

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

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

FCC 81-17

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of  
 Deregulation of Radio

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

REPORT AND ORDER (PROCEEDING TERMINATED)

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

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

*I. Introduction*

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

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

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

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

## II. History of the Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. The Comments

#### An Overview of the Comments

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

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

#### Common Misconceptions in the Comments

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

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

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

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

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

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

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

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

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

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

#### The Panel Discussions

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

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

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

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

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

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

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

##### Non-Entertainment Programming Guideline

###### The Proposals

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

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

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

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

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

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

## Discussion of the Action Being Taken

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, in 1945, the Commission spoke of:

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

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

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

(i)t is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day.

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

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

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

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

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

Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radio-broadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radio-broadcasting must be interpreted in light of this basic purpose.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Comparative Applications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Petitions to Deny

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

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

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

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

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

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

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

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

## Ascertainment

## The Proposals

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

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

## Discussion of the Action Being Taken

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

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

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

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

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

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

entertainment . . . religion, education, and instruction, important public events, discussion of public questions, weather, market reports, and news and matters of interest to all members of the family.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## The Commercial Guidelines

### The Proposals

73. The Commission's guidelines regulating maximum amounts of

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

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

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

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

#### Discussion of the Action Being Taken

##### Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Commercial Excesses and Marketplace Forces

82. The record of this proceeding provides convincing evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Potential Advantages of Elimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Program Logs

#### The Proposals

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

#### Discussion of the Action Being Taken

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

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

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

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

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

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

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

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

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

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

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

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

#### V. General Issues

##### The Experimental Option

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

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

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

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

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

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

#### Monitoring Deregulation

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

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

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

#### Administration of Deregulation

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

#### New Applications

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

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

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

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

#### Renewal Applications

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

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

#### VI. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix A

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

\* \* \* \* \*

(a) \* \* \*

(7) *Programming: commercial matter.*

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

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

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

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

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

(ii) Applications for renewal.

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

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

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

(9) \* \* \*

(10) *Programming: promise versus performance.*

(i) Applications for assignments and transfers.

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

(ii) Applications for renewal.

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

\* \* \* \* \*

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

§73.112 Program log  
 §73.282 Program log

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

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

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

\* \* \* \* \*

(g) \* \* \*

(1) \* \* \*

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

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

(2) *For commercial and noncommercial FM stations*

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

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

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

- (i) Operating and maintenance logs.

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

- (i) Program, operating and maintenance logs.

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

- (i) Program, operating and maintenance logs.

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

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

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

\* \* \* \* \*

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

Commercial Stations

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

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

(b) \* \* \*

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

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

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

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

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

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

Note 1: \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

## Introduction

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

\* \* \* \* \*

## E. Applicability

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

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

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

## A. General

\* \* \* \* \*

Answer: With applications for:

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

\* \* \* \* \*

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

Appendix B

Radio Deregulation Panels

PANEL I - September 15, 1980

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

PANEL II - September 16, 1980

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

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

## Appendix D

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

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

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

## The Economic Model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Criticisms of the Model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Scarcity as a Rationale for Regulation

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

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

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

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

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

would stem from certain economic, social, or political goals not necessarily dependent on any scarcity phenomenon "unique" to radio.

16. The relevant policy issue with respect to scarcity, then, is not simply whether spectrum is scarce. The relevant issue is whether as a result of spectrum scarcity regulation is necessary in order to achieve economically, socially, or politically determined public interest objectives—in particular, in order to provide programming responsive to public wants and needs. Before addressing this issue, it is useful to define what economists mean by scarcity. To the economist, scarcity of any commodity simply means that there is not enough of that commodity available to give everyone all that they want for free. Thus, some system of allocating the limited supply must be developed. In a radio market, under a given set of technical constraints involving allowable levels of interference, it may be technically possible for a certain number of radio stations to co-exist. For example, there may be 10 radio channels available in a market. If in that market only one—or five, or ten, but fewer than 11—individuals want to operate stations on those channels, then there is no economic scarcity. Many people in that market might want to own a station if they could make money doing so, but in fact there are more channels available than there is demand for the channels—even at a zero price. The airwaves offer *potential* service only; they have actual value only if there is sufficient economic wherewithal to exploit that potential. There is value in the free flow of ideas only if the medium for distributing those ideas is viable. Consider, analogously, land by a river. In New York City, a river view is highly demanded, and in limited supply, and is therefore scarce and highly valued. Similarly, farmland near a river that provides water for irrigation is scarce and highly valued. Riverfront property in the wilderness, on the other hand, though perhaps beautiful and potentially of value to many people, has development costs that exceed the value to consumers and therefore may not have economic value at present.<sup>17</sup> The land will command a zero price and will not be economically scarce. In the same sense, spectrum is no different from other commodities. Where its supply exceeds its demand at zero price, it is not scarce. In those markets where demand exceeds supply, it is scarce and a means of allocation must be devised. There is no inherent reason why such spectrum could not be allocated to the highest bidder—subject to restrictions on interference, perhaps analogous to zoning or pollution restrictions. However, due to certain - socially or politically determined public interest objectives—for example, diversity of voices or the provision of local service—we have allowed a modified market system where licenses are initially awarded without charge, but then are retained, bought, and sold subject to public interest findings in such areas as multiple ownership, local ownership, etc. More relevant in this proceeding is whether spectrum scarcity requires certain regulations pertaining to programming—guidelines on nonentertainment programming and commercialization levels and ascertainment procedures. The central issue is whether, in a market with scarcity, licensees would provide programming responsive to the wants and needs of the public. That is, given that in a "saturated" market there is only a fixed amount of hours available for programming, and not all demands can be met, is it more in the public interest to leave the programming decisions to a market (while maintaining licensees' individual public interest obligations, the Fairness Doctrine and acknowledging the existence of noncommercial radio) or to rely additionally on the guidelines and procedures? In the *Notice*, the Commission presented data on what the market currently provides, and from these data made forecasts of what the unregulated market would likely provide. Based both on data developed for the *Notice* and on data and analyses found in comments, we feel that the marketplace—even in an environment of economic scarcity—generally will be responsive to the wants and needs of the public. Scarcity in and of itself does not impose the need for specific programming regulations.

17. In defending the scarcity theory, the ACLU presents an approach which relies

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<sup>17</sup> Both spectrum and river front property that might not have value today might be highly valuable in the future due to technological advances or new demand.

upon another argument supporting governmental intervention in the programming area. The ACLU alleges:

The scarcity theory is based upon the need to limit the number of radio stations to reduce interference. In return for the free grant of a license, the licensee "is burdened by enforceable public obligations." [Footnote omitted.] Because the general public's first amendment right to speak via radio is abridged in order to serve the public interest in making radio signals intelligible, those who are granted a monopoly over the use of a particular frequency in a particular location must use the monopoly in the public interest.<sup>18</sup>

18. Based on this approach to the scarcity theory, the ACLU claims:

The Notice's criticism is ultimately not of the scarcity theory at all, but of the public interest objectives espoused by the Commission since its creation.<sup>19</sup>

In fact, in the *Notice* we have taken both the Commission's historical public interest objectives and all statutory requirements as given. We simply asked whether market forces could attain these public interest objectives absent certain guidelines and procedures. To conclude that these guidelines and procedures are not necessary to attain public interest objectives is not to reject those objectives, but rather to reject certain ineffective and potentially counterproductive regulations.

#### The Market for Advertising Time vs. the Market for Radio Programs

19. Dallas Smythe asserts that it is inappropriate to talk about a consumer market for radio programs because, he alleges, there is no such market; there is only a market for advertising time.<sup>20</sup> In Smythe's view, the radio program is

in a sense analogous to the "production" in the cocktail lounge of the peanuts, popcorn and pretzels which the management provides along with appropriate decor, and perhaps entertainment, in order to sell its principal product, liquor.<sup>21</sup>

This is not a perfect analogy, but it is somewhat instructive. There may be no direct market for cocktail lounge peanuts and piano players, but these "amenities" are apparently effective and in some cases necessary devices to attract paying drinking customers, and will be provided according to how important they are to a particular cocktail lounge's clientele. In the case of radio programming, it is even more important to provide the proper "amenities," *i.e.*, responsive programming. In radio the revenue-producing service, advertising messages—unlike liquor—has no appeal in and of itself to listeners. Therefore, it is precisely the programming that is necessary to attract the listeners and, indirectly, the revenues. The key point is not whether a price mechanism exists, but whether the market has an incentive structure that is responsive to consumer demands.

20. Advertiser-supported broadcast markets operate without prices and therefore are not able to take into account the intensity of demand of individual consumers. They nonetheless provide an arms-length mechanism by which individuals and society make decisions on how to employ scarce resources to produce radio programming and distribute it among various people and groups in society. This is the same function that any market with a direct price mechanism performs. With or without a direct price mechanism, there are economic limitations on how much of each type of programming listeners will consume. These limits are set by the value of the alternative uses to which listeners can put their time—the "opportunity cost" of listening to a particular program

<sup>18</sup> Comments of ACLU, *et al.*, at p. 23.

<sup>19</sup> *Ibid.*, p. 24.

<sup>20</sup> Smythe comments at pp. 29-32.

<sup>21</sup> *Ibid.* at p. 31.

rather than performing some other activity (including listening to an alternate program, listening to a phonograph record or enjoying silence). Broadcast licensees also face opportunity costs—profits foregone by providing one type of programming rather than an alternative or by investing in radio rather than in some other entrepreneurial activity. The incentives that these opportunity costs create operate for all programming—entertainment, nonentertainment, and commercial. There can be no denial that the incentives exist and perform the same task as a market with a direct pricing mechanism. The relevant issue remains whether or not this advertiser-supported market provides programming responsive to the public, *i.e.*, in the public interest.

21. There are, in fact, incentives for both licensees and listeners to be responsive in a way that will lead to a relatively efficient mix of program choices.<sup>22</sup> Listeners, in seeking satisfaction, will have an incentive either to turn to alternative activities if they do not care for the programming or to switch to another station. When programming is unresponsive to their wants and needs, consumers will reduce the amount of time spent listening to radio relative to other activities. Broadcasters, without the benefit of a pricing system, must rely on the number of listeners rather than on the intensity of demand. In order to maximize profits, licensees will try to provide programming that attracts the largest receptive audience. In markets with few stations, this will generally result in common denominator programming with broad appeal. Intense demands shared by only a few individuals may go unmet. This situation, however, is not unique to broadcasting. In small markets, there will be too little aggregate demand to support specialty restaurants, furniture stores, *etc.* As the number of stations in a market increases each station will expect to attract a smaller share of the audience, and narrower tastes will be addressed. There will be greater diversity in both entertainment and nonentertainment programming. The data presented in the *Notice* indicated that just such programming diversity already exists.<sup>23</sup> Since the *Notice* was released, 267 additional radio stations have commenced operation, and current Commission proceedings in both the FM and FM bands could make available still more stations. In sum, there is considerable evidence that radio broadcast markets, albeit imperfect, to a great extent do provide diverse programming responsive to the public and that continued entry could further increase such diversity.

#### Is "Consumer Satisfaction" The Appropriate Criterion for Analysis?

22. The use of "consumer satisfaction" as the optimizing criterion in our analysis drew more comment than any other single issue related to the use of the market model.<sup>24</sup>

<sup>22</sup> The market result will not be perfect because it will not be possible for consumers to reveal fully their intensity of demand. This problem, it must be stressed, continues to exist in a regulatory environment and may not be fully eliminated even with a pricing mechanism. This holds true because once the signal is provided there is no additional cost to the broadcaster for another listener to receive that signal. That additional listener will have the incentive, even in a pay system, to understate the value of that signal to him. Only by incurring the additional cost of scrambling signals and charging a fee to unscramble them can such "free-riders" be eliminated.

<sup>23</sup> One commenter, John R. Kupiec, investigated what he considered to be "specialty" programming in Philadelphia and Washington, D.C. for both 1958 and 1979, and alleges that the level of specialized programming has fallen over time. There are several methodological problems with his study, however, not the least of which is his inability to provide an objective definition of "specialty." Nor was Kupiec able to define criteria by which to judge whether the alleged decrease in specialty programming was in the public interest. It is difficult, then, to accept his limited and ambiguous empirical study as a successful refutation of the marketplace theory.

<sup>24</sup> Examples of these critiques can be found in the comments of the WNCN Listeners Guild, the Office of Communications of the United Church of Christ, the Office of Communications of the United States Catholic Conference, the ACLU *et al.*, and Massachusetts National Organization for Women.

Two basic arguments were made: first, that well defined public "needs" exist that are both separate and distinct from public "wants," but are not taken into account when markets respond to "consumer satisfaction";<sup>25</sup> and second, that consumer satisfaction only represents those groups to whom it is profitable to direct advertising messages.<sup>26</sup>

#### The Existence of "Needs" Separate from "Wants"

23. The commenters critical of the market model argued that there are public "needs" that are independent of consumer satisfaction and that on their own individuals will not demand programming that addresses these needs. The need exists, for example, for a well-informed electorate, and there are public benefits from pursuing such a goal that individuals might not take into account when making their listening decisions. As a result, these commenters continue, there must be government intervention to assure that certain levels of nonentertainment programming are provided.

24. As mentioned earlier, at paragraph 10 *supra*, the *Notice* explicitly took this possibility into account, recognizing that markets might not provide such programming, and then took the next step and asked whether the regulations in place resulted in a net gain to the public over the imperfect market. The findings, which have not been refuted, in the comments, suggested that absent the specific regulations, the market would continue to provide considerable news programming, but there might well be a reduction in public affairs programming.

25. One commenter, Walton Francis,<sup>27</sup> directly addressed the issue of unrevealed needs—that is, needs that consumers either do not recognize or for which they do not choose to demand programming. He warned about the inherent elusiveness and subjectivity that reliance on unrevealed needs fosters. Indeed, he questioned the existence of needs independent of wants. In essence, he pointed out the risks involved whenever the government intervenes not in response to a demonstrated unmet need but rather in response to an unrevealed, and uncertain, need. There is always the question of whether unrevealed needs, if programmed to, would draw listeners. If not, or if only in minuscule number, then there may be substantial opportunity costs, in terms of listeners being denied preferred programming, associated with allocated radio time to this use.

26. Wants on the other hand, are more identifiable than "needs," in that they are clearly revealed by expressions of individual demand. That is, wants are observable since individuals act on the basis of wants. Thus, to require programming aimed at unrevealed needs, which are difficult to determine, at the expense of programming that is clearly demanded by the public, is to replace the judgment of the government for that of the public. This should be avoided unless there is a high degree of confidence that (1) the unrevealed needs exist; (2) they are not being addressed by current programming; (3) they will continue to be unaddressed by the unregulated market; and (4) meeting these needs is more valuable to the public than meeting the revealed demand for the programming that will be replaced by the required programming.

#### Consumer Satisfaction May Not Reflect Everybody

27. Several commenters posit that a market responsive to consumer satisfaction might nonetheless fail to respond to the preferences of groups that are small in number or in purchasing power.<sup>28</sup> They argue that the public interest requires that programming be responsive to all citizens, not just to those who share tastes with many others or who are sufficiently affluent to be attractive to advertisers. There are two issues here: whether markets will respond to the preferences of these groups and, if not, whether it is

<sup>25</sup> *Id.*

<sup>26</sup> See footnote 9, *supra*.

<sup>27</sup> Comments of Walton Frances at pp. 1-2.

<sup>28</sup> For example, see ACLU, *et al.*, at 21-22, and Massachusetts NOW at 4.

in the public interest nonetheless to require programming responsive to the preferences of these groups.

#### Preferences of Groups that are Small

28. As stated earlier, it is clear that when there are few stations in a market, licensees will tend to provide common denominator programming. In such markets there is likely to be available spectrum but insufficient demand to support additional stations. Programming aimed at specialized audience segments, besides being economically infeasible, most likely would not be in the public interest if larger segments of the community would go unserved. As in the case of other consumption items where the minimum size of the producer or distributor is large relative to the size of the total market, the few providers that can be supported must provide products that will attract a sizeable share of a limited potential audience. As the size of a radio market increases, and additional outlets can be supported, it becomes profitable for some stations to direct their programming to relatively small groups rather than to split the middle-ground audience among many stations. As the market size increases, both market forces and public interest considerations change in the same direction—toward the provision of more specialized programming. There is a natural tendency for markets, as they grow, to become more responsive to the preferences of smaller groups.

29. A problem arises, according to some commenters, when the market nonetheless fails to respond to the preferences of diminutive or demographically “undesirable” groups. It is recognized that not every want or need can be met by radio. Some minimum level of demand must exist before it is profitable for broadcasters to provide particular programming. Beyond some point, it is clearly not in the public interest to forego programming that many people prefer in order to provide for every minority taste. At the same time, in many non-broadcast markets minority tastes can be met if the small number of individuals with those tastes have a sufficiently strong intensity of demand for a product and are willing to pay accordingly for it. In advertiser-supported radio, there is no mechanism for the direct purchase of programming and therefore intense minority tastes will tend not to be met. Hence, the argument that market forces alone fail to operate in the public interest.

30. We recognize the imperfection of the market in this respect, but feel that there are two alternative regulatory approaches available to address the problem. The conduct approach, favored by several commenters, would require each licensee to program for all segments of his community, including groups whose preferences might not be met in an advertiser-supported market context. The structural approach, favored by other commenters and proposed in the *Notice*, would attack the problem when it exists by devising a regulatory scheme that maximizes the opportunity for additional stations to commence operation and by encouraging ownership by and employment of members of minority groups. Wherever these potential stations are economically viable, the increased competition and consequent market fragmentation would reduce expected market shares and create incentives for licensees to seek more specialized audiences. Because specialized audiences may be too small to support full-time programming, time brokerage and time sharing within a station could be encouraged. The Commission has, in fact, just released a *Policy Statement* encouraging such time brokerage arrangements.<sup>29</sup> Time brokerage has been used in the past primarily for foreign language programming, but potentially can be expanded for use by other minority taste audiences. We have already implemented many structural rules that have had the desired effect of increasing minority taste programming and generally favor the structural approach to this issue. In addition, pay radio, which until recently was not economically viable, is now beginning to be provided on cable systems that have very large capacities. In New York City, a pay service offering Mandarin Chinese programming using FM SCA's is already

<sup>29</sup> *Policy Statement on Part-Time Programming* (BC Docket No. 78-355).

in existence. We believe that the structural approach to regulation is already proving effective in providing programming responsive to minority tastes.

31. We recognize that the marketplace approach cannot assure that every demand for minority taste programming is met. Neither could a regulatory regime with programming guidelines and formal ascertainment procedures provide that assurance. Indeed, it is not in the public interest to allocate scarce resources to meet very minute demands where the public benefits are small, but the costs—in terms of foregone alternate programming—are substantial. The primary advantage of the marketplace over administrative decisionmaking is that the former provides an efficient and flexible mechanism for measuring these tradeoffs, while the latter is necessarily cumbersome and inflexible.

#### Preferences of Groups with Low Purchasing Power

32. Some commenters argued that advertisers do not value all listeners equally, rather they prefer those individuals or groups who are most likely to purchase their products. As a result, broadcasters tend to program for certain demographic groups instead of others. In particular, it is alleged that racial and ethnic minorities and the elderly will not have their wants and needs met in the marketplace. Unfortunately, commenters did not provide any empirical data to substantiate this claim. To analyze the argument, two factual issues must first be addressed: (1) to what extent to these "undesirable" demographic groups indeed have unique preferences; and (2) if these unique preferences exist, is it true that broadcasters will not have an incentive to program to them.

33. It is difficult to determine the extent to which these groups have a set of programming interests that is substantially different from the programming oriented toward other groups. With the exception of foreign language programming, there are few formats—entertainment or nonentertainment—without some "crossover" interest, *i.e.*, that do not attract "non-targeted" as well as "targeted" individuals. It is certainly likely that the programming aimed for "demographically preferred" groups also appeals to these less preferred groups. It is difficult to determine whether, for example, the elderly who tune in to an "easy listening" station are doing so as a second programming choice, given the unavailability of their first choice, or if it would be their first choice. If it were the second choice, was it a distant second or a close second? More pertinent for this analysis, does the easy listening station address the nonentertainment issues important to the elderly or are they too small a portion of the station's total audience to be specifically catered to? Unfortunately, none of the comments provided information that addressed these questions. Nor did any commenters address the key issue that would arise if their proposed regulatory requirements or guidelines were imposed: How much is enough?

34. Several commenters assumed that licensees, responding to marketplace forces, would not respond to low income listeners because advertisers would consider them commercially insignificant. In fact, there have been studies that indicate that low income families tend to be more brand-conscious in their buying habits than higher income families and, thus, presumably more receptive to commercial advertising messages. These studies of purchases of grocery items identified differences in purchasing patterns among families with different income levels.<sup>30</sup> P. E. Murphy found that as income increases shoppers are less likely to purchase brand name items.<sup>31</sup> He found that as income increases shoppers exhibit less brand loyalty, *i.e.*, they are more likely to change brands or to purchase non-branded products. Two other studies provide some indirect

<sup>30</sup> Although grocery items do not represent all consumer purchases, they are pertinent here because many items on grocery store shelves are heavily advertised.

<sup>31</sup> Murphy, P.E., "Effect of Social Class on Brand Loyalty and Price Consciousness for Supermarket Products," 54 *Journal of Retailing* 33 (Summer 1978).

support for Murphy's findings. R. E. Frank, *et al.*, found that as education level increased, the level of brand loyalty decreased.<sup>32</sup> Since income levels and education levels are highly correlated, this is consistent with the Murphy study. Further, R. Blattberg, *et al.*, found that as income increased shoppers exhibited a greater likelihood of taking advantage of store "deals," such as cents-off-coupons.<sup>33</sup> This appears to be due, in part, to the relatively greater mobility of higher income groups who have access to automobile transportation both to comparison shop according to price and to get to the stores featuring the "deals." All of these studies suggest that lower income households are likely to spend a disproportionately large share of their income on branded products. This makes them attractive to advertisers and to broadcasters despite their lower total incomes.

35. Marketing studies on the purchasing patterns of Blacks, who generally have lower income levels than whites, are consistent with those findings. Consider for example the data that R. Dwight Bachman cites in *Dynamics of Black Radio*,<sup>34</sup> from a paper presented by D. Parke Gibson:<sup>35</sup>

Seventy-three percent of black money is spent in retail sales as opposed to 56 percent for white expenditures. [footnote omitted] Some other black financial characteristics include:

- spending up to 12 percent more at supermarkets for food to be consumed at home, than the average white family . . .
- spending more than whites when buying new cars . . .
- spending by black women of nearly \$400 million on cosmetics . . .
- consuming 19 percent more carbonated, non-carbonated and powdered soft drinks than whites . . .
- brand consciousness of high quality products.<sup>36</sup>

In addition, Bachman cites the following conclusion taken from a different study:

- The level of purchase attributed to commercials on Black radio is almost twice that of general radio.<sup>37</sup>

Cosmetics and soft drinks are among the most heavily advertised products in the economy. Although advertising represents a smaller share of total costs on automobiles, the total advertising budget for automobiles is huge. If these are products on which Black families spend a disproportionate share of their incomes, then even if those incomes are significantly below national averages Blacks will represent an inviting audience for advertisers to reach, especially if they are brand conscious consumers. And if Black listeners are especially responsive to advertising on Black formatted stations, that is yet another incentive for broadcasters to provide such programming. It is

<sup>32</sup> Frank, R.E., S. P. Douglas, and R. E. Polli, "Household Correlates of 'Brand Loyalty' for Grocery Products," 41 *Journal of Business* 237 (1968).

