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The Local Service Concept in Broadcasting: An Evaluation and Recommendation for Change

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*Tom A. Collins**

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Since the inception of federal radio and television regulation,¹ efforts to achieve local service and to resolve associated problems have

1. The Radio Act of 1927, ch. 169, §§ 1-41, 44 Stat. 1162 (1927) (current version at Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976)). Local license distribution was provided for by § 9 of the Act (current version at 47 U.S.C. § 307 (1976)). The Radio Act of 1927 provisions were made much more explicit by the Davis Amendment of 1928, Pub. L. No. 195, 45 Stat. 373. It divided the United States into five zones and required equal division of facilities among the zones. Within the zones, equitable division of broadcast facilities was required among the states based on population. The terms of the Davis Amendment, particularly the authority to revoke licenses to achieve the equality required by the amendment, were upheld by the Supreme Court in *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933).

In *Nelson* the Commission modified the license of Gary, Indiana, station WJKS to permit it unlimited time operation on 560 kc, a frequency previously occupied by two Chicago stations. *Id.* at 269. The Commission found that Illinois had an excess for a state within the zone, while Indiana had less than its proportion; that WJKS rendered an outstanding service aimed at the polyglot population of the Gary-Calumet region; and that the deletion of the two Chicago stations would provide better service and satisfy the public interest criteria. *Id.* at 270-73.

been central to regulatory policy. Federal regulation of radio and television programming, although halfheartedly applied, has attempted to provide local service to the geographic areas of broadcaster assignment and the population thereof.² Thus, radio and television licenses have been allocated on a geographic basis to serve the programming needs of local areas.³ Regardless of the significance of the local service effort, it has seldom been the focus of legal commentary.⁴ Similarly, the local service emphasis has been largely unquestioned by the Federal Communications Commission (FCC) and those who are affected by or study the FCC's work.⁵ It is therefore not surprising that the reasons for the local service effort and the definition of what constitutes the local service obligation are unclear, and consideration of the consequences of the FCC's reliance on the local service concept is minimal.⁶ Yet, in the face of, and perhaps because of, this lack of examination, emphasis on the local service obligation remains at the core of broadcast regulation. Local service has been advanced as a basic concept in every major legislative effort to modify the Federal Communications Act,⁷ including the most recent legislative attempt to revise the regulation of television broadcasting and to totally deregulate radio broadcasting.⁸ The result of

2. See Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Rad. Reg. (P & F) 1901 (1960). The Policy statement is an interim report that has been consistently relied on by the FCC. See, e.g., Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 441 (1976), *discussed in* notes 126-29, 153-63 *infra* and accompanying text; Suburban Broadcasters, 30 F.C.C. 1021 (1961), *aff'd sub nom.* Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962), *discussed in* notes 183-204 *infra* and accompanying text.

3. See 47 C.F.R. § 73.24 (1978) (AM radio); *id.* § 73.202 (FM radio); *id.* § 73.606 (television), *discussed in* notes 130-50 *infra* and accompanying text.

4. See, e.g., R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 99-108 (1973) (discussing problem from economic view); Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 640 (1966) (discussing local service only as subordinate part of programming problems); Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CINN. L. REV. 550, 556 (1968) (less than page given to problem).

The most extensive treatment of the specific problem of attaining program standards is contrary to the routine mass statewide license renewals. See *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

5. See generally *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968) (example of criticism of this approach).

6. See Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1191-98 (1973).

7. S. 624, 96th Cong., 1st Sess. (1979), *discussed in* notes 503-44 *infra* and accompanying text; S. 611, 96th Cong., 1st Sess. (1979); H.R. 3333, 96th Cong., 1st Sess. (1979); H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 12993, 93d Cong., 2d Sess. (1974). While there had been amendments to the Communications Act, no major revision was attempted until 1974, following WHDH, Inc., 16 F.C.C.2d 1 (1969), *discussed in* note 464 *infra* and following text.

8. See H.R. 13015, 95th Cong., 2d Sess. (1978). Reading various media reports leads to a view that it is likely to be a highly controversial legislative effort that may well make no progress, because it is sweeping and drastic in its changes. This Article deals primarily with the local service aspects of the bill.

this continued unexamined reliance on the local service concept is an ongoing frustration with much FCC policy. Most groups that participate in, are affected by, or are concerned with FCC policy feel this frustration. Much of this frustration flows from the inability to achieve the goals of particular groups or to elicit an overall consistent and effective policy from the FCC. The resulting problem is a state of inertia in which FCC policy, both as articulated and as applied, does not satisfactorily accommodate local service needs. This Article approaches the failure to achieve appropriate program service by posing a mode of analysis of the local service obligation,⁹ applying that analysis to the lack of appropriate program service,¹⁰ and suggesting a complex combination of simple proposals to achieve the elusive solution of better establishing and implementing elements of the local service obligation.¹¹

I. PROGRAM CONTENT—DEFINING AND BALANCING THE INTERESTS OF THE PUBLIC AND THE BROADCASTER

The framework of analysis of the local service obligation (and most other broadcasting policies) begins with the tensions between first amendment guarantees and the public interest requirement of the Communications Act.¹² First amendment considerations involve the rights of the public¹³ and the rights of the broadcaster, including the broadcaster's protection against censorship.¹⁴ A third factor, the unique business nature of the broadcast enterprise, also must be considered.¹⁵ Extensive emphasis on any one of these factors eclipses the others; this is particularly true of an emphasis that permits an unfettered exercise of licensee discretion,¹⁶ which allows the licensee to use its unduly

9. See notes 83-105 *infra* and accompanying text.

10. See notes 129-463 *infra* and accompanying text.

11. See notes 464-592 *infra* and accompanying text.

12. 47 U.S.C. § 303 (1976). The public interest standard is not distinct. Rather, the standard is a combination of the other criteria set forth and the general consideration of the public good. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 267-68 (D.C. Cir. 1974); notes 19-20 *infra* and accompanying text.

13. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

14. See 47 U.S.C. § 326 (1976) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications [of] any radio station.").

15. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974):

There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger or a demographically more desirable audience for advertisers.

Id. at 268 (emphasis original).

16. It is unlikely that the public's first amendment rights will totally eclipse the broadcaster's interest. The interest is extremely diverse. Such a diverse interest is unlikely to totally eclipse any of its parts. In addition, the need for a financially viable broadcast service to meet the public's first amendment rights largely protects the business interests of licensees. Nevertheless, when the public interest is pushed to an undue extreme, the first amendment interests of the broadcaster may be neglected. See text accompanying notes 23-24 *infra*.

emphasized first amendment right in derogation of the public's first amendment right. "If advertisers on the whole prefer to reach an audience of a certain type . . . then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public."¹⁷

Permitting an unlimited exercise of licensee discretion would be inherently inconsistent with "secur[ing] the maximum benefits of radio to all the people of the United States"¹⁸ and would not be a situation that comports with the Communications Act as construed by the United States Supreme Court. It is therefore essential to consider all three factors integrally and to establish a proper focus.¹⁹ In addition, the collateral question of the importance and nature of the local service obligation must be considered in the particular context of balancing public and broadcaster interests.

In considering program content, it is necessary to posit a federal regulatory goal for broadcasting under the "public interest, convenience and necessity" standard of the Communications Act.²⁰ The Supreme Court indicated that this statutory goal must draw support from the most basic first amendment right, that of the public.²¹ In *Red Lion Broadcasting Co. v. FCC*²² the Supreme Court enunciated this goal in the particular broadcast context of that case: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²³ More substantially, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial. . . ."²⁴ Thus, under the first amendment and the Communications Act, the goal of broadcast regulation is a broad and satisfactory access for all potential viewers to a diversity of ideas and experiences, especially those ideas and experiences concerning

17. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 268 (D.C. Cir. 1974).

18. *Id.*

19. This is not an easy task. See *id.* at 268-69, 276-83 (Bazelon, C.J., concurring).

20. The Communication Act requires that the FCC issue licenses and otherwise act consistently with "the public interest, convenience and necessity" 47 U.S.C. § 309 (1976); see *id.* §§ 303, 307(a). The term "public interest, convenience, and necessity" is not defined precisely in the Communications Act. However, the Supreme Court has stated that "[t]his mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 473 (1940) (footnote omitted). The first amendment is a major source of definition. See note 139 *infra* and accompanying text.

21. See CBS v. Democratic Nat'l Comm., 412 U.S. 92 (1973):

[T]he "public interest" standard necessarily invites reference to First Amendment principles.

. . . .

. . . In resolving that issue [of balance of public, broadcaster and individual interests] it must constantly be kept in mind that the interest of the public is our foremost concern.

Id. at 122.

22. 395 U.S. 367, 390 (1969). For an overview of the licensee's right, see notes 29-86 *infra* and accompanying text.

23. 395 U.S. at 390.

24. *Id.*

public affairs.²⁵ To achieve this purpose, the broadcaster is licensed in the public interest as a public trustee.²⁶

The focus in this part is on (1) the accommodation of the first amendment rights of the public and the broadcaster in light of the business nature of broadcasting,²⁷ and (2) the achievement of the ideal of superior local programming service while considering the first amendment rights of the broadcaster and the business nature of broadcasting.²⁸

A. Accommodating the Rights of the Various Interests

More than pious assertions and hopes are required to accommodate the first amendment interests of the public and the broadcaster. The first amendment right of the public must be juxtaposed against both the first amendment right of the broadcaster and the nature of broadcasting as a business, in light of three general principles enunciated by the Supreme Court in *CBS, Inc. v. Democratic National Committee*.²⁹ First, a viable broadcast system must exist in order to serve the public interest.³⁰ Second, the public interest that the FCC is mandated to vindicate exceeds the individual broadcaster interest.³¹ Finally, the broad-

25. This assumes public affairs programming is more important than other programming, an idea to which the FCC currently subscribes. See note 222 *infra*; cf. note 86 *infra* (rejecting consideration of entertainment programs). This is the thrust of *Red Lion* and much first amendment theory. The preeminence of public affairs programming is accepted in this Article with the caveat that entertainment programs must not be denigrated. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 267-68 (D.C. Cir. 1974).

In other decisions, notably those extending limited first amendment protection to advertising, the *Red Lion* enunciation of the public right to information has been reiterated as a right of great value. See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 762-65 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 821-22 (1975); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 121, 124-27 (1973); cf. *Lehman v. Shaker Heights*, 418 U.S. 298, 302-04 (1974) (no first amendment forum in municipally owned transit system).

26. "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969).

27. See text accompanying notes 29-72 *infra*.

28. See text accompanying notes 73-84 *infra*.

29. 412 U.S. 94 (1973).

30. The reliance on a private broadcast system requires sensitivity to the profit motive of the private licensee. This is the primary reason for protection of the business interest of the licensee. Without profits, a private broadcasting system will lack the wherewithal and the motivation to provide superior service, however defined. The profit motive can also be used as an incentive to ensure compliance with any system of priorities that is established. Of course a transition to a system of broadcasting based on other than private for-profit entities is possible, and this Article suggests such a shift. However, a primarily private for-profit system must be assumed given the present structure of broadcasting and the American economy.

31. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), in which the Court approved the FCC requirement that private licensees have the burden of broadcasting views and political opinions contrary to their own, as supported by the requirements of

caster owes a duty to the public under the first amendment to provide a variety of suitable programs.³²

The broadcaster nevertheless retains substantial countervailing first amendment rights. The broadcaster may, consistent with the first amendment, determine the content of substantially all the programs aired.³³ Practically and because of the need to be insulated from governmental interference, the initial decision as to what programs are presented is subject only to the discretion of the broadcaster.³⁴ Thus, the electronic media editor has journalistic discretion to broadcast what is deemed appropriate to the extent it is consistent with the public right of access to diverse ideas and experiences. Thereafter, governmental intervention must comport with the first amendment.³⁵

Since the inception of broadcast regulation,³⁶ the FCC has followed a policy of reviewing licensee programming content at the time of the license renewal.³⁷ This retroactive policy review was implicitly approved by the Court in *Red Lion* and explicitly held to be consistent with the first amendment in *FCC v. Pacifica Foundation*, which also continued the special concern with the public interest in broadcast regulation.³⁸ Additionally, the Court in *CBS* reconciled *Red Lion*—which held that the first amendment right of the viewers and listeners is superior to that of the broadcasters³⁹—by indicating that the broadcaster's first amendment rights, which are substantial but less than those of the print journalist,⁴⁰ are to be balanced with the first amendment rights of the public.⁴¹ The broadcaster's first amendment right is therefore consistent

47 U.S.C. § 315 (1976) (equal access for political candidates) and the fairness doctrine. The Court stated:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airways.

395 U.S. at 389.

32. See Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Rad. Reg. (P & F) 1901 (1960).

33. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116-19, 120-21, 125 (1973). "A broadcast licensee has a large measure of journalistic freedom, but not as large as that experienced by a newspaper." *Id.* at 117-18. Congress "intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Id.* at 110.

34. See note 33 *supra*.

35. Retroactive review is not considered censorship. See note 37 *infra*. This result is necessary to avoid the prohibition of censorship of 47 U.S.C. § 326 (1976).

36. See note 37 *infra*.

37. *FCC v. Pacifica Foundation*, 438 U.S. 726, 736-38 (1978). The Court discussed *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931), and *Trinity Methodist Church, S. v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). 438 U.S. at 736 n.10. These two cases are the source of the policy of review.

38. 438 U.S. at 748-49.

39. 395 U.S. at 390.

40. 412 U.S. 94, 117-18 (1973); see note 33 *supra* and accompanying text.

41. 412 U.S. at 118, 121-23.

with the public right to the extent possible,⁴² but the public right remains paramount.⁴³

Although the Court in *CBS* expressed the importance of and need for a general way of achieving a balance between public and broadcaster rights, little guidance is provided beyond the *Red Lion* description⁴⁴ of the public right and the characterization of the broadcaster's right as substantial but of lesser magnitude. The Court noted two associated problems undermining the argument that the broadcaster's right was primary. First, neither the FCC nor Congress had adopted a rule or statute to deal with the asserted first amendment right of the public.⁴⁵ The absence of such a rule or statute highlights the importance of the *Red Lion* dictum stating that broadcast coverage of controversial issues could be compelled if the licensee sought to avoid its fairness doctrine obligation⁴⁶—which requires fair coverage of controversial issues of public importance—by remaining silent.⁴⁷ The second problem noted by the Supreme Court was that the Court of Appeals for the District of Columbia Circuit in *CBS* had fashioned a rule mandating that broadcasters must permit a limited number of political advertisements. The court's rule was suspect both as to whether it could be effectively enforced and as to its impact on the first amendment rights and business interests of the broadcaster.⁴⁸ Accordingly, consistent with *CBS*, rules can be promulgated requiring certain types of programming if the rules respect and balance the interests of both the public and the broadcaster.

As a business, the broadcast enterprise intends to make a profit, presumably the highest possible.⁴⁹ This results in a shift in concern from first amendment rights to the nature of the business interest. While at times the audience is treated as the market for radio and television, it is a shadow market;⁵⁰ the true market is the advertisers. Revenues are realized from advertisers, not listeners or viewers. Audience size does influence the true market in a real way; to a large extent the size or nature of the audience determines the amount advertisers will pay. The primary goal of broadcasters as entrepreneurs is to achieve the size and

42. *Id.* at 125.

43. *Id.* at 122.

44. See text accompanying notes 22-24 *supra*.

45. 412 U.S. at 122-23.

46. See generally Fairness Report, 48 F.C.C.2d 1 (1974). For a discussion of the fairness doctrine in the context of local service, see notes 419-51 *infra* and accompanying text.

47. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393-94 (1969). Neither the FCC nor Congress mandated access for advertisement on political issues, and the question such a mandate would raise under the first amendment was not reached.

48. 412 U.S. at 124-29.

49. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 271-73 (D.C. Cir. 1974) (Bazelon, C.J., concurring) for an excellent discussion of the problem. See also *id.* at 267-68.

50. See *American Broadcasting Co.*, 7 F.C.C.2d 245, 306-09 (1966) (Johnson, Comm'r, dissenting) (ABC-ITT merger).

the nature of an audience for which advertisers will pay maximum amounts.⁵¹ This is unlike the typical market in which the consumer purchases the product directly. To the consumer, the received broadcast is a free good. As a result, viewers and listeners will accept that which they would not pay for. If a small number of viewers would pay for type X programming, but a larger number will watch type Y if it is free, type Y prevails, and the usual market mechanics of willingness to pay are eliminated.⁵² This may well result in programming aimed at potential purchasers of products rather than programs.

A successful policy favoring competition for advertising dollars . . . may well result in, not creative journalism, but commercial pabulum directed toward those whose incomes are most often spent on the advertiser's wares. A policy favoring quality journalism, on the other hand, may be anti-competitive [economically] since the broadcaster in pursuit of common notions of journalistic excellence may refuse to direct his programming at the optimal advertising audience.⁵³

This greatly affects local programming decisions; it often disadvantages programs of local origin against network programs that return a higher income.⁵⁴ Consideration of net revenue directly affects the choice of nonnetwork-originated programs.⁵⁵ Nonetheless, the function of the business interest cannot be slighted. The income and profits of licensees provide the wherewithal and impetus to fulfill the first amendment goals of service to the public and expression by the licensee. Indeed, absent a jarring modification of the means of financing broadcasting,⁵⁶ profits

51. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974).

52. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 32.

A television system that charges a zero price for viewing provides neither the incentive to broadcasters to produce programs that evoke the greatest viewer satisfaction, nor the information on which to determine the most desired type of programming.

Id. (footnote omitted). See also *id.* at 28.

53. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 271 (1974) (Bazelon, C.J., concurring) (footnote omitted); see *id.* at 267-68.

54. See, e.g., Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, 63 F.C.C.2d 674, 688-89 (1977); Amendment of Part 72 of the Commission's Rules with Respect to Television Network Programs not Made Available to Certain Television Stations, 26 F.C.C.2d 772, 780-81 (1970).

55. The effect can be in favor of or against network programming. In most cases, *i.e.*, when network programming is available, it will be chosen because it will attract the largest audience, because it is the most desirable programming available. If there is not network competition, local programming will probably be preferred. Even with lower advertising rates, the margin of profit for low cost, low quality programming will exceed that of network programming. This phenomenon apparently occurs in the Prime Time Access Hour rates. See notes 392-415 *infra*.

56. Subscription television is a partial relief to current problems of broadcast financing. Increasing funding from those sources used by public television (government, foundations, and private philanthropists) would require less fundamental change and would incorporate sources already marginally affecting most viewers.

are essential to fulfill the first amendment function of broadcasters. Both as a matter of equity to broadcasters as entrepreneurs and as an essential means of achieving the first amendment goals, the broadcast profits must be respected.

Elucidating the problem of proper balance and of compelling legal significance is the definition of superior service in *Citizens Communications Center v. FCC*.⁵⁷ In that case the Court of Appeals for the District of Columbia Circuit rejected an FCC policy statement⁵⁸ granting an incumbent licensee with a record of substantial past service without serious defect a controlling advantage against a challenging applicant for that license.⁵⁹ The court held that the incumbent licensee, as a public trustee, should be given a preference only for "superior service," which was defined in substantial part as the willingness of the licensee to forego benefit from profit by reinvesting in programming for the public benefit and by reducing advertising time.⁶⁰

Citizens Communications Center provides two important guidelines. First, the business interest of the licensee is limited by the public interest.⁶¹ The Communications Act "public interest, convenience and necessity" standard does not forbid a licensee's profitability,⁶² but it does require the licensee to share financial benefits with the public by providing improved service.⁶³ This is fully consistent with the licensee's status as nonowner of its frequency and as a public trustee obligated to act in the public interest. Second, the standard for superior service dealing with the relationship of financial return to improved programming is stated generally, both in terms of the financial burden on

57. 447 F.2d 1201, 1213 & n.35 (D.C. Cir. 1971). See also *Central Fla. Enterprises Inc. v. FCC*, 44 Rad. Reg. 2d (P & F) 345, 350-51, amended on rehearing, 44 Rad. Reg. 2d (P & F) 1567 (1979).

Specifically, the court in *Citizens Communications Center* stated:

Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public.

447 F.2d at 1213 n.35. See also *Citizens Communications Center v. FCC*, 463 F.2d 822, 823-24 (D.C. Cir. 1972) (denying mandamus action to force rule making on issue of superior service); Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 24 F.C.C.2d 383, 386 (1970) (denying on rehearing rule making to clarify definition of superior service).

58. See Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 424-25 (1970).

59. 447 F.2d at 1203-05.

60. *Id.* at 1213 n.35.

61. See *id.* n.36.

62. *Id.* nn.35 & 36. The *Citizens Communication Center* case does not address the important question of the degree of reinvestment that should be expected for a superior service rating. It would be necessary to permit appropriately above average profits as a compensation for the risk at the initial entry stage and as an incentive for performance. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 79-90.

63. See note 57 *supra*.

the licensee and, more importantly, in terms of the *nature* of the reinvestment of profit for public benefit.⁶⁴

One must recognize that the burden the superior service standard imposes on the first amendment rights of the broadcaster is ameliorated, and the impairment of the broadcaster's first amendment right in the balance against the public first amendment right is reduced, if any programming requirements imposed by the FCC are stated in terms of general categories and minimum quality standards, rather than explicitly delineated. When the constraint is general and imposed on a limited percentage of broadcasting time, with otherwise unfettered licensee discretion, the balance between first amendment interests of the public and of the broadcaster avoids unduly infringing on the broadcaster's interest.

This general approach of balancing the public interest with the broadcaster's interest in light of the business nature of the broadcasting enterprise has been accepted in two important situations. In situations in which a change in program format⁶⁵ is proposed after sale of the license, the Court of Appeals for the District of Columbia Circuit has found that some profit, not maximum profit, is the limit of the licensee's entitlement. In addition, the court of appeals has assumed limited authority over program content to the extent of directing a licensee to maintain a format.⁶⁷ The intervention goes no further. Particular programs in the format are not examined. The court of appeals is, in effect, ordering the licensee within general but certain bounds to forego profits to serve the public interest by providing certain programming.

In *In re Patsy Mink (WHAR)*⁶⁸ the FCC approached the problem of balancing public and broadcaster first amendment interests by allowing the licensee to retain channeled discretion. The FCC found that the fairness doctrine required coverage by a West Virginia licensee of a strip mining controversy.⁶⁹ By mandating coverage of a subject of local importance, the FCC followed the *Red Lion* dictum that permitted required coverage and reached an outcome inherent in the fairness doctrine and the public interest standard. When *WHAR* is considered in conjunction with the format change cases,⁷⁰ it also illustrates a sliding scale of coverage. In most situations, a requirement that the licensee

64. See note 57 *supra*.

65. See notes 274-367 *infra* and accompanying text.

66. In all the format change cases remanded by the Court of Appeals for the District of Columbia Circuit to the FCC, the transferring licensee was profitable or the issue was in controversy. When the licensee was profitable, the FCC transfer approval was upheld. See notes 282-94, 356 *infra* and accompanying text (discussing format change cases).

67. See notes 275-364 *infra* and accompanying text (discussing format change cases).

68. 59 F.C.C.2d 987 (1976). For a full discussion of the case, see notes 410-34 *infra* and accompanying text.

69. 59 F.C.C.2d at 995-97.

70. See notes 275-367 *infra* and accompanying text.

must deal with environmental problems would suffice. In *WHAR*, however, the licensee clearly had abused its discretion;⁷¹ it is bad faith for a broadcaster to operate in coal country and ignore strip mining, an important environmental subject. Moreover, even though the *WHAR* decision is specific as to subject matter, the method of coverage and the weight to be accorded various views remained with the licensee.⁷² As a result, the speech rights of the public and of the broadcasters are left in balance. If the public's *Red Lion* right is to have meaning, it must be enforced when disregarded cavalierly by the broadcaster. On the other hand, the balanced protection of journalistic discretion can be ensured by good faith exercise of that discretion. The broadcaster, as journalist, loses only a measure of that discretion and then only when good faith is abandoned. General compliance is forced on the broadcaster, while the specific implementation is left largely to discretion; only the question of implementation, not its content, becomes a matter of FCC concern.

B. *Achieving Superior Programming Service*⁷³

The problem becomes how to meet the ideal of local programming while considering the business nature of broadcasting and the first amendment rights of the broadcaster.⁷⁴ Business decisions will frequently run against local programming.⁷⁵ Emphasizing the broadcaster's first amendment right to the exclusion of the public's first amendment right will elevate business-motivated decisions over the need for local programming. Decisions based on these factors may not please a large part of the public. Some potential listeners or viewers will be repelled by programming that draws an audience of the magnitude or sort that advertisers desire.⁷⁶ Nor will journalistic discretion, which is at the core of the broadcaster's first amendment rights,⁷⁷ result in service for all.

In addition, some radio and television is used because it is free. The viewer or listener accepts the best alternative.⁷⁸ Such program choice dilutes measurement of intensity of desire for some types of presentations, so the degree of deprivation is not clear from mere numbers.⁷⁹

71. Discretion is defined throughout as the power to make a decision within defined general bounds. Too often it seems that the FCC abjures developing the general bounds and grants discretion in a broader sense to the licensee, that is, discretion to make a decision as the licensee sees fit, without guidance. Although the FCC does not articulate this grant of discretion, it does, in reality, occur. See generally Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970).

72. 59 F.C.C.2d at 994.

73. The discussion in this section focuses on local programming service. As an abstract proposition, however, the discussion applies to any choice of programming other than the choice that would be made by the licensee without regulation.

74. See Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 270-73 (D.C. Cir. 1974) (Bazelon, C.J., concurring).

75. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 110-11.

76. See *id.* at 267-68.

77. See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973).

78. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 28, 32-33.

79. See *id.* at 21-23.

Similarly, there is no assurance that the best programming, either from a community political need or aesthetic viewpoint, will be presented. Certainly, the willingness of some citizens groups to fight to preserve many types of programs involving various tastes indicates the intensity of the perceived need for the numerous types of aesthetic, cultural, and public affairs programming involved.

