guideline. At the March 4, 2010 Future of Media Workshop, senior vice president of Legal and Strategic Affairs of Allbritton Communications Company, Jerald N. Fritz, who served as chief of staff to FCC Chairman Mark Fowler, testified that "broadcasters, as content creators, monitor what the public wants on a daily basis. We evaluate who they are, what they watch, where they watch, and how they watch. We even speculate on why they watch. The trick is to amalgamate large enough audiences that advertisers will pay to reach and offset the expenses necessary to provide that programming." In his view, "broadcasters are following the public and attempting to serve it. Our sincere hope is that the Commission will have the considered, good sense to keep out of our way as we do." 400 March 1990 March 2010 Marc

Other broadcasters, however, acknowledge that they have an obligation to provide services and programming beyond what might be most popular. Jane Mago, executive vice president of the National Association of Broadcasters (NAB) testified:

"Broadcasters have and will continue to take seriously their responsibility as broadcast licensees to serve the public interest....

Whatever specific elements have been in the regulatory spotlight, the essential core of the public interest obligation has remained constant. This core requirement focuses on whether a station is providing programming responsive to the local community. In NAB's view that core obligation should remain."

On balance, Mago argued, the system has worked well:

"The current public interest standards, other than a few tweaks for digital television broadcasting (such as the requirement that each multicast stream contain at least three hours per week of children's programming) have been in place for more than two decades. They have served both the public and the broadcast industry well....

"The fact that quantified regulatory public interest standards are suspect does not, however, imply that the public interest obligation has no real meaning or that broadcasters do not take them seriously. To the contrary, it is clear that radio and television stations fulfill their public interest obligation and serve their local listeners and viewers." [6]

NAB and other broadcasters offered numerous examples of excellent local programming (our own examples can be found in Chapter 3, Television.) They maintained that local broadcasters offer \$10 billion worth of public interest value, largely calculated in the form of "lost" advertising revenue when they instead air public service announce-

ments (PSAs). [62] And they note that local TV news is still the most popular source of local news, and that Americans give their local news teams higher favorability ratings than other media sources. [65]

Our view is that the "public interest obligation" system is broken, and it does matter.

First, we fully accept the idea that many, and perhaps most, TV stations serve their communities well, or at least adequately. But the implicit verdict of the FCC's track record on license renewals and of the NAB statement is that 100 percent of them do.

Second, though the lack of meaningful disclosure has made systematic study of local TV difficult, we have enough information from independent studies to believe that too many local TV stations are not serving their communities as well as they could. While many local broadcasters do an extraordinary job, some are letting advertisers pay to appear on-air as "expert guests," without informing viewers; some are airing video news releases from companies without identifying them as such; and many are doing minimal reporting on issues of local importance. And those indiscretions are occurring among local TV stations that are actually producing local programming and local news. Literally hundreds of local stations do not produce any local news. Some of them argue that they meet community needs by helping to promote a local modeling competition, for instance, or running PSAs—and that no additional programming about local communities is actually necessary.

Third, if a station has little interest in serving its community, there are now better uses for the scarce spectrum. It could be sold to another station or—if Congress so authorizes—stations could put the spectrum into an incentive auction, where it could be purchased by a wireless company to help make wireless high-speed Internet access more available. The station would get part of the proceeds and media system would benefit from greater availability of high-speed Internet.

Fourth, and most important, we believe that there is serious gap in some kinds of local reporting and information provision. TV stations are well positioned to fill that vacuum.

In the olden days (a few years ago), it might be said that when a local TV station did little to serve its community, it was a victimless crime. That is less true now. Contrary to the view of many old-time print journalists, we believe that local TV news can be great, often is great—and, in these times, needs to be great.

Commercial Radio

Many of the policies affecting radio are mentioned in other parts of this report, but to recap:

The licensing system for radio suffers from some of the same problems as that for TV. Stations are required to say how they serve the community but the FCC has not specified what serving the community means. The Working Group that produced this report did not comprehensively review radio issues/program lists, however, and so does not have as clear a sense of how stations fill those out.

As noted in Chapter 2, Radio, local news has become less voluminous on commercial radio. Many experts told us that the combination of license and ownership deregulation likely led to, accelerated, or allowed that to happen.

Other public policies, such as those that keep satellite radio from offering local programming (see Chapter 28, Satellite Television and Radio), have protected local broadcasters from threats to their advertising revenues but do not help encourage them to provide more local news and journalism.

Scholar Paul Starr proposed that radio broadcasters be required to offer a few minutes of news each hour, in part to ensure that those who are not news junkies would nonetheless be exposed to current events. ⁶⁴ But such an approach could put radio at a competitive disadvantage, considering that the Internet and satellite radio have no such requirement.

Finally, the decline of news on commercial radio has been partly remedied by an increase in local efforts by public radio. (See Chapter 6, Public Broadcasting.)