<sup>33</sup> Blattberg, R. T. Buesing, P. Peacock, and S. Sen, "Identifying the Deal Prone Segment," 15 *Journal of Marketing Research*, 369 (1978).

<sup>34</sup> Creative Universal Products, Inc., Washington, D.C., 1977.

<sup>35</sup> *Consumer Attitudes and Marketing Strategies*. Paper delivered at the Fifth Annual Symposium on the State of the Black Economy, American Hotel, New York, June 5, 1975. See also paragraph 99, Appendix E.

<sup>36</sup> *Id.*, at 46.

<sup>37</sup> Bachman, *supra*, at 51. The quote was taken from, *A Study of the Dynamics of Purchase Behavior in the Negro Market: Negro Radio Stations*, Vol. II, The Center for Research in Marketing, Incorporated, New York, May 1962, at p. 47.

therefore not obvious that broadcasters will fail to provide programming responsive to Blacks.<sup>38</sup>

36. It appears, then, that while broadcasters might be less responsive to certain demographically "undesirable" groups, there is no clear indication who those groups are, how much less responsive radio broadcasters might be, or how effective specific regulatory procedures might be to correct the situation.<sup>39</sup> We continue to believe that structural regulation aimed at maximizing the opportunities for new stations to come on the air is the most effective way to attain specialized programming.

37. There were several other comments relating to consumer satisfaction. Robin Carey specifically addresses the issue of unique entertainment formats, which is not the issue under discussion here, but her remarks might be pertinent nonetheless if her arguments concerning classical music could be extended to nonentertainment programming. Referring to the academic works of Tibor Scitovsky<sup>40</sup> and Fred Hirsch,<sup>41</sup> Carey states:

Scitovsky, basing his ideas on research in psychology, suggests stimulus consumption, that is, "consumption which involves change, variety, surprise, novelty," and which arises from mental pursuits and from interpersonal relationships enriched by mental pursuits adds more to human well being per dollar of expenditure than the consumption for comfort, which, to Scitovsky, signifies consumption, which merely alleviates physical discomfort. In consumption decisions, consumers tend to stress comfort consumption rather than stimulus consumption, because much of the benefit from stimulus consumption takes the form of externalities. Provision of radio broadcasting for the widest range of tastes certainly provides stimulus rather than comfort.

Hirsch, in a more societal approach, warns against the consumption of what he calls positional goods, which are scarce physically or in some socially imposed sense, and thus, with economic growth, command increasing resources in exchange, though they give no greater intrinsic satisfaction. Surely the consumption of radio programming carries no such negative implications.

If Scitovsky's and Hirsch's approaches are accepted, the acceptance provides the basis for arguing that the provision of certain types of radio programming offers an opportunity for society to obtain more consumer welfare for a given amount of resources, than does the provision of comfort and positional commodities.

It is also possible to argue that variety in radio programming is itself beneficial in that it will provide listeners the opportunity to widen their tastes. While it is not being suggested that the government should prescribe tastes, it should not shrink from the responsibility of making options known.<sup>42</sup>

38. The kinds of activities that Scitovsky has in mind when he discusses stimulus

<sup>38</sup> For a similar analysis of Hispanic audiences, see Hispanic Broadcast Focus, *Television/Radio Age*, A-3 (Dec. 15, 1980).

<sup>39</sup> For example, it has often been argued that too much radio time is allocated to mindless "teenage" music or to young adults, yet trade press articles suggest that these are not necessarily preferred audience from the industry perspective. See, e.g., "18-to-49 bracket shown losing favor," 38 *Television/Radio Age*, 37 (Nov. 17, 1980).

<sup>40</sup> *The Joyless Economy: An Inquiry into Human Satisfaction and Consumer Dissatisfaction*, Oxford: Oxford University Press, 1976.

<sup>41</sup> *Social Limits to Growth*, Cambridge, Mass., Harvard University Press, c. 1976.

<sup>42</sup> Comments of Robin Carey, at pp. 7-8.

consumption range from good conversation to pleasant, well integrated architecture. This satisfaction, he argues, comes largely from "human action and imagination."<sup>43</sup> He argues that these activities are either not amenable to market transactions or, if reduced to a market transaction, lose their ability to fully satisfy.<sup>44</sup> Such a theory does not lend itself to empirical validation. It is not true, moreover, that markets do not implicitly take these factors into account. When individuals choose to listen to radio or participate in any other activity, they make choices based on how they value use of their time in one pursuit rather than another. If good conversation is valued highly by an individual, he will be more likely to partake of conversation than put on a headset attached to his radio. Similarly, if many individuals value certain architecture, that will probably be reflected in the price of buildings of the favored style; neighborhoods will gain status—and market value—accordingly.

39. It could be argued, perhaps, that nonentertainment programming is more likely to improve the conversational ability of listeners than is hard rock programming, and that as a result individuals in search of conversation partners will benefit. It is not clear, however, that it is the Commission's role to foster this. It is certainly not the Commission's role to widen tastes, though we agree with Dr. Carey that where possible options should be made available. The relevant question is *how* to make options available. Does the mechanism of the marketplace, albeit imperfect, better reflect the preferences of the public than do government rules, regulations, and guidelines? Our analysis suggests that the market can generally better reflect public preferences than can government-imposed guidelines and procedures, particularly if there are many independent voices in the market. At the same time, the government has set aside broadcast radio spectrum for non-commercial operation specifically, in part, to address minority tastes. Dr. Carey states at page 8 of her comments that "society has decided to aid certain groups . . ." This is certainly true, but it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public.

40. There is one additional criticism that has been made by some commenters concerning reliance on consumer satisfaction as the criterion for measuring the public interest. The flavor of the argument is given by the following quote from the reply comment of the Committee for Community Action:

Mr. Kessel [projects director of CCA] commented that people who listen to classical stations probably do generally have other sources for news and agreed that there might be no reason for the Commission to require much news on classical stations. But, he said, the situation is probably very different for rock stations. Based on his experiences from working in the news department of a Boston rock station, WBCN, from 1976-77, he said there was a lot of positive response to WBCN's newscasts. However, he said that WBCN listeners were very loyal and probably did not switch to other stations frequently; also most of them were probably not interested enough in news to seek it out from other sources if it were not on WBCN. Thus a loss of news on WBCN would deprive many people of their only source of news.

Kessel added that he thought listeners to the other rock stations were similar in their unlikelihood to seek out other sources of news. He said that perhaps ideally there should be a rule that distinguishes between rock and classical stations and

<sup>43</sup> Scitovsky, at pp. 82-84.

<sup>44</sup> While "externalities" may account for part of Scitovsky's concern (*id.* at pp. 85-86), he is most concerned about the degrading effect placing a market value on a stimulus good has on their enjoyment. For example, tennis played for its enjoyment provides great satisfaction; yet tennis played professionally is regarded less highly by society (*id.* at p. 83).

applies nonentertainment guidelines only to the former. But since it would probably be impossible for the Commission to promulgate different rules for different formatted stations, the most prudent thing would be to keep the nonentertainment guideline for all stations.

[When] asked whether WBCN would have eliminated its news without Commission guidelines . . . Mr. Kessel answered that the present owners and management seemed genuinely committed to news; however, during the time he worked there, under different owners and a less enlightened management, news and public affairs was viewed purely as something necessary to satisfy the FCC. Absent Commission rules it probably would have been eliminated completely.<sup>45</sup>

41. The basic argument appears to be that the availability of nonentertainment programming in a market is not sufficient; that each station must provide such programming because some listeners might not switch to other stations to receive it. The presumption is that such programming is something all citizens should receive, whether or not they want it; also, that the failure of a particular station to provide it (because the listeners of that station do not desire such programming) represents a serious imperfection. This argument presupposes many value judgments about what constitutes the public interest. Consumer satisfaction is judged an inappropriate criterion because it allows citizens to avoid their "duty" to be informed. In fact, CCA does not show that, absent nonentertainment programming guidelines, certain audiences would be uninformed. It presents no evidence that the listeners who want relatively little news on their preferred stations do not get news from other sources (newspapers, television, *etc.*). Rather, it assumes that classical listeners do, but rock listeners do not. Further, Kessel admits that listeners of WBCN, a rock station, indeed want news. That is consistent with the empirical findings we presented in the *Notice* —that radio news is demanded by the public and is likely to continue to be provided by stations. Should WBCN eliminate its news programming, it would likely lose some, possibly many, of its "loyal" listeners to other stations that continue to provide news programming.

#### Criticism of the Data

42. There were two levels of criticism made by commenters concerning the data in the *Notice*: first, that the data provided either could not be replicated or were inaccurate; and, second, that the Commission failed to collect all the data necessary to make a complete analysis of the costs and benefits of the marketplace approach compared with alternate regulatory approaches.

43. Eric S. Luskin, a student at the Annenberg School of Communications of the University of Pennsylvania, asserts that he was unable to replicate in its entirety the analysis performed by the staff because of missing or inconsistent data and that where he attempted such replication, he found errors.<sup>46</sup> Mr. Luskin states that "the *Notice* did not address the matter of methodology . . ." However, the Public Notice of January 11, 1980, which he cites in his comments, did provide a detailed description of the methodology used, including a discussion of missing data. Mr. Luskin did not criticize that methodology.

44. Mr. Luskin asserts that many of the program logs from which the staff culled the data were missing or not available for public inspection. In fact, six logs were unavailable, out of a sample of over 200.<sup>47</sup> The remainder of the material that Luskin alleges was missing or unavailable either was, indeed, available or had never been

<sup>45</sup> Reply comment of Committee for Community Access, at pp. 21–22.

<sup>46</sup> Comments of Eric S. Luskin, pp. 1–22.

<sup>47</sup> Program logs are customarily discarded by the staff after the renewal process is completed, and apparently a staff member inadvertently discarded 32 logs that had been used in the radio deregulation analysis. As soon as this was discovered, the staff

collected or used by the staff and therefore need not have been available. For example, Mr. Luskin alleges that logs were missing for Stations WGFS, WTCB, WXOG, WYOK, and WTLS; in fact, the logs for all these stations were (and still are) on file. In addition, Mr. Luskin alleges that:

The following [single station] markets not listed in the *Notice* were included [in the sample]: WLAY, Muscle Shoals; WFOM, Marietta; WLPH, Irondale; WZZK, Homewood; WTJH, East Point; WMFC, Monroe; WZZA, Tusculmbia; WNMT, Garden City.<sup>48</sup>

In fact, all of these stations were included in both the sample and the *Notice*. They are not, however, in single station markets. Marietta and East Point are communities of license within the Atlanta market; Irondale and Homewood, within the Birmingham market; Muscle Shoals and Tusculmbia, within the Florence-Sheffield market; and Garden City, within the Savannah market. A careful reading of the "Description of the Methodology Used" in the January 11, 1980, Public Notice and of Appendix A of the *Notice* should have provided Mr. Luskin with that explanation. The remaining station, WMFC, is in Monroeville, not Monroe, and was correctly included in the *Notice* as part of that two station market. Mr. Luskin's criticism is therefore unfounded.

45. Mr. Luskin complains that logs were made available for each station in the sample for only one day of the composite week, rather than for all seven days. The sample that staff constructed included only one day of programming for each station. Hence these were the only data relied upon. Mr. Luskin provides no argument for why this would yield an inappropriate sample and therefore his complaint has no apparent basis.

46. In addition, Mr. Luskin asserts that logs that were "illegible" or "difficult to interpret without a high degree of confidence" were used by the staff, in contradiction to the statement of methodology in the Public Notice. To prove his point, Mr. Luskin provides copies of several logs. Broadcast analysts in the Renewal Branch of the Broadcast Bureau, who are experienced in analyzing logs, performed the arduous task of culling the data on news, public affairs, and commercial programming. They relied upon their own judgment in deciding which logs were legible and capable of interpretation. Because of their experience in this area, their judgment should be accorded greater weight than that of Mr. Luskin.

47. Finally, in the two instances where Mr. Luskin cites "errors" by the staff, contrasting his judgment to that of the broadcast analysts, his findings were more supportive of radio deregulation than were those of the staff. Each of Luskin's examples indicates that the staff overcounted the number of commercial minutes (i.e., counted more minutes of commercial time than did Luskin). Luskin doesn't generalize from these examples except to suggest that the data should be rendered unreliable. We find that there is no reason to assume any systematic bias from two counting errors; hence there is no statistical basis to discredit the data.

48. Thomas David questions the reliability of the data culled from the program logs.<sup>49</sup> He alleges, based upon his experience as an attorney at the FCC, that many stations file false program logs that understate the amount of commercial programming aired. While occasional cases of falsification have been uncovered, there is no reason to believe that the practice is commonplace. In fact, Mr. David bases his allegations not on his experience with program logs, but rather on his experience investigating two cases involving transmitter logs.

49. Professor Richard A. Musgrave, of the Harvard University Department of \_\_\_\_\_ contacted the stations whose logs were lost and requested duplicate copies. Twenty-six stations complied with the request. Thus only six logs were unavailable for review.

<sup>48</sup> Comments of Eric S. Luckin at p. 3.

<sup>49</sup> Comments of Thomas David, at pp. 12-13.

Economics, in a two-page comment submitted as part of the United Church of Christ filing,<sup>50</sup> raises a different type of criticism. Professor Musgrave argues that more data on prevailing programming practices, demand patterns, demand elasticities, and programming costs are necessary in order fully model the relevant interactions. He asserts that without this detailed model policy judgments cannot be made. More pointedly, he states, "the [Notice] does not address the question of what number of stations is adequate to secure an effective program selection . . ." This seems somewhat disingenuous, as the answer to such a question must necessarily vary from market to market, depending on such variables as the homogeneity or diversity of tastes in each market. In effect, Professor Musgrave argues that there is a need for a highly detailed model—and supporting data—to allow the Commission to fine-tune policy decisions. There are major problems with this approach. First, it is impossible to collect the requisite data. Demand information is very difficult to obtain absent a pricing mechanism. Even if there were a pricing mechanism, radio formats are not readily definable or categorized, thus making it difficult to gauge substitutability. And even if these problems were solvable, the cost of such an analysis, in terms of dollars and time, would be prohibitive, running into the millions of dollars and years of time and the results would nonetheless be subject to a high likelihood of error. Nor could one be certain that a model could be developed to take into account simultaneously all the factors that Professor Musgrave cites. In effect, Professor Musgrave's proposal would impose an impossible burden of proof on the Commission that was not imposed when the initial actions—the introduction of programming guidelines and ascertainment procedures—was taken. Because it would impose a burden that could never be met, it would effectively assure the maintenance of the *status quo*.

#### Summary of Economic Comments and Analysis

50. Most of the comments critical of the economic model cited the existence of imperfections in radio broadcast markets that were acknowledged and addressed in the *Notice*. Although a number of commenters cited various unique features of radio broadcasting that allegedly rendered marketplace analysis impossible or inappropriate, we do not believe that those arguments were convincing. Radio broadcast markets are certainly not typical of most markets, but the usual forces of supply and demand do operate, albeit indirectly and imperfectly. It is possible to compare the ability of these markets to provide programming in the public interest with and without the Commission guidelines and procedures under scrutiny in this proceeding. The criticisms include a number of cogent arguments why regulation *might* be considered, but they fail to indicate conclusively that the market, by itself, could not provide programming in the public interest.

51. There is one additional issue that many commenters mentioned but none seriously addressed—market failure. This is discussed at length in the Appendix-E, at paragraphs 104-111. Most commenters stated, in agreement with the *Notice*, that markets could, in some situations, fail to provide programming in the public interest. Although commenters provide no evidence that this would be anything but a rare occurrence, its possibility exists. There are methods by which it can be determined that a market has failed and there are potential remedies for such failures, but these are necessarily individual cases that must be handled on an *ad hoc* basis by individual markets. As such, they raise administrative and legal issues that are better addressed in the section on nonentertainment programming and petitions to deny than as part of this economic analysis.

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<sup>50</sup> Reply comments of the United Church of Christ at ; Attachment-A.

## Appendix E

## The Non-Entertainment Programming Guideline A Brief History of Programming Regulation

1. A recapitulation of the historical involvement of the Commission in non-entertainment programming is instructive. Nearly as soon as the Radio Act of 1927 was enacted by Congress, the Federal Radio Commission, the FCC's predecessor agency, showed an interest in the non-entertainment programming of radio stations. License renewal forms requested information on the amounts of programming devoted to various types. Additionally, in its 1928 annual report to Congress the FRC stated its belief that it was entitled to consider program service provided by stations at least in comparing competing applicants so that it could make an informed judgment as to which applicant was most liable to render service in the public interest. Similarly, in cases such as *Great Lakes Broadcasting Co.*,<sup>1</sup> the FRC described as one component of the public interest the need for stations to devote ample time for the presentation of programming concerning issues of importance to the public.

2. After the Radio Act was recodified in the Communications Act of 1934, the Federal Communications Commission had the opportunity to amplify its views concerning the provision of non-entertainment programming by broadcast stations. Among the first major Commission policy statements on programming was its 1946 *Report on Public Service Responsibility of Broadcast Licensees*,<sup>2</sup> a document known as the *Blue Book*.<sup>3</sup> The document serves as a useful starting point for our purposes, not simply because of its locus in time, but, more importantly, because it illustrates the divergent doctrinal strains that have emerged from the Commission's involvement with informational programming. For example, while the *Blue Book* stressed that:

the Commission has given explicit and repeated recognition to the need for adequate reflection in programs of local interest, activities and talent,<sup>4</sup>

It also noted that:

primary responsibility for the American system of broadcasting rests with the licensees of broadcast stations.<sup>5</sup>

Similarly, although the Commission asserted that "the public interest clearly requires that an adequate amount of time be devoted to the discussion of public issues," including some "local live" and "sustaining" (non-sponsored) broadcasts, it refrained from specifying particular amounts of time to be devoted to such programming.<sup>6</sup> Moreover, the *Blue Book* discussed the relevance of the market in the provision of programming, recognizing that a balanced service to listeners could be achieved either by requiring stations to render a well balanced program service or, in metropolitan areas, by means of a number of specialized stations that together offer a balanced service to the public.<sup>7</sup>

<sup>1</sup> 3 FRC Ann.Rep. 32, 35 (1929), *aff'd.* 37 F. 2d 993 (D.C. Cir. 1930), *cert. dismissed* 281 U.S. 706 (1930).

<sup>2</sup> The first major Commission policy statement on programming involving nonprofit programs, was issued in 1935.

<sup>3</sup> Although this document has never been published in the official Commission reporter series, it has always been publicly available.

<sup>4</sup> *Blue Book*, page 37.

<sup>5</sup> *Id.*, page 10.

<sup>6</sup> The Commission struck this balance because at that time it held the view that a well-balanced program structure could not be assured if programming decisions were influenced primarily or predominantly by either local sponsors or national advertisers.

<sup>7</sup> The Commission made a similar point in discussing revisions of the broadcast application form. See, *Blue Book*, page 58.

3. In 1949, the Commission issued its *Report on Editorializing by Broadcast Licensees*, 13 FCC 2d 1246 (1949), which formalized the Fairness Doctrine and which again stressed, *inter alia*, the duty of all licensees to devote a "reasonable amount of time" to the discussion of public issues. The Commission, however, still did not itself establish precise quantitative standards. Instead, it stated that "it is the licensee . . . who must determine what percentage of its limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of broadcast."<sup>8</sup> In the next decade, however, the Commission had little opportunity to apply these principles, for very few Fairness Doctrine complaints were brought in which it was alleged that a broadcaster had failed to provide programming responsive to public needs.

4. From the paucity of case law, there arose an understandable confusion and uncertainty among broadcasters and the public as to the precise nature of the broadcaster's public obligations. Accordingly, in 1960 the Commission issued its *Report re En Banc Programming Inquiry*, 44 FCC 2303 (1960) (hereinafter to be referred to as the "*Programming Statement*"). The Commission stated that licensees must "reasonably attempt to meet [the needs and interests of their service areas] on an equitable basis." Thus the licensee's obligation to operate in the public interest primarily involved its "diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of his community."<sup>9</sup> Further, after listing elements of programming usually necessary to meet the tastes, needs and desires of the community,<sup>10</sup> the Commission went on to say that these elements:

are neither all-embracing nor constant. We emphasize that they do not serve and have never intended to serve as a rigid mold or fixed formula for station operation. The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee.<sup>11</sup>

5. The Commission also reiterated the inherent limitations of quantitative measurements of licensee performance. Quoting from a 1946 *Public Notice*, the Commission stated:

It should be emphasized that the statistical data before the Commission constitutes an index only of the manner of operation of the station and are not considered by the Commission as conclusive of the overall operation of the stations in question. Licensees will have an opportunity to show the nature of their program service and to introduce other relevant evidence which would demonstrate that in actual operation the program service of the station is, in fact, a well rounded program service.<sup>12</sup>

<sup>8</sup> 13 FCC at 1247.

<sup>9</sup> 44 FCC at 2316.

<sup>10</sup> The listed elements are: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs. The Commission also concluded that there no longer was a public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating a station's performance. This constituted a major change in Commission policy toward programming. *Id.* at 2314.

<sup>11</sup> *Id.* at 2314.

<sup>12</sup> *Id.* at 2315-2316.

In short, although the licensee had a clear obligation to serve the public with programming responsive to local needs, the Commission left the licensee with broad discretion in deciding how to achieve that goal. The licensee's discretion was not unlimited, however. The Commission could not sanction a broadcaster's willingness to ignore "a strongly expressed need" that was or should have been known to it.<sup>13</sup> Nor, likewise, could the Commission sanction programming decisions that discriminated against minorities.<sup>14</sup>

6. The Commission's policies on non-entertainment programming were further refined by the adoption of the Broadcast Bureau's current delegation of authority.<sup>15</sup> The guidelines set forth pursuant to that delegated authority,<sup>16</sup> however:

are procedural rather than substantive. They do not identify a quantity . . . of programming below which no application will be granted and above which all applications will be granted . . . Instead, [they] attempt to make clear the circumstances in which the full Commission, rather than the staff, will evaluate the past or proposed program service of a broadcast applicant. 59 FCC 2d at 491.