Thus, a group of viewers of between fifteen to twenty percent of the market warrants service if there are sufficient radio stations in the market to serve both that group and larger groups.⁸⁰ Yet, the conclusion one must draw from this situation is that it can be economically more attractive to neglect a relatively significant, strongly interested minority and to program for larger group interests. Indeed, taking a simple market with three stations, if twenty percent of the audience desired fare other than sports, but three simultaneous sports programs would draw respectively 30%, 27%, and 23% of the audience, the size of audience would dictate three sports programs.⁸¹ Such an approach emphasizes the advertisers' desire for a large audience. This choice is made in the absence of the usual control and discipline of consumers who must pay for the product. No true market can exist unless the intensity of desire measured by willingness to pay is a determinative factor.⁸² This is true of advertisers, but not of viewers or listeners.

Of course, other factors do enter into programming decisions. Smaller audiences may be acceptable because of their composition. Profitable businesses also may undertake public service activities purely out of a feeling of civic responsibility or from a need to improve their image in the community and hence improve their profits. A journalistic ethic of full and fair inquiry may prevail, as may the desire of the owners to promote their own ideas and ideologies.⁸³ Too much reliance on these factors would be naive, however. Most broadcasters are ultimately businesspersons who will try to achieve high profits from their enterprises.

Given the nature of the broadcaster's interest and of the public

80. See *Citizens Comm. to Preserve the Voice of the Arts v. FCC*, 436 F.2d 263, 269-72 (D.C. Cir. 1970). This and other cases on this general point are discussed in notes 282-301 *infra*.

81. See Sirlam & Kalin, *The Merits of Reserving the Cost-Savings from Domestic Communication Satellites for Support of Education Television*, 77 YALE L.J. 494, 516 (1968) (supplying basis for hypothetical).

82. The public interest standard is defined in note 20 *supra*. Within a general amorphous standard there will be many conflicts, including the rights of the listening public and the licensee. An equitable resolution of these conflicts is essential for all FCC policy.

83. See *WTAR Radio Corp.*, 31 F.C.C.2d 812, 830 (1970) (licensee has no duty to editorialize); cf. *RKO Gen., Inc.*, 16 Rad. Reg. 2d (P & F) 1181, 1181 (1969) (failure to editorialize adverse factor in comparative hearing). See generally *Daly v. United States*, 286 F.2d 146, 149 (7th Cir. 1971); *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1250 (1949); see also *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642, 658 (D.C. Cir. 1971), *rev'd. sub nom.* *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Storer Broadcasting Co.*, 60 F.C.C.2d 1097, 1100 (1976).

interest, it will be difficult to resolve the conflicts within the public interest standard of the Communications Act. There must be an articulation of goals that have some clarity and on which specific, certain standards can be built. This requires a willingness to question past policies and to undertake experimentation. Put another way, it requires an actual utilization of administrative flexibility, a neglected ideal. It also requires a meaningful commitment to firm enforcement of the definitive standards.⁸⁴ Such an approach, given a proper concern for the first amendment, will both ameliorate concerns of excessive governmental intervention and provide the licensee a high degree of stability while vindicating the public interest. Before going beyond the basic framework of analysis, however, it is necessary to survey the components of and the reasons for imposing a local service obligation and the efforts to enforce it.

II. THE LOCAL SERVICE OBLIGATION: SOURCE, ENFORCEMENT, AND CONSEQUENCES

A. *Local Service Obligation: Its Definition and Its Source*

1. *Local Service: Definition, Source, and Attainment*

The local service obligation is a product of two broad, interrelated concepts: (1) the requisite geographic distribution of licenses to operate radio and television stations, as demonstrated by the Communications Act: "[T]he Commission shall make such distribution of licenses . . . among the several states and communities to provide a fair, efficient, and equitable distribution of radio service to each of the same;"⁸⁵ and (2) the stations' obligation to identify and to program for local needs and problems. "The principle ingredient of a licensee's obligation is the diligent, positive and continuing effort by the licensee to discover and fulfill the problems, needs and interests of the public within the station's service area."⁸⁶ The attainment of the second concept depends on proper

84. The concept of definitive standards is advanced as a goal of the FCC. It makes no sense to talk in general terms of programming for local areas, or in the terms of *Citizens Communication Committee* standard. See note 57 *supra* and accompanying text. Rather, the FCC should establish precise standards of expectation, as suggested in Part IV of this Article, or not expect local service. Either is plausible, but the nebulous, non-enforced policy followed at present is not.

85. 47 U.S.C. § 307(b) (1976). This provision specifically requires fair, efficient, and equitable distribution, but does not require assignments to every community. Fewer, more powerful stations that will broaden service areas fairly, efficiently, and equitably will meet the statutory mandate. See notes 457-62 *infra* and accompanying text.

86. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 441 (1975), *as amended by* 61 F.C.C.2d 1, 1 (1976) (amendments do not affect local service obligation). For the history of the statute, see note 4 *supra*. In this Article, "need," when applied to audience program preferences, includes all wants, desires, and problems. It is essentially all-inclusive. "Problem" is used in its dictionary sense and that employed by the FCC. These usages are consistent. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 656 (1971). Other terms applied to audience preferences are used in their dictionary sense and as used by the FCC, if applicable.

implementation of the first. To a large measure, justification of the first concept depends on the validity, as articulated and enforced, of the second. When examined critically, this policy and its enforcement are open to serious challenge.

The local service obligation can be regarded as a success in the geographic sense. Fair and equitable service has been provided to all parts of the nation, fulfilling an unequivocal legislative mandate that requires a fair, efficient, and equitable division of radio and television services among the states and communities.⁸⁷ Concomitant to this is the policy that every person must be adequately served by radio and television outlets.⁸⁸ The FCC has acted as a traffic controller for frequency assignments, albeit one with some policy concerns. In creating a pattern of effective frequency assignments, the FCC has successfully fulfilled its obligation of geographic distribution.⁸⁹

The second aspect of the local service obligation deals with identification of local needs and problems. The desire to regulate radio arose from a technical necessity—the chaos that ensued without regulation.⁹⁰ This made a traffic controller function essential and the geographic aspect necessary, but the programming aspect remains problematic. Notwithstanding that only bars to obscenity,⁹¹ lotteries,⁹² censorship in other areas,⁹³ and equal time concepts⁹⁴ have definitions clearer than the general statutory standard of “public interest, convenience and necessity,”⁹⁵ the public interest mandate does not provide clear guidance in the particular area of local service programming or effective guidance in other regulation of programming.⁹⁶ This may be intentional, because

87. 47 U.S.C. § 307(b) (1976).

88. *See, e.g.*, *Rounsaville of Louisville, Inc. v. FCC*, 314 F.2d 280, 281 (D.C. Cir. 1963); *Interstate Broadcasting Co., Inc. v. FCC*, 280 F.2d 626, 627 (D.C. Cir. 1960); Policy Statement On Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 191 (1965); *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565, 567 (1961); *Plainview Radio*, 31 F.C.C. 259, 259 (1961); *Tomah-Maustom Broadcasting Co.*, 28 F.C.C. 1, 2 (1960); *Wendell Mayes*, 7 F.C.C. 510, 511 (1939).

89. *See generally* *NBC v. United States*, 319 U.S. 190, 206 (1943), *discussed in* note 377 *infra*.

90. *See id.*

91. 18 U.S.C. § 1464 (1976).

92. *Id.* § 1304; *see* *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990, 995 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

93. 47 U.S.C. § 326 (1976); *see* *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

94. 47 U.S.C. § 315 (1976); *see* *Farmers Educ. & Co-op Union v. WDAY, Inc.*, 360 U.S. 525, 526 (1959). *See generally* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969); *The Handling of Public Issues Under the Fairness Doctrine*, 58 F.C.C.2d 691, 692 (1974), *aff'd in part sub nom.* *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977); *Fairness Doctrine Report* 48 F.C.C.2d 1, 30 (1974); *see also* *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

95. 47 U.S.C. § 309(a) (1976).

96. The Communications Act provides for equal access for political candidates, 47 U.S.C. § 315 (1976), and forbids censorship, *id.* § 326. No other program standards are set forth in the Communications Act.

Congress can use this approach to avoid the onus of controversial legislation or unsuccessful policy.⁹⁷ Moreover, because the FCC is inhibited by a lack of guidance⁹⁸ and funds and by a viewpoint closely aligned to the broadcast industry, there is a lack of governmental guidance or programming requirements.⁹⁹ Accordingly, the problem of ascertaining and achieving a satisfactory level of programming for local needs and problems is left largely to the discretion of the private licensee whose actions are assumed to be those of a trustee for the public and thus beneficial to the public.¹⁰⁰ This assumption is both crucial and of dubious validity.

97. See Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194-98 (1973) (discussing Federal Communications Act and FCC).

98. *Id.* at 1191-97. This may be intentional. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1057-72 (1962) (discussing FCC's failure to evolve standards).

99. This does not mean the relationship is sinister, but it is a consequence of a long-term relationship between any agency and the industry it regulates. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

In the midst of a "growing sense of disillusion with the role which regulatory agencies play," many legislators, judges, and legal and economic commentators have accepted the thesis of persistent bias [toward the regulated] in agency policies. At its crudest, this thesis is based on the "capture" scenario, in which administrations are systematically controlled, sometimes corruptly, by the business firms within their orbit of responsibility, whether regulatory or promotional. But there are more subtle explanations of industry orientation, which include the following:

First.— . . . [T]he administrator whose power is essentially negative . . . is dependent on industry cooperation in order to achieve his objectives [This] places the administrator in an inherently weak position. The administrator will, nonetheless, be held responsible if the industry suffers serious economic dislocation

Second.— The regulatory bureaucracy . . . seeks to elaborate and perfect the controls it exercises The effect of this . . . is to eliminate . . . competition and buttress the position of the established firms.

Third.— The resources—in terms of money, personnel, and political influence—of the regulatory agency are limited in comparison to those of regulated firms

Fourth.— Limited agency resources imply that agencies must depend on outside sources of information, policy development, and political support. This outside input comes primarily from organized interests By contrast, the personal stake in agency policy of an individual member of an unorganized interest, such as a consumer, is normally too small to justify such representation As a somewhat disillusioned James Landis wrote in 1960, the result is industry dominance in representation, which has a "daily machine-gun like impact on both [an] agency and its staff" that tends to create an industry bias in the agency's outlook.

These various theses of systematic bias in agency policy are not universally valid. Political pressures and judicial controls may force continuing agency adherence to policies demonstrably inimical to the interests of the regulated industry Moreover, the fact that agency policies may tend to favor regulated interests does not in itself demonstrate that such policies are unfair or unjustified Nonetheless, the critique of agency discretion as unduly favorable to organized interests . . . has sufficient power and verisimilitude to have achieved widespread contemporary acceptance.

Id. at 1685-87 (footnotes omitted).

100. *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383 (1969).

Nevertheless, if the requirement of fair and equitable geographic service to the nation in conjunction with the public interest, convenience, and necessity standard is to have a rational meaning,¹⁰¹ the geographic requirement must result in service to localities, which translates into programs for localities.¹⁰² While geographic allocation of frequencies is a straightforward mandate, programming for localities' interest, convenience, and necessity is a murky and general standard. Yet the difficulty in defining and ascertaining the requisite programming obligation has not inhibited general acceptance of the local service concept as an abstract theory. Also, the local service concept has drawn little criticism even from those who raise significant and harsh complaints against the general regulation of the broadcast industry and the radio spectrum.¹⁰³ However, the FCC's application of the local service concept has been marked by a noted absence of praise.¹⁰⁴ The acceptance of the local service concept is difficult to explain, but the absence of praise for FCC application is not.¹⁰⁵ A careful examination of the local service doctrine casts doubt on whether it has achieved or can ever achieve what its advocates hope, especially without profound harm. Accordingly, the reasons for the vitality of the concept, for hopes in it, and for its failure must be explored.¹⁰⁶

2. *Why Local Service*

Since the inception of federal broadcast regulation, local service requirements have existed as an ongoing concern in allocation of broadcast frequencies among local communities.¹⁰⁷ While the FCC's allocation objective is plain, the reasons for this objective, beyond the necessary technical requirements, are less clear.

The pervasive desire of the American people to diffuse political power encourages commitment of power to local entities. Coupled with

101. They may well have no more rational meaning than that they are an acceptable political compromise. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695-97 (1975). This is not necessarily unwise. *Id.* Nevertheless, the Court and the agencies have consistently attempted legal definition of the public interest, convenience, and necessity standards. *Id.*

102. See *Stone v. FCC*, 466 F.2d 316, 327-28 (D.C. Cir. 1972); cf. *Newhouse Broadcasting Corp.*, 53 F.C.C.2d 966, 975-78 (1975) (ability of licensee to meet local needs from nonlocal program sources).

103. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 99-110 (discussing pervasive reliance on local service concept by FCC). See generally *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968). Commissioner Nicholas Johnson, the study's coauthor, during and after his tenure at the FCC was one of the most vocal critics of the FCC policies. The Oklahoma Study praises local service, but condemns FCC acceptance of the shortfalls described in that study.

104. See *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1, 3-5 (1968).

105. See notes 275-81 *infra*.

106. See text accompanying notes 107-19 *infra*.

107. See notes 71-78 *supra*.

this desire is the widely advanced argument that the electronic media exert great, even undue, influence, and that this influence should be diluted.¹⁰⁸ There is no doubt that television is an enormously influential source of information. Thus, in addressing the regulatory problem of the electronic media in the context of indecent language, the Supreme Court emphasized that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."¹⁰⁹ Surveys rank the broadcast media as the most important source of public information,¹¹⁰ but multiple sources of information are available to virtually everyone. No doubt, in a democracy multiple sources of information are desirable, at least to the minimal extent that all that is worth being heard on important subjects and compelling concerns is available to audiences.¹¹¹ Nonetheless, the local service concept as a geographic idea does not address this objective. Local programming does not increase the number of sources; it simply changes control and use of the limited number of broadcast channels available. Thus, the goal of diverse service to the public that the FCC should, and to a degree does, pursue is better addressed by an effort to increase sources.

The idea that local stations should be a vital, integral part of their respective communities is easily accepted. To fulfill that role, local stations must provide programming appropriate to the communities they serve. Local stations should reflect the ebb and flow of their place of license and offer amenities and assistance to the community that otherwise are not available. One cannot quarrel with this in substance, but only in degree. Important coverage of issues such as drought conditions is provided, while announcements concerning local events, assistance in finding dogs, and broadcasting high school football games are appropriate amenities. Coverage of international affairs or the national economy

108. See Collins, *The Future of Cable Communications and the Fairness Doctrine*, 24 CATH. U.L. REV. 833, 840-43 (1975) and authorities cited therein. See also Powell, "Or Of the [Broadcast] Press," 55 TEX. L. REV. 39, 58-62 (1976) (discussing and rejecting power of broadcast media as basis for consideration). Today the focus is on television, but at an earlier time it was on radio. Television does have an impact in several aspects. Its quantitative aspect, *i.e.*, its role as an information source, can be verified and is very important, but its social and psychological impact is difficult to measure. Anything but an inductive analysis is virtually impossible because of the problem of establishing a control group or other means of evaluation. Still, this approach lends enough support to the conclusion that there is sufficient impact to allow it to pass judicial muster. Cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-70 (1973) (discussing *The Report of the Commission on Obscenity and Pornography* 390-412 (1970) and its weak Hill-Link minority report but rejecting argument that, absent scientific evidence to conclusively demonstrate obscene material adversely affects persons or society, state regulation of pornography impermissible).

109. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

110. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 120 (1976); Frank, *Media of Technological Revolution*, 60 GEO. L.J. 934, 936 (1972).

111. See A. MEIKLEJOHN, *POLITICAL FREEDOM, THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24-28 (1960); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 210-13. The reader should consider the interrelationship of the cognate rules of the fairness doctrine and § 315 of the Communications Act. See also note 85 *supra*.

are not appropriate matters of local service. In addition, much service, especially on television, but also on the radio, deals with real community needs and interests that are also fundamentally national.¹¹²

Beyond this is a vision both realistic and overly heroic:

The future of this country hinges on the ability of individual cities to create communication where it has never existed before. Only local media can serve that need. And indeed, in large part only local broadcast stations can serve that need For many Americans, if it is not on radio or television, it might as well not have happened at all.¹¹³

This clarion call for better and more vital local service by broadcasters is overdrawn, even though unquestionably local political and social institutions need to be more functional and responsive. The broadcast media could occupy an important role in achieving that result.¹¹⁴ Local broadcast service has its limits, however, even as a communicator of local concerns, and the homogeneity of our nation ensures the necessity of the national element in broadcast service.

The acceptance of existing broadcast policy positions without reflection explains much of the emphasis on local service. At the inception of regulation much, probably most, service was of local origin.¹¹⁵ The emerging commercial networks were not yet dominant,¹¹⁶ nor did technology permit stations of extensive service.¹¹⁷ Perhaps most importantly, the nation was more diverse.¹¹⁸ Local community problems were

112. The preservation of the Vieux Carre in New Orleans from interstate highways, see N.Y. TIMES, March 21, 1975, at 20, col. 1, conflict over the west-side interstate in New York City, see *id.*, April 20, 1978, at 1, col. 5, and the protection of Hilton Village in Newport News, Virginia, from widening Warwick Boulevard, see Newport News, Hampton, Virginia, Daily Press, March 19, 1978, at 3, col. 1, are representative of the broader national problem of accommodating the automobile and civilization. Although such issues are usually treated as local problems, the conflicts presented reach across our society. These and multitudinous other problems deserve broad attention and can best be covered either by syndication or by networks, see notes 249-55 *infra* and accompanying text, supplemented with local coverage of their exclusively local ramifications.

113. Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1, 10 (1968). The study also states:

And further, the greatest challenge before the American people today is the challenge of restoring and reinvigorating local democracy. That challenge cannot be met without a working system of local broadcast media actively serving the needs of the community for information about its affairs, serving the interests of all members of the community, and allowing all to confront the listening public with their problems and their proposals.

Id. at 12.

114. The need is so apparent and compelling that it should be mandated by rules. A rule structure proposal is discussed at notes 544-91 *infra*.

115. See E. BARNOUW, A TOWER IN BABEL 209 (1966).

116. *Id.*

117. See *Crosley Corp. v. FCC*, 106 F.2d 833, 833 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 605 (1939).

118. National diversity can be emphasized to excess, however, for the United States was a rather homogeneous nation by 1927, when the Radio Act was passed. The radio networks were in their infancy. These networks, followed by the television networks, were among the most conspicuous and important factors furthering homogeneity. Of

to some extent recurrent across the nation. To a substantial degree the perceived differences were the result of parochialism. Even in the 1920s and 1930s the United States was moving toward homogeneity. Electronic communications that were to further this move toward homogeneity were becoming established. Although the perception of need for service to localities in the late 1920s was certainly more understandable and realistic than today, the conclusion that the need was great was not compelled. Some lack of certainty of the central role of local service should have existed. Local service as a central goal should not have been accepted as unquestionably as in the scheme of the Radio Act of 1927.¹¹⁹

Since the 1920s, local service has been the course of least resistance. The virtue of localism is easily and abundantly praised in America. The fear of undue concentration of influence is real. The FCC and Congress found a convenient regulatory system, and in it the industry found an acceptable criterion, especially when not too severely enforced. This general, widespread, universal acceptance deserves critical appraisal.

B. *The Rule Structure Concept: Interim FCC Failure*

Consideration of the local service obligation demonstrates its weakness in conception and implementation. The reasons for the failure in implementation of the obligation are twofold. First, the FCC has consistently failed, indeed refused, to articulate reasonably precise goals and standards.¹²⁰ The failure to establish such goals and standards, described over fifteen years ago by Judge Friendly,¹²¹ remains widespread in the FCC's domain. While the public's first amendment and statutory interests are paramount, they must be reconciled with other important interests.¹²² The varied interests of the public, the licensee journalist, the licensee entrepreneur, the program's producers, the commercial network, the advertisers, and other parties are difficult to accommodate in any single regulatory policy. This difficulty is compounded because there exists within the public constituency itself a multitude of inconsistent interests. Further, the FCC is permeable. The

course other factors were involved: the continuing development of a transportation network beyond railroads to the present interstate highway system and domestic air service; the influence of other media, particularly motion pictures; the bringing together of diverse groups in the three wars. Other factors operated as well. The point, however, is not to essay a recent social history of the United States. Rather, it is to point out the paradox that while the FCC focused on local service, the industry the FCC regulated became an increasingly important factor in creating a country with problems nationwide in their impact, rather than strictly local.

119. Pub. L. No. 632, 44 Stat. 1162 (1927).

120. See Friendly, *The Federal Administration Agencies; The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1057-72 (1962).

121. *Id.*

122. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); notes 22-24 *supra* and accompanying text.

views of its various constituencies penetrate the agency, creating substantial pressures and tensions that the agency must resolve or avoid.¹²³ Fuzzy policy or casual enforcement often results.

Second, the FCC is unwilling to use coercion to achieve its goals. The FCC avoids difficult policy issues concerning enforcement, which greatly complicates analysis of FCC policy.¹²⁴ This is compounded by the FCC's tendency to define protected first amendment rights in terms of the licensee journalist, subordinating the public first amendment rights and interests.¹²⁵ The FCC posits that if it intervenes, it will impinge on the first amendment. FCC passivity either permits impingement on the public first amendment right or allows the maximum expansion of the licensee's right. In addition, the FCC's failure to promulgate rules and policies serves to impede enforcement. It is unjust to enforce rules that are uncertain to all parties and averse to the broadcaster's first amendment interests. The reluctance to use coercion results from the American historical tendency of viewing the government as an entity government, the suppressor and not the vindicator of the public interest, motivated by proper instincts. Such a perspective, however, is not good policy, nor is it supported by the law, and it is therefore wrong. A more complex analysis, cognizant of the first amendment consequences, more precisely states the issue.

Some governmental coercion is necessary to ensure fulfillment of the local service obligation; coercion adheres in and is necessary to any system of regulation. Any civil and just body politic relies on it.¹²⁶ The licensee public trustee has duties that can with full justification be enforced. Substantial sacrifices of profit and prerogative are conceivable

123. See Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1197 (1973).

124. Thus, the FCC has never awarded a license to an applicant challenging an incumbent licensee, *Central Fla. Enterprises v. FCC*, 44 Rad. Reg. 2d (P & F) 345 (1978), *modified on rehearing*, 44 Rad. Reg. 2d (P & F) 1567 (1979) (information provided by FCC to court of appeals at court's request), nor used its network rules promulgated in 1942 to deny or revoke a license. L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 306 (3d ed. 1968). The same pattern of limited enforcement appears in the discussions of FCC rules throughout this Article.

125. See Wilson, *The Rise of the Bourgeoisie State*, in *PERSPECTIVES ON ADMINISTRATIVE PROCESS* 18 (R. Rabin ed. 1979). Professor Wilson argues:

There are at least three ways in which political power may be gathered, and desirably in two bureaucratic hands: by the growth of an administrative apparatus so large as to be immune from bureaucratic control, by placing power over a government bureaucracy of any size in private rather than public hands, or by vesting discretionary authority in the hands of a public agency so that the exercise of that power is not responsive to the public good.

Id. at 18. As to telecommunication, see DeVaney, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499, 1499-1503 (1969).

126. "It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation." J. RAWLS, *A THEORY OF JUSTICE* 240 (1972).

to preserve the license and to retain some profit and prerogative.¹²⁷ To achieve local service, the FCC must coerce; and it must coerce both the licensee and the licensee-network relationship.¹²⁸

With the general paradigm described, it is necessary to consider the specifics of the effort, the particular problems, their implications, and possible solutions.

C. *The Efforts to Achieve Local Service*

1. *Solution to the Geographic Problem: The Allocation Scheme*

Initially, the statutory requirement of local service was resolved largely by broad allocation policies.¹²⁹ The radio spectrum generally is divided among the various radio services.¹³⁰ Within the broadcast services, two approaches to geographic division prevail, both of which attempt to provide each community with a service. First, an authorization for an AM or standard broadcast service will be issued to any applicant who can meet the general FCC standards and rules for affording technical protection against interference and providing local service to the geographic area.¹³¹

127. The FCC has recognized this problem, but has been loathe to issue specific guidelines or take affirmative action. *See, e.g.*, Advertising of Children's Premiums on Television, 40 Rad. Reg. 2d (P & F) 1, 10-11 (1977) (FCC rejection of proposed standards for children's ads); Eugene Television Co., 61 F.C.C.2d 1131, 1131-32 (1976) (broadcast of program length commercials contrary to prior representations admonished, but positive action deferred until renewal); Old Dominion Broadcasting Co., Inc., 25 F.C.C.2d 629, 632 (1970) (subordination of public interest to commercial interest by allowing sponsor to influence program control); Accomack-Northampton Broadcasting Co., 8 F.C.C.2d 357, 359 (1967) (approval of new permit despite licensee policy that would allow 33 minutes of advertising per hour); Commercial Advertising Standards, 1 Rad. Reg. 2d (P & F) 1606, 1610-11 (1964) (recognizing power of FCC to regulate over-commercialization but failing to adopt specific standards); *cf.* Sunbeam Television Corp. v. FCC, 243 F.2d 26, 29 (D.C. Cir. 1957) (court on own motion requested briefs to address length and number of commercials as part of public interest consideration).

The probable solution has been suggested in *Citizens Communications Center v. FCC* and the fairness doctrine cases. However, the fundamental problems remain—lack of clear rules and inconsistent enforcement. *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971). *See also* note 57 *supra*.

128. The unwillingness to accept the fact that real coercion is required is at the root of many of the FCC's problems. This probably stems from the American aversion to internal governmental intervention in private affairs, even when such intervention is necessary to achieve a desired goal.

129. These policies, *see* notes 130-37 *infra* and accompanying text, implement the requirement of 47 U.S.C. §§ 303(a)-(h), 307(b) (1976).

130. 47 C.F.R. § 2.105 (1978). The radio spectrum is divided into various uses, which are referred to as services. AM radio, FM radio, and television are thus examples of services discussed in this Article. Various other uses are assigned by the FCC or the Office of Telecommunication Policy, Department of Commerce.