Campaign Advertising Disclosures

Since broadcast regulation began, Congress has consistently recognized the critical importance of broadcast media as a platform for political discourse and campaigning—enacting laws "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." Congress viewed this function as an important requirement for holding a license. "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates…is inherent in the require-

ment that licensees serve the needs and interests of the [communities] of license." The Supreme Court agreed that it "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." The major laws governing TV stations' obligations during political campaigns include:

Lowest Unit Charge: Section 315(b)¹⁶⁰ requires broadcasters to sell political advertising time to all candidates at the "lowest unit charge" of the station—for the same class and amount of time—during the 45 days preceding primary elections and the 60 days preceding general elections. The provision also applies to cable, ¹⁶⁹ satellite TV, ¹⁷⁰ and satellite radio operators.¹⁷¹

Advertising Purchases: The Commission first required stations to maintain and make available records regarding requests to buy broadcast time on behalf of candidates in 1938. By using these records, competing candidates can track their opponents' buying strategies and figure out what equal opportunities they can request. The files, kept at the station, are supposed to document every request made by or on behalf of a candidate for broadcast time and the outcome of that request, as well as a record of any free time provided to a candidate by the station. Stations must also list the date and time of any non-candidate-sponsored broadcasts containing a positive candidate appearance of four seconds or more. As the Commission noted, "[w]ith this material as a guide, candidates are in a position to exercise the right to equal opportunities." The Bipartisan Campaign Reform Act of 2002 (BCRA) dddd section 315(e) to the Communications Act, which included a requirement that stations retain similar information concerning requests to purchase time for certain issue-oriented ads. Stations must update the file "as soon as possible," which the Commission has held to mean immediately, absent extraordinary circumstances. Cable, Statellite TV, and satellite radio operators are also required to keep these records in their political files for two years.

In 2008, the Commission adopted policies that require television broadcast stations to place their public files on their website, if they have a website, or on their state association website, if available. The Commission, however, exempted the political component of the file from this requirement, 100 noting the multitude of requests, often on a daily basis, for political time and the resulting expenditure of station personnel resources and time to place the information on its website. The rules have not gone into effect.

Reasonable Access: The Communications Act requires broadcast stations "to allow reasonable access to or to permit the purchase of reasonable amounts of time...." by legally qualified candidates for federal elective office. [8] Stations may balance the needs of each candidate against such factors as the number of competing candidates and potential program disruption. These provisions also apply to satellite TV⁸² and radio. [83]

The reasonable access provision does not apply to candidates for state and local elective offices. Prior to 1991, the Commission's policy had been that stations were "expected to devote time to campaigns of state and local candidates in proportion to the significance of the campaigns and the amount of public interest in them." But in 1991 the

"Broadcasters are following the public and attempting to serve it. Our sincere hope is that the Commission will have the considered, good sense to keep out of our way as we do."

Commission concluded that state and local candidates did not have an affirmative right of access to broadcast facilities. In 2008, the Commission declined to take any further action, saying that it would be premature, given its decision at the time to move ahead with the Enhanced Disclosure Proceeding. Alas, enhanced disclosure has not yet been implemented.

Equal Opportunities: Section 315 of the Communications Act prohibits broadcasters from favoring one candidate over another in terms of the use of broadcast facilities. It requires that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." The "equal opportunities" provision also applies to cable operators (section 76.205) and direct broadcast satellite (DBS) providers. The Commission also has held that these requirements apply to digital audio radio satellite operators. Congress exempted from the equal opportunities requirements appearances by candidates in certain bona fide news programming—specifically, newscasts, news interviews, and on-the-spot coverage of news events, including debates and news documentaries.

No Censorship: Section 315 of the Act also prohibits broadcasters from censoring candidates' advertisements. ¹⁹² This provision also applies to cable, ¹⁹³ satellite TV, ¹⁹⁴ and satellite radio operators. ¹⁹⁵

Origination Cablecasting: The rules for political programming on cable television, including the on-air disclosure requirements for political and issue ads, apply only to "origination cablecasting" programming "subject to the exclusive control of the cable operator," such as a local news station run by the cable operator. The Commission did not specify in 1972 whether these rules applied to cable news networks, as very few existed at the time. Given the intent of the law, it would seem that they should probably apply to cable too, but the FCC has never formally ruled on whether "origination cablecasting" includes national cable network programming. The rules of the on-air discovery formally ruled on whether "origination cablecasting" includes national cable network programming.

Free Time

In the 1990s, the Commission contemplated whether it should or could mandate that free airtime be provided to legally qualified candidates. The Commission ultimately rejected the idea on the grounds that it would be too burdensome because, under the equal opportunities provision, providing free time to one candidate would result in an obligation to provide free time, if requested, to all opponents. Instead, in 1996, the Commission found that various novel programming proposals involving candidate appearances—such as debates or candidate forums—qualified as on-the-spot coverage of *bona fide* news events and were, therefore, exempt from the equal opportunities provision under section 315(a)(4) of the Act.¹⁹⁹

Recent Court Rulings

In the *Citizens United* decision in January 2010, the U.S. Supreme Court struck down restrictions on political ad spending, but—significantly—upheld BCRA's requirements for funding *disclosure* by eight to one. The Court found that disclosure does not prevent political expression and thus does not violate the First Amendment. In fact, Justice Kennedy's majority opinion held that funding limits could now be lifted only *because* the disclosure provisions of BCRA would serve as a counterbalance:

"A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today [and]...many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 200

This opinion echoed the Court's decision when it upheld disclosure requirements in *Doe v. Reed.* Justice Scalia wrote:

"Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."²⁰¹