Only minor adjustments in the Commission's regulation of non-entertainment programming have occurred since the adoption of these guidelines.<sup>17</sup>

#### Summary of Comments Filed With Regard to the Non-Entertainment Programming Guideline

7. A large number of commenters addressed the issues surrounding the proposal to eliminate the Commission's guideline relative to the amounts of non-entertainment programming that radio stations should provide. Argument and analysis were submitted on many aspects of the proposal ranging from the Commission's legal authority to eliminate the guideline to what specific types of programming might be reduced absent the guideline. In general, those objecting to the elimination of the present guideline fear the loss of certain types of programming which, they believe, have a social benefit that cannot be taken into account by the working of marketplace forces. Regulation, such commenters argue, is necessary to assure the continued provision of such programming. Those favoring elimination of the guideline generally argue that marketplace forces currently require them to broadcast more of such programming than does the Commission's guideline and that, therefore, regulation is unnecessary to assure its continuance. However, a number of those favoring deregulation ask that the Commission provide either an optional standard, or a policy statement setting forth what the Commission would consider superior programming in a comparative proceeding so that a licensee's "legitimate renewal expectancy" would be protected in a deregulated environment. The following is a more detailed summary of these comments.

#### FCC's Legal Authority to Deregulate with Respect to Programming

8. A number of parties argue that the Commission does not possess the legal

<sup>13</sup> *Stone v. FCC*, 466 F. 2d 316, 328 (D.C. Cir. 1972); *Alabama Educational Television Commission*, 50 FCC 2d 461 (1975).

<sup>14</sup> *Office of Communications of United Church of Christ v. FCC*, 425 F. 2d 543 (D.C. Cir. 1969); *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966); *Alabama Educational Television Commission*, *supra*.

<sup>15</sup> *See, Amendment of Part 0 of the Commission's Rules - Commission Organization - With Respect to Delegation of Authority to the Chief, Broadcast Bureau*, 43 FCC 2d 683 (1973); and, *Amendment to §0.281 of the Commission's Rules: Delegations of the Authority to the Chief Broadcast Bureau*, 59 FCC 2d 491 (1976).

<sup>16</sup> Section 0.281(a)(8)(i) of the Commission's Rules.

<sup>17</sup> One recent change has been to permit Public Service Announcements to count toward satisfaction of the current non-entertainment programming guidelines for all broadcast stations. *See*, FCC 80-557, released October 27, 1980.

authority to deregulate with regard to non-entertainment radio programming. Among those commenting in that regard are Congressman Ronald Mottl, Department of Professional Employees, AFL-CIO, American Civil Liberties Union (hereinafter ACLU; joined by Black Citizens for Fair Media, National Citizens Committee for Broadcasting and National Citizens Communications Lobby), Citizens Communications Center, Committee for Community Access, Classical Radio for Connecticut, WNCN Listeners Guild, Office of Communication-United Church of Christ, Archdiocese of Washington, National Radio Broadcasters Association and the National Telecommunications and Information Administration (hereinafter NTIA). The comments are in basic agreement with NTIA's assertion that the public interest standard in the Communications Act of 1934, as amended, requires the Commission to evaluate programming substantively, at least in connection with comparative proceedings and petitions to deny. Also the guideline is said by some to be necessary to assure compliance with the Fairness Doctrine. ACLU further argues that not only the Act, but also governing case law [ *e.g.*, *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945)], requires a full hearing on license renewal challenges and petitions to deny, in which context programming is contended to be possibly the most important element.

9. On the other hand, Jennings Broadcasting Company avers that nonentertainment programming requirements intrude into licensees' programming discretion and therefore are of dubious legal and constitutional validity, even as mere processing guidelines. Joint Comments filed by the law firm of Dow, Lohnes and Albertson on behalf of several licensees argue that radio deregulation is indeed legal. Their point of view is based on the doctrine of "less drastic means." This, they declare, applies when the government has a legitimate interest in regulation, but the regulation at issue impairs First Amendment rights, and alternative means of promoting the government interest are available. In such circumstances, the government is required to choose the least intrusive means of regulation. In the instant case, they argue, other existing regulations (*e.g.*, the Fairness Doctrine) are less intrusive than processing guidelines, and can work as well. The Department of Justice also supports the legality of radio deregulation, arguing that if agencies have the power to regulate where competition does not work, they surely can deregulate when changed circumstances indicate that competition would work to assure the continued presence of non-entertainment programming.

10. In conclusion, there is dispute in the comments over whether, particularly in light of the public interest standard in the Communications Act, the Commission has the authority to deregulate radio in the area of non-entertainment programming.

#### Arguments Against Deregulation Public Trust Doctrine

11. Several parties, including Charles Firestone (on behalf of ACLU), Donna Kaprel, and National Association for Better Broadcasting, take the position that, regardless of the legality of deregulatory action, deregulation would jeopardize the fundamental principal that a broadcast license creates a public trust. United States Catholic Conference and Archdiocese of Cleveland argue that service to the community of license, regardless of its profitability, is part of the trade off for the use of a frequency. UNDA, the National Catholic Association of Broadcasters and Allied Communicators, considers the airwaves a gift of God. Many commenters, most notably the National Association of Black Owned Broadcasters, evince the belief that scarcity continues to be a factor of concern in the radio industry, statements in the *Notice* in this proceeding to the contrary notwithstanding. They assert that the public trust doctrine is the solution to the problem that limited spectrum space, and lack of financial wherewithal, prevent everyone who wants one from owning a broadcast station.

12. Many commenters declare that, under deregulation as proposed in the *Notice*, the public interest would be effectively determined by the majority of radio listeners, but that this does not necessarily correspond to the actual public interest. WNCN Listeners Guild, United Auto Workers, Andy Finn, William Sabio, Maureen Lynch, Pacifica Foundation, United States Catholic Conference, Faith and Life Radio and TV-General

Conference Mennonite Church, ACLU and allied parties and Citizens Communications Center argue that the public interest standard involves other values than the mere sum of consumer preferences. Consumer Federation of America and National Sisters Communications Service, among others, state that the market result is but one criterion of consumer well being. American Federation of State, County and Municipal Employees asserts that the economic model inevitably ignores the First Amendment component of the public interest standard which has a value transcending those taken into account by economic analysis.

13. Andy Hughes, Stephen P. Wing, Bonneville International Corporation, Jennings Broadcasting Company and others declare that, to the contrary, market forces would indeed produce a result that reflects the public interest, since the market functions as a straightforward measure of the public's desires. Numerous commenting licensees assert that to remain viable they must serve the needs of their listeners and therefore would continue to provide non-entertainment programming absent the guideline.

#### Market Failure

14. Related to the above are comments regarding market failure. A number of commenters, chiefly members of the industry, argue that the market can work well to reflect consumer preferences. They aver that the operation of marketplace forces would limit the possibility of market failure as, to remain in business, broadcasters would be forced to provide desired programming.

15. Others, however, claim that a variety of factors would, in a deregulated atmosphere, inhibit a result that truly reflects the public interest and that deregulation would therefore inevitably result in market failure. These factors fall into two general categories: situations where the market does not respond to the preferences of groups that are small in number or that are underrepresented in purchasing power; and situations in which nonmaterial benefits to society as a whole are not reflected in the demands of individual consumers.

16. Examples of such comments abound. Committee for Community Access, for instance, says that scarcity keeps the market from satisfying the preferences of minority groups. Action for Children's Television lists the child audience as an example of a segment of the public with little buying power, whose needs will not be served except via Commission rules. Memphis Black Media Coalition argues that Black consumers are another segment of the public that lacks responsive programming due to low buying power. San Diego Committee on Media avers that because consumers do not pay directly for programming under the present system, the public does not have an adequate opportunity to intervene in the market, absent programming guidelines. Robin Carey, Associate Professor of Economics at the College of Staten Island of the City University of New York, discusses the quasi-public nature of radio programming as a consumer good at great length and concludes that certain external benefits, such as intellectual stimulation and broadcast service to shut-ins and the elderly, will not be reflected in a market-oriented model. Another societal value that several parties complain will not be reflected in the sum of individual consumer preferences is the importance of an informed electorate in a democratic society. For example, Alfonso Caci, Donna Kaprel, Lawrence Wroblewski, Committee for Community Access, and San Diego Committee on Media express concern that radio's service to this end would be curtailed or eliminated without guidelines which are said to have the effect of encouraging a certain amount of informational programming.

#### Summary

17. The parties disagree whether it violates the public trust principle to deregulate and to let the market govern non-entertainment programming decisions. They further disagree about whether the market will truly reflect consumer preferences and whether or not the concept of the public interest is grounded on more philosophical values that the marketplace concept would not take into account.

## Arguments Relating to Specific Types of Programming

18. Most commenters discussed whether or not various types of non-entertainment programming are likely to continue without the processing guidelines.

## Noncommercial Stations—Informational Programming in General

19. Several parties representing noncommercial broadcast interests, most notable among them National Public Radio and the Pacifica Foundation, while supporting deregulation in principle, express concern that relaxation of standards regarding informational programming on commercial stations will result in reduction in such programming and a concomitant shift of the burden of providing informational programming to public stations. This, it is contended, would place a financial burden on such stations and, in fact, might violate the Congressional intent for public radio. National Federation of Community Broadcasters believes that noncommercial stations will not be able to adequately shoulder this additional burden, especially given their incomplete penetration levels in many markets. Ohio Educational Television Network Commission states that the deregulation of commercial radio stations would thereby reduce the chance of deregulation of noncommercial stations, and that this would be violative of the doctrine of equal protection. But National Association of Broadcasters, North Carolina Association of Broadcasters and Washington Legal Foundation assert that Congress intended public stations to carry a disproportionately great amount of informational programming, and, thus, they do not see this possible shifting of the burden as a significant hindrance to deregulation of commercial stations.

## Diversity

20. Several parties believe that, as a basic matter, the public benefits from diversity on the radio. The Ad Hoc Committee of Organizations for Unique Radio, for instance, says that more than one radio outlet in a market is necessary for diversity in a competitive system, and since this does not exist everywhere, Commission policy must be supported with rules that further such diversity. Faith and Life Radio and TV-General Conference Mennonite Church thinks that diversity would be reduced under deregulation, since majority preferences would govern. Ten Eighty Corporation, to the contrary, says that audiences demand diversity in non-entertainment programming, so it would be provided in an unregulated climate; in any case, it continues, it is really quite simple for listeners to switch stations to find diverse kinds of programs.

## News

21. The comments are in wide disagreement about whether it is important that all stations in a market carry news. United States Office of Consumer Affairs asserts that news on all stations is essential to a public policy goal of having an informed citizenry. Committee for Community Access argues that since people do not as a rule switch stations to hear news, maintaining an informed electorate requires news on all stations. Douglas Fraser, President of United Auto Workers, regards news on all stations as important because he believes that on any particular station, the news presented is not objective. San Diego Committee on Media also feels that more than one news source in a market is necessary to keep the public well informed. Fisher Broadcasting also believes that each station in a market should bear some of the market's overall burden with regard to producing news.

22. United States Council on Wage and Price Stability, without coming to any conclusion, states that having news available on all stations in a market is a social value, the possible loss of which must be calculated in any cost/benefit analysis of deregulation. WBRE, however, avers that the cost of unwanted non-entertainment programming, presented in response to the Commission's guidelines, must likewise be taken into account, under the existing regulatory configuration. CBS argues that since different communities have different interests, it is unnecessary to require all stations to provide all kinds of programming. North Carolina Association of Broadcasters believes that

specialty stations should not be required to cover issues their particular audience has no interest in. While Stephen P. Wing believes that news might disappear from some all-music stations, this, he argues, should not be regarded as problematic since news would continue to otherwise be available on other stations in the market.

23. A number of commenters insist that there would be no news on at least some stations absent Commission guidelines. ACLU and allied parties reason that the relatively high initial cost of wire service encourages that news be broadcast throughout the day, but that without the necessity of incurring that cost initially, news would disappear on many stations. Several other commenters agree in this regard. Classical Radio for Connecticut believes that the expense of local news will contribute to its abandonment, absent regulation. William Seiberlich regards this as an especially serious problem in smaller markets, where radio is the primary local news source. He conducted a three-market survey that purports to demonstrate that the public does not feel it is receiving sufficient local coverage at present in smaller markets. Committee for Community Access and United Auto Workers think that news might be reduced without federal regulations encouraging it. Mr. Fraser, of UAW, takes issue with the Commission's premise in the *Notice* that there is a correlation between the greater number of commercials and news broadcasts during morning drive time. He believes that this theory is contradicted by the fact that there are fewer commercials at other times when news is broadcast. He also asks what point there is in eliminating the guidelines, if they in fact follow listener preferences anyway.

24. National Black Media Coalition believes that news would continue without regulation, except possibly in small markets. National Association of Broadcasters states that news is indeed expensive to provide, but is cost effective, because it is popular, and cites studies that indicate that news would continue, absent Commission guidelines. Others, including the Justice Department, Don Self, Stephen P. Wing, CBS and Washington Legal Foundation, agree that news would continue, on most stations, in an atmosphere governed by competition absent Commission regulation.

#### Public Affairs

25. A number of comments express concern that public affairs programming, because it is generally unprofitable, would be abandoned under deregulation. Among those sharing this belief are Allen Kratz, Mrs. Thomas J. O'Neill, William Sabio, National Public Radio, Classical Radio for Connecticut, Committee for Community Access, Archdiocese of Cleveland, Memphis Black Media Coalition, National Congress of Parent/Teacher Organizations, National Sisters Communications Service, Spanish Speaking/Surnamed Political Association, United States Catholic Conference, WNGN Listeners Guild, National Education Association and United Auto Workers. National Black Media Coalition estimates that one-to-two thirds of stations would sustain a reduction in such programming. These commenters, along with Metro-Act of Rochester, Paralyzed Veterans of America and California Association of the Physically Handicapped, and San Diego Committee on Media, see a great value in public affairs programming, and believe that society as a whole would suffer a loss, were it reduced. Entertainment Communications, Inc. says that although this kind of programming may be in the public interest, it is hard to understand how an unregulated competitive market would ensure its continuation, because it is unpopular.

26. National Radio Broadcasters Association thinks it is unlikely that deregulation would result in less public affairs programming, but acknowledges that it is difficult to find evidence to support its intuition. Don Self, on the basis of an informal survey conducted in the Chattanooga market, states that there might be some reduction in public affairs programming under deregulation, but that the quality of what remains is likely to be improved, because broadcasters would no longer be producing it just to fulfill Commission requirements. Others including the Justice Department, John Morrill, Haley, Bader and Potts, KGY, King Broadcasting Company, Nationwide Broadcast Company, Ohio Association of Broadcasters and Salt Lake City Radio Market Broadcast-

ers Association, assure us that public affairs programming would continue in a competitive environment, because it is good business and the public demands it.

#### Minority Interest Programming

27. A great many parties emphasize the importance of radio's service to minority groups in the community, including the elderly, youth, low income groups and racial and ethnic segments of the community. There is a general belief, shared by numerous commenters,<sup>18</sup> that the current guidelines help to ensure service to such groups via public affairs programming, but that without the guidelines such groups would no longer be served as well, even on stations that air entertainment programs for specialized audiences.

28. CBS points out that even with guidelines, all minorities in a community inevitably will not require specialized radio programming. NAB adds that there are no present requirements that low income, elderly or minority groups receive specialized service, and that the extent to which they do now would probably continue under deregulation. American Women in Radio and Television, while favoring deregulation, encourages the Commission to continue to expand diversity through structural means such as ownership and staffing regulations, to ensure adequate programming for women and minorities. Stephen P. Wing asserts that in large markets specialized programming would continue; he asserts that since there are so many stations, it is profitable for stations to program to smaller segments of the community thus permitting minority tastes and interests to be fulfilled. Others, mostly consisting of members of the industry, are convinced that a certain amount of specialized programming would continue under deregulation.

#### Local Programming

29. Some commenters are also concerned about locally originated programs. Many, including Fisher Broadcasting, United Church of Christ, United States Catholic Conference and National Association of Black Owned Broadcasters, believe that local programming is an important element of the public interest standard. Some feel that regulation is the only effective means of ensuring adequate local programming. Among them are John Kupiec, Classical Radio for Connecticut, Faith and Life Radio and TV-General Conference Mennonite Church, Puerto Rican Legal Defense and Education Fund and San Diego Committee on Media. Their reason is basically that it is more expensive to produce programs locally than to purchase syndicated or network programming, which is an incentive for broadcasters to forego local programming unless required to air such by regulations. There is particular concern regarding the newly emerging ethnic enclaves within larger metropolitan areas, which are discussed in the *Notice*.

30. A number of licensees argue that broadcasters are committed to local involvement, out of both public spirit and good business sense. Marin Broadcasting Company believes that deregulation would result in increased local programs, to replace nonlocal public affairs programs which are now aired only to meet the processing guideline.

#### Public Service Announcements

31. Some comments express concern that deregulation could result in the loss of public service announcements. Several parties, including Classical Radio for Connecticut, Archdiocese of Cleveland and National Black Media Coalition, appear to believe that present Commission rules require stations to air PSAs. (This belief is shared by literally

<sup>18</sup> *E.g.*, Allen Kratz, John Kupiec, Robin Carey, Robert Monaghan, Lawrence Wroblewski, Charles Firestone, Ad Hoc Committee of Organizations for Unique Radio, ACLU and allied parties, Classical Radio for Connecticut, Committee for Community Access, Memphis Black Media Coalition, National Association of Black Broadcasters, Puerto Rican Legal Defense and Education Fund, Spanish Speaking Surnamed/Political Association, United Church of Christ, and WNCN Listeners Guild.

thousands of other formal and informal commenters.) Others, such as Mrs. Thomas J. O'Neill, Southern California Committee for Open Media, American Council on Education and Council for the Advancement and Support of Education, imply merely that the present regulatory climate enhances the likelihood that PSAs will be aired, and foresee their loss under deregulation. Catherine Jensen of the United States Department of Agriculture, David Persse, Massachusetts Coalition of Citizens with Disabilities, and Massachusetts and New York chapters of the National Organization for Women emphasize the importance of PSAs and community bulletin boards to citizens groups and nonprofit organizations. William Sabio believes that the Commission should, by rule, require PSAs.

32. National Association of Broadcasters points out that there is no PSA requirement at present, contrary to the inference of some comments. ABC, echoing this, asserts that PSAs are aired anyway, as part of broadcasters' adherence to the public interest standard. Station KGY argues that PSAs are aired because it is good business, not because of rules, and that competition would ensure that this would continue, even under deregulation. Georgia Association of Broadcasters avers that PSAs can indeed fill community needs, even though they do not currently fall within the categories of the processing guidelines.

#### Access

33. Some parties argue that the public affairs element of the processing guidelines helps to assure access to the airwaves to community groups and nonprofit organizations. Among those commenting in this vein are Maureen Lynch, Public Interest Communication Services and American Council on Education and Council for the Advancement and Support of Education. There is some concern, voiced by National Education Association, National Council of Churches and others, that access would be curtailed under deregulation. Indeed, UNDA, the National Catholic Association of Broadcasters and Allied Communicators, argues that nonprofit organizations should have a right of free access to the airwaves. David Beauvais would like to see access channels available to all citizens free of charge. National Citizens Committee for Broadcasting (NCCB) puts forth the concept of an "Audience Network," whereby all stations would donate five percent of their airtime for the purpose of public access.

34. National Association of Broadcasters points out that currently there is no right of access mandated under Commission rules or policies.

#### Summary

35. In sum, broadcasters, trade associations and other members of the industry are generally of the opinion that news, public affairs, local programs, programming for specialized audiences and diverse kinds of programming would continue, absent Commission regulations encouraging such, because the public interest standard requires it and consumer demand for it makes it good business policy to air such programming. On the other hand, a number of individuals, consumer groups and nonprofit organizations believe it is the non-entertainment guidelines that control whether such programming is aired, that it would be reduced or abandoned without them and that society as a whole, as well as individuals, would suffer from this loss.

#### Arguments in Support of Deregulation of Programming

##### Burden on Licensees

36. A number of comments especially by industry members complain that the burden of compliance with existing regulations is not justified by any concomitant benefits. National Public Radio, Haley, Bader and Potts, Jennings Broadcasting Company, King Broadcasting Company, National Association of Broadcasters and American Federation of Small Business concur that the cost to the public, the government and licensees of non-entertainment guidelines outweighs the benefits. Billboard Broadcasting Corpora-

tion, among others, cites the burdensome nature of the paperwork necessitated by reporting requirements connected with the guidelines.

37. Committee for Community Access, in reply comments, takes issue with NAB's assessment of the cost of compliance with federal regulations. ACLU and allied commenters argue that the cost to the government of enforcement of the guidelines is minimal.

#### Fairness Doctrine

38. Several parties state that they believe that the Fairness Doctrine could adequately take the place of non-entertainment programming requirements. NTIA, for example, points out that the public interest standard would continue to require enforcement of the Fairness Doctrine, even under deregulation. The Justice Department agrees that the Fairness Doctrine would continue to ensure that informational programs are aired, at least with respect to controversial issues. Jennings Broadcasting Company proposes that the Fairness Doctrine be modified to be less intrusive into program content, absent clear proof of its efficacy.

39. Committee for Community Access complains that greater Fairness Doctrine enforcement would be necessary, without non-entertainment programming guidelines, and that this actually would be more intrusive than the present system. WNCN Listeners Guild believes that licensees would not meet the first half of the Fairness Doctrine, absent guidelines requiring public affairs programming.

#### Summary

40. Licensees generally argue that: (1) the relevant data indicate that competition would work to provide adequate non-entertainment programming in most categories, absent Commission guidelines; (2) the burden of compliance with the guidelines is an additional factor which supports their elimination; and (3) other Commission rules and policies, including the Fairness Doctrine, also serve to ensure that the public's needs and interests with regard to informational programming are met.

#### Suggested Remedies

##### Market-wide Standards

41. Most comments are critical of any regulatory change that would have the effect of imposing standards on a market as a whole. Fisher Broadcasting is joined by Marin Broadcasting Company in the opinion that such rules would be unenforceable, since the FCC does not license markets, but individual stations. ACLU and allied commenters concur. Indeed, Marin and NAB feel that market-wide regulation would unfairly penalize responsible licensees for the failings of other licensees in the market. National Public Radio believes market-wide regulation would require the Commission to exercise control over format changes, but would provide no means of ensuring adequate performance from individual licensees. Classical Radio for Connecticut feels that market-wide standards would effectively do away with specialized programming that meets the needs of intramarket groups. National Congress of Parent/Teacher Organizations and National Association of Black Owned Broadcasters think that local programming, which is properly the responsibility of individual licensees, would be neglected. Georgia Association of Broadcasters asserts that market-wide standards applied across the board in all markets would discriminate against small market stations, which would have to shoulder a proportionately greater burden than their large market counterparts. This group does believe, though, that market-wide standards would relieve stations not geared to provide public affairs programming of this burden in markets where all-news stations fill that role.