131. *See id.* § 73.24. In the AM allocation, to meet the first element in the local service and technical protection requirements, the frequency must be between 535 and 1605 khz and be carried on one of the 107 channels in successive steps of 10 khz. *See id.* §§ 73.2, .3. Stations are then classed by power, time of operation, and type of service and assigned to channels.

Class I stations are unlimited time stations designed to serve broad areas with no objectionable interference to its primary signal, *id.* § 73.182, and with only adjacent channel interference to secondary signals, *id.* § 73.21(a)(1). This power is limited to 50 kw. *Id.* § 73.182(a)(1)(ii).

Second, FM¹³² and television assignments¹³³ are made by a table of assignments established by FCC rules that tie certain frequencies to certain locations.

Similar simple standards control both approaches either in licensing assignment or rule making. First, a broadcasting station must meet the technical and other basic requirements of the Communications Act.¹³⁴

Class II is a wide-area service station with primary service limited by and subject to such interference as may be received from a Class I station. In addition, they must avoid interference with Class I stations. *Id.* § 73.21(a)(2). This Class is subdivided into several subclasses. Class II-A channels are assigned to particular communities in certain states, *id.* § 73.21(a)(2)(i), on the basis of the Clear Channel Broadcasting Order, 31 F.C.C. 565, 604 (1961). Class II-B stations are unlimited as to time of operation with a power range of 0.25 to 50 kw. 47 C.F.R. § 73.21(a)(2)(i) (1978). Class II-D (there is no Class II-C) stations operate during either daytime or other limited time at 0.25 to 50 kw. of power. *Id.* § 73.21(a)(2)(iii).

Class III stations are regional channels designed to serve populated areas and contiguous rural areas. *Id.* § 73.21(b)(1). The Class is further subdivided into two types of stations subject to general interference rules. *Id.* § 73.182(a)(3). Class III-A stations have a power range of 1-5 kw. *Id.* § 73.21(b)(1)(i). Class III-B have a power range of 0.5 to 1 kw. at night, or 5 kw. during the day. *Id.* § 73.21(b)(1)(ii).

Class IV stations serve cities, towns, and their immediate areas. *Id.* § 73.21(c)(1). They operate at a minimum power of 0.25 kw., with a maximum power of 0.25 kw. at night and 1 kw. during the day. *Id.* § 73.21(c)(1).

The general interference standards set forth in the regulations apply to these channels. The regulation prohibits overlap of the contours of the signal of stations of various classes on cochannel, and on various adjacent channels. *Id.* § 73.37(a). The need to protect these contours imposes the restraint on new AM stations.

132. 47 C.F.R. § 73.201 (1978). The FM band, 88 mc/s to 108 mc/s, is divided into 100 channels of 200 kc/s. *Id.* Assignments are then made to localities, subject to spacing requirements that vary with class and zone. *Id.* § 73.203. Zones are based primarily on population density. The northeast is Zone I; southern California, Puerto Rico and the Virgin Islands are Zone I-A; and the remainder of the United States is Zone II. *Id.* § 73.205.

Class A stations serve a small city, town, or community and surrounding areas, *id.* § 73.206(a)(2), with power limited to 3 kw. and antenna height limited to 300 feet above average terrain, *id.* § 73.206(a)(3). Class B stations operate on either Class B or C assigned channels in Zone I and I-A with power limited to 50 kw. with an antenna height not to exceed 500 feet above average terrain. *Id.* § 73.206(b)(2), (3). Class B stations serve large cities and contiguous areas. *Id.* § 73.206(b)(2). Class C stations are assigned Class B and C channels in Zone II and serve broad areas. *Id.* § 73.206(b)(4). Class C station power is limited to 100 kw. with an antenna limit of 2000 feet above average terrain. *Id.* § 73.206(b)(5). Class D educational stations are permitted a power of no more than 10 watts. *Id.* § 73.506(a)(1). Other educational stations operate under the same restrictions unless they are commercial stations, *id.* § 73.504(b)(2), or special channel assignments, *id.* § 73.501. No protection against interference other than space between assignments, *id.* § 73.209, and power and antenna height limits, *id.* § 73.211, is provided.

133. Television stations are not categorized and are assigned to localities. *Id.* §§ 73.606, .607. In addition, the United States is divided into three zones of varying sizes, with operation based on population density and climate. *Id.* § 73.609. Power and antenna height limits are imposed by channel, because of varying propagation characteristics. *Id.* § 73.614. Charts included in the regulations establish sliding scales of these factors for zones. *Id.* § 73.699. No protection from interference, other than assignment separations, is provided. *Id.* § 73.612.

134. AM assignments are made on the basis of the Act's requirements, tracked in 47 C.F.R. § 73.24(a)-(f), (k) (1978). The licensee must also meet interference requirements, *id.* § 73.24(h), (i); *id.* § 73.37, and the general AM rules, *id.* pt. 73(a).

Second, the license assignments will go to unserved localities over served localities.¹³⁵ Third, when one of two mutually exclusive applicants will provide a third (or greater) broadcast service and the other applicant will provide a second service, the need for the second broadcast service will control.¹³⁶ In all other situations, factors other than geographic allocation will determine the award of license; if there are not multiple applicants for a frequency, in most situations the applicant seeking a broadcasting license need only meet the general FCC standards after a potential assignment has been found.¹³⁷

The assignment schemes for AM and FM radio have not been challenged.¹³⁸ In *Yankee Network, Inc.*¹³⁹ the original television allocation plan was challenged on the theory that section 307(b) of the Communications Act not only required an equitable geographic distribution of licenses,¹⁴⁰ but also required that the distribution be made through individual licensing procedures rather than rule making. The FCC rejected this contention¹⁴² by relying on its authority under section 303 to promulgate rules and regulations, including specific authority (1) to classify stations on the basis of the service a station is to render,¹⁴³ (2) to assign bands to the various services and to determine frequencies and power of individual stations,¹⁴⁴ and (3) to establish the coverage of stations.¹⁴⁵ In *Logansport Broadcasting Co. v. United States*¹⁴⁶ the Court of Appeals for the District of Columbia Circuit noted the FCC's general rule making authority and found that many questions within the FCC's jurisdiction can be resolved either by adjudication or by rule making within the agency's informed discretion.¹⁴⁷ The experience of the AM and FM allocation plan, in which individual licensees were assigned nationwide on the basis of a rule making, was found to be a sufficient basis for the FCC's decision to use rule making.¹⁴⁸ Therefore, the court of appeals sustained the FCC's plan and method of allocation.¹⁴⁹

135. Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 191 (1965).

136. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955).

137. See text accompanying notes 152-82 *infra* (discussion of suburban doctrine).

138. But see *Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963).

139. 12 F.C.C. 1043 (1948) (applicant for channel in Bridgeport, Connecticut, sought consolidated hearings with two Hartford, Connecticut, applicants; FCC rejected request).

140. See note 85 *supra* and accompanying text.

141. 12 F.C.C. at 1043-44.

142. *Id.* at 1044.

143. *Id.* at 1043 (applying 47 U.S.C. § 303(a)-(b) (1976)).

144. *Id.* (applying 47 U.S.C. § 303(c) (1976)).

145. *Id.* (applying 47 U.S.C. § 303(d) (1976)).

146. 210 F.2d 24 (D.C. Cir. 1954). Appellant objected to the assignment of Channel 10 VHF to Terre Haute, Indiana, rather than Logansport, Indiana, and Owensboro, Kentucky. The objection was rejected. *Id.* at 28. See also *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 287-88 (D.C. Cir. 1953) (earlier, less well-reasoned case that court refused to distinguish in *Logansport*).

147. 210 F.2d at 27.

148. *Id.* at 25, 27.

149. *Id.*

The FCC has chosen a system of ad hoc allocation for AM radio and an allocation system based on geographic locality for FM radio and television.¹⁵⁰ Since both allocation approaches are clearly workable, an adequate system can be predicated on either. The problem is not the system of allocation itself, but the other factors involved. FCC hesitancy to consider and to resolve hard policy questions, even when fully informed, casts grave doubt on the FCC's willingness to use the tools at its command. FCC indecision is not the only problem. Once the goal of the geographic allocation plan is realized, the licensee can essentially act at its discretion. In all likelihood, the licensee will turn to network programming if possible, because the affiliation with a network provides popular programs that draw large audiences. This is reflected in payment from the networks for advertising that is network-originated and results in higher charges to local advertisers.¹⁵¹ The result is an enormous diminution of local programs. The occurrence is so regular and extensive that it alone jeopardizes the efforts to nurture local service. Nevertheless, the particulars of the FCC effort must be examined.

2. Community of Service: Where, Who, and What Service

In determining what location¹⁵² (political subdivision or otherwise) that a licensee is to serve, the problems of geographic distribution and program content merge. It makes no sense to license a station to a community if that station will not provide service to the community. This problem first became intense in radio. The FCC concluded in *Huntington Broadcasting Co. v. FCC*,¹⁵³ in which the applicant would have provided essentially the same signal to Los Angeles and its suburb Huntington Park, that in metropolitan areas a station licensed to a suburb may actually serve the center city.¹⁵⁴ Hence, to avoid suburban assignments becoming central city assignments, a station is required to serve the community of license.¹⁵⁵

However, there are broader ramifications to determining the area of service. A licensee, especially a licensee of a television station or a powerful radio station, must provide service to its entire area of coverage, in addition to its obligation to serve the needs and interests of its city of license.¹⁵⁶ Furthermore, recent change of format cases cast

150. See notes 129-50 *supra* and accompanying text.

151. See notes 49-62 *supra* and accompanying text.

152. 47 C.F.R. § 73.30(a) (1976) defines location as "a . . . city, town, political subdivision, or community," which is doubtless part of the problem.

153. 14 F.C.C. 563 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951).

154. See *id.* at 583-84. The multiplicity of stations assigned to smaller political subdivisions in a relative homogeneous, one-market metropolitan area pushes toward this result. *Id.*; see note 160 *infra*.

155. Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 193-94 (1965); see note 159 *infra*.

156. *Stone v. FCC*, 466 F.2d 316, 327-28 (D.C. Cir. 1972).

doubt on the rationale of the requirement of service to a city of assignment, because the decisions consider all licensees assigned to a metropolitan area included in central city and suburban assignments, and thus seem to run counter to the suburban community protection policy.¹⁵⁷ Still, the problem of determining community of service, in all its facets, remains important. A series of rules and policies have developed to determine what constitutes a geographic location.¹⁵⁸

The most difficult identification of community problems is establishing whether service to a suburb is distinct from service to the central city. By its *Policy Statement*¹⁵⁹ on the suburban community issue, the FCC basically adopted the *Huntington Broadcasting Co.*¹⁶⁰ rule, which was questioned in subsequent, factually distinguishable litigation.¹⁶¹ The FCC attempted to avoid the tendency of stations with

157. See notes 160-69 *infra* (questioning FCC policy on this issue).

158. For the FCC's unhelpful general definition, see note 152 *supra*.

159. Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190 (1965). In *Woodland Broadcasting Co. v. FCC*, 414 F.2d 1160 (D.C. Cir. 1969), the policy statement eliminated one of two mutually exclusive applicants. That applicant asserted the statement was arbitrary because previously the stations would have been treated equally as wide area stations. *Id.* at 1162. The contention was rejected because of the FCC's experience that small suburban stations tend to become central city stations, because the formula of the statement was itself reasonable, and because the appellant had not been automatically rejected. *Id.* at 1164. For further comments on *Woodland*, see note 169 *infra*.

160. 192 F.2d 33 (D.C. Cir. 1951). In this case there were two mutually exclusive applicants for a license (a third was disqualified for other reasons). One proposal was to serve Los Angeles, the other to serve Huntington Park, a politically autonomous suburb of Los Angeles. *Id.* at 34-35. Both proposals provided a fully adequate signal for Huntington Park and essentially the same signal for Los Angeles and the metropolitan area. The FCC ruled, and the Court of Appeals for the District of Columbia Circuit affirmed, that because the service coverage was in fact for Los Angeles, the Huntington Park applicant deserved no preference for providing that city a first primary service. *Id.* at 35. The rule emerged that if a central city and suburban applicant both provided high quality service to the entire metropolitan area, both would be regarded as central city applicants for purposes of determining scope of service and community of license. *Id.*

The FCC must determine, as a threshold matter, the suburban-central city relationship in cities with less than 50,000 people. Compare *V.W.B. Inc.*, 8 F.C.C.2d 744 (1967) (suburban issue added) with *Durgin Assocs., Inc.*, 10 F.C.C.2d 24 (1967) (suburban issue dismissed). In *V.W.B., Inc.*, the FCC found Bridgeton, North Carolina (population 15,717), to be a suburb of New Bern, North Carolina, relying on the commercial dependence of the former to the latter. 8 F.C.C.2d at 745. In the second, *Gardner, Maine* (6,897), was found not to be a suburb of Augusta, Maine (21,680), because Gardner's population could and did support a separate entity. 10 F.C.C.2d at 25.

161. See *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199 (D.C. Cir. 1965). In that case there were two mutually exclusive applicants: one for Monroeville, a borough of more than 22,000, 3.5 miles from Pittsburgh, and the other for Ambridge-Aliquippa, two boroughs aggregating more than 40,000 in population, 10.5 and 12 miles respectively from Pittsburgh. The Monroeville application was omnidirectional and reached a third of Pittsburgh. *Id.* at 200. The Ambridge-Aliquippa application was directional and served 98% of Pittsburgh. Applying the *Huntington* rationale, the FCC found that Monroeville was a suburban service, but that Ambridge-Aliquippa was a Pittsburgh service. On the basis of first local service, Monroeville was awarded the license by the FCC. *Id.*

increasing areas of coverage to become metropolitan rather than local stations.¹⁶² The FCC has created a rebuttable presumption that if a suburban station's five mv/m contour¹⁶³ penetrates a city with a population of 50,000 or more that is twice as large as the applicant's proposed community of service, then the applicant intended to serve the larger city.¹⁶⁴ If the presumption is not rebutted, the license application will be denied. The essential elements of a rebuttable presumption are: first, a showing "that [the applicant's] community has separate and distinct programming needs;"¹⁶⁵ second, that those needs are not presently being adequately met;¹⁶⁶ and third, that the applicant's proposals will adequately meet them.¹⁶⁷ In addition, the applicant must introduce evidence to show financial support through advertising from within its community.¹⁶⁸

Although not necessarily determinative, the importance of the advertising consideration is apparent. If a community's advertisers cannot support a station, the station must seek other advertisers who probably will want to reach another market. To prosper, the station is likely to seek a broader audience to satisfy the advertisers' demands. In doing so, the station will present programs that appeal to listeners in the larger metropolitan area, which are not necessarily the same programs that appeal to the suburban interests. In *Miners Broadcasting Service, Inc. v. FCC*¹⁶⁹ the Court of Appeals for the District of Columbia reversed and

The circuit court found that in *Huntington* the local service issue was avoided and thus removed an unfair disadvantage from an applicant, while in *Miners* inequities were created. *Id.* at 201. The case was remanded, requiring an explanation of the extension of the rule that would reduce rather than increase the number of potential licensees from which the FCC could choose. *Id.* at 201-02. Because *Huntington* furthers the public interest when used to widen inquiry does not mean that it will do so when used to narrow interest. "We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service." Policy Statement on Section 307(b) Consideration for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 192 (1965).

162. See also AM Station Assignment Standards, 2 Rad. Reg. 2d (P & F) 1658, 1661 (1964), discussed in Policy Statement on Section 307(b) Consideration for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 192 (1965).

163. The mv/m contour is millivolts per meter, the FCC standard measure of AM radio signals.

164. Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190, 192-93 (1965).

165. *Id.* at 193.

166. *Id.*

167. *Id.*

168. *Id.*

169. 349 F.2d 199 (D.C. Cir. 1965); see *Woodlands Broadcasting Co. v. FCC*, 414 F.2d 1160, 1161 n.3 (1969). *Woodland* involved a situation similar to *Miners*. A Vidor, Texas, applicant was disqualified by the policy statement; the license was awarded to a Port Arthur, Texas, applicant. Port Arthur was outside the scope of the disqualifying clause because its population exceeded 50% of Beaumont, Texas, the central city, and the rationale of *Miners* was rejected in view of the policy statement. *Id.* at 1162-63.

remanded an FCC extension of the *Huntington Broadcasting*¹⁷⁰ standard in such a way as to treat two suburbs of Pittsburgh, Ambridge and Aliquippa, as part of Pittsburgh,¹⁷¹ while treating Monroeville, another suburb, as a separate community.¹⁷² The result was that the Monroeville applicant would receive the license without considering the merit of the licensee, because this was Monroeville's first AM broadcast service.¹⁷³ On remand the FCC responded with a *Policy Statement* modeled on *Huntington Broadcasting*. The *Policy Statement* both adopted and clarified the FCC's prior rationale.¹⁷⁴ The court of appeals affirmed the result and approved the policy.¹⁷⁵

In *Jupiter Associates, Inc. v. FCC*¹⁷⁶ the applicant for license to Matawan, New Jersey, asserted that the FCC *Policy Statement* was improperly applied.¹⁷⁷ Mutually exclusive applicants for Matawan and Elizabeth, New Jersey, both invoked the suburban doctrine because neither city was more than fifty percent the size of New York City and their five mv/m signal reached the city. The court had no difficulty in finding on the facts that Matawan clearly had a lesser programming need.¹⁷⁸ Accordingly, the court held that the Matawan applicant would tend to serve the New York City metropolitan area rather than the city of license, and Radio Elizabeth would primarily serve the programming needs of Elizabeth, New Jersey.¹⁷⁹ Therefore, the award to Radio Elizabeth was affirmed.¹⁸⁰

Thus, by rule making the FCC has evolved a special policy under which both geographic distribution problems and programming needs are initially solved by technical criteria. While technical data are relied on, the rules recognize that in appropriate circumstances consideration of the community's programming needs and the station's abilities will

170. 349 F.2d at 202; see note 154 *supra* and accompanying text; note 160 *supra*.

171. 349 F.2d at 200.

172. *Id.* at 200-01.

173. *Id.* at 200.

174. Policy Statement on Section 307(b) Consideration for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C.2d 190 (1965).

175. *Jupiter Associates, Inc. v. FCC*, 420 F.2d 108, 114 (D.C. Cir. 1969). The case is similar to *Miners*. Appellant would have served Matawan, New Jersey, a rural borough of a city of about 5000, 4.2 miles (three of which are over water) from New York City with a significant nonmanufacturing business community (158 establishments). It had other indicia of autonomy: a weekly newspaper, a court system, and an independent government. It had no radio or television stations. The successful applicant, Radio Elizabeth, sought a license for Elizabeth, New Jersey, a city of about 100,000 and county seat of Union County, which had a population of approximately 500,000 and was also a part of the New York City-northeast New Jersey metropolitan area located 14 miles from New York City. It was a heavily industrialized and commercial city with a government. The court set out detailed findings as to these conditions and the needs created thereby. The court found the evidence sufficient to support the rebuttal of the presumption of the policy statement. *Id.* at 111-14.

176. 420 F.2d 108 (D.C. Cir. 1969).

177. *Id.* at 110.

178. *Id.*

179. *Id.* at 113-14.

180. *Id.* at 114.

outweigh the presumption that arises on technical grounds. The result is a workable and predictable rule that relies on technical standards for initial consideration with waiver of these standards permitted in rare circumstances.

By this approach the FCC has recognized the needs of the community for service as well as the needs of the licensee for a milieu that both permits the exercise of journalistic discretion and allows adequate financial returns to the licensee.¹⁸¹ These interests are accommodated without undue difficulty. The ability to accommodate these interests is enhanced considerably by the lack of directly asserted interests from representatives other than the FCC and potential licensees. Public interest assertions have complicated and cast doubt on the effectiveness of the suburban community doctrine beyond its applicability to news and public affairs.¹⁸² While hardly a model for other situations, the suburban community doctrine suggests that local service problems can be solved even when they include general programming decisions. In addition, it leads to the more complex question of what programming will be required to rebut the presumption of suburban service to a central city.

D. Local Service Program Rules Applied to Individual Licensees

1. From the 1960 Policy Statement to the Primer

The FCC first set forth in 1962 the basis of ascertainment requirement, which instructs a potential licensee to determine community problems and needs, in *Henry v. FCC*.¹⁸⁴ In that case, the applicant, without undertaking steps to become familiar with community characteristics or needs, sought a permit to construct a radio station in Elizabeth, New Jersey.¹⁸⁵ The program proposals submitted to the FCC by the applicant were identical to program proposals that its principals had used to apply for permits in two other locations.¹⁸⁶ In its explanation of the standard by which such applications are reviewed, the FCC stated:

It is not sufficient that the applicant will bring a first transmission service to the community—it must in fact provide a first local outlet for community self-expression. Communities may differ, and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs . . . [Applicant's] principals made

181. See notes 47-56 *supra* and accompanying text (discussing financial needs of licensees).

182. See notes 275-314 *infra* (format change cases).

183. 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962).

184. 302 F.2d 191, 193 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962).

185. *Id.*

186. *Id.* at 192.

no inquiry into the characteristics of Elizabeth or its particular programming needs.¹⁸⁷

On appeal to the Court of Appeals for the District of Columbia Circuit, the appellant asserted that under the federal licensing scheme the FCC was bound to issue a license to the applicant for an unserved community without regard to programming proposals if the applicant was legally, financially, and technically qualified.¹⁸⁸ The court held that the "public interest, convenience and necessity" standard of the Communications Act¹⁸⁹ provided the FCC with sufficient latitude to require programming designed to meet the needs of the community.¹⁹⁰

Eight years later in *City of Camden*¹⁹¹ the FCC applied the rationale of *Suburban Broadcasting* to a proposed ownership transfer of a Camden, New Jersey, radio station. On undisputed facts, a bifurcated issue pertaining to community service arose: (1) was the transferee's effort to determine the community's programming needs adequate,¹⁹² and (2) did the transferee's programming proposals actually serve the public interest by meeting the ascertained needs?¹⁹³ In an effort to ascertain the community's programming needs, the applicant's proposed station manager interviewed twenty persons in political and business leadership positions. The sampling included only one black and one woman and did not include representatives of youth groups or representatives of ethnic groups other than blacks.¹⁹⁴ No effort was made by the transferee to survey public opinion in a general way.¹⁹⁵ Further, no effort was made to determine the ethnic makeup of Camden,¹⁹⁶ which

187. 30 F.C.C. at 1022 (footnotes omitted). The FCC has made clear as well that local programming will be an important, indeed one of the most decisive, factors in comparative hearings. Policy Statement on Comparative Hearings, 1 F.C.C.2d 393, 394 (1965). In terms of local service, the most effective FCC regulation of licensees occurs in determining who will receive the license.

The primary reason for this is the relative lack of control by the FCC over station transfers. *Id.* at 406 (Lee, Comm'r, concurring). In *Powell Crosley, Jr.*, 11 F.C.C. 3 (1945), the FCC attempted to determine if the transferee was the best available party and, if not, to require the transfer to be made to the best available party willing to pay the required price. The FCC abandoned the effort, 14 Fed. Reg. 3235 (1949), and Congress legislated to prevent a return to the practice. The Act now permits the FCC to examine only the potential transferee and the proposal for operation to determine if minimum public interest standards are met, not whether the transferee is the most qualified potential transferee. 47 U.S.C. § 310(d) (1976). Significantly, the statute is *not* a complete bar to an examination of a proposed transfer. See notes 327-37 *infra* and accompanying text. Indeed the Communications Act specifically permits a determination of whether the transfer serves the public interest. 47 U.S.C. § 310(d) (1976). Nevertheless, the bar is of considerable consequence, and enforcement efforts were concentrated for some time at the time of license issue.

188. 302 F.2d at 193.

189. See *id.*

190. *Id.* at 194.

191. 18 F.C.C.2d 412 (1969).

192. *Id.* at 418-19.

193. *Id.* at 418.

194. *Id.* at 415, 422.

195. *Id.*

196. *Id.*

was approximately twenty-five percent nonwhite and over seventeen percent foreign and first-generation Americans.¹⁹⁷

Notwithstanding that the interviews with the twenty Camden residents indicated a feeling that the station had one deficiency, a lack of local (South Jersey) news,¹⁹⁸ the program proposals manifested an intent to reduce the time committed to local news coverage.¹⁹⁹ The applicant's principals, one of whom had interviewed two persons and listened in an unsystematic way to the local and Philadelphia stations, proposed a "good music" format employed by several of their other stations.²⁰⁰ All public affairs and news programs were to be reduced in time, with local news assigned one-half hour a week compared to three hours weekly under the transferring licensee. Foreign language programs were to be dropped without adding anything of special interest to any ethnic group.²⁰¹

As in *Suburban Broadcasting*, the proposed transferee station's programming was placed into a preconceived mold of what makes a profitable metropolitan station. The FCC had sought to avoid frustration of the local service obligation by suburban stations using such a preconceived mold. Because of both the survey method and the proposed programming, the FCC denied transfer as against the public interest.²⁰² Thus, the *Suburban Broadcasting* requirement of ascertaining the community's programming needs was complemented by requiring the potential licensee to show an intention to meet those needs by specific programming.

The *City of Camden* decision is potentially important not only because it provides a means to initiate achievement of the local service goal, but also because it creates standards that apply to transfers of broadcasting licenses.²⁰³ The most effective control, although not an outstanding one, had been in the issuance of the original license. Transfers have tended to undermine the impact of the original choice of licensee. *City of Camden* provides a potential remedy to this deficiency through more effective enforcement of standards imposed on license transferees. Furthermore, the FCC attempted to define a previously vague standard²⁰⁴ with sufficient precision to permit its use in license application, transfer situations, and subsequent station operation appraisals. An awareness of the community's needs emerged.

197. *Id.* at 413.

198. *Id.* at 416.

199. *Id.* at 417.

200. *Id.* at 416.

201. *Id.* at 417-18.

202. *Id.* at 424.

203. *Id.* at 425.

204. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 418, 36 Fed. Reg. 4092 (1971). See also Notice of Proposed Rulemaking, 53 F.C.C.2d 3 (1975); Primer on Ascertainment of Community Problems by Broadcast Applicants, Pt. I, §§ IV-A & IV-B of FCC Forms, 20 F.C.C.2d 880 (1969) (original Primer on ascertainment).

To further the end of developing standards for the ascertainment of community problems and needs by commercial broadcast license applicants, the FCC in early 1976 adopted a *Primer*²⁰⁵ in question and answer form that requires a broad survey of community opinion and a consultation of a list of typical community institutions and groups.²⁰⁶ The prospective licensee must note the programs that will meet particular community needs discovered in the survey.²⁰⁷ The *Primer* is phrased in language an intelligent person can understand. However, its language is general and requires either interpretation by decision, or the grant of considerable discretion to the licensee involved to act in accord with current FCC thinking, again to be derived from the trend of decisions.²⁰⁸

2. *The Requirements of Ascertainment*

The applicant for issuance or renewal of a license is required to conduct a procedure to ascertain the problems of the proposed community of license and to suggest broadcast programs to consider these problems.²⁰⁹ The applicant must conduct two surveys during ascertainment: a formal survey of community leaders²¹⁰ and a less formal random survey of the community.²¹¹ Initially in the process of ascertainment the licensee is required to maintain certain demographic information on the city of license, including population, minority representation, and number of women.²¹² However, the licensee need not follow this determination. The FCC list of twenty universal categories of people²¹³ to be questioned is all that must be completed.²¹⁴ Communities are regarded as so homogenous that the FCC list of twenty categories of people will elicit needs, problems, and interests of the community.²¹⁵ Consultation with members of these groups discharges the very important obligation

205. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976), as amended by 61 F.C.C.2d 1, 1 (1976).

206. *Id.* at 428-29.

207. *Id.* "If local service does not in fact play a significant role in the operation of the present system, traditional policies may be senseless and they may in addition turn out to be surprisingly short of life." Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas, and Nebraska, 14 F.C.C.2d 2, 16 (1968).

208. See 57 F.C.C. 2d at 427-31.

209. See Primer on Ascertainment of Community Problems by Broadcast Applicants, Pt. I, §§ IV-A & IV-B of FCC Forms, 27 F.C.C.2d 650 (1971) (initial application); Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1975) (renewal applicants).

210. See 27 F.C.C.2d at 881; 57 F.C.C.2d at 423-28.

211. See 27 F.C.C.2d at 881; 57 F.C.C.2d at 428-30.

212. 57 F.C.C.2d at 434, 442.

213. The FCC has resisted efforts to add new categories to the 19 listed, but has explicitly required that all significant groups in the applicant's community be ascertained. See Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey, 69 F.C.C.2d 1815, 1821 (1978).

214. 57 F.C.C.2d at 430, 442. Under the prior *Primer*, the information was used to guide the licensee interview. See Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 F.C.C.2d 880, 881 (1969).

215. See Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 434, 442 (1976).

of the leader survey without further regard to its scope. In conducting this group survey, the licensee must use at least fifty percent management level employees.²¹⁶

The FCC also requires a random survey of the entire community. It need not be scientific or otherwise designed to assure coverage of all segments of the community;²¹⁷ the basic requirement is that it have sufficient geographic scope to cover the service area. Its goal, like the leader survey, is to discover the problems, needs, and interests of the community.²¹⁸ Beyond this, total neglect of discrete groups would not be permissible,²¹⁹ but little more of substance exists in the requirement of the random public survey.

The problems, needs, and interests of the community are adduced from the interviews in the survey. Program preferences may be considered, but are not to control the licensee.²²⁰ The licensee, considering the interviews, must program to meet the determined needs and problems,²²¹ including news, public affairs, and other related programming, but generally not entertainment.²²² The decision of *how* to program is within the licensee's discretion. The licensee may give greater weight to some highly perceived problems than others, but may not neglect all problems.²²³ Moreover, the licensee is not required to propose programming for minority group problems on the basis of the percentage of the minority groups in the population of the area.²²⁴ Indeed, as a broad proposition, any coverage of minority problems is adequate given the FCC's position that general programming serves minority groups.²²⁵

216. *Id.* at 426-27, 443. Nonmanagement level employees must be supervised by management level employees. *Id.* at 426-27.

217. *See id.* at 443; *see, e.g.*, Montgomery Ind. Telecasters, Inc., 62 F.C.C.2d 262, 263 (1977); Julie P. Miner, 60 F.C.C.2d 892, 898-99 (1976); Pueblo Stereo Broadcasting Corp., 32 F.C.C.2d 734, 738 (1971). *But cf.* Rocket Radio, Inc., 65 F.C.C.2d 589, 590-91 (1977) (ascertainment efforts found fatally defective).

218. 57 F.C.C.2d at 428-30, 444; *see, e.g.*, KSD/KSD-TV, Inc., 61 F.C.C.2d 504, 506-09 (1976); Lance Communications, Inc., 57 F.C.C.2d 1235, 1236-38 (1976). The same standard applies to the leader survey. *See* Alvin L. Korngold, 45 F.C.C.2d 1, 3 (1974).

219. *See, e.g.*, Town and Country Radio, Inc., 65 F.C.C.2d 694, 697 (1977); CBS, Inc., 57 F.C.C.2d 505, 513 (1975); Eastern Broadcasting Co., 50 F.C.C.2d 599, 600 (1975); Folkways Broadcasting Co., 48 F.C.C.2d 723, 725 (1974).

220. Ascertainment of Community Problems by Broadcast Applicants, 35 Rad. Reg. 2d (P & F) 1555, 1589 (1976); *see, e.g.*, Lakewood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919, 923 (D.C. Cir. 1973); A.S. Abell Co., 51 F.C.C.2d 871, 873 (1975).

221. *See, e.g.*, Patrick Henry, 62 F.C.C.2d 293, 295 (1977); Ascertainment of Community Problems by Broadcast Applicants, 61 F.C.C.2d 1, 3 (1976); Midland Broadcasters, Inc., 48 F.C.C.2d 195, 196-97 (1974).

222. *See, e.g.*, Gulf Television Corp., 58 F.C.C.2d 228, 230 (1976); Television Wis., Inc., 58 F.C.C.2d 1232, 1233-1238 (1975); Bud's Broadcasting Co., 51 F.C.C.2d 238, 240 (1975).

223. Lefloore Broadcasting Co., 65 F.C.C.2d 556, 566 (1977); Southeast Ark. Radio, Inc., 57 F.C.C.2d 351, 352 (1976); WHEC, Inc., 55 F.C.C.2d 687, 689 (1975).

224. *See* note 238 *infra*.

225. Puerto Rican Media & Educ. Council, Inc., 51 F.C.C.2d 1178, 1181-82 (1975); RKO Gen., Inc., 33 F.C.C.2d 664, 668 (1972); WKBN Broadcasting Corp., 30 F.C.C.2d 958, 970 (1971).

3. *The Primer Experience*

The implementation of the *Primer* has become the primary contemporary means of assuring local service.²²⁶ Nevertheless, the FCC's hesitant enforcement of the *Primer's* requirements has negated the thrust of earlier decisions.²²⁷ This has occurred because the entire scope of ascertainment of community needs and problems is entrusted to licensee discretion, and because unusually high pleading requirements must be met by the challenger under section 309 of the Communications Act.²²⁸ The result is that few complaints reach the stage of successful pleading, which in itself is a victory insofar as it shakes licensee complacency. A substantial number of all other challenges are lost when the FCC finds an arguably reasonable basis for the licensee's determination that its undertakings are adequate.²²⁹ The cases provide little opportunity for the assertion and vindication of clearly felt public discontent. The result is a gross imbalance against the public first amendment right in favor of the licensee's business interests and first amendment right.

4. *The Primer and the FCC: A Framework of Decisions*

*Stone v. FCC*²³⁰ and *Columbus Broadcasting Coalition v. FCC*²³¹ involved challenges to the means and scope of ascertainment of, and the requisite programming to meet the community needs under, the *Suburban Broadcasting* and *Primer* rules. In *Stone* the renewal of WMAL-TV, licensed in Washington, D.C., was challenged by a group of black community leaders. Washington has a significant black majority, but WMAL-TV sought to provide service to the suburbs as well, which are overwhelmingly white. The appellants' position was that the primary obligation of the licensee was to meet the needs of the city of license, not the needs of surrounding suburbs.²³² Both the method of ascertainment of community problems and the choice of programs were challenged as allocating too much weight to the suburban areas while neglecting the city.²³³

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's findings that most central cities have complex and pressing problems requiring special attention, and that the licensee had provided such attention.²³⁴ The court held, however, that a "licensee has an

226. See Note, *Judicial Review of FCC Program Diversity*, 75 COLUM. L. REV. 401, 401-03 (1975).

227. See *id.* at 419-20.

228. See *id.* at 417.

229. See *Western Mich. Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968). See also *Southwest Operating Co. v. FCC*, 351 F.2d 834, 837-38 (D.C. Cir. 1965) (applying *Stone v. FCC*, 466 F.2d 316, 321-23 (D.C. Cir. 1972)).

230. 466 F.2d 316 (D.C. Cir. 1972).

231. 505 F.2d 320 (D.C. Cir. 1974).

232. 466 F.2d at 325.

233. *Id.* at 325.

234. *Id.* at 327.

obligation to meet the needs and interests of its entire area of service."²³⁵ This is especially true in television because it has fewer stations than radio. The court then decided that a licensee has the discretion to determine how to meet conflicting and competing regional and minority needs within its area of service.²³⁶ A licensee cannot disregard a strongly expressed need, but it is not bound by a formula, such as a requirement that time be allocated on the basis of the percentage of discrete groups with particular needs among potential viewers.²³⁷ The performance of WMAL-TV was found to be within the required ambits.²³⁸

The method of ascertaining community needs and problems was attacked by the community leaders because it considered suburban needs and used extravagant language to describe the station's relationship with black leadership.²³⁹ Consistent with FCC policy, both leaders and the general public were questioned by the licensee to ascertain community needs. Community leaders were chosen proportionately on the basis of the population in the District of Columbia and the surrounding Virginia and Maryland suburbs. The representation of Washington was doubled because it was the city of license. In addition, the balance toward Washington was increased by a scientific survey of the city directed at large groups and by in-depth interviews of some inner-city residents.²⁴⁰ The appellants read the renewal application survey of community leaders to state that applicants' management was in continual daily contact with each of the interviewed black leaders. This reading was not accepted. The court of appeals affirmed the FCC's finding that the applicant was in fact in continuous daily contact with some of the leaders, including all at various times, and that this was what the application meant.²⁴¹ On the basis of obligation to the city of service, this was found to be proper ascertainment.²⁴²

Stone raised another, more difficult question of what is to be ascertained. The FCC through its *Primer* and other procedures focuses on community problems that translate into newsworthy events.²⁴³ Thus,

235. *Id.*

236. *Id.* at 328.

237. *Id.*

238. *Id.*

239. The application could be read to suggest daily contact with each of the state leaders, stating that there was "close personal association" and "daily and continuing activity" with the black leaders. *Id.* at 326-27. The court of appeals found this "perhaps careless," but "that there was no intent . . . to deceive." *Id.* at 327.

240. *Id.* at 325-26.

241. *Id.* at 326-27. The protest to the use of printed forms at the interviews of community leaders was rejected. The court approved the *Primer* suggestion that printed forms could be used in conjunction with the interviews of community leaders, not as the interviews but to structure them. *Id.* at 326.

242. *Id.* at 326-27.

243. *See id.* at 328 n.44. The court of appeals questioned the focus on newsworthy events to the exclusion of other needs. The court suggested that ascertainment might include inquiry into "the broad range of human activity that includes family life, art, and social interaction." *Id.* The court concluded that the FCC is the forum for any consideration of a different evaluation of programming. *Id.*

while the FCC has recognized the need for special ethnic programs²⁴⁴ other than news and public affairs, its policies push another way. Ethnic groups want their culture treated in a sympathetic and thorough way in the aggregate of programs, not neglected or relegated to an insubstantial place.²⁴⁵ Aesthetic and social affairs, the aspects of many ethnic groups that bind them together, often are forgotten because such affairs are not problems.²⁴⁶ The licensee will prefer coverage of difficulties among ethnic and racial groups in the community over the more mundane social and cultural events. If the FCC is to pursue the local service concept, however, it should by rule and decision include coverage of such cultural, aesthetic, and social matters.²⁴⁷

The importance of this concern must not be overlooked. While the license renewal in *Stone* was opposed by local groups, their complaint has national ramifications. It is not only in Washington where black culture is slighted, nor is it only blacks who are neglected. The problem is national, and the FCC is in a much better position to act for the public interest than are individual groups. Articulation of standards and enforcement of their policies will meet this need and provide a degree of certainty to the licensee, enhancing the protection and protectability of their interests.

While the licensee might prefer no standard and freedom to disregard public complaints, ongoing public complaint is the result of poorly established, vague standards. Such standards are subject to continued attack by public interest groups unsatisfied with the product of the general standards. Legal defense entails considerable expense for the licensee. The cost of complying with firmly enforced standards might well be less for the licensees as a group and certainly would be less for those subject to particular attack. Likewise, if the standards were more specific, public groups would know their rights and could vindicate them more effectively.

The court in *Stone* applied the pleading requirement of the Communications Act requiring pleadings to "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest]."²⁴⁸ The FCC's strict application of the requirement for a prima facie case hampers efforts to

244. See *Radio Akron, Inc.*, 62 F.C.C.2d 987, 994-95 (1977); *Alabama Educ. Television Comm'n.*, 50 F.C.C.2d 461, 465-71 (1975); cf. *Gulf Television Corp.*, 58 F.C.C.2d 228, 232 (1976) (proportional programming for minorities not required); *Gunther Heinrich*, 27 Rad. Reg. 2d (P & F) 211, 211-12 (1973) (FCC allowing decrease in ethnic programming for financial reasons).

245. See *Stone v. FCC*, 466 F.2d 316, 328 n.44 (D.C. Cir. 1972).

246. *Id.*; cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394-95 (1969) (discussing first amendment implications of local service).

247. The 1974 legislative proposal included this type of rule making. See H.R. 12993, 93d Cong., 2d Sess. §§ 2(a)(i), 2(b), 4, 6 (1974). While the language varied in the House and Senate prints, the requirement remained basically the same.

248. 47 U.S.C. § 309(d)(1) (1960) (emphasis added).

challenge incumbent licensees' local service efforts²⁴⁹ by creating a burdensome task for the complainant at the commission level. Judicial review does not ease the complainant's burden because courts will defer to agency expertise in drawing inferences and reaching conclusions, if reason permits.²⁵⁰ The licensees' discretion in all steps of determining and proposing to meet community needs renders the preparation of sufficient pleadings an exceedingly difficult task.²⁵¹ Even if the pleading requirement is met, the matter is still fundamentally within FCC expertise; it is difficult to elicit an affirmative response from the agency.²⁵² Although the result is salutary in protecting against frivolous complaints, it cuts too deeply. Not only are frivolous complaints excluded, but many complaints that raise substantial questions concerning programming and general policy are lost.

Columbus Broadcasting Coalition v. FCC,²⁵³ which reiterates the procedural position of *Stone* that no hearing is required if the pleading requirements of section 309(d)(2) of the Communications Act are not met,²⁵⁴ is a narrow case. In 1974 the coalition²⁵⁵ appealed the FCC rejection of its program complaints that public affairs were slanted against blacks, that black music was neglected, and that news and public affairs programming proposals were significantly decreased from the 1967 proposals.²⁵⁶ The Court of Appeals for the District of Columbia Circuit affirmed the FCC decision with little elucidation.²⁵⁷ Public affairs, the court of appeals said, cannot be broken into black points of view and other points of view.²⁵⁸ According to the court, a mere change in percentage of programs is not a relevant point itself since diminution of service is a subjective public interest question, not a mathematical question.²⁵⁹ Additionally, the ascertainment of what programming is in

249. See 466 F.2d at 328-29 (deficiency of *Stone* pleadings discussed in context of requirements of 47 U.S.C. § 309(d)(1) (1960)); *id.* at 328 n.44 (problems facing appellant discussed in terms of FCC rules that preclude consideration of issues appellant regarded as vital). For a survey of these issues, see note 243 *supra*.

250. 466 F.2d at 322; see, e.g., *Civic Telecasting Corp. v. FCC*, 523 F.2d 1185, 1189 (D.C. Cir. 1915); *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965). However, the courts will require the FCC to state the basis for its decisions to permit some minimal review. See *Wait Radio*, 418 F.2d 1153, 1156, 1159-60 (D.C. Cir. 1969) (remand for explanation of reasons for denial of waiver of rules). Compare *West Mich. Telecasters, Inc.*, 396 F.2d 688, 691-92 (D.C. Cir. 1968) with *Thunder Bay Broadcasting Corp.*, 49 F.C.C.2d 1023, 1027-28 (1974) (FCC interpretation of its discretion in light of prior court ruling).

251. See note 267 *infra* and accompanying text.

252. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 258 (D.C. Cir. 1974) (en banc).

253. 505 F.2d 320 (D.C. Cir. 1974).

254. *Id.* at 323-24.

255. The coalition consisted of individuals residing in the Columbus, Ohio, area who, *inter alia*, sought to advance the interest of black residents of the Columbus area. *Id.* at 322.

256. *Id.* at 327-28.

257. *Id.* at 328.

258. *Id.* at 327.

259. *Id.*

the public interest does not reach the entertainment field.

The *Columbus Broadcasting Coalition* decision validated the general FCC policy of leaving programming to the discretion of the licensee with little inquiry into service to particular groups. The court refused to recognize the existence of a separate, black viewpoint.²⁶⁰ In doing so the court encroached on its previous *Office of Communications, United Church of Christ v. FCC* decision, which held that deleting pro-integration news was contrary to the public interest because it did not serve the needs of the large black population in and surrounding Jackson, Mississippi.²⁶¹ In *Columbus Broadcasting Coalition* the existence of a black view was rejected.²⁶² Equally important, the court did not act on its suggestion in *Stone* (and the logic of the format change cases) that interests often subsumed in the entertainment category are highly important.²⁶³ *Columbia Broadcasting Coalition* limited *Stone* and essentially left supervision of licensee community service to the FCC, which in turn delegates that function to the licensee, with little effective concern for the position of diverse public groups.²⁶⁴

FCC decisions before and after *Stone* have resulted in a situation in which the licensee's ascertainment of community problems has supplanted program evaluation as the primary basis for determining whether the locality is served by the licensee. This approach is based on the assumption that once the problems of a community are disclosed, the licensee will program to meet these problems. Articulation of this proposition is much less difficult than its proof. Indeed, what proof there is indicates a contrary result.²⁶⁵ The large number of programming complaint cases coupled with ascertainment complaints indicate that those petitioning the FCC do not believe they are served. It has been demonstrated that meeting the public service obligation is financially feasible in some of these cases, and financial infeasibility has not been shown in most. Similarly, it has not been shown that the policy impinges on journalistic independence. Indeed, these matters are simply not discussed by the FCC in a significant manner. Thus, to challenge programming, the process of ascertainment must be challenged.²⁶⁶

5. *Ascertainment Under the Primer: A Critique*

Beyond pro forma ascertainment, the FCC *Primer* requirements promote an ongoing dialogue between the licensee and the residents of

260. *Id.*

261. 359 F.2d 994, 1008-09 (D.C. Cir. 1966), *rev'd on rehearing*, 425 F.2d 543, 550 (D.C. Cir. 1969), *discussed in* notes 265-70 *infra*.

262. 505 F.2d at 327.

263. *See id.*

264. *See* notes 177-200 *supra* (discussing implications of format change cases).

265. *See* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 422, 460 (1976).

266. *But see id.* at 460-62 (Robinson, Comm'r, dissenting).

the licensee's service area. Ascertainment should be a continuing process.²⁶⁷ The public should be involved in the decisions of licensees, but only to a limited extent. An agreement to consult the public or to establish an advisory council is acceptable;²⁶⁸ an agreement to program a particular position of time or to subject decisions to approval of a citizens' committee is not acceptable.²⁶⁹ The licensee may not bargain away its control of programming to further its public interest obligation.²⁷⁰ This FCC position is correct, but it is neither fully consistent with other licensee practices nor sufficiently supported by FCC willingness to enforce the desired dialogue.²⁷¹

In fact, many licensees delegate control of their programming to networks and thereby frustrate service to local groups, despite the fact that this delegation is prohibited.²⁷² The relative neglect of certain local groups and deference to network programming reflect reality. The substantial local demand for the programs of reasonably high quality provided by the networks is fulfilled. In addition, network affiliation and the use of network programming is profitable. Whether permitted by formal agreement or not, the licensee will pursue the course of action that is lucrative to the exclusion of the less lucrative. Accordingly, network programming will be preferred, and programming for local needs will be limited to the minimum necessary to buffer the noisome complaints. This can be altered only by the FCC aligning itself with the complainants and forcing further notice of them.

The ascertainment process is of limited value. The great reliance on licensee discretion cloaks the licensee in a series of strong, but not irrebuttable, presumptions. The pleading rules of unusually high specificity and materiality requirements reinforce this protection. Likewise, the assumption that most program mixes are satisfactory hampers the effec-

267. See, e.g., *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 43 F.C.C.2d 1, 2 (1973); *The Outlet Co.*, 38 F.C.C.2d 355, 367 (1972); *Amendment of Section IV of Broadcast Application Forms*, 5 F.C.C.2d 175, 178 (1966).

The requirement of continual ascertainment has thwarted attacks on license renewals by allowing the applicant to upgrade its application. See *Eastern Broadcasting Co.*, 55 F.C.C.2d 276, 276 (1975); *Roy H. Park Broadcasting of Va., Inc.*, 54 F.C.C.2d 995, 997 (1975); *The Outlet Co.*, 38 F.C.C.2d 355, 367 (1972).

268. See *Public Communications, Inc.*, 49 F.C.C.2d 988, 989 (1974); *Bob Jones Univ., Inc.*, 32 F.C.C.2d 781, 781-82 (1971). See also *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42, 42 (1975).

269. See *RKO Gen., Inc.*, 42 F.C.C.2d 1076, 1077 (1973), *reconsideration dismissed as moot*, 44 F.C.C.2d 1004 (1974), *vacated as moot sub nom.* *Boston Community Media Comm. v. FCC*, 509 F.2d 516 (D.C. Cir. 1975) (per curiam).

270. This requirement permits the licensee to enter into an agreement and not comply with it or to enter into an agreement that would be unacceptable to the FCC as a licensee proposal. Cf. *KCOP Television, Inc.*, 62 F.C.C.2d 93, 94 (1976) (licensee's failure to comply with agreement accepted by FCC).

271. *Agreement Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42, 44 (1975); *Mission Cent. Co.*, 54 F.C.C.2d 581, 583 (1975); *Intercontinental Radio, Inc.*, 53 F.C.C.2d 1171, 1173 (1975); *Great W. Broadcasting Corp.*, 53 F.C.C.2d 1147, 1154 (1975).

272. See note 104 *supra* and accompanying text.

tiveness of the process. The important exclusion of consideration of community interests and of entertainment programming results in considerable dilution of the policy's impact. Still, the undertaking has some virtue. The most laggard licensee must do something to make a gesture towards serving the public interest. Problems are discovered and some response probably occurs. The simple exposure to community feelings and views is further enhanced by the active complaint process,²⁷³ which doubtless results in some small victories. The response, however, is limited and the value of the focus on individual licensees dubious.

The bulk of television programming is, after all, network fare. The same is not currently true of radio. If this reality were faced, some modification of programming would be more likely. Even as structured, programming could be affected beneficially if the interests of the community were considered, if the programming were required to be directly linked to problems, needs, and interests, and if a recognition emerged that minority concerns should be treated as matters of some urgency, distinct from general programming but not so distinct as to subsume all programming. The ascertainment process needs a clearer focus and a more determined implementation through program performance scrutiny by the FCC.

E. The Format Change Cases

1. Introduction: The General Principles

The format change or transfer cases²⁷⁴ have established the principle that the public obligation interest requires, if feasible, a program format that accommodates all major aspects of contemporary culture within the broadcast service area. Once established, such service may not be changed or abandoned when a broadcasting license is transferred. While the general proposition would seem to apply to all licensees, the FCC has not acted against incumbent licensees who change their programming format, but have no intention to transfer their broadcasting licenses. Rather than evaluate the licensee when the format change occurs, this becomes one factor considered by the FCC at the time of license renewal.²⁷⁵ This approach is deficient in two particular aspects. A format change that is consistent with the public interest will persist until the time of license renewal. Additionally, at license renewal the FCC is disinclined to subject the individual licensee, seeking renewal with a large number of other licensees, to scrutiny.²⁷⁶

273. See Canbry, *Programming in Response to the Community: The Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67, 87 (1976).

274. See text accompanying notes 282-314 *infra*.

275. *E.g.*, Hubbard Broadcasting, Inc., 41 Rad. Reg. 2d (P & F) 979, 980 (1977); Entertainment Formats of Broadcast Stations, 66 F.C.C.2d 78, 85 (1977); Southern Broadcasting Co., 57 F.C.C.2d 891, 895 (1976).

276. See Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1, 4 (1968).

The result is that licensee format changes are excluded from serious and effective review by the FCC. This is an indefensible policy.²⁷⁷ A fairness doctrine complaint, which alleges unfair coverage of a controversial issue of public importance, receives immediate FCC consideration,²⁷⁸ even though it requires extensive intervention in programming. Additionally, a format change is considered prior to transfer of a broadcasting license.²⁷⁹ Thus, practices that are analogous in theory are treated differently. When the public interest is damaged by an incumbent format change, it is tolerated; when an incumbent violates the fairness doctrine and thus infringes on the public interest, or when a change in programming format is incidental to a change in ownership of the licensee, the matter is immediately considered. Incumbent changes should receive the same treatment.

The result and rationale of the transfer cases are significant nonetheless. Program consideration is practical and is sometimes required by the Communications Act.²⁸⁰ The feasibility of program consideration is established on two showings: (1) the FCC is required to consider not only the city of assignment, but also the entire metropolitan area;²⁸¹ (2) recognizing the fundamental concern of the licensee, the FCC must determine whether the format is financially viable.