##### Legitimate License Renewal Expectancy

42. A number of licensees and industry members argue that, although they favor

deregulation, they believe the Commission should articulate some standard, mandatory or otherwise, by which licensees could assure via performance that their license would be renewed. Among those taking this position are the National Radio Broadcasters Association and Station WISM. Committee for Community Access, Fisher Broadcasting and Wismer Broadcasting all allege that it is unfair to licensees not to inform them in advance as to what the Commission expects of them. Several commenters favor nonmandatory non-entertainment programming guidelines, adherence to which would ensure the likelihood of prevailing in a license renewal contest. Among them are Entertainment Communications, Inc., Ten Eighty Corporation and the Tribune Company. Bonneville International Corporation suggests that the Commission adopt a standard of quality programming, as determined by the licensee, as an element of operation in the public interest. Susquehanna Broadcasting Company supports a content-neutral standard, such as the relation between ascertained needs and programming. NAB argues vehemently on behalf of licensee stability, encouraging adoption of a "1980 Programming Policy Statement," based on compliance with the Fairness Doctrine and other Commission rules, under which a license would be renewed absent a pattern of abuse or serious dereliction. NAB believes that some evaluation of past performance is necessary in defining a renewal standard, but that this should not be attempted with mathematical precision. Joint comments filed by Dow, Lohnes and Albertson on behalf of several licensees also suggest adherence to other Commission rules, such as the Fairness Doctrine, access for political candidates, equal opportunity employment and lowest unit charge rules, as ensuring a license renewal expectancy. CBS likewise opposes non-entertainment standards *per se*, but advocates an articulation of a reasonable nonquantitative guideline defining operation in the public interest for license renewal purposes. ABC presses for a definition of adequate past performance, to be phased in over time, which would specify a number of hours of non-entertainment programming (including PSAs), adherence to which would preclude comparative proceedings on renewal.

43. The Department of Justice argues that it is illegal to use programming as such a criterion, since that would amount to affording the incumbent a vested right to the license.

#### Comparative Challenges

44. Broadcasters and citizens groups alike believe that programming standards are essential in comparative evaluations. NTIA, Committee for Community Access, United States Catholic Conference, WNCN Listeners Guild, Entertainment Communications, Inc. and Plough Broadcasting Company are among those adhering to this viewpoint. National Public Radio believes that licensees should have the option of reporting programming in comparative proceedings. North Carolina Association of Broadcasters argues that non-entertainment programming should only become an issue in the comparative context if the incumbent raises it, because it is unfair for the Commission to let the market determine programming levels initially and then make an after-the-fact determination that the market mandated too little.

45. Marin Broadcasting Company thinks that non-entertainment programming should not be considered in comparative proceedings, absent compelling evidence that the licensee failed to serve the public. Wismer Broadcasting believes that there should be no comparative challenges based on non-entertainment programming levels, and the Justice Department likewise thinks that comparative challenges should be resolved only on the basis of nonprogram criteria.

#### Petitions to Deny

46. A number of individuals and citizen groups complain that deregulation would remove programming as a ground for a petition to deny, and thus deprive the public of a most important weapon to ensure broadcaster accountability to its needs and interests. These commenters include Stewart Hoover, Mrs. Thomas J. O'Neill, ACLU and allied commenters, Memphis Black Media Coalition, National Black Media Coalition and United States Catholic Conference. Committee for Community Access objects to the

suggestion, which it asserts was made in the *Notice*, that past performance may be raised only at the behest of an incumbent, and insists that petitioners must also be afforded the opportunity to address the issue of non-entertainment programming.

47. The bulk of licensees commenting on this issue believe that non-entertainment programming should no longer be a basis for a petition to deny. These include Bonneville International Corporation, joint comments filed by several licensees, Marin Broadcasting Company, Susquehanna Broadcasting Company and Wismer Broadcasting. Susquehanna does not feel that an incumbent should be able to raise the relationship of ascertainment results to program performance, in order to show excellence in meeting community needs, when faced with a renewal challenge.

#### Format Change Amendment

48. Three parties, Ad Hoc Committee of Organizations for Unique Radio, WNCN Listeners Guild and NAB, oppose the amendment of the format change delegation proposed in the *Notice*.<sup>19</sup>

#### Suggested Solutions

49. Among comments favoring Option 1, elimination of non-entertainment programming guidelines, are those of CBS, Haley, Bader and Potts, Marin Broadcasting Company, NAB, WBRE Radio and Stephen P. Wing. Mr. Wing feels that Option 1 is preferable to Option 6, which is his second choice, because it would lessen regulation where marketplace forces would assure continued non-entertainment programming. ABC also favors elimination of mandatory non-entertainment programming requirements, but encourages, nevertheless, adoption of a quantitative standard that will establish a legitimate license renewal expectancy. United Church of Christ likewise supports elimination of the guidelines (with Option 6 as its second choice) providing the Commission substitutes an alternative plan. Asserting that Option 6 may be too simplistic a measure to be the basis of a conclusive license renewal determination, UCC suggests that the Commission give credit for service to local needs to stations contributing at least five percent of gross revenues to nonprofit organizations for production of local public affairs programs. NAB believes this proposal to be illegal. In addition, UCC proposes a Commission policy that all markets have local news on at least two outlets [a station could not drop local news if it would bring the total below two], and asks (1) that the Commission encourage stations serving specialized audiences to air news of interest to the particular audience and (2) that the Commission require a minimum amount of local PSAs, to be aired at all times during the day.

50. National Association of Black Owned Broadcasters and Memphis Black Media Coalition would like to see the present guidelines retained fearing a reduction in non-entertainment programming in their absence. Archdiocese of Cleveland likewise advocates retention of the guidelines at present or higher levels, up to thirty percent "informed electorate programming" per day (two thirds of this to be local), with thirty percent of that to be aired during prime time (again, two thirds to be local).

51. Fisher Broadcasting favors Option 6, with its emphasis on local service, and seeks a reduction in the number of formal categories of programming, to provide greater flexibility for licensees. Public Interest Communications Service also prefers Option 6 to Option 1. Puerto Rican Legal Defense and Education Fund advocates a combination of Options 4 and 6, emphasizing local programming, with quantitative standards for each category. AFSCME would have the Commission choose Option 5 or 6, approving of Option 5's linking of commercial success with reinvestment in informational programming, but still retaining flexibility with respect to specific programming decisions. Faith

<sup>19</sup> The reference in Appendix B of the *Notice*, to Section 0.281(2)(9) of the Commission's Rules was through inadvertance. The entire question of the Commission's role with regard to format changes is currently before the United States Supreme Court, in *F.C.C. v. WNCN Listeners Guild et al.*, Case Nos. 79-824, 79-825, 79-826, and 79-827.

and Life Radio and TV-General Conference Mennonite Church also finds Option 5 attractive. Religious Media Ministry would like to see a combination that relates public service programming to profit motivation: a specified percent of time allocated to local public service programming aired at reasonable times during the day, with a specified percent of the station's operating budget to be spent thereon. NCCB proposes the creation of an "Audience Network." The network would be a national organization that citizens could join for a fee. The Commission's involvement would be by way of mandating that a certain proportion of the broadcast day of each station would be turned over to the audience network. The Commission would also set standards as to when, during the day, such "Audience Network" time would occur. The board of directors of each local chapter would appoint "professional management" to produce programming in accordance with the mandate of the members, "as expressed through the board."

52. Department of Professional Employees, AFL-CIO, would like the Commission to designate required percentages of non-entertainment programming, based on the size and nature of the particular community, as well as the programming provided on other stations in the market and the listening habits of the public. The Media Reform Committee of the California chapter of the National Organization for Women favors a combination of Options 4, 5 and 6, in the form of guidelines specifying amounts of public service programming as a percent of time and money, with flexible categories, but requiring some programming in each category. National Congress of Parent/Teacher Organizations favors time-oriented (in percents or absolute amounts), as opposed to monetary standards, since a monetary standard could be filled with undesirable nonlocal or wire service programming, which would comply with the letter but not the spirit of the rule.

53. National Black Media Coalition does not believe guidelines to be necessary for news or religious programming, but supports a six percent standard for local public affairs, PSAs and public access programming (editorial replies and free speech messages), on both AM and FM stations, not to be aired between midnight and 7 AM on weekdays and midnight and noon on weekends. Committee for Community Access, noting that broadcasters seem to desire guidelines, suggests a rule requiring eight percent locally-produced news, public affairs, and PSAs, to be aired at reasonable times on both AM and FM stations. United States Catholic Conference opts for a ten percent processing guideline for AM and FM stations alike, outlining broad categories of non-entertainment programming, which would encourage but not require local programming and give special credit for sustaining time donated to nonprofit organizations.

54. Station WISM favors, as the *sine qua non* of license renewal, a minimum percent requirement for local public service programming, which may be met with local news, public affairs, PSAs, community bulletin boards and other locally-produced non-entertainment programming. United States Office of Consumer Affairs also believes that the Commission should adopt minimum separate percentages for news and public affairs, to be aired whether in all day parts or between 6 AM and midnight. ACLU and allied commenters would like to see the same minimum percentage requirements for local public service programming applied to both AM and FM stations. They would define "local" as produced in or around the city of license, and also encourage the Commission to stress that such programming should be aired at high audience times (by requiring, for instance, that programs aired during "graveyard" hours may only be counted toward one quarter of the total). Finally, they state that the Commission should deregulate with regard to non-entertainment programming only on an experimental basis and in markets that are not "saturated," that is, where additional stations are available on a "drop-in" basis.

55. National Radio Broadcasters Association favors the present six and eight percent processing guidelines, applied directly as rules, to be decreased in three minute increments as a station goes from 18 to nine minutes of commercials. Fulfillment of this standard with all kinds of non-entertainment programming aired throughout the day

would comprise a *prima facie* case for operation in the public interest, rebuttable by substantial evidence to the contrary. NRBA adds that the Commission might give non-entertainment program credit for PSAs, as a means of encouraging them. NAB believes this rule would be inconsistent, if commercial time standards are eliminated. Committee for Community Access thinks the non-entertainment program levels proposed are inordinately low.

56. NTIA would define non-entertainment programming broadly, and apply a six percent standard as a minimum for license renewal. NTIA also suggests that ten percent, aired between 6 PM and midnight, be considered a substantial amount that entitles an incumbent to preference in a comparative case. NTIA would except "beautiful sound" stations, *i.e.*, those that air fewer than four minutes of commercials per hour on weekdays, and require only four percent informational programming from them. These percentages are merely suggestions based on the available data; NTIA would have the Commission develop more sophisticated statistics from which to derive percentages. NTIA suggests that this kind of standard could also be used for Fairness Doctrine purposes. Committee for Community Access approves this result; however, United Church of Christ objects that it does not distinguish between local and nonlocal informational programming.

#### Summary

57. In conclusion, it appears that a number of parties, especially industry members, who otherwise favor deregulation, nevertheless support the concept of non-entertainment programming guidelines (often as voluntary guidelines) imposed on an individual basis, either as entailment of the public interest standard in the Communications Act, or because licensees are entitled to know what is expected of them and how to ensure license renewal in a comparative context. In addition, a number of those commenting stress locally produced and oriented programming as an important component of any non-entertainment program standard.

#### Discussion of the Major Issues Raised

58. Having set forth a summary of the comments filed with regard to the Commission's proposals relative to the nonentertainment programming guideline, we turn now to a discussion of the major issues raised in opposition to its elimination.

59. As noted in the section above regarding the comments in this area, there was a significant controversy relative to this portion of our original proposal. Questions were raised with regard to our legal authority to eliminate the guideline, fears were expressed as to the behavior of the market without the guideline, and problems were highlighted with reference to the effect of the guideline's elimination on the comparative hearing process and the petition to deny process. Many commenters expressed the fear that absent the guideline, programming directed to "economically insignificant" segments of society—those that it was presumed would not be attractive to advertisers—would disappear. Other commenters, chiefly from the broadcast community expressed the fear that elimination of the guidelines would interfere with their "legitimate renewal expectancy." Several minor issues, such as a claim that stations would tend to automate absent the guideline, were also raised in the comments. Such issues, having no decisional significance, are not treated below.

#### Authority to Conduct the Proceeding

60. Several of those commenting contended that the Commission was without authority to make the subject proposals, especially with regard to the elimination of our non-entertainment programming guideline. No party seriously contests the Commission's ability to undertake rule making proceedings as a general matter. Section 4(i) of

the Communications Act of 1934, as amended, settles the matter as to the Commission's ability to conduct rule making proceedings.<sup>20</sup> It is claimed, however, that the elimination of our non-entertainment programming guideline would be contrary to established law and, therefore, we may not take that action within the context of a rule making proceeding. In this regard a number of cases are cited to the effect that programming is a vital area in which the Commission has authority to regulate and that the elimination of programming requirements would destroy the comparative renewal process.

61. We continue to believe that the Communications Act and judicial precedent supply the Commission with sufficient authority to consider the elimination of the non-entertainment programming guidelines and, in fact, to actually eliminate it should the record support such a conclusion. It goes without saying that the Commission has the authority to regulate in the programming area and to adopt such guidelines as those currently in effect. That authority ~~is~~ <sup>was</sup> vindicated in many of those cases cited by commenters. However, having the authority to do something is considerably different from having a requirement to exercise the authority. In the context of the non-entertainment programming guideline some additional historical review is instructive.

62. Neither the Commission nor its predecessor agency, the Federal Radio Commission (FRC), historically relied on percentage guidelines to assure that non-entertainment programming was present. In fact, from the earliest, a bias against such guidelines was demonstrated. In 1929, for example, the FRC stated with regard to various types of programming, including non-entertainment, that:

(t)here are differences between communities as to the need for one type (of program) as against another. The Commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What it wishes to emphasize is the general character which it believes must be conformed to by a station in order best to serve the public.<sup>21</sup>

The FRC went on to state what might well be construed as an accurate description of a marketplace theory noting that it expected that the amounts of programming aired would vary as between stations based on the number and types of other radio services available (especially clear channel stations), the amount of capital available to the station for programs, the coverage area of the station, and disparities in population. In other words, while the Commission was concerned with the types of programs offered by stations, and stated its belief as to what types of programs were necessary to constitute operation in the public interest<sup>22</sup> it did not believe that the imposition of nationally applicable standards as to the amounts of such programming was necessary, or even desirable.

63. This approach remained relatively constant until the adoption of the current delegations of authority to the Chief, Broadcast Bureau, in 1973. For instance, the 1946 *Report on Public Service Responsibility of Broadcast Licensees* (the so-called "Blue Book") refrained from specifying particular amounts of time to be devoted to programs involving the discussion of public issues. Rather, it recommended that "adequate" amounts of time be devoted to such programming without specifying a uniform amount to be presented by each station. Similarly, the *Programming Statement*<sup>23</sup> left it to licensee discretion to decide how much programming of each of the fourteen program-

<sup>20</sup> That Section states, in pertinent part, that the Commission has the authority to, ". . . perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary to the execution of its functions."

<sup>21</sup> 3 F.R.C. Ann. Rep. 34, Statement of Facts and Grounds for Decision, *Great Lakes Broadcasting Co. et al. v. Federal Radio Commission*, Cases Nos. 4900, 4901 and 4902, in the Court of Appeals for The District of Columbia, p. 35 (1929).

<sup>22</sup> *Id.*, at 28 and 36.

<sup>23</sup> 44 FCC 2d 2303 (1960).

ming elements, necessary to service in the public interest to present. The Commission clearly stated that the elements were not all embracing nor constant and were specifically not intended to serve as a rigid mold. Rather, the "honest and prudent" judgments of the licensee were held to be entitled to great weight.<sup>24</sup>

64. Indeed, more recently it has been stated with regard to quantitative guidelines in the comparative application context, that such guidelines are "a simplistic, superficial approach to a complex problem," and that there is:

(n)othing in the Communications Act (that) imposes any requirement that the FCC promulgate quantitative programming standards. In granting broadcast licenses the FCC must find that the "public convenience, interest or necessity will be - served thereby." (Citation omitted) Within these broad confines, the Commission is left with the task of particularizing standards to be used in implementing the Act.<sup>25</sup>

While this is not to say that we may not impose such standards or that they would be unlawful or unwise in every case, it is further evidence of this historical preference to avoid such standards unless absolutely necessary. Given this background, the argument that the Commission cannot legally eliminate the current guidelines simply does not have any basis. Indeed, the guidelines, currently embodied as delegations to the Chief, Broadcast Bureau, were adopted without the benefit of a broad public inquiry as we have under consideration in this proceeding.

65. While there historically has been a bias against enacting programming guidelines, the Commission did adopt non-entertainment processing guidelines when it amended the Broadcast Bureau's delegations of authority in 1973. [*Amendment of Part 0 of the Commission's Rules-Commission Organization-With Respect to Delegation of Authority of the Chief, Broadcast Bureau*, 43 FCC 2d 638 (1973)]. Having concluded that such a change was at that time in the public interest, we must now inquire as to whether they remain so and, if not, whether the public interest standard is sufficiently flexible to permit the elimination of that guideline.

66. As we explained in the *Notice*, the courts historically have been generous in their interpretation of the authority of the Commission to change its position. In that regard, we reiterate the Supreme Court's statement,

And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.<sup>26</sup>

Therefore, the Court concluded, Congress acted deliberately in failing to provide an itemized list of specific manifestations that the Commission could or should regulate. Rather, it provided a large framework within which the Commission has the authority to respond to changing circumstances.

67. Also cited in the *Notice* was *Pinellas Broadcasting Company v. FCC*,<sup>27</sup> wherein Judge Prettyman clearly set forth a broad construction of the Commission's authority in changing previously held attitudes about what is prohibited or required by the public interest standard.

And it is also true that the Commission's view of what is best in the public interest

<sup>24</sup> *Id.*, at 2314.

<sup>25</sup> *National Black Media Coalition v. FCC*, 589 F. 2d 578, 580-581 (D.C. Cir. 1978).

<sup>26</sup> *National Broadcasting Company v. United States*, 319 U.S. 190, 219-20 (1943).

<sup>27</sup> 230 F. 2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 76 S.Ct. 650 (1956).

may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational . . . . All such matters are for the Congress and the executive and their agencies.

68. Similarly, with regard to the Interstate Commerce Commission's ability to alter past decision, the Supreme Court has stated:

. . . the (Interstate Commerce) Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice . . . .

\* \* \* \* \*

In fact, although we make no judgement as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.<sup>28</sup>

69. The foregoing merely is to say that while the Commission historically has been concerned with types of programming presented; and while the Courts have sustained the Commission's authority to apply its concerns in that regard, there is not a longstanding historical basis, nor judicial requirement, for nationally imposed programming guidelines. In truth, there has been an historical bias against the imposition of such guidelines and a judicial support for the Commission's reluctance to impose them. Certainly, too, the courts have given the Commission wide discretion to reevaluate its prior holdings so long as departures from prior precedents are discussed and the bases for the departures are carefully spelled out.<sup>29</sup>

70. While the Commission has the authority to adopt non-entertainment programming guidelines, it is a mistake to believe that it lacks authority to discontinue them should it conclude that the record supports such elimination. The theoretical basis for the proposal to eliminate the current guideline (which was supported by the data compiled by the Commission and several commenters) was that marketplace forces would continue to assure that significant amounts of the subject programming would continue to be available to listeners even absent the guideline. We certainly believe that it is desirable to re-evaluate our rules from time to time and to investigate whether the premises behind the rules remain valid and whether or not there are other, less burdensome and costly, methods by which to achieve the ends intended. We therefore conclude that we have the authority to investigate, and if the record warrants to eliminate, our current guidelines.

#### Economic and Statistical Discussion Relative to the Guideline's Elimination

71. Many commenters expressed the view that nonentertainment programming would either be cut back or eliminated subsequent to elimination of the nonentertainment guideline. A variation of this theme was voiced by those who thought that certain

<sup>28</sup> *American Trucking v. Atchison, Topeka and Santa Fe Railway Co., et al.*, 387 U.S. 397, 416 (1967).

<sup>29</sup> See, for instance, *Teamsters Local Union 769 v. NLRB*, 532 F. 2d 1385, 1392 (D.C. Cir. 1976) and *Food Marketing Inst. v. I.C.C.*, 587 F. 2d 1285, 1290 (D.C. Cir. 1978).

groups or individuals would have a more difficult time gaining access to the radio medium.<sup>30</sup> Absent any guideline requiring some minimum level of nonentertainment programming, we would expect demand for and supply of this programming to determine the amount that is broadcast. Once an adjustment period had passed, we would expect an equilibrium amount of this kind of programming to be established. This equilibrium would reflect both the desires of the listeners and the costs of providing the service as well as the sensitivity of listeners to substitute uses of the broadcast time and substitute sources of information.<sup>31</sup>

72. Under a pure marketplace approach the equilibrium level of programming could then be compared to some standard to determine whether the market was producing at least the amount of programming thought to be minimally required by listeners. As noted above, however, the Commission currently has a nonentertainment programming guideline. In analyzing the effect of that guideline, one can posit that if the stations exceed that minimum by a substantial amount it can be inferred that the guideline is superfluous. If the market is generating programming in excess of the required minimum amount mandated by the Commission, then there is no reason to expect a reduction in that programming subsequent to removal of the guideline.<sup>32</sup>

73. Having set forth this basic statement, we turn to an examination of the evidence presented in the record. Few commenting parties presented formal studies of the amount of nonentertainment programming broadcast by radio stations. The NAB, for instance, undertook a study of small market (either a single AM-FM combination or a single station) broadcasters.<sup>33</sup> Their findings were remarkable in that the FM stations devoted an average of 20.9% of their time to nonentertainment programming, while the AM stations surveyed devoted an average of 27.5% of their broadcast time to nonentertainment programming.<sup>34</sup> In their reply comments, NAB provided the results of a second study, similar to the first except that it included radio stations for all markets regardless of size.<sup>35</sup> The results of this study are comparable to the small market study. No market size class showed an average level of nonentertainment broadcasting below 22.7% for AM stations or 15% for FM stations.<sup>36</sup> Clearly the results show that time devoted to informational programming greatly exceeds the current guideline. Further,

<sup>30</sup> For an example of the former view see comments of the American Federation of State, City, and Municipal Employees. An example of the latter is the comment of the U.S. Catholic Conference.

<sup>31</sup> Of course, as listener tastes change over time, the market will continue to adjust the supply of different types of programming to these changes in demand.

<sup>32</sup> The broadcasters could be protecting against the risk of a challenge to their license by programming in excess of the minimum. To make this argument, however, requires a showing first that there is a risk; and second, that the excess programming equals in amount the assessed risk (measured in percent of broadcast day).

<sup>33</sup> Comments of NAB, Appendix A.

<sup>34</sup> The station averages by type of programming were (Id. at 4):

	News	Public Affairs	Other
AM	14.3%	3.0%	10.2%
FM	11.2%	2.3%	7.4%

<sup>35</sup> Reply Comments of NAB, Appendix A. Their methodology involved developing a stratified random sample drawn from four market size categories.