2. The Cases and the Principles

In *Citizens Committee v. FCC*²⁸² the licensee proposed to transfer his license of a station with the only classical music format in Atlanta to a transferee who would have adopted a popular-light classical music format.²⁸³ In explanation of the transfer the licensee asserted, and the FCC accepted, that it was not financially feasible to continue the operation of a classical music format.²⁸⁴ The court required an examination of this aspect of the decision in light of substantial capital expenditures in the early part of the relevant six-year period, thereby raising the accounting practice problems.²⁸⁵ In *Citizens Committee to Keep Progressive Rock v.*

277. This position is linked to the importance of the service to the public and the total use and availability of a sufficient number of stations to permit distinct formats. Early network radio, like television today, was largely interchangeable. See *Hartford Communications Comm. v. FCC*, 467 F.2d 408, 413 (D.C. Cir. 1972).

278. See *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 18 (1974).

279. This issue is present in all cases discussed in this section. See *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 249 (D.C. Cir. 1973); *Citizens Comm. to Preserve Progressive Rock v. FCC*, 478 F.2d 926, 928 (D.C. Cir. 1973); notes 346, 388 *infra* and accompanying text.

280. For transfer of format changes, see 47 U.S.C. § 310(d) (1976), construed in *WNCN Listeners Guild v. FCC*, 45 Rad. Reg. 2d (P & F) 1404, 1408 (1979).

281. See notes 160-75 *supra* and accompanying text.

282. 436 F.2d 263 (D.C. Cir. 1970).

283. *Id.* at 265.

284. *Id.* at 266.

285. *Id.* at 269-70.

*FCC*²⁸⁶ the court required reconsideration of a proposed transfer from unique hard rock formats that were becoming profitable to "middle of the road music."²⁸⁷ The transfer involved a suburban station that served the Toledo, Ohio, metropolitan area, an area served by multiple licensees.²⁸⁸ In *Citizens Committee to Save WEFM v. FCC*²⁸⁹ the court required a reconsideration of whether a classical music station operated by Zenith Radio Corporation in Chicago could be transferred to a proposed licensee that would have adopted a contemporary or "rock music" format.²⁹⁰ Like Toledo, Chicago had multiple licensees.²⁹¹ Similarly, the format was arguably unique, at least as to metropolitan-wide service.²⁹² Zenith used accounting practices that fully considered the promotional and technical development benefits from the station accruing to Zenith.²⁹³ In *Lakewood Broadcasting Service, Inc. v. FCC*²⁹⁴ a Denver licensee of an all-news station proposed a format change to "country and western" music format.²⁹⁵ Like the Toledo and Chicago cases, there were multiple licensees and the all-news format was unique.²⁹⁶ However, the financial loss was clearly real; accordingly the court affirmed the FCC decision permitting format change.²⁹⁷

After these holdings, the FCC has an affirmative obligation to establish that a reasonable substitution for the terminated format exists, if the change is to be permitted.²⁹⁸ Finally, the FCC has been required to establish that the format is not unique. "Top Forty" stations playing some hard rock are not hard rock equivalents,²⁹⁹ nor is an apparent fine arts station that presents classical music along with other cultural material the equivalent of a classical music station.³⁰⁰ While these matters seem obvious, they tend to elude the FCC. In applying these standards, the Court of Appeals for the District of Columbia has forced the FCC to analyze the facts—an undertaking the FCC has not shouldered gladly—while permitting it to draw reasonable inferences from the analyzed facts.

In sum, the FCC effort to disregard the facts, and its clear effort to benefit incumbent licensees to the disadvantage of the public have been

286. 478 F.2d 926 (D.C. Cir. 1973).

287. *Id.* at 928.

288. *Id.*

289. 506 F.2d 246 (D.C. Cir. 1973).

290. *Id.* at 249.

291. *Id.* at 249-50.

292. *Id.* at 262-63 (rehearing en banc 1974).

293. *Id.* at 265.

294. 478 F.2d 919 (D.C. Cir. 1973).

295. *Id.* at 922.

296. *Id.* at 921.

297. *Id.* at 925.

298. Compare *Lakewood Broadcasting*, 478 F.2d 919, 922-23 (D.C. Cir. 1973) with notes 267-68 *supra* and accompanying text.

299. See 478 F.2d at 932.

300. See 506 F.2d at 264-65.

firmly rejected in these cases.³⁰¹ Moreover, court decisions have forced a recasting of the requirement under section 309 of the Communications Act of pleading specific facts material to the public interest in format change cases. Thus, if the FCC is unable for any reason to find that the public interest would be served by the transfer on the basis of the application, pleadings, and officially noticeable matters, it must extinguish the doubt or deny the transfer.³⁰²

The rigorous analysis of the format change cases has been carried still further. It has weakened the concept of the suburban community under section 307(b) of the Communications Act in the radio context.³⁰³ Just as *Stone* established the service obligation for central city television stations to their suburbs, the format change cases have established the relevance of all radio services of a metropolitan area in considering any one licensee's service to the entire area. Thus, in *Citizens Committee v. FCC*³⁰⁴ a Decatur licensee was considered in making a determination of service to Atlanta, in apparent contradiction to the earlier position that suburban stations should serve their suburbs, not their central cities.³⁰⁵ And, in *Citizens Committee to Keep Progressive Rock v. FCC*³⁰⁶ the FCC considered a Sylvania, Ohio, licensee in determining service to Toledo, Ohio. Finally, in *Citizens Committee to Save WEFM v. FCC*³⁰⁷ the court held that the public interest required consideration of the entire service area in format change cases.³⁰⁸ While these cases dealt with entertainment formats rather than news, public affairs, and other features on which the FCC had placed emphasis in the *Suburban Community* cases, the rationale applies to all situations. While suburban communities have some separate news and public affairs interests, it is anomalous to suggest that suburbs do not share a common interest in their center city, and/or in a metropolitan area with other suburbs and the central city.

3. *What the Cases Demonstrate: An Interim Conclusion*

In reaching the format change results, the Court of Appeals for the District of Columbia has relied on the virtue of diversity in broadcasting to justify its position.³⁰⁹ This is assuredly important, and the cases further the goal of diversity. More importantly, however, the cases require

301. See note 298 *supra*.

302. See 506 F.2d at 258-59.

303. See notes 175, 180, 274-302 *supra* and accompanying text; notes 304-67 *infra* and accompanying text.

304. 436 F.2d 263 (D.C. Cir. 1970).

305. *Id.* at 267, 271-72.

306. 478 F.2d 926, 927-28 (D.C. Cir. 1973).

307. 506 F.2d 246 (D.C. Cir. 1974).

308. *Id.* at 263.

309. See Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 419-34 (1975).

that ascertained broadcasting interests of a segment of the population of a metropolitan area must benefit from the diversity. In doing so, the decisions have recognized that it is people, not a locality, that require service.³¹⁰ When service to the public and not to a geographic locality is recognized as paramount, the geographic locality is properly cast as a convenient, effective, and proper means to allocate broadcasting frequencies.³¹¹ While residence in a particular locality is an indicator of certain concerns, basically concerns about local news and to some extent public affairs, such a residence is not determinative of all programming needs. However, entertainment and cultural interests depend less on a local basis. Interest in classical music or hard rock is not limited to one area, nor is interest in black culture or the social condition of women so limited. The same is true of other ethnic groups and devotees of all types of entertainment and culture, no matter how popular or obscure. Excepting some news and some public affairs, most interests are not functions of geographic location. Efforts to promote local service on the basis of geography rather than public interests do not further the goal of fulfilling the desires implicit in the public interest criterion.

The format change cases clearly illustrate a flawed FCC view of the policy necessary to implement its mandate. The effort to avoid the statutory requirement of consideration of format changes at license transfer is a neglect of important means of achieving proper service to the public. Seldom has the bias of an administrative agency toward the status quo and the interests of those it regulates, rather than fidelity to its statutory mandate, been clearer.³¹² Still, the court of appeals has been restrained in its response. The FCC decision to consider format changes

310. In the *Citizens Committee* case the Court of Appeals for the District of Columbia Circuit observed that

[t]he "public interest, convenience, and necessity" can be served in the one case [when there are 20 radio channels] in a way that it cannot be in the other [where there is one radio channel], since it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly owned public resources whenever that is technically and economically feasible.

436 F.2d 263, 269 (D.C. Cir. 1970), *quoted in* *Citizens Committee to Save WEFM*, 506 F.2d 246, 260-61 (D.C. Cir. 1973).

311. See notes 127-31 *supra* and accompanying text.

312. The Court of Appeals for the District of Columbia Circuit observed: "We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of *Citizens Committee* to cases involving Atlanta classical music stations." *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926, 930 (D.C. Cir. 1973), *quoted in* *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 260 n.17 (D.C. Cir. 1974); see *WCWN Listeners Guild v. FCC*, 45 Rad. Reg. 2d (P & F) 1404, 1411-17 (D.C. Cir. 1979) (requiring FCC consideration of format changes at transfer and renewal and strongly criticizing FCC actions in format change cases). The court observed:

Throughout the format controversy, the Commission has displayed a deep-seated aversion to the decisions of this court . . . while at the same time misinterpreting and exaggerating their meaning . . . And [the FCC] instituted the present proceeding in the nature of rule making with the apparent purpose of overruling the WEFM case. Whatever [the FCC's] power generally

made by licensees during the term of their license at the time of license renewal, as one aspect of the agency's overview of programming evaluation, is dubious and distressing.³¹³ Almost certainly, the issue will never emerge; FCC patterns of action and administrative law concepts of expertise, discretion, and scope of review will bar inquiry. Nor is it likely that the knowledge of FCC deficiency will be applied in other situations. Again, administrative law doctrines largely will preclude review. The FCC is given the primary mandate to execute the Communications Act, and Congress has accepted the agency's role and acquiesced in its performance.³¹⁴

4. *The FCC Response to the Cases*

Following *Citizens Committee to Save WEFM*, the FCC issued notice of hearing³¹⁵ and an opinion and order indicating that the FCC would not follow the format change cases.³¹⁶ The order was stayed³¹⁷ for sixty days or until the outcome of litigation challenging the FCC position.³¹⁸ The FCC challenged the court of appeals by relying on several theories. First, a series of administrative complexities would arise³¹⁹ from the problems of determining what constituted a particular format; thus, changes in musical taste or the broadcasting of classical music from different eras would create difficulties in decisionmaking.³²⁰ Second, first amendment considerations are implicated by the FCC supervision of program content involved in considering format changes.³²¹ Third, the legislative history is against the interpretation of the court of appeals.³²² The FCC correctly identified the problem in the first two instances, but it failed in the third; the FCC attempted to resolve its distaste for format change authority, but it searched for an answer and found none.

to proceed by rule making rather than adjudication, we think it a somewhat different matter when the seeming purpose . . . is the circumvention of a recent court decision

Id. at 1414-15.

313. See note 273 *supra* and accompanying text.

314. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796 (1978). The Court is highly critical of the lower court's reading—which was contrary to the FCC's reading—of the Communications Act, the first amendment, and FCC policy in *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 963 (D.C. Cir. 1977). The Court overruled the District of Columbia Court of Appeals and affirmed the FCC rules set forth in its Second Report and Order, 50 F.C.C.2d 1046, *reconsidered*, 53 F.C.C.2d 589 (1975), concerning licensee ownership of daily newspapers. 436 U.S. at 792. See also *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 543-44 (1978) (court-agency relationship).

315. Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580, 580 (1975).

316. Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 865-66 (1976).

317. *Id.* at 866.

318. *WNCN Listeners Guild v. FCC*, 45 Rad. Reg. 2d (P & F) 1405 (1979).

319. *Id.* at 861-65.

320. *Id.* at 862.

321. *Id.* at 859-61, 865-66.

322. *Id.* at 859-62.

Because the Communications Act requires consideration of transfer format changes, the FCC must seek an answer that facilitates such consideration.

The answer is fundamental to administrative law: establish standards by rule making or decisions and follow them.³²³ The makeup of a format is complex. It involves nuances of personality of on-the-air talent,³²⁴ trends in music,³²⁵ and other issues of format classification.³²⁶ The best method to resolve these questions is by rule making that recognizes that the format classification cannot be perfect, but can identify the salient issues to be considered,³²⁷ or failing that, by common law analysis and development of standards.³²⁸

Sensitive rule making is required when the first amendment is implicated. Those who argue for format change control cite the paramount public interest language of *Red Lion*. Those who object emphasize the concern for journalistic discretion in *Columbia Broadcasting*.³²⁹ If *Columbia Broadcasting* is thus relied on, then *Miami Herald Publishing Co. v. Tornillo*³³⁰ must be briefly considered to emphasize the scope of the opinions. *Tornillo* rejected legislation mandating replies to critical remarks about political candidates in newspapers. Though analogous to the rules in *Red Lion*, *Tornillo* extended broader first amendment protection to the print media. *Red Lion*, like every other Supreme Court case on the issue, recognized that appropriate regulation of content by the FCC is permissible under the first amendment because of the unique nature of the electronic media,³³¹ a characteristic shared with all other broadcasting media, notably motion pictures³³² and sound tracks.³³³ Regulation not appropriate for newspaper under the first amendment is appropriate to other media.

323. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1064 (1962).

324. Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 862 (1976).

325. *Id.*

326. *E.g.*, Hubbard Broadcasting, Inc., 41 Rad. Reg. 2d (P & F) 979, 986-88 (1977); Entertainment Formats of Broadcast Stations, 66 F.C.C.2d 78, 85 (1977); Southern Broadcasting Co., 57 F.C.C.2d 891, 895 (1976).

327. *Compare* SEC v. Chenery Corp., 318 U.S. 80, 92-93 (1943) (suggesting preference for rule making) with SEC v. Chenery Corp., 332 U.S. 194, 201-04 (1947) (accepting use of adjudication when rule making was available).

328. This common-law development of standards has occurred in many areas of the law, most notably in labor law adjudication. *Compare* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762-66 (1969) (suggesting disapproval of consistent NLRB use of adjudication when rule making was available) with NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974) (accepting continued use of adjudication by NLRB).

329. 412 U.S. 94, 124-25 (1973).

330. 418 U.S. 241, 258 (1974).

331. 395 U.S. 367, 386-87, 389-95 (1969).

332. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

333. *Kovacs v. Cooper*, 336 U.S. 77, 97-98 (1947) (Jackson, J., concurring). While the case did not produce a majority opinion, it has been generally cited for this view. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969).

Nor is this media variance standard applied to the electronic media alone. Censorship with close scrutiny of procedural safeguards is permitted for motion pictures,³³⁴ but not for the print media,³³⁵ and time, place, and name standards are more strict for the sound track³³⁶ than the press³³⁷ or motion pictures.³³⁸ Nor does *Columbia Broadcasting* undermine format supervision. The court of appeals was not reversed because of its state action views³³⁹ or because of fundamental first amendment rights.³⁴⁰ Rather, the court was reversed because of the lack of either legislative mandate or proposed workable rule.³⁴¹ Had Congress or the FCC promulgated an appropriate standard for licensee conduct, the standard might have survived scrutiny.³⁴²

The standard suggested by the decisions rendered in favor of the FCC is one of general scope that does not directly control programming. The fairness doctrine, which requires fair coverage of controversial issues of public importance, and the equal opportunity doctrine, which requires licensees to make time available to all political candidates for a particular office on equal terms, are such standards. In the area of objectionable programming, such as obscenity, the general programming guidance of the FCC has been approved.³⁴³ Two early cases, *Trinity Methodist Church, South v. Federal Radio Commission*,³⁴⁴ involving the use of a station to present a single religious viewpoint, and *KFKB Broadcasting Association v. Federal Radio Commission*,³⁴⁵ involving the use of a station to further the licensee's fraudulent scheme of sale of prescription drugs,³⁴⁶ looked at program content by approaching format in a general sense and rejected license applications. And, in *FCC v. Pacifica Foundation*³⁴⁷ the Supreme Court rejected prior censorship, but specifically endorsed subsequent review of program content.³⁴⁸ The Court also rejected a system of rigid supervision approaching censorship.³⁴⁹ Accordingly, the proper course is one of general guidance set by rules establishing a framework in which problems can be addressed by adjudication and further rulemaking.

334. *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

335. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931).

336. See note 333 *supra*.

337. See notes 330, 335 *supra*.

338. See note 334 *supra*.

339. Only three justices held that there was no state action. 412 U.S. at 114-21; see *id.* at 171 (Brennan, J., dissenting) (discussing division in Court).

340. *Id.* at 121-32.

341. *Id.* at 122-31.

342. *Id.*

343. *Trinity Methodist Church, S. v. Federal Radio Comm'n*, 62 F.2d 850, 852-53 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

344. *Id.*

345. 47 F.2d 670 (D.C. Cir. 1931).

346. *Id.* at 671-72.

347. 438 U.S. 726 (1978).

348. *Id.* at 735-38.

349. See *id.*

In *WCWN Listener's Guild v. FCC*³⁵⁰ the court of appeals rejected the FCC effort to treat the format change cases as the FCC wished rather than as the court decisions required.³⁵¹ The court made clear that the public interest, convenience, and necessity standard of the Communications Act required consideration of format changes when a license is either transferred or renewed.³⁵² The court emphasized that a hearing to determine whether a format change or transfer was warranted was required when four factors occurred: (1) there is significant "grumbling" by a significant portion of the population of the locality served;³⁵³ (2) there are multiple broadcast licensees in the locality;³⁵⁴ (3) the abandoned format is unique;³⁵⁵ and (4) the abandoned format is financially viable.³⁵⁶

The court clearly indicated that the FCC had a role in the court/agency partnership.³⁵⁷ The FCC could define formats broadly,³⁵⁸ evaluate the degree of grumbling,³⁵⁹ and set standards for financial viability.³⁶⁰ The FCC could not, however, disregard the statutory mandate as interpreted by the court of appeals.³⁶¹ Problems of administrative complexity could not be incorporated when they did not exist³⁶² (as the court demonstrated in *WCWN*).³⁶³ Likewise, the court's insistence on general supervision of format could not be read as a particular scrutiny of programs to amount to unconstitutional censorship or some other violation of first amendment rights. The *WCWN* decision makes clear that people are to be served under the public interest standard. While the court gave the FCC appropriate flexibility, it required a fidelity to the statutory mandate the FCC had attempted to avoid.

The problem of public benefit and detriment from maintaining or abandoning a particular format has an easy solution. The FCC must look at the market, the information from the market, and its own developed information and apply its good faith discretion.³⁶⁵ The course thereafter is also clear. The format change cases emphasize that multiple outlets do not assure diversity.³⁶⁶ Under the present statutory

350. 45 Rad. Reg. 2d (P & F) 1404 (D.C. Cir. 1979).

351. *Id.* at 1420.

352. *Id.* at 1407.

353. *See id.* at 1408.

354. *See id.*

355. *See id.*

356. *Id.* at 1407-08.

357. *See id.* at 1417.

358. *Id.* at 1418-19.

359. *Id.* at 1419.

360. *See id.*

361. *Id.* at 1414-15, 1420.

362. *Id.* at 1413-14.

363. *Id.* at 1414.

364. *Id.* at 1419.

365. *Id.* at 1421-22.

366. *See* notes 282-314 *supra* and accompanying text.

scheme, format changes must be supervised.³⁶⁷ The FCC, the junior partner in the court/agency hierarchy, has its marching order. Instead of attempting to avoid the court's mandate, the FCC must follow that mandate, whether the FCC wishes to or not. The reluctance to act here is amply illustrative of why the FCC does not establish and implement policy well.

F. *The Regulation of Networks*

1. *Introduction: Of Rules and Local Service*

The 1927 Radio Act included provisions indicating Congress recognized that network radio broadcasting had begun; the scope of radio and television network influence since has expanded vastly. While rules limiting multiple ownership of licensees prevent an aggregation of national broadcast power outside the networks,³⁶⁸ nothing effective has been done to counteract network power. Because the networks or other national effort are the only entity capable of providing the service desired by the public and by advertisers, such an eclectic response to the realities of broadcasting³⁶⁹ was a near certainty. The result of ineffectively restrained network power is a loss of local service in the sense of both the use of standard national programs and the removal of decisions concerning programming from local to national decisionmakers.

2. *Network Affiliate Rules*

A major source of actual, largely unexercised, local power over programming in network television and radio are the FCC rules governing the relationship of networks and their affiliated stations.³⁷⁰ The network

367. See notes 313-14 *supra* and accompanying text.

368. Beyond networking, the associated problem of concentration of ownership that may impair local service has been addressed, but in a way of limited effectiveness. Multiple ownership of broadcast facilities are limited to seven AM, 47 C.F.R. § 73.35(b) (1978), seven FM, *id.* § 73.240(a)(2); and seven television, of which five may be VHF, *id.* § 73.636(a)(2). In a particular market, ownership is limited to one license in each service. *Id.* Cross ownership of print and broadcast media is also prohibited in certain situations. See *id.* § 73.636(c). Such action is necessary if control is to be decentralized. However, this policy has not been marked by unusual zeal or even sustained serious attention. Thus, after the cause célèbre of the *WHDH* case, rule making was instituted concerning cross ownership. *WHDH, Inc.*, 16 F.C.C.2d 1, 12-13 (1969). This took five years to complete, even though the issue had coalesced over 15 years earlier. Likewise, reinforcement of the duopoly rules has been marked by delay. See Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *modified*, 28 F.C.C.2d 662 (1971), *modified*, 50 F.C.C.2d 1046 (1975). The rules originally would have banned ownership of two broadcast stations in any market. 22 F.C.C.2d at 306. They ultimately banned only VHF television and AM radio ownership in the same market. 50 F.C.C.2d at 1047.

369. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 58-60.

370. In *NBC v. United States*, 319 U.S. 190 (1943), the Court discussed the FCC regulations on chain broadcasting. *Id.* at 193-98. The rules are discussed in notes 373-74 *infra* and accompanying text.

affiliate rules were promulgated in the early 1940s during one of the periods of FCC concern with supposed excessive network dominance of broadcasting.³⁷¹ Because the Communications Act does not provide for direct regulation of networks,³⁷² the network affiliate rules prohibit certain licensee contract provisions. The rules in current form forbid contracts that do not permit a station to broadcast programs of other networks³⁷³ or that do not permit the network to provide programs rejected by an affiliate to other stations in the particular market.³⁷⁴

Two particular problems—network ownership of large numbers of stations and operation of more than one network by one company—were solved by the FCC study and rule making. Networks were forbidden to own two stations serving one area³⁷⁵ or to operate more than one network.³⁷⁶ In *NBC v. United States*³⁷⁷ the Supreme Court upheld the substance of the network affiliate rules as consistent with the public interest criteria of the Communications Act³⁷⁸ and, in an aggregate consideration of other parts of the Act, endorsed the rationale underlying the rules.³⁷⁹ The Court made clear that the FCC has the authority to redress the imbalance between the networks and network affiliates, to expand service generally to listeners, and to promote local service.³⁸⁰

By a series of examples cited by the court in *NBC*, the FCC established elements that constitute a failure of service to the local community.³⁸¹ Interestingly, the FCC included the restriction of network programs by exclusive affiliate contracts.³⁸² The Court cited the FCC example of the 1939 World Series broadcast by the Mutual Network; National Broadcasting Company and Columbia Broadcasting System affiliates could not carry the broadcast under the terms of their affiliate contracts.³⁸³ This example illustrated the harm arising from a network affiliation contract that forbade an affiliate of one network from carrying programs of another network.³⁸⁴ The Court did not address the question of whether the public interest mandated the particular programs. Rather, the FCC's findings were upheld because the restriction on the licensee's choice of the programs they deemed best suited to their locality's needs, illustrated by the FCC examples cited by the Court,

371. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 131 (1976).

372. See 47 U.S.C. § 151 (1976).

373. See 47 C.F.R. § 73.132 (1978).

374. *Id.*

375. See *NBC v. United States*, 319 U.S. 190, 208 (1943).

376. See *id.*

377. 319 U.S. 190 (1943).

378. *Id.* at 215-18.

379. *Id.* at 216.

380. *Id.* at 218.

381. See *id.* at 198-208 (brief discussion of FCC examples).

382. *Id.* at 198-200.

383. *Id.* at 199.

384. *Id.*

violated the public interest obligation imposed on the licensees by the Communications Act.³⁸⁵ Likewise, under the existing contracts establishing a network affiliation, the network, in exchange for granting an exclusive right to all network programming, received a right, known as option time, to require the affiliate to carry a certain amount of the network's programs at specified times. Programs not covered by this option time and rejected by an affiliate granted this exclusive right were not available in the locality of the particular affiliate. The court approved the FCC's finding that the resulting inability of listeners to receive a program rejected by such an affiliate was contrary to the public interest.³⁸⁶

The Court specifically related the option time right to local programming needs. The FCC had found that when large amounts of time were required by the networks as option time the quality of nonnetwork programs was impaired. The Court accepted the FCC's finding that "[l]ocal program service is a vital part of community life."³⁸⁸ To achieve local service, the Court held that freedom from the control of excessive option time by networks was essential. The Court also approved the FCC finding that a contractual and practical right to reject programs must exist in the licensee vis-à-vis both networks and advertisers. The court stated: "The licensee has the *duty* of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate the duty or transfer the control of his station directly to the network or indirectly to an advertising agency."³⁸⁹ Accordingly, the Court approved the FCC's determination that a licensee must exercise its reasoned discretion as to which programs are satisfactory for its audience and locality.³⁹⁰

The Court's discussion of the FCC's rule making manifests three important values. Broadcasters are to be compelled by the rules to provide listeners and viewers access to the type of programs the listeners and viewers desire. This value is forwarded by promoting diversity of program presentation without regard to source. Second, local service vital to community life, especially in the form of locally produced programs, is to be encouraged. Finally, the licensee is to be protected and encouraged in its duty to act independently from the network and other external controls. Undoubtedly, FCC's network affiliate rules have had some impact. Since their initial challenge, however, the rules have not been subject to litigation.

385. *Id.* at 190-99.

386. This conclusion was supported by the example of Buffalo, New York, where the exclusive Mutual Network affiliate rejected the lauded "American Forum of the Air," and no other station could carry it because of the contract between Mutual and its affiliate. *See id.*

387. *Id.* at 203.

388. *Id.*

389. *Id.* at 205 (emphasis added).

390. *Id.* at 206.

On occasion, massive refusals by affiliates to approve the airing of programs have occurred.³⁹¹ These instances, however, were rooted in national political controversy, and the viewers who wished to view the programs (including viewers of stations willing to clear them) were deprived of the privilege. No doubt the network affiliate rules have some marginal impact: the rules encourage diversity and local programming and counterbalance network power pressing on the individual licensee. The impact of the FCC is low profile, slight, and certainly not significant in developing either a marked diversity of programming or large amounts of local programming.

3. *The Prime Time Access Rule*

The latest addition to the network affiliate rule structure is the prime time access rule (PTAR) for television,³⁹² which requires that no more than three hours of the prime time period be devoted to network programming in the top fifty markets.³⁹³ The primary goal of the FCC was to promote a high quality syndication³⁹⁴ of programs.³⁹⁵ Greater syndication would result because the local stations would need to purchase programs for the time freed by PTAR; syndicated programs are a logical choice for this free programming slot. A secondary goal was to encourage local service. The licensee could choose local programs for the time freed by PTAR. Finally, it was hoped that the networks would continue to program four hours for the smaller markets, and that support of network programs by independents in the larger market would aid the independents and promote diversity.³⁹⁶ Since PTAR applies only to licensees in the top fifty markets, the networks might have programmed (but in fact did not) for other markets and nonaffiliated stations in the top fifty markets. A direct result of more local news or more locally originated programs was not the primary original goal of PTAR.³⁹⁷

Notwithstanding that it was not an FCC goal to increase the amount of local news or locally originated programs, the diversity permitted by syndication should have that effect. PTAR frees one of the

391. See, e.g., BROADCASTING, March 12, 1973, at 27; *id.*, April 14, 1969, at 50-51.

392. Prime Time is 7:00-11:00 p.m., except in the central time zone where it is 6:00-10:00 p.m.

393. Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 394-96 (1970), *aff'd sub nom.* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476-88 (2d Cir. 1971).

394. Syndication of programs means the sale of programs to stations. The programs are provided on video tape or film and may be used at any time by the station. While the syndication provides programs like a network, the time of presentation is not affected by the syndication, nor is there an ongoing relationship between one syndication and a licensee.

395. 23 F.C.C.2d at 397.

396. *Id.*

397. PTAR I nowhere discusses such programming as a primary goal, and it is thus apparent that it was not. *Id.* at 382 *passim*.

four prime time hours for use as the licensee wishes. If the theory of the local service doctrine is correct, local stations could program for their audiences by a choice of locally produced programs or by an increased use of syndicated programming appropriate to their local communities. The initial results were not mixed. After a year in which off-network reruns were permitted and predominated, the fare shifted from locally produced programs to syndications of "stripped" game shows,³⁹⁸ broken by some marked expansion in local origination of service by news and other programs, and a handful of other programs. General complaints increased,³⁹⁹ although the broadcast industry and others were divided in their support and opposition to the rules.⁴⁰⁰ The initial goal of the FCC was frustrated.

FCC frustration, substantial industry unhappiness, and some public feeling that poorer programs followed PTAR resulted in the FCC's promulgation of a modified rule.⁴⁰¹ The second rule making was overturned by the Court of Appeals for the Second Circuit because of procedural irregularities.⁴⁰² A third rule making was delayed, but is now in force.⁴⁰³ The new rules, PTAR III, recognize local service as a goal⁴⁰⁴ and protect the viewing public's interest in certain kinds of programs, even though such programs may not be local⁴⁰⁵ (notably children's programs, public affairs programs, or documentary programs).⁴⁰⁶ While the substance of PTAR was not greatly changed in its third form, the FCC discovered new justification, including a strong emphasis on local service. While not operative,⁴⁰⁷ the rules proposed in PTAR II warrant discussion because their substance is the type necessary if there is to be local programming service.

Not only was local service to be promoted by PTAR II, but industry discontent was to be alleviated. Substantial concessions to the networks

398. See *Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule*, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 829, 877 (1975). "Stripped" programming is presented five or more times a week in a certain time slot, instead of the normal one day per week.

399. See *id.* at 831.

400. *Id.* at 831-32.

401. *Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule,"* Section 73.658(k), of the Commission's Rules, 44 F.C.C.2d 1081, 1148-49 (1974).

402. *National Ass'n Ind. Television Producers & Distribs. v. FCC*, 502 F.2d 249, 255, 257-58 (2d Cir. 1974).

403. *Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule*, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 829, 853 (1975).

404. *Id.* at 835, 843-44.

405. *Id.* at 841-44.

406. *Id.* at 840. Both of these categories are broadly defined. See *id.*

407. See *National Ass'n Ind. Television Producers & Distribs. v. FCC*, 502 F.2d 249, 255, 257-58 (2d Cir. 1974) (finding administrative irregularities). PTAR II was then abandoned and PTAR III rule making followed. *Consideration of the Operation and Possible Changes in, the Prime Time Access Rule*, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 829, 829-35 (1975).

also reflect the compromises that occurred. On Sunday, the three networks begin programming at 7:30 p.m. returning to local time at 10:30 p.m.⁴⁰⁸ The freeing of a particular one-half hour a week reflects a move toward greater program flexibility.⁴⁰⁹ Promotion of public affairs and informative public programs in this time slot is considered in the public interest in spite of promotion of such programs being a judgment of program merit, because the promotion is "permissive, not a requirement and . . . related to only a half-hour a week"⁴¹⁰

It is, of course, a judgment by the FCC that children's programs and public affairs programs are worthwhile.⁴¹¹ Nevertheless, the FCC did not bar game shows in PTAR II or PTAR III, even though they had become a bane of PTAR.⁴¹² However, the FCC, after noting that local programming service had benefited from the rule in prior form,⁴¹³ stated in uncharacteristically strong language that programming beneficial to the local community or segments of it, whether locally originated or syndicated, was expected either in the time cleared of network programs or in other prime time.⁴¹⁴

The FCC in its experiment with and reevaluation of PTAR properly seems to have made a major discovery. General rule making coupled with statements of hope are not likely to achieve either the desired result or any other great change. On the other hand, specific statements of goals and of the expected results in reasonable rules aimed at attaining such goals should have a more affirmative effect on change and the achievement of the desired result. The great resistance to the rules indicates a desire to maintain the status quo ante.⁴¹⁵ Determinations of what will occur await an FCC decision to implement the rule when procedural

408. Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 829, 831 (1975). While the FCC report states that 10:30-11:00 p.m. is cleared time, it is far from universally true.

409. In PTAR II, the half hour from 7:30-8:00 p.m., Monday through Saturday, was made the object of the rule, subject to limited exception, with the rule removed on Sundays. See Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule," Section 73.658(k) of the Commission's Rules, 44 F.C.C.2d 1081, 1131-32 (1974). It also permitted the use of one of these six weekly half hours by the network either for a children's "special" or for public affairs or documentary programs, broadly defined. *Id.* at 1133-35. Finally, feature films as well as off-network programs were barred from the time period for the top fifth markets. *Id.* at 1135-36.

The choice of change came from a conglomeration of considerations. The 7:00-7:30 period is traditionally "local time" and the networks are not likely to convince their affiliates to relinquish it. In addition, either sports overruns or special arrangements of new programs, which created problems with waiver requests that had been unusually troublesome, nearly always occur in this time period. However, the setting of the 7:30-8:00 p.m. time conceivably permits feature films or off-network features earlier. See *id.* at 1136-38.

410. 50 F.C.C.2d at 841.

411. *Id.* at 843.

412. *Id.* at 846.

413. *Id.* at 852.

414. *Id.*

415. See *id.* at 831-35.

requirements are satisfied. It will depend on whether the FCC will rely on occasional rhetoric or consistent effective enforcement to implement its rules and their underlying aims.

G. Local Service and the Fairness Doctrine

1. United Church of Christ

The fairness doctrine requires a fair coverage of controversial issues of public importance. The licensee must seek out these issues and cover them. While equal time for all sides of issues is not required, the licensee—of its own initiative—is responsible for addressing all sides of an issue. The effect of the fairness doctrine, as illustrated by *Office of Communication of United Church of Christ v. FCC*,⁴¹⁶ and *In re Patsy Mink (WHAR)*,⁴¹⁷ is that local problems are covered because of a mandate of a rule not directed particularly towards local service. In addition, *United Church of Christ* illustrated that national programming, and in that case network programming, may provide service to people in a station's geographic location.⁴¹⁸

United Church of Christ illustrates an alternative way of approaching local service in a failure to serve the public interest by programming. Appellant United Church of Christ objected to deletion by the local station of certain network productions.⁴¹⁹ Thus, the result of deleting national network programming was a denial of local service.⁴²⁰ Relying on the general public interest standard of the Communications Act, the United Church of Christ's complaint on behalf of the viewers of WLBT, Jackson, Mississippi, directly asserted the fairness doctrine by alleging a lack of balanced local service.⁴²¹ The Court of Appeals for the District of Columbia decided the fairness doctrine issue in favor of complainant.⁴²² Further, the court of appeals undertook an innovative exploration of standing and made clear that representatives of the local population may protest programming on the basis of the general public interest standard if the programming does not meet the local population's needs.⁴²³

In *United Church of Christ* the issue was civil rights. WLBT, a television station licensed to Jackson, Mississippi, consistently presented a

416. 359 F.2d at 994 (D.C. Cir. 1966), *aff'd on rehearing*, 425 F.2d 543 (D.C. Cir. 1969).

417. 59 F.C.C.2d 987 (1976).

418. 425 F.2d at 544-45, 548.

419. 359 F.2d at 998.

420. *Id.* at 998-99.

421. *Id.* at 1000-06; see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1729-30 (1975) (analysis of *United Church of Christ* as key in development of contemporary standing concepts). See also *id.* at 1723-47 (development of law of standing into vital aspect of protection of public interest).

422. 359 F.2d at 1000-03, 1006.

423. *Id.* at 1000-06.

segregationist view of race relations, violating the fairness doctrine.⁴²⁴ WLBT overtly refused, under the guise of technical problems, to present national network programs on the subject.⁴²⁵ The refusal had the effect of denying blacks, who constituted forty-five percent of the population in WLBT's primary service area, an opportunity to have varied views presented on this controversial subject. The population served by WLBT was denied balanced material provided by a national outlet on civil rights, a local issue of great importance. Although the court spoke in terms of the fairness doctrine, the decision's thrust is broader. Not only is fairness crucial, but service to meet a particular need for discussion of a local problem deeply affecting the residents of the service area is also important.

While the proposition that litigants such as television viewers should have standing to protest a license renewal is now commonplace,⁴²⁶ the position was novel when *United Church of Christ* was decided.⁴²⁷ In determining that the appellant public representatives had standing, the court canvassed the basic concerns related to local service requirements. The court quoted with approval an earlier FCC study of network practices:

[I]t is the public in individual communities throughout the length and breadth of our country who must bear final responsibility for the quality and adequacy of television service—whether it be originated by local stations or by national networks. . . . Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of television service which stations and networks provide and which, undoubtedly, has a vast impact on their lives and the lives of their children

424. *Id.* at 999, 1000; see Fairness Doctrine Report, 48 F.C.C.2d 1, 30 (1974).

425. The station routinely placed "trouble with network transmission" signs before the camera and stopped network discussion of civil rights. 359 F.2d at 998.

426. Today standing is granted for minimal economic or other harm if arguably protected by the relevant statute. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 740 (1976) (injury to environment does not support standing when no individual interest affected); *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154-56 (1970) (data processing services have standing under Bank Service Corporation Act or National Bank Act); see Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 961-79 (1976) (law of standing as developed currently); *id.* at 979-80 (limits on development of standing); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1728-30 (1975) (discussing *United Church of Christ*). See also *id.* at 1723-47 (development of "interest" standing).

The broadcast viewer or listener would be protected by the public interest standard of the Communications Act; and if harmed would be a "person aggrieved" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702 (1976).

427. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1167, 1729-30 (1975) (development of contemporary standing concepts). See also *id.* at 1723-47 (development of law of standing into vital aspect of protection of public interest).

. . . . [T]heir interest in television programming is direct
 They are the owners . . . of all broadcasting.⁴²⁸

The rationale and effect of *United Church of Christ* on standing, as well as the FCC's rather consistent, yet unenforced, importation on viewer's rights, gives "the public in individual communities" the right to seek redress of what they regard as abuse or omission in programming. It also illustrates, as do the programs discussed in the *NBC* case, that some, if not most, local problems can be met by national service and, by extrapolation, that most of the goals of the local service programming requirement can be met either by syndicated or by network national service.

2. The WHAR Case

Of greater significance than *United Church of Christ* was the FCC decision in the *WHAR* case.⁴²⁹ Complaints from various national environmental groups led the court to hold that radio station WHAR of Clarksburg, West Virginia, violated the fairness doctrine by its failure to adequately cover the biological and environmental aspects of strip mining during consideration of federal legislation on the issue. WHAR carried Associated Press news reports on the general issue of strip mining without editorial comment, one program that tangentially discussed strip mining safety, and ABC documentaries, including an *Issues and Answers* radio version in which strip mining was discussed.⁴³⁰ WHAR could not identify any broadcasts concerning strip mining, but apparently assumed that some existed.⁴³¹ The FCC determined that, in substance, the licensee had failed to cover an issue of public importance to its community.⁴³² Service to the community was required by the FCC under the long established, judicially endorsed, but previously ignored, fairness doctrine, which required coverage of issues of public importance by licensees.⁴³³

The *WHAR* decision facilitates the use by citizens of the fairness

428. 359 F.2d at 1003 (quoting FCC, TELEVISION NETWORK PROGRAM PROCUREMENT, H.R. REP. NO. 281, 88th Cong., 1st Sess. 20 (1963) (emphasis added by court)).

429. Complaint of Representative Patsy Mink, 59 F.C.C.2d 987 (1976).

430. *Id.* at 993-94. The requirement of fairness was originally stated in the Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1948), and was approved in dicta in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969), and *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111 (1973). The policy was restated by the FCC in 1974 Fairness Doctrine Report, 48 F.C.C. 1 (1974). Nevertheless, the *WHAR* opinion was the first enforcement of the rule. 59 F.C.C.2d at 998 (Robinson, Comm'r, concurring).

431. 59 F.C.C.2d at 997.

432. *Id.*

433. *Id.* at 998. In his concurring statement, Commissioner Robinson correctly characterizes the FCC's test, although several other adjectives appear in the main opinion. *Id.* at 995-97.

doctrine to require local service; it leaves a number of questions open, however, and raises other issues. An initial matter is the critical question of what constitutes an issue of sufficient importance to require coverage.⁴³⁴ Harrison County, where Clarksburg is located, is the area subject to the most strip mining (measured by surface area) of any West Virginia county.⁴³⁵ As a manifestation of this fact, the local newspapers had devoted extensive commentary to the subject, petitions had been circulated locally, and congressional attention had focused on the matter.⁴³⁶ Accordingly, the FCC held that this was a critical issue and as such triggered the fairness doctrine requirement.⁴³⁷

The critical issue requirement fails to solve the problem, however, because one person's critical issue is another's irrelevancy. For example, strip mining was not listed as a principal need or interest of WHAR's community in its 1970 renewal application and its 1974 application for a new FM license.⁴³⁸ Apparently, the licensee found no one who thought the issue critical, yet in a highly principled concurrence,⁴³⁹ Commissioner Robinson could assert that "it is not merely an issue which is 'critical' or 'burning' but one which all reasonable men must acknowledge to be such, that triggers this obligation."⁴⁴⁰ This is true with the caveat that reasonable people may disagree as to when "reasonable men" must agree. Perhaps it would be better to require that the issue be demonstrably critical, with a further requirement that objective demonstration approach the high level⁴⁴¹ of the critical issue in *WHAR*.

Two important local service questions remain after *WHAR*. First, one must ask what becomes of ascertainment. If the FCC intends to require the licensee to ascertain and program for local needs,⁴⁴² the failure to comment on this fact, which was raised by petitioner and recognized implicitly by the Commission in its discussion of sources of the fairness obligation, is strange.⁴⁴³ Perhaps such a discussion would have encumbered the initial FCC statement on the issue coverage aspect of the fairness doctrine; still, the failure is so blatant and gross that it requires not only remark, but inquiry.⁴⁴⁴ A licensee could miss a critical issue only by gross negligence, sloppiness, or intention. FCC silence

434. *Id.* at 995.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 990.

439. *Id.* at 998-99.

440. *Id.*

441. *See id.* at 995.

442. *See id.* at 996 (citing *City of Camden*, 13 F.C.C.2d 412 (1969) (principal FCC decision on congruence of ascertainment and programming)). *See also* *WHEC, Inc.*, 52 F.C.C.2d 1079, 1081-83 (1975) (principal case on service to place or to people question).

443. *See* 59 F.C.C.2d at 999 n.2 (Robinson, Comm'r, concurring).

444. *See id.* (Robinson, Comm'r, concurring).

strongly suggests that the FCC will hesitantly enforce its ascertainment rules. The extreme disregard of *WHAR* reflects an apparent attitude that only marginal compliance with FCC rules is required. The long line of ascertainment decisions and the failure to effectively enforce the fairness doctrine, exemplified by *WHAR*, suggests the attitude of *WHAR* is widespread and one on which licensees who wish to avoid their obligation can rely.

Second, there is the question of what constitutes local service. The important answer is that local service is service to the public provided by the licensee in its soundly exercised discretion.⁴⁴⁵ While the FCC's opinion expressed concern that *WHAR* did not program locally on the strip mining issue,⁴⁴⁶ the *primary* concern is that *WHAR* "delegated" to the Associated Press and to ABC its duty to program on the subject,⁴⁴⁷ a delegation that is emphasized both by the station's assertion that ABC provided programming on the subject and by its failure on inquiry to identify any such programming.⁴⁴⁸ The well-placed reliance on an observation that it is the service that fulfills the need, and not the source of that service,⁴⁴⁹ properly indicates the course of inquiry the Commission should use to prevent licensees from avoiding the substance of the rules. Thus considered, the FCC's rules attempt to promote the goal of local service, although in fact they only marginally promote it. It is, however, uncertain whether these rules are effective or whether they are used primarily as make-weights; often they provide facile logic, not hard reasoning, to determine which applicant will receive a license.

Significantly, the integration of ownership and management is ranked second among the issues that must be considered in every comparative hearing.⁴⁵⁰ The criterion for determining who receives a license at issue in a comparative hearing is supported by the rationale that management by licensee owners, who bear the ultimate responsibility for meeting all standards set forth in the Communications Act and by the FCC, will better assure adherence to the entire scope of standards than management by employees. Local service is considered enhanced because the owner-managers must by nature of the position reside in the community of service. Accordingly, they will be sensitive to local needs and, since the owner-managers are responsible for meeting all standards

445. *See id.* at 998 n.1 (Robinson, Comm'r, concurring).

446. *Id.* at 998 (Robinson, Comm'r, concurring).

447. *See id.* at 999 n.3 (Robinson, Comm'r, concurring).

448. *Id.* at 997.

449. *Id.* at 996.

450. The comparative issues must be considered when two mutually exclusive applicants for a license meet the minimum statutory and technical requirements. The 1965 Policy Statement sets forth the following issues: (1) diversification of control of the media; (2) full-time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; (6) character; and (7) other factors (including any relevant and substantial factors). 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965).

of the Communications Act and of the FCC to retain the license, will be punctillious in doing so.⁴⁵¹

While owner-managers may be circumspect in fulfilling their programming duties, employee-managers may also perform well. At worst, the employee-managers will presumably wish to manage well enough to assure the license is not revoked, which would extinguish their jobs. It is reasonable to assume that employee-managers will act responsibly and attempt to further the licensee's interest by good or superior management. Additionally, the employee-managers are probably residents of their respective community of license and will bring the same knowledge about the community to the job that the managing owners would bring.⁴⁵²

Credit given in the comparative hearing is enhanced if the residences of the owner-managers is local. Local residence is preferred by the FCC to previous experience in broadcasting when integration of ownership and management is evaluated.⁴⁵³ Also, the FCC awards a plus for involvement in local affairs before licensing.⁴⁵⁴ Here, too, it seems the policy overstates the obvious while neglecting the reasonable. No doubt contacts in the community are beneficial. Still, the experienced broadcast executive should have little trouble establishing a strong knowledge of a new community of employment.

The FCC has attempted to promote and to accommodate local service in a number of policies.⁴⁵⁵ As a result, local service has intruded into an emphasis of those policies. Rather than closely examine each policy for its potential contribution to both the public interest and local service, the FCC has maintained its earlier preoccupations. Paradoxically, this may be beneficial in the future, even though it seemed quixotic over the past years. While the FCC has hampered some developments such as cable television, it has totally stifled none, including the possibility of new technologies supporting multiple television networks.

The intrusion of the commitment to local service into policy deci-

451. *Id.* at 396, 402; cf. Jaffe, *The WHDH Case: The FCC and Broadcasting Licensee Renewals*, 82 HARV. L. REV. 1693, 1696-97 (1969) (criticism of standard).

452. Even if this is not true when first employed, the employee-manager will quickly become a resident and familiar with the community. The argument that a new resident is presumptively unfamiliar with the community and unknowledgeable about local issues was rejected by the Supreme Court as a justification for durational residency as a prerequisite to voter registration. See *Dunn v. Blumstein*, 405 U.S. 330, 356-58 (1972). See also Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 688 (1977) (discussing *Dunn v. Blumstein* problem).

453. 1965 Policy Statement on Comparative Broadcasting Hearings, 1 F.C.C.2d 393, 396 (1965).

454. *Id.* at 396.

455. The FCC supported H.R. 12993 in the House form. In the 1970 policy statement, Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 2d 829 (1975), such a standard was omitted. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425 (1970).

sions has been pronounced. Limiting radio station power to 50,000 watts results largely from local service views,⁴⁵⁶ as does the refusal to use higher powered television stations. Local service commitment likewise impeded variation on the allocation tables promulgated in 1952 that would have permitted four viable television networks.

The United States has never used radio stations with a power greater than 50,000 watts, except for a brief experiment with WLW, Cincinnati, in the 1930s.⁴⁵⁷ In 1945 the FCC instituted proceedings to determine whether more efficient use of twenty-five clear channels in the AM broadcast service would best be achieved by adding additional stations to them,⁴⁵⁸ or by permitting the stations then assigned the channels to broadcast at substantially increased power.⁴⁵⁹ By 1961 the proceedings were suspended⁴⁶⁰ with the decision to permit additional stations on thirteen channels and to reserve the remaining twelve stations for possible future duplication of service or use with super-power stations.⁴⁶¹

The decision the FCC faced was, and still remains, a difficult one. A super-power station would provide greater signal coverage at night, but it presents interference problems. Its signal "blankets" the transmitter area so its programs cannot be received. In addition, its very power creates problems of cochannel and adjacent channel interference. Nor is a super-power station clearly superior for providing a first service to more people, as opposed to an additional service, whether first or of a lower order. The ground wave of the super-power station is not proportionately greater than a 50,000 watt station, so in this respect doubling the number of stations may be preferable to increasing power. Likewise, proper geographic distribution of a second station would provide first- or second-night services to many people, reducing the advantage of a super-station. Thus, the FCC clear channel problem is difficult and complex.⁴⁶²

The clear channel problem remains today. The FCC currently is inclined to finish the task it began in 1961. Duplication of the remaining clear channels has been proposed and appears likely. The problem has given rise to a controversy that exemplifies the thesis of this Article. If

456. Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 569, 573 (1963).

457. See *Crosley Corp. v. FCC*, 106 F.2d 833, 833-36 (D.C. Cir.), cert. denied, 308 U.S. 605 (1939).

458. Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 568-69 (1961).

459. *Id.*

460. *Id.* at 601.

461. *Id.* at 573. Between the WLW experiment and the 1961 decision, the FCC elicited contradictory resolutions from the two houses of Congress. Compare S. REP. NO. 294, 75th Cong., 3d Sess. (1938) (Senate disapproves over-50,000 watt stations) with H. REP. NO. 714, 87th Cong., 2d Sess. (1962) (House approves over-50,000 watt stations).

462. See Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 572, 600 (1961).

WSG, Nashville, which broadcasts the Grand Old Opry, were duplicated, geographically dispersed communities would receive added local service of a significant magnitude. Communities of country music devotees would lose their present program. The choice is between places and people.⁴⁶³ Would the increment of new geographically determined service exceed in value the loss of the Grand Old Opry? However answered, the problem poses the persistent confrontation between local geographic allocation and an effort to serve people broadly.

III. TOWARD A REFORM OF THE LOCAL SERVICE OBLIGATION

A. Legislative Reform and the Local Service Concept

In *WHDH, Inc.* an incumbent licensee operating on a temporary license assignment was denied license renewal. The FCC awarded the license to one of several competing applicants after a comparative hearing; the Court of Appeals for the District of Columbia Circuit affirmed.⁴⁶⁴ The court of appeals applied the 1965 Statement on Comparative Hearings.⁴⁶⁵ The FCC relied primarily on the diversification of media ownership, a major factor against the incumbent licensee that also owned the Boston Herald Traveler,⁴⁶⁶ and secondarily on the greater integration of owners into day-to-day management by the successful applicant.⁴⁶⁷ The decision shook the firmly held FCC position that incumbent licensees should be given a strong, essentially insurmountable preference over challenging applicants for the frequency assignment at renewal. The *WHDH* decision examined the rules for initial grant of license for vacant frequencies.⁴⁶⁸ This could be justified, and the case restricted to its facts, because *WHDH* was given an FCC temporary assignment license. Despite the possible factual limitation of *WHDH*, the case reverberated widely.⁴⁶⁹

1. The FCC Response to the WHDH Case

The immediate response to the *WHDH* decision was an interplay between Congress and the FCC aimed at mitigating the anxieties of the

463. See BROADCASTING, March 5, 1979, at 98.

464. *WHDH, Inc. v. FCC*, 444 F.2d 841, 861-63 (D.C. Cir. 1970).