<sup>36</sup> *Id.*, at 3. For all stations in the sample the results are:

	over 500,000	100,000- 499,999	15,000- 99,999	Below 14,999
AM	23.9%	24.4%	22.7%	27.6%
FM	15%	19.9%	17%	18.5%

public affairs programming is produced in substantial quantities in all market classes and for both AM and FM stations. The quantity of public affairs programming ranges from an average of 3.4% of all programming in the largest AM markets to 2.8% in the smallest, while for FM the range is from 2.4% in the largest market class to 1.8% in the smallest market class. These data confirm the data developed by Commission staff in the *Notice*.<sup>37</sup>

74. J. Jerome Lackamp, writing for the Diocese of Cleveland, submitted a substantial study of the Cleveland radio market as it evolved over a 12 year period.<sup>38</sup> This study was developed by Mr. Lackamp for his use and was attached to his comments on behalf of the Diocese of Cleveland so that the data would be available for examination by others. These data allow an analysis of the market for two renewal periods prior to implementation of the processing guidelines (1967-1973) and two renewal periods following introduction of the guidelines (1973-1979). The single most significant finding concerns the amount of nonentertainment programming broadcast on both AM and FM stations. For both classes of radio stations, the average level of nonentertainment programming greatly exceeded the processing guidelines both prior to and following introduction of the guidelines. As can easily be seen by examining Table 1,

Table 1: Percent of the Broadcast Day Devoted to Nonentertainment Programming

Source: Diocese of Cleveland, Exhibits 1-4

	1967-70	1970-73	1973-76	1976-79
AM	20.9%	22.5%	23.8%	24.4%
FM	11.0	11.3	10.7	10.4

the programming in Cleveland closely resembles the averages found in both the FCC and NAB studies.<sup>39</sup>

75. Partial data were provided regarding the proportion of news programming that was devoted to local and regional issues. The average for the AM stations was always at least 54 percent while the average for FM stations was at least 37 percent.<sup>40</sup> The final point to be made is that the data exhibit no perceptible effect stemming from the guidelines. From this it is reasonable to infer that nonentertainment programming will not be substantially adversely affected by removal of the processing guideline.

76. The *Notice* provides additional confirmation to the argument that the market would support substantial informational programming in the absence of the guideline. First, the distribution of news programming is most pronounced during the drive time hours—hours that draw both the greatest number of listeners and, as a result, the greatest amount of advertising. This, as the *Notice* points out, suggests that news programming is both profitable and desired by listeners. Second, with the exception of Sunday evening, early Monday morning and both early Saturday and early Sunday mornings, public affairs programs are more or less randomly distributed and there is no

<sup>37</sup> *Notice* at paras. 181-182 and Tables 14A-16C.

<sup>38</sup> Comments of the Diocese of Cleveland, Exhibits 1-4. Each exhibit presents data gathered from composite week logs for each AM and FM station in the Cleveland market for four three year renewal periods: 1967-70, 1970-73, 1973-76, and 1976-79.

<sup>39</sup> As with this FCC and NAB data, there were a few instances of stations (only FM) broadcasting less than 6 percent nonentertainment programming—2 in 1967-70, 2 in 1970-73, 3 in 1973-76 and 0 in 1976-79.

<sup>40</sup> The AM averages were 57% for 1967-70, 54.6% for 1970-73 and 56.3% for 1973-76 while the FM averages were 37.5% for 1970-73 and 49.2% for 1973-76.

significant trend toward placing public affairs broadcasting in time slots with little or no advertising time.<sup>41</sup> The fact that some advertising coexists with this programming suggests that there is at least some listener support even for public affairs programming.<sup>42</sup>

77. The NTIA, while not attacking the *Notice's* conclusions, argues that the nonentertainment data would be more complete if data on the "other" category of nonentertainment broadcasting had been included. It was NTIA's belief that that category of programming must be specifically included in setting a guideline for meritorious service.<sup>43</sup> In addition, it expresses concern regarding the sampling methodology used by the staff in developing its programming data base.<sup>44</sup> It felt that some bias might be introduced because only one day was sampled for each station, though it provided no other basis for claiming such a bias. The methodology chosen by the staff was carefully set out in a Public Notice issued subsequent to the *Notice*.<sup>45</sup> The fact that only one day was selected at random from each composite log was dictated by limited staff resources but, because the sample utilizes accepted statistical techniques using only one day from each log should have no bearing on the statistical integrity of the results.

78. The major criticisms of the recommendation to eliminate nonentertainment guidelines fall into two categories. First is the view that without these guidelines there will be no "Ejective" criteria at renewal time by which to determine what constitutes "meritorious" service.<sup>46</sup> A brief comment regarding the economic consequences of this process is in order. First, although setting a specific rule or guideline level provides a superficial aura of objectivity in fact, there is no way to know what the appropriate level should be.<sup>47</sup> More important, guidelines that pertain to all licensees create incentives for all licensees to act the same way, even if they are operating in very different market environments. Licensees become responsive first and foremost to the guideline, only secondarily to the public. Hence guidelines may not provide programming in the public interest.

79. An additional criticism of removal of the nonentertainment guideline is that less local or special programming (e.g., religious programming) will result.<sup>48</sup> This criticism fails to take into account three factors. First, current guidelines do not require licensees

<sup>41</sup> *Notice*, at Tables 14A and 16A.

<sup>42</sup> Some support for the argument that public service broadcasts are demanded by listeners is also found in the data presented by the NAB *supra* note at Appendix A.

<sup>43</sup> NTIA comment, at 15.

<sup>44</sup> *Id.*

<sup>45</sup> FCC, *Public Notice* re: Release of Additional Materials in Radio Deregulation Proceeding (BC Docket No. 79-219) January 11, 1980.

<sup>46</sup> An "objective" standard was felt desirable primarily to avoid the Commission having to make judgments on particular programs thereby creating First Amendment difficulties. See, NTIA comment at 9-14.

<sup>47</sup> NTIA presents at least two alternative approaches to this problem. First is to treat both AM and FM as equals and assess the same percentage figure, perhaps 6 or 8%. There would be a reduced obligation for stations that use reduced advertising formats (e.g., "Beautiful Music" or Classical formats). The alternative is to choose a standard based upon the mean (average) level of the existing percentage of time devoted to nonentertainment broadcasting. Meritorious service would then be defined as a level of programming that exceeds one standard deviation above the mean level. See NTIA *supra* note at 14-22. The defect of these proposals is that they could present the prospect of a moving target as stations modify their behavior both in response to the method of computing the standard, itself; and in response to changes in the station's market. They would also place an enormous administrative burden upon the Commission.

<sup>48</sup> See for example Comments of the United Church of Christ, U.S. Catholic Conference, the Diocese of Cleveland and the Committee for Community Access.

to provide any particular kind of programming, either by general category type (*i.e.*, news, public affairs, religious, *etc.*) or source (save, of course, candidates for federal elective office). There is no reason to expect current programming patterns to change since broadcasters appear to already be producing nonentertainment programming in quantities that are well beyond the current minimums. Demand for information by listeners will continue with or without the guideline and for that reason the broadcaster would find it in his own self-interest to provide that programming even absent any requirement to do so. Where programming is currently provided with limited commercial support—*e.g.*, religious programming—it represents the broadcaster's recognition of the value of "good will" in the community and there is no reason to expect that motivation to lessen. Second, even without the guideline broadcasters would have to meet their Fairness Doctrine obligations. The Fairness Doctrine is key in that it goes directly to the public interest concerns of many commenters who are ill at ease with removal of the guidelines. Finally, some concern was expressed that in markets with 10 or more stations there are a substantial number of stations that fail to meet the processing guideline, or barely meet it.<sup>49</sup> This was based on a misunderstanding of the data presented in the *Notice*. The data do not include programming from the "other" category and, as a result, a superficial reading of Tables 10A and B might give the illusion that a number of stations do not meet the processing guideline. If the "other" category were included, very few stations would be below the guideline. Additionally, such large markets had a higher incidence of stations providing over 50% of their programming as news and public affairs ("All-News" stations) than did smaller markets. Therefore the overall availability of nonentertainment programming in these markets is great. In smaller markets, the average nonentertainment presentation by each station was greater but there appeared to be fewer "All-News" stations. To argue, based upon the evidence in the *Notice*, that the guideline is an effective constraint, is not correct.<sup>50</sup> The totality of the data must be examined when making such a judgment. Inspection of the NAB data set indicates that a small number of stations may still just meet (or in some instances fail to meet) the guideline.<sup>51</sup> This should not be interpreted as a need for a guideline as only 7 stations (6 of which are FM's) in the NAB sample of 100 stations for markets of 100,000 and above did not meet the guideline.<sup>52</sup> This represents a very small percentage of the total number of AM and FM stations in the sample.

80. In an effort to point out the weaknesses of a market type analysis with regard to the provision of local news programming, the United Church of Christ presented a study of news sources available to communities within the New York City urban area.<sup>53</sup> Their approach was to examine an area dominated by a very large city and show that news

<sup>49</sup> Comments of ACLU.

<sup>50</sup> See *Notice*, at Table 10A and 10B.

<sup>51</sup> Reply comments of NAB Attachment B.

<sup>52</sup> Also only 2 stations out of a sample of 74 stations for markets between 15,000 and 100,000 and no stations out of a sample of 143 stations in markets of less than 15,000 population did not meet the processing guidelines.

<sup>53</sup> Comments of UCC at 18-14. While the UCC appears to be troubled by the staff's choice of boundaries for the "New York City" market, they do not clearly explain their preferred alternative. For example, UCC indicates that the staff is in error when it suggested that eastern Suffolk County stations are part of the SRDS New York market (*Notice* at Appendix A). While UCC appears to be correct on this point it is irrelevant since the staff excluded Suffolk and Nassau Counties from the New York market. As an aside, UCC also argues that this Long Island market should have been included in Table 3 of the *Notice*. The tone of the UCC study suggests, however, that since part of both Nassau and Suffolk Counties are dominated by New York City stations, these areas should be included in a New York City market. Even this is unclear, however, since at some places they speak of these counties as though they constitute a separate market, (comments of UCC at 19, 20-22) and are examined as such.

oriented toward smaller communities in the shadow of that city would be underrepresented. For the New York City urban area they conclude that, in fact, little news of smaller nearby communities is carried by the New York City stations and, on that basis, argue that guidelines even stronger than those now in effect are needed. As our review of their study shows, it is not possible to conclude that more local news (presumably news directed at specific smaller communities) is either desired by residents or, for that matter, is not currently being provided by other stations, especially those on Long Island.

81. UCC begins by describing the diversity of both institutions and populations residing in the communities that fall within the area of dominance of the New York stations. It points out that six radio stations licensed in New Jersey and five stations licensed in Southeastern New York state exist within the New York market. In addition, at this stage of the UCC study, Nassau and Suffolk counties are combined into a market called "Long Island." The Long Island market contains 12 radio stations but no television stations because of the proximity of both New York City and the stations of Connecticut and Rhode Island. UCC's methodology consists of monitoring one New York City all news radio station, WCBS, for 16 hours on one day. It found that only one story originated from Southeastern New York state, and that was not of distinctly local interest.<sup>54</sup> On the same day, there were five distinct stories (one of which was carried eight times) that related to New Jersey and seven minutes of news pertaining to Long Island (all but two of those stories dealt with crime).<sup>55</sup> In neither case were the news stories considered by the UCC to be of "distinct interest to any . . . community."<sup>56</sup> UCC asserts (based upon their knowledge of New York City) that the results of the WCBS monitoring experiment extend to the other New York all news station, WINS. From this UCC concludes that the local interests of citizens in the Long Island market would not be served if the Commission went to a market test even though the market would not be considered to have failed that test. It further argues that the many local newspapers that exist in the Long Island market are not suitable substitutes for radio news because they are not daily papers and, as a result, cannot provide timely coverage.

82. Perhaps the single most important critique of the UCC study is the inductive reasoning attempted by the authors. First, there is no guarantee that deregulation will cause all local newscasting (for the relevant parts of New Jersey and southeastern New York state—if not for Long Island) to fall on the shoulders of WCBS or WINS. Indeed, such a result appears to be unlikely given the widespread interest in news programs among listeners are demonstrated by the data. Second, and even more important, no monitoring of the 13 stations licensed to communities in Long Island—or for the relevant New Jersey or southeast New York state stations—was undertaken. Without that analysis there is no way to know whether these stations provided news not found on WCBS but oriented toward those communities. This is compounded by the fact that only one New York station was monitored—and that for only one day. Finally, even if the AM and FM spectrum were not both saturated and dominated by New York City, it is not clear whether each community in Nassau and Suffolk counties would have informational programming directed toward their specific needs. It may not be economically possible (leaving aside engineering considerations) to establish enough stations to serve each community. In this regard, we note that UCC did not attempt to empirically establish what, for it, was a crucial assumption, *i.e.*, that enough listeners want "timely" news coverage related specifically to their immediate communities to warrant additional provision. As a general proposition it is unreasonable to expect broadcasters to provide a service that may be less highly valued than their current programming. Perhaps weekly

<sup>54</sup> The story was concerned with the murder of Dr. Herman Tarnower and was carried nationally.

<sup>55</sup> At this stage of its analysis, UCC seems to be treating "Long Island" as part of the New York City market. Otherwise, it is hard to understand their interest in WCBS' reporting of events there.

<sup>56</sup> UCC at 21-22.

or twice-weekly papers are enough to satisfy the demand for local news. In this regard we this regard we note that the Long Island paper, *Newsday*, provides substantial local Long Island coverage on a daily basis.<sup>57</sup>

83. Another study submitted in this proceeding was conducted by William Seiberlich, a graduate student at the Annenberg School of Communications. The Seiberlich's study, conducted in three small communities, purports to demonstrate that radio is a primary source of news and information contrary to the assertions made in the *Notice*. Even though other news sources were available, 75% of the respondents in the survey stated that they considered radio to be the primary source for news about their community.

84. Without regard to methodological problems with the study (*i.e.*, some of the comments on station performance appear to have come from listeners responding to a newspaper advertisement placed by Mr. Seiberlich soliciting comments, yet there is no information in the study on the number of respondents or discussion as to whether obtaining responses in this fashion may have a built in bias) the study does not affect the course of action which we are taking herein. We continue to agree with the Roper study cited at paragraph 71 of the *Notice* that indicated that the majority of people rely on television as their primary source for news. We also noted, however, that the type of news that was most important to radio listeners was local news. Thus, in small communities with fewer alternative sources for such news, it would not be surprising to find, as apparently Mr. Seiberlich did, that residents of such communities turn to radio as a primary source of local news. That in no way, however, forms a basis for retaining the guideline. As the data compiled by the Commission and several commenters (as discussed elsewhere herein) demonstrate, news is presented at such times and in such amounts as to strongly suggest that it is being offered in response to listener wants and therefore would remain absent the guideline and without regard to whether radio is a primary or secondary news source.

85. Additionally, Mr. Seiberlich presented anecdotal information to the effect that radio service is poor in the surveyed communities even under current regulations. This information ranged from the fact that one of the subject stations had no manager, news director or receptionist, to claims by interviewees that there was a lack of sufficient religious and public affairs programming. As Mr. Seiberlich correctly points out, these claims do not necessarily represent violations of current Commission requirements. It is therefore difficult to consider these as reasons not to take the action being taken herein. Our focus must be upon whether or not market forces and the remaining requirements are an adequate substitute for the regulations under considerations. If the programming was not present in amounts pleasing to all listeners at a time when the guideline was in force, but without occasioning a violation of the rules, it is difficult to see how the situation would be adversely affected by the guideline's elimination. Indeed, one anecdote in the study provides strong support for the economic model in general (and the elimination of the commercial guideline in particular). Mr. Seiberlich reports that one station manager broadcasts less than the allowable number of commercial minutes but would sell more than 18 minutes of commercial time per hour "if only there were buyers." But there are not, and this is what has limited the broadcaster to fewer than 18 minutes per hour of commercials and should continue to so limit the broadcaster absent the guideline. Mr. Seiberlich's study simply does not persuade us that our theoretical basis was seriously flawed or the actions we are taking are contrary to the public interest.

#### Non-Entertainment Programming in the Absence of the Guideline

86. The analysis and material discussed above supports the elimination of the

<sup>57</sup> *Id.*, at Attachment 3.

guideline for non-entertainment programming. The data released with the *Notice*, supplementary material<sup>58</sup> and that supplied with comments (as discussed above) clearly demonstrate that radio stations are offering a large amount of non-entertainment programming, often well in excess of the guideline, and, with reference to at least news programs, tend to offer it at times of peak radio listenership. This plainly suggests a listenership preference for news that exists independently from the current guideline. No commenters have rebutted or explained the presence of large amounts of news at peak listenership times of the broadcast day as being anything other than a response to listenership interest. It would defy all sense of reason to believe that radio broadcasters schedule news programming in this way merely because of our guidelines. Clearly listeners demand news programming on radio. There also appears to be some interest in public affairs.<sup>59</sup>

87. Some analysis of the data in the comments suggests that non-entertainment programming would disappear without the guideline and buttress this claim by contending that the data demonstrate that a large proportion of stations are currently not meeting the non-entertainment programming guideline.<sup>60</sup> This claim, however, is based upon a faulty premise. As noted above, the Tables did not include any "other" non-entertainment programming. What the subject Tables purported to demonstrate, rather, was that most stations were offering almost, or in excess of, the guideline amounts for non-entertainment programming even when only their news and public affairs programs were counted. Experience dictates that most stations also offer some amount of so-called "other" non-entertainment programming.<sup>61</sup> Therefore, the amount of *all* qualifying non-entertainment programming being offered can reasonably be anticipated to exceed the amounts shown in the Tables which, again, refer only to news and public affairs.<sup>62</sup>

88. We do not believe that the tentative conclusions that we drew from the data in the *Notice* have been successfully rebutted, especially with regard to news programming. In short, that data shows that news is offered in high amounts at high listenership times,<sup>63</sup> and that most stations exceed current non-entertainment programming guidelines even when only two of the three "countable" types of non-entertainment programming are considered. Data submitted by commenters show that the total amount of such programming offered often far exceeds the guideline. From this we believe it safe to conclude that absent the guideline, news would continue to be offered, public affairs programming might (but not necessarily would) decline, and substantial amounts of all types of non-entertainment programming would be likely to remain. One might deplore the lower listenership interest in public affairs programming (as compared to news); one might urge that the Commission should require its presence regardless of the inclinations of the population at large. But the preliminary conclusions that we drew from the data still appear to be sound. Since many commenters nonetheless believe that substantial amounts of, or all, non-entertainment programming would flee from

<sup>58</sup> See Public Notice, Report No. 15448, released January 11, 1980.

<sup>59</sup> NAB indicated that between 1.75% and 3.4% of broadcasters' hours of operation were devoted to public affairs with NTIA showing an average of 3% for AM stations and 2.3% for FM stations.

<sup>60</sup> This conclusion is presumably drawn from the data in Tables 10-11, and 12.

<sup>61</sup> Indeed, in its comments (at fn. 24) NTIA reported on a study it conducted wherein it discovered that such "other" programming presented an additional 37% over the mean amount of news and public affairs presented.

<sup>62</sup> We draw attention to the NTIA, NAB and Cleveland Archdiocesan studies setting forth these amounts. See paragraphs 71-77, *supra*.

<sup>63</sup> The fact that, as Douglas Fraser pointed out, news also is aired at other times of the day does not account for the unrebutted fact that news is offered in its largest amounts at what is well known to be the highest radio listenership times of the day—morning and evening drivetime—although not required to be so scheduled by Commission rule.

commercial radio under deregulation, we will address some of the reasons why we disagree with that conclusion even without regard to the data available to us that suggest the contrary.

89. Recent trends in news programming indicate the importance of news on radio stations independent of Commission requirements. An article in the August 25, 1980, *Broadcasting Magazine* notes that stations are now often tailoring their news reporting to what they see as being the informational interests of their audience.<sup>64</sup> While it is reported to be a trend that is not universally endorsed by radio journalists, the article asserts that it is a trend that "seems to have caught on with audiences."<sup>65</sup> Benefits to the public seem to be occurring as a result of this trend. As noted in the

Last spring the station [WBCN-FM, Boston, Mass.] reported on a nuclear accident in Le Havre, France, a full 12 hours before the wire services moved the story. And last fall it won a UPI award for its coverage of demonstrations at the Seabrook, N.H., nuclear power plant site.

Additionally, state wide radio news networks are said to be developing to the extent that the National Association of State Radio Networks has grown by 450% since its founding in 1973. Other, nationally oriented, networks also are said to be making great strides in bringing information to the public. Commission guidelines did not cause WBCN-FM to cover the nuclear disaster, did not create 18 statewide radio news networks, and did not require radio station KGO-AM, San Francisco, California, to spend \$40,000 to bring its listeners interviews from the Middle East and the opportunity to call in questions to newsworthy persons in Tel Aviv, Israel, and Cairo, Egypt. It can only be concluded that these stations and networks are providing these services in response to the preferences of the listening public, not in response to a Commission guideline that gives no more credit for a "rip and read" news broadcast than it does for a live report from Tel Aviv.

90. As to public affairs programming, the evidence was admittedly different. As discussed above, public affairs programming does not appear to be as highly valued as news by the listenership. For twenty years we have permitted such programming to be sponsored. Sponsorship would generally be expected to be attracted to programming with a significant listenership. If there was a large listenership for such programming, and the programming therefore attracted advertising, one would expect to see it presented at higher listenership times.<sup>66</sup> Our data indicate that while public affairs programs are offered during high and medium listenership day parts, the highest proportions are offered at poorer listenership time. This suggests that there may be a smaller interest on the part of the listening public in public affairs programming on radio than there is in news. It is legitimate to question whether it is in the public interest to require the use of the airwaves for the presentation of greater amounts of less desired programming. That is a philosophical question that may not be capable of definitive resolution but it is at least a question worth asking. As a general proposition, it may be offensive to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard. Alternatively, we

<sup>64</sup> See, "Carving Out a Niche in News," pp. 86-91.

<sup>65</sup> *Id.*, at 86.

<sup>66</sup> The fact that public affairs programming begins to increase after 6:00 a.m. Sunday mornings does not necessarily mean that licensees await people waking-up before presenting public affairs. It is quite possible that such scheduling is a result of our determination that, "the scheduling of all public affairs programming during the "graveyard" hours between midnight/and 6:00 a.m., when audiences are presumably smallest, would warrant further inquiry . . .," *KKO General, Inc.*, 52 F.C.C. 2d 582 (1975). While public affairs is offered in higher amounts at such times, its random distribution over the remainder of the broadcast week tends to indicate some listener interest in these programs.

can construct hypothetical situations in which the actual amount of public affairs programming offered in a market under deregulation could exceed that offered in the market prior to deregulation. For instance, in a given market with a number of stations, there may exist a licensee with a middle-of-the-road (MOR) music format. The station may, however, be only the fourth most popular MOR station in the market and have but a three or four percent share of the listenership. If the licensee found that, for instance, under deregulation five percent of the listenership was not receiving the public affairs programming that it had previously enjoyed, the hypothetical MOR station might find it desirable to change its format to all news and public affairs. In such a circumstance, it might turn out that the amount of public affairs programming offered by one, primarily public affairs, station, exceeds the total that had been offered by all stations in the market, each offering between one and three percent public affairs programming, prior to deregulation.

91. While this is a hypothetical situation, it is a possible example of what could happen through the working of marketplace forces and is no more speculative than the prediction that all public affairs programming on commercial stations would be lost, as feared by many commenters. In fact, the data presented in the *Notice* in Tables 12A and 12B suggest that this scenario is quite plausible. As market size increased (and the expected market share of each station fell), an increasing percentage of stations offered high levels of public affairs programming (*i.e.*, public affairs programming exceeded 6% of their total programming). This suggests that there exists a small audience for such programming that will become increasingly attractive to some broadcasters as their expected market shares fall and if other broadcasters cut back on this type of programming. In any case, given the action taken herein, news programming should continue for the reasons set forth above and other types of non-entertainment programming will necessarily continue to assure compliance with the Fairness Doctrine and the requirement set forth above to address community issues.

#### Loss of Programming Relevant to Low Income Individuals

92. Several commenters feared that in a deregulated environment, specialty programming to groups with low economic power (which were often equated in comments with minority groups) would be lost. There was little showing in the comments of the current amounts of such specialty programming, that programming tastes of low income individuals in general differed from those of the rest of the population, or of the amounts that would be lost. In the past, we have attempted to assure the presence of specialty programming through a number of means,<sup>67</sup> and we will presume that it exists.

93. While it is unwise and, we believe, inaccurate to assume that low income individuals have no interest in programming other than that directed specifically toward them, the loss of non-entertainment programming relevant to issues concerning such groups would, of course, concern us. We question, however, whether any such loss would be a realistic prospect under deregulation. First, we cannot assume that low income individuals have different programming wants than does the general population. With regard to discrete minorities, we are attempting to assure that the needs of minority groups are met through structural means such as EEO and minority ownership policies. This appears to us to be an excellent way to encourage such programming with the least amount of content intrusive regulation. In addition, there are already an increasing number of minority oriented programming services. As Table 4 appended to the *Notice* indicated, 416 radio stations in 239 radio markets provide some regularly scheduled Black-oriented programming with 139 of these stations presenting full time black-oriented programming. Table 6 indicated that 270 stations in 173 markets provide some regularly scheduled Spanish language programming with 44 such stations presenting

<sup>67</sup> See the fourteen elements of programming necessary to meet the public interest in the *En Banc Programming Inquiry Statement*, 44 FCC 2303 (1960); additionally, our ascertainment requirements were intended to result in programming relevant to the needs of all significant segments of the community.

full time Spanish language programming. More recent data indicate substantial increases in such programming.<sup>68</sup> Black formatted radio stations showed an increase of 12% in the top 25 markets in 1979, alone.<sup>69</sup> The trend towards programming directed to ever narrower groups appears to be taking place at the present time. There is no reason to believe that this trend will not continue.

94. We believe that it has been amply demonstrated that all types of minority needs, be they racial, ethnic, or taste, can be, and indeed are being well met through increasing the number of stations. In an environment where often an audience share of 5% or less is considered a rating success, as it is today in many major markets, narrowly based tastes, needs and interests can be served. The Commission has implemented structural programs to increase the number of stations and to facilitate such programming especially with regard to minorities. Indeed, since the *Notice* in this proceeding was adopted, the number of radio stations on the air has increased from 8,654 to 8,921.<sup>70</sup> That is an increase of 267 stations in one year, without any of the structural measures discussed in the *Notice* having yet come into play.<sup>71</sup>

95. This increase in the number of stations has resulted in the creation of new entertainment formats. Although the deregulation proceeding relates primarily to issues concerning the non-entertainment programming offered by stations, this phenomenon of format fragmentation is nevertheless relevant. What it demonstrates is that the economic theory that holds that an increase in the number of stations promotes service to narrower and narrower segments of the community is correct. As it can be demonstrated to be true as to entertainment programming, there can be little doubt that the same effect would occur with regard to non-entertainment programming, much of which, it appears, is offered in response to the listenership's desires.<sup>72</sup>

96. A recent article in the trade publication *Broadcasting Magazine*, noted that although a station's overall image is increasing in importance, the case with formats is that:

Fragmentation is the key to what's happening in today's radio formats. Top 40 is divided into standard, adult and album. Country competes with modern and easy country and rock is spreading its audience among soft and progressive practitioners.

Even beautiful music, which for the past few years has divided itself only vaguely into classic, MOR and country modes, is showing signs of lining up in vocal-oriented and standard-instrumental camps. In religious, the difference is between listener-supported block programming and Christian music stations. In news/talk, it's light-talk versus news-oriented.<sup>73</sup>

97. The fine tuning of formats is directly related to the anticipated audiences that broadcasters are seeking to serve. They apparently perceive a different listenership for,

<sup>68</sup> See the attachment to this Appendix.

<sup>69</sup> See, *Broadcasting Magazine*, June 9, 1980, "Radio's Format Leader: Adult Contemporary," pp. 44-46.

<sup>70</sup> See, Commission News Release, "Broadcast Station Totals For October 1980," Mimeo No. 01558, dated November 13, 1980.

<sup>71</sup> While the Clear Channel proceeding, Docket 20642, has resulted in a *Report and Order* (FCC 80-317, released June 20, 1980) that would eventually result in new stations commencing operation, petitions for reconsideration have been filed. In any case, it is too soon for any new stations to have resulted from the measures taken in that proceeding.

<sup>72</sup> See paragraphs 151 through 217 of the *Notice*.

<sup>73</sup> See, *Broadcasting Magazine*, "Overview: Images Sharpen as Formats Blur," August 25, 1980, p. 52.

by way of example, each of the following formats: urban contemporary, contemporary, adult contemporary, black contemporary, bright contemporary, contemporary gospel, contemporary rock, contemporary rhythm, top-40 contemporary and personality contemporary.<sup>74</sup> Clearly, the needs of smaller and smaller segments of the community are being appealed to by this fragmentation which is the natural result of an increase in the number of stations which permits service to such elements.

98. While several commenters argued that low income individuals and minority groups would be ignored as they are asserted to be non-consumers, (and therefore unattractive to advertisers), this argument appears to be belied by the facts. As an initial matter, even individuals having low purchasing power make purchasing decisions. They are not "non-consumers" they are low-income individuals. There is considerable empirical evidence that low income individuals tend more than higher income individuals to buy brand name products (see, Appendix D, and paragraph 151 of the *Notice*). This may be due to a lack of discretionary funds necessitating the making of purchasing choices perceived as being "safe." Perhaps low income individuals with little margin for error in their purchasing decisions therefore stick to name brand products rather than gambling on off-brand products. Whatever the reason, it does appear that there is a preference for name brand products on the part of low income individuals and, therefore, advertisers wishing to reinforce their image as name brands, or to establish themselves as name brands, may wish to sponsor programming appealing to low income individuals.

99. A recent article in *Broadcasting Magazine*, "The Black Market Becomes a Must Buy," by Eugene D. Jackson, Chairman-President of the National Black Network,<sup>75</sup> presents persuasive evidence that minorities in general are an attractive market to advertisers and are becoming increasingly so. If this is the case, the argument that minorities will not receive relevant programming must fail as the argument is based upon the premise that the programming will not be there because advertisers will not support such programming. Mr. Jackson points out that in 1980, the aggregate income of black workers is projected to be \$125.8 billion, increasing to \$225 billion by 1985. If black Americans constituted a separate nation, Jackson continues, their \$125.8 billion economy would rank it sixth in the free world, ahead of both Canada and Australia. The article points out certain demographic distinctions between minority and majority communities that demonstrate both an increasing demand for service of all types in the Black community and specific features that advertisers may want to focus on, which would lead to support of programming directed toward minority group members. As Mr. Jackson states, "Unless all of society metamorphosis, there will be a discernible need for a special kind of community, a special kind of marketing in the black marketplace." The data and argument set forth in the article are supportive of the conclusion that minorities can be, and indeed are, an attractive audience for advertisers to reach.<sup>76</sup> Accordingly, it reasonably can be anticipated that advertiser support would be available for programming directed toward the black community without regard to the Commission's non-entertainment programming guideline and ascertainment regulations.

100. A review of programming services currently available on radio demonstrates that many groups, including both those with lower than average incomes and those small in number, receive radio service. It should be noted that the services indicated in the Attachment to this Appendix are not the result of any current Commission programming requirement. Our structural regulations aimed at encouraging Black, Hispanic and Asian-American ownership of and employment by broadcasting stations may have played a role in achieving this result. In addition to programming relating to these

<sup>74</sup> These formats represent only formats utilizing the word "contemporary" in their description and present in the top-10 stations in the top-50 radio markets. Of course, numerous other formats also exist. See *Broadcasting Magazine*, "The Fortunate 501," August 25, 1980, pp. 62-74.

<sup>75</sup> *Broadcasting Magazine*, October 6, 1980, p. 22.

<sup>76</sup> Also see, paragraphs 35-36 of Appendix D, *supra*.

groups presented on stations not specifically appealing to these groups, there exist numerous stations formatted entirely, or in significant part, to meeting the needs of such groups.<sup>77</sup> The existence of these formats and programming segments is not the result of any Commission requirement. The stations and their formats exist because their licensees have come to the conclusion that, even where the group appealed to traditionally has had a low income or is low in number, marketplace forces make the provision of radio service to these segments of the community a rationale economic decision.

#### The Role of Public Broadcasting

101. As noted above, some commenters have argued that deregulation of commercial broadcast radio stations would place an intolerable burden upon noncommercial stations that, it is claimed, would be expected to take up any loss of non-entertainment programming resulting from deregulation. This is also said to be inconsistent with the legislative intent for public radio, which was to be considered as competitive with commercial radio and not as a repository for all non-entertainment programming. Much of this concern appears to have sprung from our discussion in the *Notice* in paragraphs 156-159. There we noted that the government subsidizes noncommercial radio programming by reserving valuable frequencies and by providing financial aid. We also noted that National Public Radio (NPR) affiliated stations provide, "a heavy diet of regularly scheduled news and public affairs programming. While we intended to indicate that the levels of such programming are a factor that must be considered in any discussion of the availability of non-entertainment programming in the marketplace, we did not intend to indicate that it was our belief that, under deregulation, non-commercial radio would be expected to be responsible for all non-entertainment programming. However, some further discussion of the role of non-commercial radio is important.

102. The role of noncommercial radio has not been viewed as a way to relieve commercial broadcasters of their obligations under the public interest standard as construed by the Commission. Nor has it traditionally been viewed as being in economic competition with commercial broadcasting.<sup>78</sup> However, it has been viewed as being for the purpose of, "filling the gaps that commercial broadcasters do not fill."<sup>79</sup> To this end, National Public Radio, which was established in 1970 to distribute programs to public radio stations, had in 1978, a budget of \$8,100,000 and produced approximately 40 hours of programming per week, primarily of the news and public affairs variety.<sup>80</sup> Since the commencement of Federal financial contributions, the growth of public radio has been described as being remarkable while achieving "impressive program quality . . ."<sup>81</sup> NPR stations are currently present in 66 of the top 100 Standard Metropolitan Statistical Areas (SMSA's) and are estimated by the Corporation for Public Broadcasting (CPB) and NPR to be available to 50% of the population of the United States.

103. That noncommercial public radio was intended to fill gaps in programming offered by commercial stations appears beyond doubt.<sup>82</sup> Were this not the intent, no reason would have existed for the extension of Federal funding for some noncommercial

<sup>77</sup> See the attachment to this Appendix for a listing of several formats and specialty programming aired at several groups some of which have a high proportion of low income individuals or which are small groups numerically.

<sup>78</sup> H.R. Rep. No. 572, 90th Cong., 1st Sess. 16, 17 (1967).

<sup>79</sup> *Id.*

<sup>80</sup> See, The Carnegie Corporation of New York, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* (hereinafter "Carnegie II"), page 190 (1979).

<sup>81</sup> *Id.*, p. 193.

<sup>82</sup> For instance, the Carnegie Commission notes, in Ramah, New Mexico an NPR station translates the Albuquerque Journal newspaper and weather information into the Navajo language.

radio operations. The Carnegie II report amplified upon this role for noncommercial radio asserting that purported shortcomings of commercial radio, indeed, constituted the strongest argument for increased support of public radio. While we disagree with some of the Report's conclusions regarding commercial radio, we would agree that there are some cultural tastes and programming preferences so outside of the mainstream that commercial stations cannot reasonably be expected to respond to them. That is why the government has reserved channels for noncommercial use and has provided financial assistance. The presence of such an institution in many radio markets cannot be ignored. To the contrary, its presence and purpose must be considered in any evaluation of the programming that is, and would be, present in the marketplace. While we would not expect that noncommercial radio would be called upon to provide all news and public affairs programming, in a deregulated environment,<sup>83</sup> we continue to believe that the "gap filling" programming that it does provide, and function which it serves, are relevant factors in our deliberation. In any case, our resolution of the non-entertainment guideline issues largely renders the concern expressed in this area moot.

#### Market Failure

104. In the *Notice*, we set forth as one option intervention by the Commission only with regard to non-entertainment programming if a market failure had occurred in a particular market or community. This was based on our analysis that in almost all situations market forces would assure the provision of radio services in the public interest. Because markets, like all other allocation systems, are imperfect the Commission did not want to exclude the possibility of intervention in the unusual circumstance that the market failed to respond to listener wants. Several commenters addressed this subject. Most of those doing so, approached it from the standpoint of whether the market could ever satisfy consumer preferences in radio.<sup>84</sup> Few commenters addressed the question of whether the Commission could regulate on a market-wide basis by assessing the sufficiency of programming available by the total amount of programming of a particular type that is offered on a market-wide basis. Still fewer suggested how we might determine whether a market has failed to respond to consumers and what we should do about it if we determine that it had.

105. The concept of the use of market failure to trigger Commission intervention is a relatively new one. In its Opinion in *WNCN Listeners Guild v. F.C.C.*, 610 F. 2d 838 (D.C. Cir. 1979), *cert. granted*, U.S. (1980), the Court of Appeals, while contending that the radio market is an imperfect reflection of listener preferences, also acknowledged that the Commission may permit these admittedly imperfect market forces to operate until it obtained strong evidence of market failure. The court stated:

Further, as is clear from our earlier cases, the Commission's obligation to consider format issues arises *only when there is strong prima facie evidence that the market has in fact broken down.* (Emphasis supplied).<sup>85</sup>

There is no reason to believe, whatever the outcome of the case on appeal, that the Supreme Court would view the Commission as having more stringent obligations (*i.e.*, to intervene although the market is functioning well), at least in the format area, than did the Court of Appeals.

<sup>83</sup> The basic premise of deregulation is that marketplace forces would continue to assure the presence of large amounts of nonentertainment programming in each market, although not necessarily, with the same amount on each station in the market.

<sup>84</sup> The argument generally stated was that the market would invariably fail because the market does not respond to the preferences of groups that are small in number or in purchasing power and because the non-material benefits to society of certain types of programming are not reflected in market demand.

<sup>85</sup> *WNCN Listeners Guild v. F.C.C.*, *supra*.

106. We believe that this same principle may be applicable to issues other than entertainment formats. While, as asserted by a number of commenters, the marketplace may be a less than perfect reflection of listener preferences, this does not imply that a regulatory alternative would better reflect listener preferences. We cannot think of any area, be it automotive, newspapers and periodicals, motion pictures, food, clothing, *etc.*, where there is an absolutely perfect reflection of consumer preferences in the market. Yet, this reality does not trigger the call for pervasive regulation. Nor is there any indication in the Congressional history of the Radio Act or the Communications Act, in court interpretation of either the Act or of Commission decisions, or in Commission decisions themselves, that radio has ever been viewed as that one area in which there would be a perfect correlation between consumer preferences and services offered. Rather, the history of radio regulation has been that it should be regulated to achieve the "public interest." That phrase has variously been defined as requiring, "the greatest good to the greatest number,"<sup>86</sup> the "fullest and most effective use," of the airwaves,<sup>87</sup> or "the best practicable service to the public."<sup>88</sup> None of these equate the public interest with a perfect correlation between service and listener preference. Rather they all recognize that the Commission's obligation is to assure the best practicable service, not perfect service, to the listeners. Our obligation to intervene is triggered only when there is strong *prima facie* evidence that the imperfection is so great as to constitute a breakdown of the market. In that case, the flawed market result should be compared to the regulatory alternative, which is itself inherently imperfect, to determine which alternative better serves the public interest.

107. In the instance presented herein, we believe that there are three problems that render it difficult to rely on "market failure" as the trigger for intervention into non-entertainment programming. While market failure in broadcast services may be difficult to identify, this does not mean that we cannot study alleged cases and fashion remedies or that similar difficulties also exist in non-broadcast type services. The first problem is administrative rather than substantive: because each market is unique, so is the failure of any one market unique. It would therefore require action on an *ad hoc* basis to properly determine when market failure had occurred. A market-wide six percent guideline on non-entertainment programming, for example, would simply represent the reimposition of a guideline—albeit now at a market level rather than at a station level. This would in no way address the issue of how well each particular market is meeting audience wants and needs.

108. More important, markets cannot be viewed at a single point in time and be judged to have failed. Rather, they must be viewed *over time* to see whether or how they have reacted to changes in supply and demand, *i.e.*, to see how producers respond to available information on what consumers want. For example, at a point in time a radio market might not be providing a particular type of programming that is of importance to a significant segment of the community, just as at a point in time there might be no American automobile maker providing high gas mileage automobiles. The test of the market is not instantaneous; the test is whether in a reasonable period of time there is some purveyor of services or goods to provide that programming or that automobile (assuming the demand for these is demonstrated). The problem with relying on such a test to determine when intervention should be triggered is that the appropriate period of time is not readily known and the information on consumer demands is difficult to collect. To require an instantaneous market response is to disregard how markets work and to totally abandon the marketplace approach; to wait too long is to deny the reality that markets can fail occasionally, and that the public interest is harmed on those

<sup>86</sup> Donovan, *The Origin and Development of Radio Law*, lecture given at the School of Law, New York University, April 8, 1930, p. 11.

<sup>87</sup> *National Broadcasting Company v. United States*, 319 U.S. 190 (1943).

<sup>88</sup> 1965 Policy Statement, *supra*, p. 394; cited in *F.C.C. v. National Citizens Committee for Broadcasting*, *supra*, p. 782.

occasions. As a result, the administrative difficulties associated with strict reliance on a market place analysis may be insuperable. There is an additional unanswered question regarding administration of such a market approach. That is, if the Commission determined market failure had occurred, what remedy could it fashion that would be equitable. For instance, if a station in the market was rendering superior service, how would it fit into any remedy that we might construct to rectify market failure? Such questions are troubling, and, while they may not be insolvable, we have grappled with them, but have not resolved them. Accordingly, we would not be comfortable relating the concept of market failure to the non-entertainment programming area at the present time.

109. Additionally, a number of commenters pointed out that the Act requires the Commission to make public interest findings with regard to individual stations—not markets. We believe that this argument has merit in this context. Section 307 of the Act, for instance, speaks in terms of the Commission granting “to any applicant” a station license if it would serve the public interest.<sup>89</sup> Section 312 of the Act speaks in terms associated with actions of individual licensees in the context of reasons for license revocation. Licensees traditionally have had individual responsibilities to operate their stations in the public interest and while we believe that stations can make programming determinations as to type, content and, to an extent, amount based upon what other services are available, each licensee has a bedrock obligation, historically rooted, to cover public issues. This obligation is not relieved by the presence of the large number of stations now available and, therefore, we will not attempt to apply the concept of market failure as set forth in the *Notice* to this subject area.

110. Finally, to have to review the performance of each market and to evaluate the levels of individual types of programs being provided and to assess the desires of the members of that market would present serious administrative burdens to the Commission. It would require the Commission to engage in extensive generation of data, would require the storage of that data, and would require complex analysis of the data. This would have had to be accomplished on a continuing basis for all markets had we opted to adopt a complete market approach. We believe that it is well within our discretion to decline to adopt a solution that would require this type of extensive scrutiny which could cripple the functioning of the Commission and its ability to carry out its regulatory responsibilities in other areas through the diversion of resources that would be required.

111. These arguments have convinced us that a strict market approach to nonentertainment programming is unworkable at the present time. Such an approach would be both administratively inconvenient and could be construed as contrary to the Act which mandates the licensing of individual stations. While we are not adopting such an approach, we will, as noted above, take into account market forces by permitting each licensee to assess the other stations in the market and the nature of their audiences and their programming in making its own determination as to what issues it will address in its own programming. However, each station will retain the obligation to present some programming relevant to issues facing the community, or, in the appropriate instance as described above, to its listenership.

#### The “Cross-Fertilization” Factor

112. A number of commenters argued that permitting stations to specialize in their programming would be undesirable and that it is necessary to require each station to present programming relevant to all significant segments of the community so that there can be communication between diverse groups. This was referred to by some as being a “cross fertilization” function. There are two facets to this argument warranting attention. The first is whether such a function is currently performed under existing regulations. The second is that, if so, whether or not this function would continue given the action taken herein.

<sup>89</sup> Also see Section 309 of the Act.

113. We have significant doubts that our current regulations achieve the claimed cross fertilization. Broadcaster discretion would now permit a licensee to address issues of more general relevance in lieu of narrowly focused issues. Additionally, there is the problem that even if addressed, those segments of the population to which the programming was not relevant would be likely to tune it out. If either of these were the case, the cross-fertilization would not occur. Thus, current regulations do not necessarily serve this asserted function with regard to truly group-specific programming.

114. There is little reason to believe, however, that under deregulation all programming reflecting issues of particular concern to, for instance, minority groups, would disappear from stations directing programming to, for instance, majority audiences. For instance, Black teenage unemployment may be thought of as being of principal interest to those affected—Black teenagers. However, the levels of such unemployment in a community could be so significant as to make it an issue of concern to all in the community. Because we are requiring programming addressing issues of concern to the community, programming addressing the problem of unemployment and Black teenage unemployment would likely be present on at least some stations with other than a Black teenage audience. Cross-fertilization can also occur when individuals that are not members of the “target audience” of a station, nevertheless, listen to the station and become aware of issues primarily relevant to the target audience. We do not assume that individuals only listen to one station. Indeed, the economic model and casual empiricism indicate that individuals will do what is necessary to satisfy their wants and, therefore, switching among channels to obtain desired programming can reasonably be anticipated. By listening to a variety of stations, individuals will naturally be exposed to programs that they are not the target audience for and, thus, cross-fertilization will result. Finally, we do not assume that individuals are uni-dimensional in their use of media. The subject cross-fertilization can also occur when individuals are exposed to varying issues and viewpoints through their use of a variety of media.

#### Attachment

##### Radio Stations Having Certain Formats or Specialty Programming\*

- I. Formats (stations presenting more than 20 hours per week of the indicated type of programming:
  - American Indian - 5 stations
  - Black\*\* - 239 stations
  - French - 3 stations
  - Italian - 1 station
  - Japanese - 5 stations
  - Polish - 1 station
  - Portuguese - 3 stations
  - Spanish (including Puerto Rico) - 124
  
- II. Special Radio Programming (special programming of 1-20 hours per week)
  - ack\*\* - 563 stations
  - American Indian - 53 stations
  - Black\*\* - 563 stations
  - French - 86 stations
  - German - 116 stations

\* Data from *Broadcasting/Cable Yearbook 1980*, pp. D-74 to D-107. Each station is counted separately although there may be some AM-FM combinations where the specialty programming is duplicated or simulcast.

\*\* Includes station formats characterized as rhythm and blues, and soul. It does not include jazz or gospel formatted stations.