465. 16 F.C.C.2d 1, 4 (1969).

466. See *id.* at 17-19. Interestingly the Herald-Traveler folded after loss of the *WHDH* license, since the television station apparently subsidized the newspaper. The total impact on service to the community, especially when the importance of continued network presentation on the *WHDH* successor is considered, seems negative, even though the case is an important step forward in legal doctrine.

467. *Id.* at 13-14.

468. *Id.* at 2.

469. The decisions in *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963), and *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), were brought into uncertainty even though not repudiated. See 16 F.C.C.2d at 9. These decisions gave incumbent licensees a clear preference. See 35 F.C.C. at 678-80; 15 F.C.C. at 1175.

broadcasting industry. Senator Pastore introduced legislation that would have required a broadcasting license to be renewed absent both a finding that an incumbent licensee had not served the public interest and a hearing to determine who should be the new licensee.⁴⁷⁰ This would have discouraged challenges to incumbent licensees. The FCC responded with a *Policy Statement*⁴⁷¹ that would have had the force of rules. The criterion for license renewal established in the FCC's *Policy Statement* was substantial service indicated by meeting the needs and interests of the licensee's area of license in past programming.⁴⁷² If service of this caliber was not otherwise tarnished by serious deficiencies, the incumbent would receive a preference sufficient to result in license renewal.⁴⁷³ The *Policy Statement* was overturned by the Court of Appeals for the District of Columbia Circuit in *Citizens Communication Center v. FCC*.⁴⁷⁴ The court found that the *Policy Statement* was substantially equivalent in effect to the Pastore legislation and thus effectively precluded in a comparative hearing.⁴⁷⁵ The court held that under the Communications Act, a comparative hearing must be afforded any applicant for an incumbent frequency with the license going to the party best equipped to serve the public interest.⁴⁷⁶ The court thereby indicated that "superior performance should be a plus of major significance"⁴⁷⁷ and rejected the FCC *Policy Statement* view that substantial service should result in a plus of major significance.⁴⁷⁸ The court set forth general guidelines in both quantitative and qualitative terms for FCC clarification of the meaning of superior service.⁴⁷⁹ The FCC should consider "elimination of excessive and loud advertising and delivery of quality programs."⁴⁸⁰ Moreover, "one test of [this standard] of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public."⁴⁸¹ Such a plus would virtually assure renewal.⁴⁸²

The FCC reaction was to avoid the *Citizens Communication Center* decision and to revert to a policy virtually identical to that which pre-

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

471. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970).

472. *Id.* at 425.

473. *Id.*

474. 447 F.2d 1201, 1214 (D.C. Cir. 1971).

475. *Id.* at 1210. In *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945), the Supreme Court held the Communications Act requires a comparative hearing under 47 U.S.C. § 309(a) (1976).

476. 447 F.2d at 1210-13. This language implies that all possible comparative factors are to be considered.

477. *Id.* at 1213 (emphasis original).

478. *See id.* at 1212-14.

479. *Id.* at 1213 n.35.

480. *Id.*

481. *Id.*

482. *Id.* at 1213.

dated *WHDH*.⁴⁸³ Initially, the FCC in its 1971 decision, *Moline Television Corp.*,⁴⁸⁴ insisted that its term "substantial" was the same as the circuit court's term "superior."⁴⁸⁵ It then proceeded to renew a challenged license in which the licensee had failed to fulfill its promise as to local and public service programs and could not meet the "substantial" test as to news.⁴⁸⁶ Then in *RKO General, Inc. (KHJ-TV)*⁴⁸⁷ the FCC accepted programming that was at best average and disregarded the thrust of the other comparative criteria and ordered renewal.⁴⁸⁸ The FCC avoidance of *WHDH* and *Citizens Communications Center* was clear and complete. No matter how serious the challenge or weak the incumbent, the incumbent licensee would be preferred.⁴⁸⁹ This preference amounted to an automatic renewal after pro forma hearings and rhetoric following the court of appeals opinions.

In *Central Florida Enterprises, Inc. v. FCC*⁴⁹⁰ the court of appeals ended this FCC practice. Central, which sought the license held by incumbent Cowles Broadcasting, had prevailed on the questions of diversity, integration of ownership and management, and minority participation.⁴⁹¹ Cowles had been found to have improperly located its studio outside its city of license.⁴⁹² On the issue of past performance the FCC, without support in the record, found Cowles's performance "substantial" and held that it fulfilled the FCC's "renewal" expectation.⁴⁹³ The court of appeals expressed specific dissatisfaction with the FCC's treatment of diversity of ownership and past performance.⁴⁹⁴ Central prevailed without question on the comparative issue of diversity of ownership, since Central had no other media interests while Cowles had extensive media interests elsewhere.⁴⁹⁵ Cowles was allowed to benefit from a record of past programming, which the FCC failed to demon-

483. See Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 488-89 (1975).

484. 31 F.C.C.2d 263 (1971).

485. See *id.* at 268-70.

486. *Id.*

487. 44 F.C.C.2d 123 (1973), *aff'd sub nom.* Fidelity Television, Inc. v. FCC, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

488. See *id.* at 130-33.

489. See Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975).

The Commission wanted to avoid decisions . . . denying renewal to a licensee. . . . [The FCC] sent a message to the industry and to potential challengers. Even when the licensee had not rendered "superior" or "substantial" service and even when the challenger compared favorably with him on comparative criteria such as diversification and integration, the licensee would obtain renewal.

Id. at 496.

490. 44 Rad. Reg. 2d (P & F) 345 (D.C. Cir. 1978), *amended on rehearing*, 44 Rad. Reg. 2d (P & F) 1567 (1979).

491. *Id.* at 354-56, 368.

492. *Id.* at 362-63.

493. *Id.* at 359.

494. *Id.*

495. *Id.* at 364-65.

strate was above average.⁴⁹⁶ The court noted that the FCC had an aversion to applying a comparative criteria to challenges to incumbents except those that favored the incumbent.⁴⁹⁷ The court made clear that until original applications and renewals were distinguished by the FCC, a conclusion difficult to support under the Communications Act, both were governed by the *Policy Statement* of 1965.⁴⁹⁸ By abandoning the *Policy Statement* the FCC may have violated section 309(e) of the Communications Act.⁴⁹⁹ In particular, the court held that substantial service, however defined, did not "justify renewal *more or less* without regard to comparative issues."⁵⁰⁰ Nor does substantial performance that is in the average range merit "'a plus of major significance.'"⁵⁰¹ Rather, the court held that prior service that is superior or above average warrants a plus of major significance that will generally result in renewal.⁵⁰² The challenger must then make a clear and strong showing that it is superior in the comparative criteria in areas in which the incumbent is deficient.⁵⁰³

These decisions make it clear that the FCC must consider licensee performance. Pro forma renewals are no longer acceptable. Therefore, the FCC and Congress should develop comparative criteria for renewal that will result in programming for the various segments of society.

2. *The Legislative Efforts: The 1974 Proposal*

In 1974 Congress nearly succeeded in a modest reform of the current Act.⁵⁰⁴ Congress emphasized the problems that will be faced in any legislative reform in a bill that passed the House and Senate in different forms. The bill illustrates especially the uses and importance of the local service concept.⁵⁰⁵ Congress was apparently motivated by the *WHDH* decision and the court of appeals' rejection of the FCC position in *Citizens Communication Center*.⁵⁰⁶ Congress proposed to shift the FCC's focus in challenged renewal applications from diversity of media to greater emphasis on ascertaining needs and programming for the needs

496. *Id.* at 369-71.

497. *Id.* at 360.

498. *See id.*

499. *See id.* at 360 n.60.

500. *Id.* at 370.

501. *Id.*

502. *Id.*

503. *See id.* at 370-71.

504. *See* H.R. 12993, 93d Cong., 2d Sess. (1974).

505. The House version of H.R. 12993, 93d Cong., 2d Sess. § 2(a) (1974), and the Senate version of H.R. 12993, § 5(a), both require ascertainment of local needs. The Senate version requires problems, needs, and interest to be substantially met. Both versions of the bill focused primarily on this aspect to achieve change that moved from the *WHOH* emphasis on diversification of media ownership and the inferior service standard of *CCC*.

506. For a discussion of the effect of these decisions on the state of the law, see text accompanying notes 464-89 *supra*.

of the area of service of the licensee.⁵⁰⁷ The major inquiry in renewal of broadcast licenses was to be a limited one, based on unexamined criteria acceptable to licensees, not an inquiry based on criteria the licensee found distasteful, as in the *WHDH* or *Citizens Communications Center* decisions.⁵⁰⁸ The legislation passed the House and Senate in different forms.⁵⁰⁹ While the bills were never reconciled, they had substantial common ground. Both versions required ascertainment of local needs and programming to meet the ascertained needs.⁵¹⁰ Both required the promulgation of rules before the FCC could consider matters pertaining to industry structure in individual cases.⁵¹¹ Both required the FCC to determine which broadcast licensee regulations do not serve the public interest and to report to Congress regarding this process.⁵¹² The House of Representatives would have lengthened terms of license from three to five years,⁵¹³ eliminated consideration of integration of ownership and management,⁵¹⁴ and required negotiations of some sort between licensees and the public they serve as trustees.⁵¹⁵ The conference committee was unable to resolve the differences between the houses and did not report.

Both bills moved from consideration of media ownership, central to the *WHDH* holding, to ascertainment of and programming for community needs. In the House version the licensee was to ascertain the needs, views, and interests of the community throughout the term of the license.⁵¹⁶ The Senate version limited the scope of ascertainment to the community's problems, needs, and interests.⁵¹⁷ The omission of the community's views is significant, at least insofar as it avoids irreconcilable conflict. Catering to local views might result in substantial bias and impossible disagreement as to the nature of local views. Assuming some variation among different places, most localities will have a spectrum of views.⁵¹⁸

507. Diversity was the focal point of *WHOH* and the 1965 policy statement. The two bills in § 2(a)(i) made ascertainment of local needs the focal point.

508. Both the diversification of ownership of media view of *WHOH* and the inferior service standard of *CCC* were defeated by a 1974 attempt to amend the Communications Act, H.R. 12993, 93d Cong., 2d Sess. § 2(a)(i) (1974).

509. Compare H.R. 12993, 93d Cong., 2d Sess. (1974) (House print) with *id.* (Senate print). The two versions were referred to conference committee, which did not report.

510. See H.R. 12993, 93d Cong., 2d Sess. § 2 (1974).

511. *Id.*

512. *Id.* § 6 (House print); *id.* § 3 (Senate print).

513. *Id.* § 2(d)(1) (House print).

514. *Id.* § 2(b)(2)(B)(ii) (House print).

515. The section added subsection (j) to § 309 of the Communications Act. The Commission shall prescribe procedures to encourage licensees of broadcasting stations and persons raising significant issues regarding the operation of such stations to conduct, during the term of the license for such stations, good faith negotiations to resolve such issues. *Id.* § 4. The Senate version placed greater emphasis on ascertainment during the preceding term.

516. H.R. 12993 93d Cong., 2d Sess. § 2(a) (1974).

517. *Id.* (Senate print).

518. A vivid example is *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 998, 1006 (D.C. Cir. 1966), *aff'd on rehearing*, 425 F.2d 543 (1969). No

Determining the various community interests is another important step in making licensing decisions. The 1960 *Policy Statement* gave this undertaking considerable weight.⁵¹⁹ By the issuance of the *Primer on Ascertainment* in 1971, the FCC policy had shifted its emphasis to programming for problems of the community rather than programming for interests of the audience.⁵²⁰ Programming for interests of the audience remains important, however. Local groups who regard themselves as excluded from appropriate consideration by licensees in program decisions lodge complaints that focus on neglect of their programming interests.

The thrust of the House and Senate bills was salutary. Diversification of media ownership clearly can be dealt with by rule making.⁵²¹ Recognition that a licensee should serve its public is helpful. The House position on negotiations between the licensees and their local communities was a firm move toward public involvement. Still, both bills and their legislative history emphasize to excess the idea of local service by local licensees, rather than emphasizing appropriate service, whatever its source. The bills would have benefited from an appreciation of the ubiquitous quality of most "local" needs and possible changes in structures to meet them.

3. The 1978 and 1979 Legislative Efforts

1978 and 1979 saw the most extensive effort at legislative reform of broadcast since enactment of Communications Act of 1939.⁵²² While two Senate bills⁵²³ of a more restricted scope⁵²⁴ were introduced, the effort centered on legislation introduced in the House Subcommittee on Communication of the Commerce Committee. The broadcast provisions

doubt the white citizens' council view in Jackson, Mississippi, in the 1950s and early 1960s favored segregation to the extent of desiring suppression of integrationist views. This, however, neglected the black view that probably favored integration, although, given intimidation, the existence of such a view might have been difficult to ascertain. To identify and follow local views would be extremely difficult and contrary to the general understanding of the public interest.

519. Report and Policy Statement (Network Programing Inquiry), 44 F.C.C. 2303, 2310 (1960).

520. 27 F.C.C.2d 650, 650, app. B, at 682 (1971).

521. H.R. 12993 § 6(b) (House print) and § 3(b) (Senate print) took this approach, as did the FCC after its failure. For a history of the FCC effort and its affirmation, see FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 793-94 (1978).

522. See H.R. 3333, 96th Cong., 1st Sess. (1979); H.R. 13015, 95th Cong., 2d Sess. (1978).

523. S. 622, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979).

This Article is about local service, not the 1978-1979 legislative effort. The examples are illustrative of the 1978-1979 legislative effort. Unlike the 1974 legislative effort, which strongly focused on local service, see text accompanying notes 504-21 *supra*, the 1978-1979 effort retained local service as a key aspect of regulation of television in the 1978-1979 effort, see text accompanying notes 525-43 *infra*.

524. See WNCN Listeners Guild v. FCC, 45 Rad. Reg. 2d (P & F) 1404, 1423 n.56 (1979) (H.R. 3333 regarded as providing most deregulation, S. 622 as providing substantial, and S. 611 some, but least of three).

were finally abandoned in the summer of 1979.⁵²⁵ This in part is due to the drastic changes in regulation involved. In spite of the broad range of deregulation, including the specific elimination of requirements of ascertainment on the theory that good licensees will ascertain local needs on their own, local service and its traditional core news and public affairs are returned as licensee obligations. The House bill provides for the deregulation of radio and the removal of the public interest, convenience, and necessity standard from application to television.⁵²⁶ In other respects, both bills are similar. For example, both retain for television an obligation to program for news and public affairs, and locally produced programs are still required.⁵²⁸ Both contain an equity principle requiring coverage of controversial issues to replace the fairness doctrine⁵²⁹ and an equal opportunity section for candidates seeking public office.⁵³⁰ The requirement for ascertainment is specifically eliminated.⁵³¹ The Communications Regulatory Commission (CRC), rather than the FCC, would fill the gaps by rules.⁵³² The CRC would not have the FCC's authority to allocate frequencies.⁵³³

The approach to local service in the 1978 legislation is erroneous. The removal of the ascertainment requirement, justified by assertions that good licensees will ascertain the programming needs of their community,⁵³⁴ is unsupported. It is contradicted by the format change cases,⁵³⁵ the fairness doctrine cases,⁵³⁶ and the failure of the licensees to

525. See BROADCASTING, July 16, 1979, at 24.

526. Radio is granted an indefinite license with general technical standards. H.R. 3333, 96th Cong., 1st Sess. § 471(a) (1979); H.R. 13015, 95th Cong., 2d Sess. § 431(a) (1978). The public interest standard is absent from the bills.

Cable is not regulated by H.R. 13015, but the cablecaster must have permission of the station or the producer to retransmit a program. H.R. 3333, 96th Cong., 1st Sess. § 453(a)(2) (1979).

527. See H.R. 3333, 96th Cong., 2d Sess. § 462(a)(1) (1979); H.R. 13015, 95th Cong., 2d Sess. § 434(a)(1) (1978).

528. See H.R. 3333, 96th Cong., 1st Sess. § 462(a)(1) (1979); H.R. 13015, 95th Cong., 2d Sess. § 434(a)(1) (1978).

529. H.R. 13015, 95th Cong., 2d Sess. § 434(a)(2) (1978) provides that the FCC shall require television broadcasting station licensees to "treat controversial issues of public importance in an equitable manner." H.R. 3333, 96th Cong., 1st Sess. § 462(a)(2) (1979) requires broadcast licensees to "devote a reasonable amount of time to controversial issues of public importance and afford reasonable opportunity for the discussion of conflicting views on such issues."

530. H.R. 13015 required television to provide equal opportunity for all candidates, H.R. 13015, 95th Cong., 2d Sess. § 439(a)(1)(A) (1978), but exempted candidates for President, Vice President, the Senate, or any state-wide office. H.R. 3333 required television stations to provide equal opportunity for any candidate, without exception, for the office involved, H.R. 3333, 96th Cong., 1st Sess. § 463 (1979).

531. See H.R. 3333, 96th Cong., 1st Sess. (1979); H.R. 13015, 95th Cong., 2d Sess. (1978).

532. See H.R. 3333, 96th Cong., 1st Sess. § 211 (1979); H.R. 13015, 95th Cong., 2d Sess. § 211 (1978).

533. See H.R. 3333, 96th Cong., 1st Sess. §§ 251-252 (1979); H.R. 13015, 95th Cong., 2d Sess. §§ 251-252 (1978).

534. H.R. 12993, 93d Cong., 2d Sess. § 434(b) (1974); H.R. 3333, 96th Cong., 1st Sess. § 462 (1979).

535. See text accompanying notes 274-367 *supra*.

536. See text accompanying notes 416-55 *supra*.

avail themselves of the freedoms provided by the network affiliate rules.⁵³⁷ Although ascertainment has not been a great success, the cause lies in the FCC's failure to require programming to meet ascertained needs. Rather than attempting better implementation, good policy is rejected because of poor implementation.

The requirement of locally produced programs is also unwise except for the specific requirement of local news and public affairs. Audiences need programming that meets the needs, desires, and tastes of the people in the audience, not locally produced programs that may or may not meet the viewers' or listeners' needs. Indeed, in many situations syndication, networks, or programs purchased from other sources will provide superior local service. This gesture to localism is based on ritualistic acceptance of what has occurred before, but not on reason.

The deregulation proposals likewise are ill-conceived, although more so in the case of radio than cable. A review of the cases demonstrates that radio is the focal point of complaint, not television.⁵³⁸ While excessive plaudits should not be lavished on the television broadcasters, radio fails to a far greater degree to serve the public.⁵³⁹ The argument that there are large numbers of radio stations, thus reducing scarcity, is unavailing. While much constitutional doctrine has been posited on scarcity,⁵⁴⁰ the Supreme Court has shifted the inquiry in radio to the pervasive, penetrating nature of radio.⁵⁴¹ Just as the constitutional basis does not depend on scarcity, likewise abundance does not assure satisfactory service. This is nowhere better demonstrated than in the format change cases in which inadequate service has been challenged by utilizing a doctrine that requires an absence of scarcity to accommodate the varied formats.⁵⁴² Congress should, therefore, reject the current proposals for radio regulation.

The cable proposals, however, present different issues. FCC cable rules often have been couched in terms that intend to vindicate local

537. See text accompanying notes 370-91 *supra*.

538. See, e.g., *City of Camden*, 18 F.C.C.2d 412, 413 (1969); *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323 (D.C. Cir. 1974). The major broadcaster first amendment cases, *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), *Columbus Broadcasting Coalition*, and *FCC v. Pacific Foundation*, 438 U.S. 726 (1978) are radio cases. These cases have been decided during both the period of the growth of television and the abundance of radio. While television matters have been litigated, they constitute a small number of cases involving program content, especially as it relates to local service.

539. This conclusion flows from the bulk of complaints against radio, see note 538 *supra*. It also reflects the view of the author drawn from observation of what is occurring both directly and on the basis of broad survey secondary material.

540. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376, 396 (1969); *NBC v. United States*, 319 U.S. 190, 213-16 (1943); *Trinity Methodist Church, S. v. Federal Radio Comm'n*, 62 F.2d 850, 852 (D.C. Cir. 1932); *KFKB Broadcasting Ass'n, Inc. v. Federal Radio Comm'n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

541. See *FCC v. Pacific Foundation*, 438 U.S. 726, 748 (1978).

542. See *WCWN Listeners Guild v. FCC*, 45 Rad. Reg. 2d (P & F) 1404, 1406-07 (1979). A common factor of the format change cases, see notes 274-367 *supra*, was the existence of multiple stations.

service concepts. Substantial deregulation should occur in the cable area, but at this juncture it is not clear that total deregulation is the best course. Judicial decisions in other areas of broadcasting are removing the more objectionable FCC restraints.⁵⁴³ Likewise, prodding legislative oversight rather than a hard statutory enactment should supplement the judicial effort in the cable area. To accommodate all branches of government, the President should appoint commissioners who are not hostile to cable or overprotective of over-the-air broadcasters. These steps should achieve the goal of a limited regulatory scheme promoting a good, growing cable system. Complete deregulation is premature.

The effort to foster the local service concept by legislative reform is not satisfactory. The 1978 proposal is inadequate and clearly ignores the main problems of local service while purporting to exalt it. The 1974 proposal was more helpful. It attempted to build on an existing structure that, while unsatisfactory, is acceptable; what is required is recognition of the actual problems, aggressive FCC rule making and enforcement, and legislation in the vacuum that will remain.

IV. A PROPOSED REGULATORY SCHEME FOR SERVICE TO LOCAL COMMUNITIES

A. The Theory of Regulation

This Article has demonstrated the inadequacies of both present FCC policy and current legislative proposals pertaining to the local service goal. Interests of the public and licensee are involved, and first amendment values permeate both. This interplay of first amendment interests necessitates a broad, complex solution to local service problems. The essence of local service is to provide service to the individuals in a location, not merely to serve geographic areas.

In approaching the solution, case law provides valuable guidance. The first amendment right of the public is paramount and takes precedence over the first amendment right of the broadcaster.⁵⁴⁴ Likewise, the business interest of the broadcaster is subordinate to both the public's first amendment right⁵⁴⁵ and the duty of the broadcaster as public trustee under the Communications Act.⁵⁴⁶ The definition of superior service as reinvestment in better service and reduction of adver-

543. See, e.g., *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1203-05 (D.C. Cir. 1971) (rejecting FCC policy statement granting incumbent licensee controlling advantage); *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548-49 (D.C. Cir. 1969) (requiring that FCC "assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of [its] duty to serve the public interest"); *Miners Broadcasting Serv., Inc. v. FCC*, 349 F.2d 199, 200-02 (D.C. Cir. 1965) (limiting FCC extension of *Huntington Broadcasting* standard).

544. See notes 19-43 *supra* and accompanying text.

545. See note 57 *supra* and accompanying text.

546. See note 62 *supra* and accompanying text.

tising is instructive of the appropriate relationship.⁵⁴⁷ These maxims, read together, make clear that the FCC has the authority by rule and course of decisions to require a higher level of program service from its licensees to the public. The FCC has abjured this opportunity.

The FCC must determine whether the potential improvement in programming is worth the regulatory effort, impact, and cost. This Article has established that present efforts to improve programming through the local service requirement are largely futile and perhaps counterproductive. The following proposals demonstrate that the required effort, impact, and cost can be reasonably defined and are subject to realistic limitations.

The public's first amendment and general public interest rights must be paramount. Accordingly, licensees should be subject to effective regulation, and their first amendment rights should be balanced against and appropriately subordinated to the public right. In addition, some financial burden, speculative but controllable and subject to amelioration, will be imposed on the licensee. Overemphasis of the possible impingement on the licensee's interests has effectively excluded other values, particularly those of the public under the first amendment. Under these proposals, it is possible that the FCC will be required to devote more time to the local service obligation problems. This probably will occur in the early phase of such an effort. It is reasonable to assume that once standards are set and enforcement is established as the norm, the FCC probably will expend less resources annually on the problem than it has in an average year since 1970.

B. Possible Approaches to the Problem

There are three general approaches to the local service obligation requirement: maintenance of the status quo, abandonment of present standards except for geographic distributions, or improvement of the quality of standards and enforcement. The approaches range on a continuum from no regulation to strict regulation, and each approach has variants.

Maintenance of the status quo is possible, but one must recognize and accept its manifest failure to fulfill the goals of local service. The present approach consists of an occasional episodic assertion by the FCC of local service standards through agency action or litigation. The FCC's reliance on pious statements, vague standards, meaningless requirements, and unfettered licensee discretion does little to achieve the local service goal. Indeed, to a substantial degree, the FCC's approach effectively excludes persons from speaking on behalf of the public, thus insulating the licensee from its public interest obligation.

547. See notes 74-83 *supra* and accompanying text.

The status quo could be diluted by relaxing standards and enforcement. The result would be a cumbersome, uncertain system that would protect licensees and reduce their costs, and the public would remain without effective vindication of its interests. A modest increase in efforts to enforce the present standards would have similar, inverse effects. Moreover, licensee uncertainty and costs would increase along with only a modest increase in vindication of the public interest. The 1974 legislative effort would have fallen somewhere in this range of better enforcement, although the FCC's vigor in enforcing the public interest would be determinative of the amount of uncertainty and increased cost that would be produced.⁵⁴⁸ Sufficient indolence and bias against strong standards could have resulted in a less stringent regime of standards. The important flaw in this approach, then, is its lack of certainty. This argues for either deregulation or establishment of clear, enforced standards.

The most likely form of deregulation is to abandon any standards beyond geographic allocation. That is the approach of the 1978 legislation, which proposed deregulation of radio. This approach has several virtues. It would remove the illusion that the FCC is accomplishing something or could do so within its present mode of approach. Complete deregulation makes licensee autonomy the primary value, with the hope that the public will be served, or more accurately the belief that the public is best served, by the absence of regulation.⁵⁴⁹ As a result, costs to all parties would decline. Licensees would have no reason to expend monies on defense because no grounds for complaint would exist. The public interest advocates would be frustrated, but they would have whatever solace is found in clear rules.