Greek - 49 stations  
 Italian - 117 stations  
 Japanese - 15 stations  
 Polish - 181 stations  
 Portuguese - 37 stations  
 Spanish (including Puerto Rico) - 480 stations  
 Ukrainian - 13 stations

## Appendix F

### Ascertainment

#### A Brief History of Ascertainment

1. To place the Commission's determination regarding ascertainment into perspective, a brief review of ascertainment's history is relevant. Even before the 1960 *Programming Statement*, the Commission had alluded to the broadcaster's obligation to make a special effort to understand the needs of its community.<sup>1</sup> The *Programming Statement*, however, represented the first formal policy statement on the issue expressly requiring a "diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area . . ."<sup>2</sup> Subsequent to its issuance, the Commission proposed that broadcast applicants should explain their efforts to identify community needs and to plan responsive programming.<sup>3</sup>

2. In addition to proposing to amend broadcast application forms, the Commission began implementing its ascertainment policies on a case-by-case basis. In 1961, the Commission denied an application for a new FM station in Elizabeth, New Jersey, on the ground that the applicant had not adequately ascertained community problems and needs. The Commission 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; and the applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs [footnote omitted]. The instant programming proposals were drawn up on the basis of the principal's apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois, [footnote omitted] or, in the words of the examiner "could be served by FM broadcasters generally." . . . [T]he evidence admits of no other conclusion than that the applicant's program proposals were not "designed" to serve the needs of Elizabeth . . . [T]he applicant has made no showing as to Elizabeth's programming needs, and a determination of whether Suburban's program proposals "would be expected" to meet such needs is rendered impossible. In essence, we are asked to grant an application prepared by individuals totally without knowledge of the area they seek to serve. We feel that the public deserves something more in the way of preparation for the responsibilities sought by [the] applicant than was demonstrated on this record.<sup>4</sup>

3. The applicant raised statutory and constitutional objections to the decision on appeal. However, the United States Circuit Court of Appeals for the District of

<sup>1</sup> See, e.g., *Wayne M. Nelson*, 44 FCC 1132, (1957); *Mid-Island Radio, Inc.*, 15 FCC 617, 640 (1951); *Pilgrim Broadcasting Co.*, 14 FCC 1308, 1348 (1950); *Alexandria Broadcasting Co.*, 13 FCC 601, 614 (1949); and *P.B. Huff*, 11 FCC 1211, 1218 (1947).

<sup>2</sup> *Programming Statement*, *supra* at 2316.

<sup>3</sup> See, *AM and FM Program Form*, 1 FCC 2d 439 (1965); and *Television Program Form*, 5 FCC 2d 175 (1966).

<sup>4</sup> *Suburban Broadcasters*, 30 FCC 1021, 1022-1023 (1961).

Columbia rejected the objections, holding that the Supreme Court's decision in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), permitted the Commission to impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community.<sup>5</sup>

4. When the new application forms were adopted in 1965 and 1966, the Commission imposed a four-step ascertainment process.<sup>6</sup> These changes were soon reflected in the Commission's actions. Issues were added in hearings<sup>7</sup> and petitions to deny applications raised questions about compliance with the ascertainment requirements.<sup>8</sup> The Commission, perceiving a problem, issued a Public Notice<sup>9</sup> to publicize its requirements and to lessen a "costly workload burden on the Commission."<sup>10</sup> The Commission later made another change, ruling that although the applicant's subjective evaluation of the ascertained problems and needs must be made, it need not be submitted as part of the application.<sup>11</sup>

5. Considerable problems remained, however, over the precise nature of the Commission's requirements. In *City of Camden*,<sup>12</sup> the Commission denied an application for assignment of license on the ground that the proposed assignee's ascertainment of community leaders failed to reflect a cross-section of the community when compared against known demographic information.<sup>13</sup> The Commission subsequently initiated a *Notice of Inquiry* in which it proposed a detailed ascertainment primer as a means of eliminating the apparent confusion surrounding the ascertainment process.<sup>14</sup> A primer containing 36 questions and answers was adopted after consideration of the many comments filed in that proceeding.<sup>15</sup> The Commission set out procedures for determining the composition of the area to be served, consulting with community leaders and members of the general public, enumerating and evaluating community problems and needs, and relating proposed programming to the evaluated problems and needs.<sup>16</sup> Failure to conduct the ascertainment in accordance with the requirements of the *Primer* would subject the applicant to a possible denial of application.<sup>17</sup>

6. The *Primer* was, at the outset, the standard for all applicants. On the same day that the *Primer* was issued, however, another proceeding was initiated to determine whether different standards should apply to renewal applicants. Ultimately, a *Renewal Primer* incorporating the four basic requirements of the original *Primer* was adopted.<sup>18</sup> Procedurally, though, the *Renewal Primer* made some changes.<sup>19</sup> In addition, the

<sup>5</sup> *Henry v. I FCC*, 302 F. 2d 191, 193-194 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962).

<sup>6</sup> Applicants were expected to provide full information on the following matters: (1) the steps taken to become informed of problems and needs of the area to be served; (2) the suggestions received as to how the station could help meet those problems and needs; (3) the applicant's evaluation of the suggestions; and, (4) the programming proposed to meet evaluated problems and needs. *Television Program Form, supra*, 5 FCC 2d at 178.

<sup>7</sup> See, e.g., *Minshall Broadcasting Co.*, 11 FCC 2d 796 (1968).

<sup>8</sup> See, e.g., *Andy Valley Broadcasting System*, 12 FCC 2d 3, 6 (1968).

<sup>9</sup> 13 RR 2d 1903 (1968).

<sup>10</sup> *Id.*

<sup>11</sup> *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969).

<sup>12</sup> 18 FCC 2d 412 (1969).

<sup>13</sup> *Id.* at 422.

<sup>14</sup> 20 FCC 2d 880 (1969).

<sup>15</sup> *Ascertainment of Community Problems*, 27 FCC 2d 650 (1971).

<sup>16</sup> See generally, *Ascertainment of Community Problems, supra*, 27 FCC 2d at 671-674.

<sup>17</sup> See, e.g., *Bamford v. FCC*, 535 F. 2d 78 (D.C. Cir. 1976).

<sup>18</sup> *Ascertainment of Community Problems by Renewal Applicants*, 57 FCC 2d 418 (1975), *recon. granted in part*, 61 FCC 2d 1 (1976).

*Renewal Primer* experimentally created a partial "small-market" exemption for stations licensed to certain cities of 10,000 persons or fewer on the assumption that licensees of small communities know the problems and needs of their communities without undertaking a formal ascertainment.<sup>20</sup> Of course, the exemption does not relieve small-market licensees from the duty to respond to the problems and needs of their communities.

7. In general, although they have often provided very specific guidance for and oversight of broadcasters, the ascertainment *Primers* carried over three basic principles of broadcast regulation. First, the *Primers* made it clear that the broadcaster has broad discretion.<sup>21</sup> Second—and of major importance for our present purposes—the *Primers* acknowledged that a broadcaster could take into account its particular audience and the programming of other stations in making programming decisions. The Commission did state, however, that a problem should not be ignored merely because few in the broadcaster's audience shared that problem.<sup>22</sup> But, by the same token, the Commission also said the make-up of the audience and market were factors that could legitimately influence the broadcaster's programming judgment.<sup>23</sup> Third, the Commission has retained the authority and power to inquire about the basis for a licensee's programming choices; if the licensee's conduct is unreasonable or in bad faith, the Commission has made it clear that further actions—including denial of a license application—could result.<sup>24</sup>

8. Since the issuance of the *Notice of Inquiry and Notice of Proposed Rule Making*, herein, the Commission has rendered three noteworthy decisions with regard to its ascertainment requirements. In a *Report and Order*, FCC 80-134 (April 4, 1980), the Commission declined to add specifically either the gay community or the handicapped to the checklist of specific institutions and elements within a community which renewal and noncommercial educational television applicants are required to ascertain.<sup>25</sup> Moreover, it deferred action on the experiment small-market exemption, noted above, pending the resolution of the larger ascertainment issues being considered in this proceeding.<sup>26</sup> Additionally, we recently gave permission to broadcast stations to utilize Public Service Announcements in responding to problems discovered through ascertainment.<sup>27</sup>

<sup>19</sup> For example, the *Renewal Primer*: (1) calls for an on-going ascertainment process, rather than conducting it solely in the six months preceding the filing of the renewal application; (2) provides for a community leader checklist; (3) specifies the number of consultations to be made, based on the size of the community of license; (4) requires renewal applicants to maintain information on the composition of their communities in the public inspection file; (5) requires that licensees annually deposit in their public inspection files a list of no more than ten problems and needs existing in their service areas during the preceding year, and a list of programs treating those problems and needs; and, (6) requires documentation of the ascertainment procedures to be placed in the station's public inspection file.

<sup>20</sup> *Ascertainment of Community Problems by Renewal Applicants*, *supra*, 57 FCC 2d at 437; but compare, *Ascertainment of Community Problems by Noncommercial Applicants*, 58 FCC 2d 526 (1976).

<sup>21</sup> See, e.g., *The Primer*, *supra*, 27 FCC 2d at 686; and, *Renewal Primer*, *supra*, 57 FCC 2d at 445.

<sup>22</sup> 27 FCC 2d at 673.

<sup>23</sup> *Id.*; see also, *Renewal Primer*, *supra*, 57 FCC 2d at 445.

<sup>24</sup> See, *The Primer*, *supra*, 27 FCC 2d at 686; and *Renewal Primer*, *supra*, 57 FCC 2d at 433.

<sup>25</sup> However, it did rule that any group that came forward to a broadcaster and indicated it was a significant group in the community should be considered. The broadcaster had the discretion to make the determination of whether the groups were indeed significant, but groups could challenge that decision.

<sup>26</sup> *Order*, FCC 80-277 (May 9, 1980).

<sup>27</sup> *Order*, FCC 80-557, released October 27, 1980.

## The Comments

## Introduction

9. Considerable comment was received with regard to the ascertainment proposals contained in the *Notice*. Comments ranged all the way from support for the outright elimination of ascertainment to requests that it be retained in its present form. There was some consensus in the comments, and greatly in evidence during the panel discussions, that ascertainment may have grown into too complex a procedure where form has been elevated over substance. Accordingly, many commenters and panelists, representing widely disparate points of view, agreed that some modification may be warranted, and even desirable, although the boundaries of such a change were disputed. In the words of one of the panelists, ascertainment has become "a ritual dance,"<sup>28</sup> and should at least be simplified.

## Arguments in Favor of Elimination of Ascertainment

10. There was some disagreement among those supporting deregulation of ascertainment not only over what the result of elimination would be, but what it should be. While some commenters believe that community-wide ascertainment would continue as a result of marketplace forces, others believe that the elimination of ascertainment would permit stations to concentrate on the needs of their own audience and as a result to better serve it. In this way a wide variety of audiences in the community would be served through diverse, albeit specialized, radio stations. One view is premised on the idea that radio stations should present "well balanced" non-entertainment programming so that many significant segments of the community would have programming relative to their needs and problems on each station. The other concept is that stations should no longer need be required to present "well-balanced" (something for everyone) programming, given the number and diversity of stations. This situation, it is argued, would in many markets result in all significant segments of the community being served, but not necessarily by each station attempting to serve multiple segments. Rather, service would result from a number of comparatively specialized stations each serving their own audiences, but with all significant segments receiving service somewhere in the market.

## Market Forces as a Substitute for Ascertainment Requirement

11. Much of the support for elimination of ascertainment comes from broadcasters. The National Association of Broadcasters and the American Broadcasting Companies both strongly support the total elimination of ascertainment requirements arguing that marketplace forces can be relied upon to substitute for Commission regulation. CBS, while agreeing that ascertainment requirements should be eliminated, asserts that the goal of the ascertainment process—licensee knowledge of its community and responsiveness to it—should remain an element of service in the public interest.

12. Other commenters also contend that marketplace forces would provide an adequate substitute for ascertainment requirements. NTIA, for instance, shares CBS's view that ascertainment could be left to marketplace forces. NTIA believes that to establish informal requirements would be but the first step to a return of litigation and new rulings that would eventually formalize ascertainment along its current lines. Therefore, it suggests that the Commission merely announce that broadcasters must reasonably endeavor to serve the needs and interests of their communities and to indicate that ascertainment is an excellent vehicle to achieve that goal. Under its proposal, NTIA would have the Commission limit its review to the product—service to the community—not the process. If this approach failed, NTIA states, the Commission could still consider other procedures.

<sup>28</sup> See, Transcript, September 15, 1980 Panel Discussions In the Matter of Radio Deregulation, p. 19, testimony of Erwin Krasnow.

## The Cost Factor

13. A number of broadcasters based their objection to ascertainment requirements not upon a lack of necessity for them, but, rather, upon their costs as related to their benefits. The estimated costs for ascertainment ranged from \$167 per year to \$20,000 per year.<sup>29</sup> The Ohio Association of Broadcasters estimates that a licensee devotes a minimum of 200 person hours per year to leader interviews alone. Nationwide Communications estimated that WGAR in Cleveland, Ohio, devotes 2 hours per month from each department head for thirty months for community leader interviews at a salary cost of \$5,000. Billboard Broadcasting Corporation and Radio Stations WLAC-AM and WKQB-FM maintain that the minimum annual cost for leader interviews in the Nashville, Tennessee, market is \$8,272, and provide a detailed breakdown of the costs involved. Plough Broadcasting Company, Inc., indicates that its annual ascertainment costs in five markets was in excess of \$8,000. The median number of person hours per year for ascertainment reported was 100, with an average number of person hours devoted to ascertainment being 160.

14. Other commenters also addressed the issue of the costs of ascertainment. The Council on Wage and Price Stability noted that ascertainment was not an end in and of itself, but that its purpose was to make stations more responsive to community needs without interfering directly in specific programming decisions. It states that:

(i) it is not clear, however that the ascertainment procedures are effective in eliciting programming addressed to these special community needs. Since we know of no convincing evidence indicating that these procedures are effective, and since on the other hand they do impose large costs, we support the Commission's proposal to eliminate them.

## Value of Ascertainment Irrespective of Cost

15. Several commenters question the value of ascertainment without regard to whether or not it involves any costs. Walton Francis, for instance, submitted a study prepared for the Department of Health, Education and Welfare, evaluating their "needs assessment" requirements contained in various funding programs. This is said to be analogous to the Commission's community needs ascertainment requirement. The study, *Needs Assessment: A Critical Perspective*, concludes that needs ascertainment is not, and in fact cannot be a valid objective approach to determining consumer preference. One major problem, the report states, is the concept of the word "need" which is said to be "basically an empty term, one without conceptual boundaries." This being the case, it:

... becomes loaded with cultural, normative, philosophical and political overtones. Because it is both emotion-laden and value-loaded, "need" is subject to many shades of meaning, intent and interpretation. The emotive and mercurial attributes of the word "need" follow the term into activities called "needs assessment."

Therefore, whatever method is utilized to conduct needs assessments (the type of assessment utilized in the Commission's ascertainment requirement is equivalent to what is referred to in the study as the "key informant" type, and is only one of a number of types of possible needs assessment methods) the process cannot be counted on to provide the questioner with a valid picture of "needs." Commenter Francis therefore concludes that the choice between utilizing marketplace forces and ascertainment to obtain programming responsive to community needs is a choice not between two imperfect mechanisms, but instead between an imperfect and an invalid (or non-existent) mechanism.

<sup>29</sup> The low figure was for a 5 kW daytime only AM-FM combination in a town of 4,000. The high figure was a non-identified response to a radio market survey conducted in Chattanooga, Tennessee. The average cost reported of stations that provided dollar estimates for ascertainment costs was \$3,411 per year.

16. One community leader who has been subjected to ascertainment interviews also argued in favor of elimination of ascertainment from first hand experience. Congressman Ronald Mottl stated:

I endorse the Commission's proposal for elimination of ascertainment obligations for commercial radio broadcasters. Having been called upon a number of times as a public official to participate in the ascertainment process, I have concluded that it is a meaningless formality. Broadcasters I have spoken with regard it as perhaps the greatest 'nuisance' regulation of the Commission. Certainly ascertainment helps breed disrespect for Commission regulations generally to the detriment of genuinely worthwhile broadcast regulation activities of the Commission.

17. Others also argue that ascertainment is actually counterproductive. Joint comments filed on behalf of Southern Broadcasting and a number of other licensees contend that the current procedures are resented by community leaders, many of whom are contacted by a number of licensees. Thus, instead of promoting dialogue between broadcasters and community leaders, the requirement is said to impair such dialogue. While noting that its stations employed procedures to ascertain community needs and interests long before the Commission's adoption of specific requirements, Bonneville International, too, asserts that the current system is counter-productive. It claims that it is bound by the *Primers* to conduct ascertainment by fixed methods that do not afford flexibility to respond quickly to significant changes in the community. The Tribune Company echoes this view adding that different service areas require different approaches. Similarly, it is contended, stations that gear their service to minority groups should be able to focus their ascertainment on those groups rather than expend needless energies elsewhere.

18. Many individual licensees argued that ascertainment is not only counter-productive but is non-productive. Were it not enough that being ascertained by a number of licensees inconveniences and angers some community leaders, the procedure is also said to fail to provide significant information to the broadcaster on hitherto unknown community problems. It is argued that both by being in, and involved with, the community, and by virtue of the fact that broadcasters are involved in the business of communication, licensees invariably learn of significant community problems without resort to ascertainment. A number of broadcasters pointed out, and submitted evidence of, their participation on various community boards, commissions, and agencies, which is said to provide them with knowledge of community needs and problems. Ascertainment, it is argued, does little to improve upon the knowledge gained in other ways, while all the while imposing additional burdens.

#### Summary

19. Commenters expressing approval of the proposal to completely eliminate the ascertainment requirement believe that marketplace forces would assure continuation of it in some form but that current requirements are either too costly or ineffective (or, indeed, are counter-productive). However, many of these same commenters expressed a desire to have the Commission set forth some indication of what it considers to be an optional ascertainment procedure that would provide a "legitimate renewal expectancy." These requests and other alternate proposals are more fully explored below.

#### Arguments in Opposition to the Elimination of Ascertainment

##### Lack of Burden

20. A number of commenters oppose any diminution of current ascertainment requirements and procedures. The Organization for Unique Radio, for instance, contends that current procedures are not onerous. Indeed, one commenter, the Department of Communication, United States Catholic Conference, cites a survey reported by the Comptroller General of the United States to Congress that claimed that 61.2% of the

licensees polled found ascertainment procedures to be helpful in a range from "a very small extent to a very large extent." Entertainment Communications states that while some methodological improvements are warranted, it has not found current procedures unduly restrictive. It claims that instead, the requirements have produced significant valuable information for its stations.

Marketplace Forces are Unable to Acquaint Broadcasters with Community Problems

21. The Organization for Unique Radio contends that ascertainment was not only not a burden to broadcasters but that the procedures are necessary to assure "diversity on the air." Maureen C. Lynch, Donna M. Kaprel and Alfonso Caci agree, arguing that without ascertainment broadcasting will become one-sided, with broadcasters being unaware of, and unresponsive to, needs of many significant segments of the community. Catherine Jensen, Information Officer in the New England Region of the U.S. Department of Agriculture, who has been interviewed in the ascertainment process, indicates that at times the process may be meaningless but that often issues are discussed sincerely and with substantive results, especially with regard to "... the development of nutrition information public service announcements." It is feared that without the requirement, marketplace forces would fail to result in such ascertainment and the results that it is said to obtain. The Diocese of Cleveland conducted a review of various problems-programs lists of Cleveland licensees and contends that this review demonstrates that, "not only are there different needs on different lists, but priorities are dramatically different from one another." Accordingly, it asserts, this disparity demonstrates that broadcasters cannot be considered knowledgeable of their communities.

22. The Department of Communications, United States Catholic Conference echoes this belief. It contends that marketplace forces would result in programming that catered only to consumer wants whereas ascertainment has a different objective. Ascertainment, it states, attempts "to determine community needs and problems and to reflect a response to those needs and problems in non-entertainment programming that offers a service to the public in return for the use of a public resource." WNCN Listeners Guild agrees, maintaining that broadcasters must be bound by specific ascertainment requirements to assure that licensees will "go beneath the surface" to learn of the needs and problems of the communities they serve. In a nutshell, it argues that:

In ascertainment, as in other areas raised by the Commission in this proceeding, there is no sure correlation between the licensee's commercial or self-interest and the public interest; the structural, conduct related requirement which are presently in effect are necessary to remedy that inevitable gap and serve the public interest requirements of the Communications Act.

23. In support of its position, the Guild submits the results of a study conducted to determine the effectiveness of allowing licensees to assume responsibility for ascertainment procedures of their own design. The study was conducted in an area of New York State in which there are two ascertainment exempt communities and one non-exempt community in close proximity. The Guild conducted an ascertainment survey in the area and compared its results with: (1) the ascertainment results of the non-exempt station; and (2) the problems-programs lists of two exempt stations. What was found was that there was a much higher degree of correlation between the Guild's ascertainment survey and the station's ascertainment survey than there was between the Guild's survey and the two stations' problems-programs lists. This commenter contends that, "the exempt stations . . . , caught virtually none of the problems uncovered by the students (that conducted the survey for WNCN Listeners Guild) or by the control station's actual formal ascertainment." Therefore, it believes, it has demonstrated that the small market ascertainment exemption was a failure and that deregulation of radio is a folly.

24. Other commenters touched, albeit briefly, on the small market exemption. National Education Association, Office of Communications, contends that it has been its

experience that the absence of ascertainment requirements in small markets has hindered its ability to get its views aired. It contends that in small markets, especially on stations in Peoria and Decatur, Illinois, it has had difficulty in getting its Public Service Announcements on the air or in getting time in which to air its views. (Neither Peoria nor Decatur, Illinois, are ascertainment exempt communities.)

#### Summary

25. Those opposing any relaxation or elimination of the ascertainment requirement generally believe that the regulations are not burdensome or that, at any rate, marketplace forces would fail to assure broadcasters' acquaintance with, and responsiveness to, community problems. This is especially feared to be the case with regard to audiences with low purchasing power as it is believed that broadcasters have no incentive absent regulation to appeal to such groups. Accordingly, left to the marketplace, such groups, it is claimed, could not expect to be ascertained as to their needs and problems and would, therefore, not have relevant programming available. It is also contended that consumer wants are not the same as community needs so that in no case can the marketplace become an adequate substitute for regulation. Finally, an attempt is made to prove this hypothesis through an experiment that purports to show that broadcasters in communities subject to the small market exemption were far less aware of community problems than were broadcasters in nearby, non-exempt communities.

#### Alternative Proposals to Complete Elimination of Ascertainment

26. There was a broad consensus that ascertainment as it currently exists could, and should, be changed. While there was disagreement as to what shape such changes should take, many commenters felt that current requirements were too mechanistic, overly formalized, and could stand at least some simplification.