Given the clear imperfection of an absence of regulation, the third alternative of serious regulatory effort must be preferred. However, two fallacies must first be rejected. First, one must reject the fallacy that current unrealistic regulatory efforts by the FCC are the best available alternative. Second, one must reject the fallacy that a regulatory scheme, unlike a scheme absent regulation, must be essentially perfect. Any scheme of regulation or deregulation will be flawed. Therefore, the solution is to strive for the best scheme possible. The nature of the electromagnetic spectrum⁵⁵⁰ and the pervasive character of radio and television make some governmental intervention unavoidable.⁵⁵¹ With

548. See note 469 *supra*.

549. See generally *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 420-39 (1976). This policy choice rests on the initial assumption that minimal regulations will best vindicate the public interest. The result would be to abandon as many regulations as is lawfully possible and perhaps to legislate for further deregulation. See also *Complaint of Representative Patsy Mink*, 59 F.C.C.2d 987, 998 (1976) (Robinson, Comm'r, concurring).

550. *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367, 375-77 (1969); *NBC v. United States*, 319 U.S. 190, 211-13, 216-19 (1943).

551. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978).

intervention comes the parcelling of a valuable resource and a usable medium.

The results of governmental regulations are economic benefit and access to the medium for those favored by the allocation. A more complex regulatory scheme is required to redress the unavoidable societal imbalances that regulation initially creates.⁵⁵² The regulatory scheme should govern not only the traditional forms of radio and television, but also the new areas of UHF and cable television.

The great power vested in the licensee by the government vis à vis the public at large must be restrained, while the effective exercise of first amendment rights by licensees continues. Accordingly, with establishment of the need for an actual effort at regulation, the desirability and superiority of regulation is clear. Establishing the need for better regulations is only a partial solution to the local service obligation problem. It is next necessary to consider the basis for the new regulations.

C. *The Need to Increase Broadcast Outlets*

The optimum number of sources possible will increase potential diversity and ensure service to many segments of society. While some ongoing, direct regulation of program content will be necessary, regulation with the goal of optimum service to the public via multiple broadcast outlets is the means that is least intrusive on program content. For this purpose, television and radio must be regulated in different ways. In television the solution is a hybrid scheme of six network over-the-air systems based on redistributed super-power stations⁵⁵³ and development of UHF and satellite technology. One of the six networks should be public television, since this will be the only over-the-air noncommercial television service. Significant experimentation with over-the-air service should be undertaken. With the apparent success of pay cable⁵⁵⁴ it is possible that many pay stations and perhaps a new network will emerge.

The development of other technologies of telecasting must be given serious scrutiny in a comprehensive system of television service. UHF television technology offers an apparent opportunity to expand the number of UHF and VHF channels. Satellite transmission offers broad distribution of present independent UHF stations via cable and the possibility of establishing another network. Direct-to-home communications and VHF drop-ins could also establish new networks.

552. See BARRON, *In Defense of "Fairness": A First Amendment Rationale For Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31, 32-33, 41-46 (1964).

553. R. NOLL, M. PECK & J. MCGOWAN, *supra* note 4, at 116-20.

554. PRESIDENT'S TASK FORCE ON COMMUNICATION POLICY, FINAL REPORT ch. 7, 32-50 (1968). The need to maintain a free service for those who, for one reason or another, cannot afford cable seems the only argument for over-the-air television. See note 555 *infra*.

The development of alternative technologies should be supplemented by an extensive cable television system. First, there should be an increase in the number of cable systems. It is clear that an effort to expand broadcast outlets can succeed, but the effort must be pursued without exaggerated regard to the effect on current licensees. While the service and hence the viability of the current licensees is essential, continued oligopolistic profits are not. Second, the cable systems in every station area should be required to carry over-the-air network systems to assure them financial viability and to afford them twenty-four hour protection against program duplication.⁵⁵⁵ Third, the cable system should be made geographically extensive enough to be viable financially, to provide reasonable protection to over-the-air broadcasters, and to be subject to only minimal governmental regulation.⁵⁵⁶

Additional cable outlets should provide coverage of local matters not covered by over-the-air broadcasters. If cable outlets do not provide such coverage, it should be mandated by legislation. Additionally, the cable system should be permitted to provide pay television, either as an independent undertaking of the individual cable systems, as part of a pay cable network, or as a combination of both. Finally, the cable systems should be required to provide a capacity for both supplemental, nonbroadcast information services and two-way capacity.⁵⁵⁷ Given this structure, which removes the great majority of program control from the cable systems, concerns with concentration of cable ownership could be abandoned.⁵⁵⁸ The control of programs, beyond filling the outline above with details, could be set aside until it became clear that such control was needed.⁵⁵⁹

A further aspect of structural modification is a greater emphasis on public television and on cooperative ownership of broadcasting stations. Both devices offer the potential for substantial improvement of service. Public broadcasting presently provides programming for many. In addition, it has the potential of providing a yardstick for commercial broadcasters in both public affairs and entertainment directed at particular groups.

Nevertheless, there are problems inherent in this approach. Public

555. These protections are to protect those who cannot afford cable. The urban poor cannot afford a subscription fare. Rural viewers will have problems with the adequacy of cable systems serving them.

556. The importance of minimal governmental regulation of cable television was demonstrated in *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). The court in *Midwest Video* disapproved of the requirement that cable systems have a public access channel. *Id.* at 1063.

557. Such service appears to be feasible today. Warner Cable's Cube experiment in Columbus, Ohio, is a hopeful sign of the potential of such service. BROADCASTING, July 31, 1978, at 27-31. Similar efforts are hopeful in Reading, Pennsylvania. *Id.* at 31.

558. There remains a concern with antitrust laws. See text accompanying notes 576-85 *infra*.

559. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392-95 (1969) (suggesting rules to mandate coverage if fairness doctrine inhibits coverage of controversial issues).

television has been relegated to UHF, but in the future it should receive first chance at any available VHF drop-ins. In addition, cable will facilitate development of broader UHF audiences and hence broader public television audiences. Moreover, a second or subsequent public television network could be developed based on cable and satellite transmissions.

Further problems abound, however. The elitist nature of public broadcasting narrows the number of people who receive supplemental benefits from it. This narrowing lessens the usefulness of public broadcasting as a yardstick. Some upward pressure of an elitist nature should be accepted, but such programming cannot be a sole criterion for public television. Equally important is financing. Public broadcasting is chronically underfunded, and the quality of public television is diminished by its clutter of solicitation for funds. Numerous funding proposals have been made. Revenue from satellites, excise taxes on television set sales, a licensing tax on television sets, or user fees from spectrum use have been urged. Limited advertising is also a possibility. A mix of user fee and excise tax on set sales may be the best solution to public television funding problems. The funding aspect is the most troubling and limiting part of public television.

Cooperative ownership is a potentially more fruitful area. Congress endorsed the cooperative concept by establishing a cooperative bank to lend funds to cooperatives. Cooperatives are likely to be faithful to the public interests because they are owned by the public at large. Likewise, they meet the superior service standards of *Citizens Communication Center*, since they tend to reinvest their profits in better service. Cooperatives can seek and receive commercial licenses on the same basis as for-profit licensees, and they should be encouraged to do so.

Radio presents a more difficult problem, although the recommendations on public broadcasting and cooperative ownership apply to radio as well as television. Technical ability to expand radio sources is limited.⁵⁶⁰ Similarly, allocation policies are not as clearly subject to fruitful modification. The only helpful allocation policy is a continued effort to improve technology.

The lack of any realistic means of improving the situation by allocation policy does not end the matter, however. As this Article has demonstrated, an enormous amount of past and current public dissatisfaction with service is focused on radio. This is illustrated in the format change cases, in which all the elements necessary for high quality service are present. There are profitable licenses, multiple outlets, and an audience with a demonstrated intense desire for a service. Yet, for-

560. See Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 569 (1961). Further Notice of Proposed Rule Making rejected proposals for AM stations in cases of 500 watts power. It also proposed to duplicate the remaining AM clear channels.

mat changes do not occur. The reasons for this are clear. Profits are made from advertisers, not from audiences. Usually, audience size, and sometimes audience make-up, determine advertiser choice. Therefore, to realize profits, licensees will program for advertisers' interests.⁵⁶¹ This is so even though the intensity of demand of an unserved interest group is great, and this group might pay more for the programming. These cases, from a policy view, show that regulation is necessary if all significant segments of the population are to be served.

In radio, as in television, improved public broadcasting and cooperative ownership of stations promises improved service. The need for governmental regulation is greater in the area of radio, however, because of the advertisers' control over program content.

The foregoing is a sketch of a proposed structural model for achieving local service for persons as residents of places. It will take years to achieve this model and to solve the problems neither raised nor foreseen. Accordingly, a more particular response to regulation of program content is required. The FCC generally has failed to suggest or develop a meaningful standard. Superior service should be defined by the FCC in both quantitative and qualitative terms, and the requirement of such service should be enforced.

D. Intervention in Program Content

The legal basis for intervention in program content is clear. The Supreme Court in *Red Lion* established the first amendment interests of the public, as listeners, as more significant than those of the broadcaster. Having demonstrated that scrutiny of and limited intervention in programming is desirable, legally mandated, and feasible, a proposal of a model to implement this desired result is now necessary. Statement of a proposed model must be general because much crucial information is either unavailable or effectively so due to lack of compilation. In addition, while a serious and considered effort to cast initial proposals in practical terms is mandatory, so is flexibility and a recognition of the limits on foresight. In such a complex area, the administrative virtues of experimentation, ad hoc responses, and development of policy over time are indispensable as actual tools. There will be careful policy decisions to be developed and erroneous policy and technical judgments to be corrected. While attempting a detailed statement of a complete scheme is not possible, setting forth principles with some precision is.

The fundamental aspects of local service are that it is for people, that it can be realized by drawing on a variety of sources, that the nature of the license and the market service are integral to any obligation imposed, and that the program regulation should be general,

561. See Dirlam & Kahn, *The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television*, 77 YALE L.J. 494, 516 (1968).

especially as to quality and content. Indeed, the regulation should be of categories and not of content.⁵⁶² There are limits to licensee financial resources, to the size of the radio spectrum, to the prescience of licensees and the FCC, and to the Commission's resources. Some critics of regulation may focus on these realities as grave defects. These ultimate practical inadequacies do not, however, justify the present default or the abandonment of efforts at superior service. Instead, they require that a superior system be proposed and implemented.

The problem of penalties is a nagging one. Presently the FCC may issue a cease and desist order⁵⁶³ (sometimes in affirmative form), levy forfeitures up to \$1,000,⁵⁶⁴ renew broadcasting licenses for a period of under three years,⁵⁶⁵ or refuse renewal.⁵⁶⁶ In appropriate circumstances, a cease and desist order may be useful. For stations with limited financial resources, the forfeiture is significant, but this causes alarm to a limited number of licensees. The short renewal causes alarm and leaves no time for concentrated reflections on conduct. The refusal of renewal is such a drastic remedy that it is seldom applied.

For medium and large businesses, the penalty structure is one of harassment buttressed by the faint possibility of revocation of license. The cost of the harassment may be sufficient to deter or to alter conduct. Clearly, years of letter writing, agency action, and litigation are not desired by licensees. This approach, however, also may be undesirable because the public's criticisms are not vindicated. The FCC seems to accumulate unvindicated charges because of its vague standards and changing community attitudes. The unvindicated charges may also represent a situation in which the costs of defending and the reflections caused by possible revocation have focused the licensee's attention sufficiently on its shortcomings that the FCC imposes no sanction. Thus, the charges are vindicated only to the extent that FCC harassment causes some change in conduct.⁵⁶⁷

562. This is the approach of H.R. 13015, 95th Cong., 2d Sess. §§ 420, 434(1) (1978). Section 420 forbids censorship or for the CRC to "otherwise regulate content" or to construe the act to so permit. Section 434(1) requires news, public affairs, and locally originated programs, which is substantially the same approach taken in this Article. More categories might be required or inquired into, but the inquiry would go to type of programming, not particular content.

563. 47 U.S.C. § 312(b) (1976).

564. 47 U.S.C.A. § 503(b) (West Supp. 1979). Each day of violation is subject to the forfeiture. *Id.* § 503(b)(2).

565. 47 U.S.C. § 307(d) (1976) permits a broadcast license period of up to three years, but requires no minimum.

566. 47 U.S.C. § 309 (1976) applies to all grants of licenses and renewals. Section 303(m) permits suspension of licenses and § 312 provides for revocation of licenses. *Id.* §§ 303(m), 312.

567. This is speculative, but quite possible. It is also a questionable form of justice. Consider the agonizing of and *mea culpa* (including over-the-air apologies, promises not to do it again and some effort to disclaim responsibility) of the Columbia Broadcasting System over its false assertion that its "Heavyweight Championship of Tennis" was a winner-take-all event. *See, e.g.*, BROADCASTING, May 8, 1978, at 27; *id.* Apr. 10, 1978, at 31; *id.* Mar. 20, 1978, at 25. Notwithstanding the clear misconduct of Columbia Broad-

This has not been sufficient, however. Clearer standards are an essential first step. Fewer frivolous complaints (probably fewer complaints) or more summary dismissals would result. Harassment costs to the licensee would decline, and the FCC staff would be less burdened. A license period of five years⁵⁶⁸ would be warranted by better licensee compliance. Clarity in rules and a longer license term would reduce licensee compliance cost and release FCC resources. Presumably, compliance would increase with clearer rules and greater resources.

The FCC could then concentrate its resources on those licensees who faced serious charges of violation of FCC standards or who regularly disregard or fall short of the standards. Violators should face both larger forfeitures based on the type of licensee⁵⁶⁹ and shorter renewals, with the penalties often combined. The combination would penalize severely the malfeasant licensee without exacting the ultimate revocation penalty and would avoid the problem of frequent license changes when redeeming virtues exist in a licensee. It would also reserve license revocation for the most recalcitrant violator. The cost would thus increase for those who violate FCC standards.

The effects are the converse for those who comply. A five-year license period and the advantages of clear standards would decrease these costs. Even for those wrongly charged, costs would be less because of quicker, surer dismissals. The result is that inadequate licensees would be penalized, and better ones rewarded.

E. Ascertainment

To fulfill the first step, the licensee must ascertain and meet the needs of its area of service. Initially, the licensees must determine the demography of its community. This includes general knowledge of the area and specific knowledge of discrete groups in the community. Then, the ascertainment's impact on programming must be determined.⁵⁷⁰

An initial undertaking is to establish policy that causes ascertainment to have an actual effect on programming. The fundamental fac-

casting System, the use of harassment is unjust. In the Columbia Broadcast System cases, the FCC has taken the action of renewing one of the network licenses for only one year, a reasonable sanction. The problem is the next violation of the Columbia Broadcast System. License revocation will probably not occur, and other sanctions are ineffective. In all likelihood little will occur.

568. H.R. 12993, 93d Cong., 2d Sess. § 2(b) (d)(1) (1974) established five-year terms. Subsequent legislative proposals give longer periods, followed by an indefinite term. See H.R. 3333, 96th Cong., 1st Sess. § 471 (1979); H.R. 13015, 95th Cong., 2d Sess. § 431(a) (1978).

569. Licensees would initially be divided into four categories: VHF television, UHF television, AM radio, and FM radio. Further divisions would occur on the size of market, hours of operation, and strength of permitted signal. Penalties for initial violations should be small. The \$1000 per violation limit of 47 U.S.C. § 503(b) (1976) would be a useful limit. Thereafter, a forfeiture of up to 10% of projected profit would be a good benchmark.

570. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 460 (1976) (Robinson, Comm'r, dissenting).

tors are essential. The licensee must be required to identify programs that match needs, problems, and interests.⁵⁷¹ Ascertainment in any market should be largely a cooperative effort. There is no reason to insist on duplicative total surveys by each licensee. In addition, knowledge of what other licensees are doing might result in meeting unfulfilled needs.⁵⁷² The information would provide the basis for particular licensee evaluations by an FCC official without great effort.

Licensee dialogue and agreements with community groups and with general FCC policy formation can be verified in part by licensee consultation, which can also assure minimum service and at least limited agreement on provision of service.⁵⁷³ There is no need for a requirement that every station provide classical music or Spanish language programs, nor must every licensee serve every member of its service area. Licensees now identify and meet the needs of their area of service individually. This policy should continue,⁵⁷⁴ but the FCC should also require formal, direct consultations among licensees, restricted in scope to demographic determination, and ascertainment of needs for programming guidance. These consultations should provide a basis for consultation with listener/viewer groups.⁵⁷⁵

This approach presents the most difficult legal problem regarding FCC policy suggested in this Article. While much current licensee action is consistent with these proposals, it is neither a concerted effort nor one undertaken pursuant to FCC regulations. This lack of FCC direction raises serious antitrust problems. Concerted licensee action on programming may violate antitrust prohibitions against division of markets.⁵⁷⁶ The issue is whether the FCC can, under the Communications Act, exempt licensee action, taken under its direction and subject to its approval, from antitrust prosecution.⁵⁷⁷ An exemption from antitrust regulation may be justified here because the broadcast industry is subject to governmental regulation.⁵⁷⁸

In *United States v. RCA*⁵⁷⁹ the Supreme Court held that FCC

571. See *id.* at 432-34.

572. See generally *id.* app. B, at 445. The licensee should be required to take cognizance of both community needs and the programming of other licensees. With possible exceptions for special format stations, the licensee should be required to devote a specific amount or percentage of time in specific periods to news and public affairs and public service announcements.

573. This presently occurs in the course of market evaluation. The aim is to formalize that evaluation properly. See *id.* app. B, at 426-27, 445.

574. While some services, such as that to women or to large ethnic concentrations in metropolitan areas, may impose heavy burdens on general format stations, not all service requirements will. In smaller communities served by few or single licensees, the service obligation must focus on larger segments of the population, with more specialized services either provided by broad service metropolitan stations or neglected.

575. See Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, app. B, at 441-46 (1976).

576. 15 U.S.C. §§ 1, 2 (1976).

577. See generally P. AREEDA, ANTITRUST ANALYSIS ¶ 179(e) (1974).

578. See *id.* ¶ 179(c).

579. 358 U.S. 334 (1959).

approval of a license transfer *did not* exempt the transfer from antitrust law.⁵⁸⁰ RCA exchanged a television station in Cleveland for one in Philadelphia.⁵⁸¹ FCC approval for the exchange was required by statute and was granted after the exchange occurred.⁵⁸² The Court held that the lack of a pervasive regulatory scheme⁵⁸³ and Congress' refusal to give the FCC jurisdiction to determine antitrust matters⁵⁸⁴ demonstrated that the transfer was not exempt from antitrust law.⁵⁸⁵

The proposal made in this Article envisions FCC-initiated cooperation aimed at achieving better programming service and therefore differs from the factual situation in *RCA*. The intent is fulfillment of the public interest and local service requirements of the Communications Act. Private initiative is not the source of the conduct, and a private economic benefit is not the intended result. Instead, the scope of the concerted activity is limited to undertakings useful in promoting the public interest through enforcement of the local service obligation. The proposed station cooperation in fulfilling the ascertained needs of the community would not affect advertising. Rather, its primary effect would be on programming that satisfies the needs of various listener/viewer groups. Given this proposal's limited effect on economic competition and the clear and immediate promotion of the Commission's statutory mandate, the *RCA* case can clearly be distinguished. In this factual context the FCC should adopt a regulation stating that cooperation in determining and fulfilling ascertained needs is exempt from antitrust law. In the absence of an FCC rule, the courts should find an antitrust exemption.

F. Particular Program Standards

Licensees must be reevaluated to determine the extent to which they can serve the public interest. This evaluation would balance the licensee's business interest against the public's right to information under the first amendment. Stations should be classified on the basis of profit,⁵⁸⁶ and three general categories of service should be established. They are, in order of importance,⁵⁸⁷ (1) news, public affairs, and public service, (2) special entertainment and programming, and (3) general entertainment and programming. The first category should include those programs presently so classified by the FCC. The second category

580. *Id.* at 350-51.

581. *Id.* at 335-36.

582. *Id.* at 336-37.

583. *Id.* at 350.

584. *Id.* at 346.

585. *See id.*

586. *See* Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971); note 324 *supra* and accompanying text.

587. This follows current FCC policy in regard to public affairs programs. *See* note 25 *supra*.

should include all programs in a specialized format, as well as all programs that are directed toward significant cultural or ethnic groups and significant⁵⁸⁸ groups with special interests, whether those interests arise from the nature of the groups, or define the nature of the groups.⁵⁸⁹ The third category would include all other programming. The licensees would then be required to serve the needs of particular interest groups within the various categories. Every licensee would be required to justify in writing, with reference to unserved community needs, any desired upgrading or downgrading in programming. Likewise, the licensee could decline to change the lowest apparent classification, if such a change would not be to its benefit. The licensee classification should be subject to prospective FCC modification only if there was a showing of bad faith or a pattern of improper classification.⁵⁹⁰

In addition, trade offs between special entertainment and public affairs should be permitted, especially to encourage special entertainment. These trade offs should occur when a format serves a particular group, which qualifies programming as special programming. In that situation the rules should reduce the required amount of public affairs to a minimum. When it can be shown that a substantial segment of broadcast time is devoted to such special groups, a proportionate reduction of the time required for public affairs should occur. These elements of trade off would recognize that there are substantial values for segments of the community beyond public affairs programming, would reward those who meet those values, and would reiterate that the public can be served in a myriad of ways.⁵⁹¹

Based on minimum standards for all licensees and higher expectations for higher potential and actual profitability, minimum percentages of time should be required for news, public affairs, and public service, for special entertainment, and for the aggregate of the two. The aggregate amount should exceed the amount of the two combined, without regard to trade offs. All licensees would be permitted to use the time generally as they determined, within the two broad ranges.

The licensee should be given further rights for allocation of this

588. What constitutes significance would remain a relative determination. In *Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972) 16% was significant. *Id.* at 328 n.34. In *City of Camden*, 18 F.C.C.2d 412 (1969), 17% was sufficient to be protected. *Id.* at 413, 418. Factors such as the number of present licensees and other groups of various kinds would bear on the matter of significant percentage. *See id.* at 417-18.

589. Mexican ethnic origin with concomitant interest is an example of the first category in which the group defines the interest. Classical music is an example of the second category in which the interest defines the group.

590. Presumably this would occur only when a program fell into special entertainment. No harm would result from a movement away from general entertainment, but a movement from special entertainment to news might result in falling short of special entertainment goals.

591. *See Stone v. FCC*, 466 F.2d 316, 328 n.44 (D.C. Cir. 1972). *See also* notes 275-314 *supra* and accompanying text (format change cases).

time. First, it should be permitted to show that the financial circumstances of the licensee require general programming and entertainment. Second, it should be permitted to serve a need of the community without regard to whether the need is fulfilled in either its programming or the general programming for the community of service within the scope of public affairs and special entertainment. Third, although probably not an attractive option, the licensee should be able to use broadcast time in any way, absent a verified complaint concerning lack of coverage of an area of need in either the licensee's or the general market's coverage. The third option, however, should result in a rebuttable presumption that superior service had not been demonstrated if a competing applicant filed for the license. The option is sufficiently unappealing that it would rarely, if ever, be chosen; still, in the absence of community demand for better service, the licensee should perhaps have the option of not providing it and taking the risk that another will make the offer to provide it.

This Article urges that quantification be adopted, but avoids hard positions on quantification of requirements that might be imposed. Accordingly, illustrative suggestions derived from past proposals are advanced. The ten to fifteen percentage proposal for local programs⁵⁹² should be a norm for that portion of the requirement, modified as suggested below. The same amount seems a reasonable norm for special entertainment. The aggregate of the two, twenty to thirty percent, would be a reasonable aggregate amount for the two categories. To accord with the model and to provide some licensee discretion within the guidelines set forth, a model should be redistributed to about eight percent public affairs, eight percent special entertainment, and nine percent interchangeable.

In the case of licensees with a substantial degree of financial difficulty, the aggregate should be reduced to ten percent of which half should be public affairs and the other half interchangeable. Stations with modest financial problems and low profitability should be placed between. Licensees with specialized formats should be permitted to excise all special entertainment and to reduce public affairs in the form of news to only three percent. Again, intermediate reductions should be permitted for partial adoption of a special format.

V. CONCLUSION

The local service obligation remains largely unexamined, even

592. These figures are drawn from prior proposals and a study of the current situation, but do not reflect synthesis of or access to all information needed for a final proposal, and should, therefore, be treated as illustrative of possible approaches rather than precise formulations. See *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 40 Rad. Reg. 2d (P & F) 763, 767-68 (1977); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 27 F.C.C.2d 580, 587 app. (1971) (later rejected).

though it has been central to radio and television regulation from its beginning. The conflict within the doctrine between the public interest standard and the licensee interest has been neglected, and the reasons for local service are little understood. This lack of understanding results in an exaggerated emphasis on geographic service and a failure to focus on providing satisfactory service to various groups of people. This situation prevails in spite of the availability of FCC doctrine capable of going beyond the successful geographic allocation to ensure satisfactory service for the public. The neglect of the available means, and the proposal to abandon them for substantial deregulation, is especially lamentable given the repeated public petitions to the FCC requesting it to mandate satisfactory service by its licensees. Beyond these failures, the FCC has, in the name of geographic local service, hampered technologies that could enhance service to individuals in localities. The FCC ought to encourage and emphasize these technologies. To remedy the situation the problem must be confronted by the FCC's power to regulate broadcasting. The FCC must encourage more sources, whenever possible sources more congenial to the public interest standard than present licensees are available. The FCC must also promulgate and enforce rules to prod the recalcitrant licensee to the extent necessary to fulfill the public interest standard of the Communications Act, while simultaneously guarding licensee interest. These steps involve a reshaping of communications policy towards the local service concept. If a view based on the needs of people is placed at the core of the local service concept, it can be a worthwhile part of FCC policy. If such policy changes are not implemented, the local service concept will remain a ponderous make-weight justifying FCC decisions.