#### Optional Guidelines

27. Some commenters that were in favor of the abolition of the ascertainment requirement nevertheless asked that we retain the goal of ascertainment—knowledge of and responsiveness to the needs and problems of all significant segments of the community. As noted above, NTIA asked the Commission to emphasize this concern while eliminating ascertainment as a requirement. McKenna, Wilkinson and Kittner, filing on behalf of a number of radio station licensees, and the Ten-Eighty Corporation, both suggest that in abolishing the requirement the Commission set forth an optional guideline that would be available to radio stations and which, if followed, would provide a "legitimate renewal expectancy." The Mid-Atlantic Legal Foundation supports abolition of ascertainment but asks that the Commission list specific criteria for what it would consider to be market failure. The concern for certitude is also shared by NBC, which urges the Commission to retain the current checklist in the belief that major market licensees prefer the certainty and guidance that a checklist provides. Marin Broadcasting, and others, expressed concern over the effects that any change in our processes will have on the processing of renewal applications. It suggested that we amend our pre-filing announcements covered by Section 73.1201 of the Commission's rules to include the licensee's list of up to ten community problems and to invite the public to comment upon these perceived problems. It should be noted that not all broadcasters share these beliefs. Some, such as WBRE Radio, are concerned that anything short of complete abolition of ascertainment requirements, such as suggested above, would discourage licensees from developing flexible and innovative ascertainment methods. It is believed that, absent complete abolition, licensees would be concerned over the potential for uncertainty and delay at renewal time and would therefore continue to conduct ascertainment as currently required (or as set forth in any optional system) as a safe harbor.

## Retention of a Simplified Ascertainment Requirement

28. Numerous comments supported either option 2 or 3 as set forth in the *Notice*. Although these options were similar, a brief description is warranted. Option 2, as set forth in the *Notice*, was to require that licensees conduct ascertainment but to permit them to decide in good faith how best to conduct that ascertainment. Under this option there would be no formalized Commission requirements on its conduct. Option 3 was to retain the ascertainment requirement and to have some formal requirements as to its conduct but in a simplified form as compared with current requirements. These options received widespread support, although the distinction often was blurred.

29. Licensees supporting options 2 or 3 did so in efforts to "come to grips" with uncertainty over what would be necessary for renewal of license. Thus, some licensees, such as WISM, Inc., desired adequate documentation, fearing challenge. Similarly, Susquehanna Broadcasting supports option 2; however, it would have the Commission require licensees to submit at renewal time a list of community problems and a brief statement describing how these problems were ascertained. The National Association of Black Owned Broadcasters would require an annual report to the Commission; the National Radio Broadcasters Association would also have the Commission require an annual problems-programs report. It would limit the scope of the Commission's review of these lists to, "determine if ten 'issue-oriented' problems have been listed and programming described relating to each of those problems." The list could be challenged on the basis that a listed problem was not "issue oriented," but no further inquiry would be permitted into the adequacy of the licensee's non-entertainment programming. NRBA believes that this would afford the Commission with a basis upon which to make its "public interest" determination.

30. The law firm of Dow, Lohnes and Albertson filed comments on behalf of a number of broadcast licensees. It suggests that we "retain only the general requirement that a radio licensee be able to demonstrate, by methods of its own choosing, familiarity with the needs and interests of its service area, without any precise guidelines being spelled out or enforced." Fisher Broadcasting, however, would have the Commission provide a general guide to broadcasters as to the substantive requirements of ascertainment, but leave the details of how to conduct their ascertainment program to the broadcasters. In a somewhat different vein, Entertainment Communications states that it has not found current ascertainment procedures unduly restrictive and has obtained significant valuable information as a result of ascertainment. However, it contends that the current methodology may not be best for all licensees and, therefore, supports the view that ascertainment be required but with the methodology to be determined by the licensee based upon its individual circumstances. Licensees utilizing the current "costly" ascertainment methods would, under this commenter's proposal, receive a comparative edge for doing so should they be placed in a comparative setting at renewal.

31. Numerous nonbroadcast commenters also supported the idea of at least a lessening of the formalistic requirements of ascertainment. For instance, in its comments (which were filed in the belief that this entire proceeding is ill-conceived but that it did not wish to forego the opportunity to comment should the proceeding go forward), the United Church of Christ states that ascertainment has failed. It attributes this failure to a lack of broadcaster sincerity in carrying out their obligations in good faith. Nevertheless, it states that,

We have reached the conclusion that it would be better to start over. However, we believe it should be made clear that broadcasters have not been relieved of their statutory obligation to serve community needs and that it is impossible to serve them without knowing what they are. Accordingly, we recommend that the Commission abandon the 1976 *Ascertainment Primer*. There may well be value, however, in retaining the 1971 *Primer* for applications for construction permits, major changes in facilities and assignments of license.

The Commission should indicate that, in the event of a petition to deny or competitive application, a licensee will be required to show that it is familiar with the composition of the community of license and that its programming has been and will be responsive to its problems and needs. In particular, a licensee should be prepared to document with particularity how it identified the problems and needs of the elements of the community whose needs are usually most acute, such as persons of low income, ethnic and racial minorities, the elderly, children and youth, etc. This disclosure should be made before the Commission rules on any petition alleging a lack of programming responsive to community needs.

32. These views were expanded upon by UCC in its reply comments wherein it advances the belief that the Commission cannot totally eliminate ascertainment so long as the public interest standard remains. However, it continues, documentation can be simplified and limited to three items: (1) a brief analysis of significant demographic changes and changes in community organizations and their leadership since the previous report; (2) a list of community problems identified by the licensee as of the date of its report; and (3) a list of programs broadcast during the prior year in response to the problems identified. This documentation would be retained in each station's public file.

33. Similarly, Classical Radio for Connecticut agrees that licensees should be permitted to develop their own methods for ascertainment as existing procedures serve to divert licensees from the underlying purpose of ascertainment and instead focuses their attention on mere mechanical compliance with Commission regulations.

34. A number of other commenters likewise support some simplification. Many of them, such as the New York Chapter of NOW, the Media Reform Committee of California NOW, Inc. of the National Organization for Women, the National Black Media Coalition, and the American Federation of State, County and Municipal Employees, believe that the dialogue between broadcasters and community leaders that has been established through ascertainment must not be lost.

#### Non-Listed Alternatives to Current Ascertainment Requirements

35. Some commenters suggested options that, strictly speaking, are not contained within those set forth by the Commission. Generally, these options favor a retention of ascertainment but with specific changes in the formalistic aspects of it.

36. For instance, the Religious Media Ministry recommends that we retain current ascertainment requirements but permit stations to submit an alternate ascertainment plan at renewal time. If approved by the Commission, the licensee would be free to utilize its own methodology. The United States Office of Consumer Affairs, supported in reply comments by the Committee for Community Access, proposes that the, "Commission give stations a choice of ascertainment methods (community surveys, interviews of community leaders, public hearings, solicitations of written comments, and so on) and encourage, to the extent permissible by law, experimentation with joint ascertainment to cut costs." Douglas Fraser, President of the United Auto Workers, supports the holding of public forums with community leaders to replace current requirements.

37. The National Black Media Coalition is concerned that elimination of ascertainment requirements would sorely hurt minorities, "even in (and often particularly in) northern small towns, (where) segregation is the rule not the exception." Moreover, it contends that a move to more specialized stations provides a better reason for, "more cross-fertilization of ideas among various groups, not less." Therefore, NBMC would support the following simplification of ascertainment procedures:

1. Radio broadcasters should be required to show a substantial number of ongoing consultations with community leaders in categories which, by their nature, are unlikely to be those with which most broadcasters communicate frequently. These are: \* (footnote omitted)
  - (a) Charities

- (b) Civic, neighborhood and fraternal groups
  - (c) Consumer service groups
  - (d) Labor
  - (e) Minority and ethnic groups
  - (f) Organizations of and for the elderly
  - (g) Organizations of and for women
  - (h) Organizations of and for youth (including children) and students
  - (i) Minorities and women
2. Radio broadcasters should be required to show that they have some systematic method of contacting local residents about community needs themselves, not through a survey company. Accessibility, and not raw numbers, should be the watchword. Thus, it should be insufficient to say "our door is always open." It should be sufficient to publicize group ascertainment sessions and open them to the public or to hold on-air "meet your station manager" forums with the public invited to call in, or to have managers and employees do a survey and report the findings directly to top management.
3. Broadcasters should not be restricted from asking about program content in ascertainment interviews. In fact, they should be encouraged to do so.
38. The United States Catholic Conference, while supporting the continuation of ascertainment, also supported some degree of modification and proposes to simplify it. It states that:

There also seems to us no necessary reason why in some situations ascertainment of needs and problems cannot be tied in some way to the target audience the format station seeks to attract, as long as the non-entertainment programming reflects those needs and problems in a significant service to the listeners and is not so exclusive of a sense of other community needs and problems that listeners cannot relate them to those wider problems and needs.

In other words, USCC proposes to permit stations to ascertain and program to the primary group(s) to which its entertainment format is directed. However, it would not permit only ascertainment and service to such group(s). Needs of other elements of the community would also have to be dealt with to some extent.

39. WNCN Listeners Guild, too, proposes some simplification of ascertainment. As with many commenters of various types, the Guild believes that the general public portion of the ascertainment survey could be substantially modified or even eliminated in the case of renewal applicants. Walton Francis contends that much of the same information that is obtained through ascertainment could be garnered at much less cost by requiring that station managers read a local newspaper at least once a week.

#### Summary

40. There was a wide consensus among commenters that ascertainment need not be retained in all of its current aspects. Rather, many commenters felt that while it should not be eliminated, it should either have simpler requirements for its conduct or that the methodology to be used should be left to the licensee. A number of specific proposals were made ranging from the Commission merely establishing optional guidelines for the conduct of ascertainment to its requiring a more complete ascertainment, but only of groups that usually cannot be expected to be counted among those that the broadcaster has significant contact with on a regular basis.

#### Discussion of the Major Issues Raised

41. We turn now to a discussion of the major arguments made in opposition to the elimination or modification of the ascertainment requirements. These chiefly fall into two categories: (1) that formal ascertainment requirements are essential if the broadcaster is to ferret out information concerning community needs, problems and

interests; and (2) that absent formal ascertainment requirements, broadcasters might ascertain the views of some groups but even if they did so they would ignore the needs, problems and interests of groups that were not economically attractive to advertisers. We first address studies submitted relative to these issues.

#### Ascertainment Studies

42. Several studies were submitted that relate to our proposal to remove the ascertainment requirement. Numerous commenters representing varied interests agree that the current approach to ascertainment is not effective because it emphasizes form over substance. The repetitive nature of the interviews, from the perspective both of the ascertainees and the licensees was said to lead to reluctance to participate.<sup>30</sup> Furthermore, the licensees sometimes find it difficult to obtain access to many leaders and had to settle for discussions with their subordinates. Finally, the responses of the ascertainees are often both general and perfunctory. Alternative methods of ascertainment are contained in the comments. For example, licensees in the Houston market have used a group process whereby all licensees get together and have a "press conference" with each official or community leader. This approach has the advantages of reducing the cost of ascertainment and conserving of the time of the community leaders. Mark Johnson studied the results of a survey of both broadcasters and ascertainees in Houston to determine their views of the group ascertainment process.<sup>31</sup> He found that the vast majority preferred it to the old approach but felt this might be accounted for by the savings of time allowed by the group process. He found that it did, however, create some distance between the community leaders and the licensees in that the "personal" interview no longer existed.<sup>32</sup> It was clear that both groups—ascertainees and broadcasters—felt that the other group was interested in being at the session and that the ascertainees were having an impact on programming.<sup>33</sup>

43. While many commenters argue that the ascertainment process as practiced currently is not effective, some propose changes rather than elimination of the requirement. The basis of their belief, that ascertainment of some kind is necessary, is that the licensee is not, and would not become, familiar with community problems absent some kind of ascertainment. This is especially true, these commenters claim, where the licensee is not a local resident. Other commenters argue that the licensee, or more relevantly the station manager, has a strong incentive to be aware of the community's wants and problems even without an ascertainment requirement. The motivation comes first from competitive pressure in the market and second from other statutory requirements (including the Fairness Doctrine).

44. The WNCN Listeners Guild submitted a major study purporting to demonstrate that broadcasters are not always sufficiently aware of, or responsive to community issues when not required to conduct the Commission's formal, ongoing, ascertainment studies. The Guild researchers studied three communities in central New York state.<sup>34</sup> Two of these communities are exempt under the Commission's small market exemption;

<sup>30</sup> The *Ascertainment Primer* requires that well over 220 local leaders be interviewed in markets the size of Houston over the course of the 3 years license cycle. Many of these leaders may be contacted by a number of licensees.

<sup>31</sup> Comment of Mark Johnson, in "Joint Community Ascertainment in Large Media Markets," mimeo.

<sup>32</sup> This loss of one-to-one contact, according to Mark Johnson, led some public interest groups to oppose the group process. *Id.*, at 2-3.

<sup>33</sup> We can only speculate as to whether this process would continue absent the ascertainment requirement. It is likely, however, that to the extent that both sides find the contacts useful, some form of interchange would continue.

<sup>34</sup> Although the main comment refers to five exempt stations in the study, only three exempt stations are considered in the attached research report. See, Comments of WNCN Listeners Guild, p. 28.

one of these communities has two stations, and the other community one station. The third community is not exempt from formal ascertainment, and has one station. It was used for validation of the study, *i.e.*, as a "control group."<sup>35</sup> The four stations have considerable signal overlap, and were assumed by the researchers to have comparable audiences and comparable community needs and problems. The researchers did a community leader ascertainment study for the two exempt communities much like those required under our ascertainment primers. The researchers did not do the general survey required under the *Primers*. From this limited formal ascertainment, the students developed a "problems/issues" list for each of the exempt communities. These lists were compared to those in the stations' public files in both the exempt and non-exempt communities. Based on these comparisons, the Guild argues that stations in exempt communities are not adequately discovering the "needs" of the communities they serve. Therefore, WNCN concludes that the Commission's formal ascertainment rules should apply to all stations and should not be relaxed in this rule making.<sup>36</sup>

45. While the study provides a novel approach to measuring the effects of the ascertainment exemption experiment, it appears to have serious flaws that lead us to question the validity of the data and the conclusions. The study focused on the data gathering and record keeping aspect of ascertainment, specifically the correlation of the stations' community needs lists with the lists derived from the Guild study.<sup>37</sup> Putting aside for a moment the question of how closely the lists might be expected to correlate, we have several problems with the methodology used by the student researchers. First, the students rely solely on a community leader survey of the two exempt communities and do not utilize the more easily replicatable general public survey required by our *Primers* for formal ascertainment. Second, the so called "control" community cannot measure the reliability of the study as asserted. As the students noted, the "control" community varies from the exempt communities in significant ways.<sup>38</sup> In addition, no independent ascertainment study was done by the researchers to validate or invalidate the ascertainment efforts of the "control" group. At most, it serves as an interesting point of comparison. More important than these methodological errors however, are the problems created by the assumptions supporting the correlation studies. These assumptions do not give sufficient emphasis to the subjective judgments inherent in the ascertainment, problem identification, and responsive programming processes. Instead, these give crucial significance to the *naming* of community problems and how closely those names correlate with the names given the problems by the researchers. But, the most important flaw of the study is that it does not consider the actual programming listed by licensees. Quite simply, the object of the ascertainment requirement is not the generation of a list of community problems that can be reliably replicated. The object of ascertainment is responsive programming. From that perspective, information from the research report undermines the Guild's assertion that the stations are failing to meet their program responsibilities. These data in fact indicate, at least, that the stations may be doing a reasonable job of responding to the community problems in both their lists and the lists of the student researchers.

46. The first town examined was Monticello, New York, which has two radio stations (WVOS and WSUL) both of which are exempt from the formal ascertainment procedures. Seven problems were isolated by the students and ranked according to the percentage of those surveyed that indicated the particular "problems/needs."<sup>39</sup> Unfortu-

<sup>35</sup> While the students also included the non-exempt station's proposed problem oriented program plan, it was not utilized by them in their study.

<sup>36</sup> *Id.*, at 30.

<sup>37</sup> *Id.*, Exhibit C at 4-5. The study was performed by two students of Kristen Booth Glen—Michael A. Mermer and Helene E. Brenner.

<sup>38</sup> Comment of WNCN Listeners Guild, Attached Ascertainment Study, p. 7.

<sup>39</sup> In order these were: Transients, Unemployment, Lack of Business Activity, Recreation for Youth, Crime, Transportation, and Education. *Id.*, at 27-28.

nately, the students did not explain their methodology for rank ordering the problems. For example, it was not explained what weight was given to a problem mentioned in passing versus problem discussed at length by a leader. Once the students had deciphered the stations "records" they found WVOS had listed 8 problems, though none matched the seven identified in the survey. But the reason for a lack of correlation of listed problems apparently stems from the nature of the WVOS problems list.<sup>40</sup> Quite simply, WVOS did not provide a list of problems/needs, *per se*. Instead it provided eight examples of the kinds of issues covered in its programming. Examples of the content of particular programs are: *WVOS Forum of the Air*, (aired twice weekly for 15-20 minutes each) dealing with, for example (but not limited to), Health and Education; Editorials on problems facing local industry (the example given is personal injury suits against ski area operators); *Remote Broadcast* featuring, in one instance, a local science symposium; *Project Second Chance*, (aired each Sunday evening) dealing with issues of interest to women; consumer information programs aired weekly; *On The Spot*, which involved interviews with candidates for public office; *Let The People Know*, (aired Saturday mornings) dealing with Social Security related matters; and *Open Mike*, (4 days a week for about 53 minutes each) a phone-in format that sometimes focused on particular issues of local interest while at other times allowed participants to discuss any issue of concern to them. Examining this list of programming it is impossible to know the extent to which each of the topics on the students' list is or is not covered; yet it is clear that at least education oriented issues were aired.

47. An analysis of the other Monticello station (WSUL) yields a similar result. The students found four problems listed by WSUL also on their list. Examining WSUL's programming, we can identify one program category that could cover at least two additional problems on the Guild list. For example, under the general heading "Government/Civilian Relations," WSUL might have devoted time to the problems of both youth recreation and transportation. Further, "Health," which is not listed by the students but is listed by WSUL, can generally be considered important to any community. A similar presumption can be made for WSUL's listing, "The Arts."<sup>41</sup> In addition, the two local stations in Monticello each offer substantial amounts of nonentertainment programming based on the number of listed minutes per week. Further, to the extent that particular times of day are given, the programs are not relegated to the "graveyard" hours.

48. The second community surveyed was Ellenville, with one radio station (WELV). The students in their survey of leaders found ten problems of significance, only two of which were explicitly listed among the station's six problems.<sup>42</sup> Like that of the Monticello stations, the Ellenville station's programming appears to have a high correlation to the Guild's problems list. WELV listed three times weekly Job Bank programs and twice daily (total of 55 minutes per day) talk programs that included local officials as guests. The latter programming allowed direct access by telephone to each of those guests. Again, while the station list included such general topics as: "Improvement

<sup>40</sup> *Id.*, at a-3 to a-7.

<sup>41</sup> In a later submission, the Guild reported that WSUL had utilized the same list for several years. The list is generic and does not refer to specific episodes of programs. This and the difficulty the Guild had in deciphering WVOS's records points out a record-keeping problem that our resolution of the ascertainment question should eliminate.

<sup>42</sup> The students listed: Alienation of the Spanish, Unemployment, Housing, Transportation, Recreation, Revitalization of the Town, Education, Senior Citizens, Drug Abuse, and Transients. These are not listed in order by the percentage of those surveyed that named the problems as important. Ranked by that criterion "Transients" would be first and "Alienation of the Spanish" would be tenth. *Id.*, at 28-30.

of School Image in Public Eye," "Non-Cooperation between Public, Town and Village Officials," and "Lack of Public Confidence for State and Federal Government."<sup>43</sup> As with the Monticello stations, WELV did not broadcast public affairs programs in the "graveyard" hours.

49. The "control" station, WALL, Middletown, N.Y., did conduct ascertainment studies in accordance with the *Primer*. WALL listed 47 problems derived from their ascertainment, only seven of which matched the problems derived from the Guild ascertainment.<sup>44</sup> Further, the single problem that received the greatest amount of comment in the students' surveys (transients) was not mentioned by WALL—nor by the three exempt stations.<sup>45</sup> Finally, examination of the WALL programming plan does not reveal a pattern of programming significantly different from those of WELV, WVOS or WSUL.<sup>46</sup>

50. The students further conclude that WELV is "substantially deficient in revealing community problems." This conclusion is based strictly upon the lack of correlation between the two problems lists but ignores both the substantial time devoted to public affairs programming and the substantial positive response of leaders in the Ellenville Community.<sup>47</sup> In addition, the students comment favorably on WALL's ability to identify the problem of a lack of bi-lingual programming for Spanish speaking people, but ignore the fact that WALL lists no programming designed to explicitly respond to this problem. Meanwhile, the researchers ignore the fact that WELV, provides both a Spanish language religious service and an additional Spanish language program of some unspecified kind, both on Sunday.<sup>48</sup>

51. Examination of the raw interview data leads to additional conclusions. First, many of those surveyed said that the radio stations attempted to be responsive even when issues of interest to that particular interviewee were not being covered. Some negative comments were received, however, regarding the perceived responsiveness of WVOS.<sup>49</sup> Second, several interviewees commented that when they took their problems to the radio station, the station attempted to accommodate them. A few encountered a negative reaction. Finally, the students brought out a point in their concluding remarks that was most revealing. They mentioned the perceived lack of responsiveness of WVOS and report that WVOS became more responsive following the entry of WSUL. WSUL was consistently accorded very favorable comment regarding its efforts in the community. It appears that the students correctly attributed this result to the competition generated by WSUL's entry.<sup>50</sup>

<sup>43</sup> *Id.*, at a-1 and 2-2.

<sup>44</sup> *Id.*, at a-16 and a-17.

<sup>45</sup> We must point out that the students did not survey Middletown leaders, therefore we do not know whether community leaders consider transients a problem in that community. However, by not undertaking this survey, it was impossible to compare the actual responsiveness of the Middletown station—in terms of leaders subjective opinions—to the responsiveness of the Monticello and Ellenville stations.

<sup>46</sup> *Id.*, at a-18 to a-22.

<sup>47</sup> *Id.*, at 34-35.

<sup>48</sup> Comments of interviewee Manuel Polanco. *Id.* at 17. Mrs. Polanco comments that additional Spanish language programming would be desirable. She is the only interviewee in the law students' survey in either Monticello or Ellenville that commented on the problems of the Spanish speaking community.

<sup>49</sup> See, for example, the comments of Buddy Goldsmith, Director of Recreation. *Id.*, at 23.

<sup>50</sup> The students go on to suggest that this may only be the result of WSUL's recent entry and infer that things may change. It is not clear why they believe this to be true but it certainly is not ordained. Even where only one station exists—in Ellenville—the radio station was considered very responsive; therefore, WVOS might be the exception rather than the rule. *Id.*, at 34.

52. This analysis of the WNCN study points out clearly the difficulty of designing and assessing an experiment of the kind envisioned by the small market exemption rule making. The ascertainment process is concerned with inherently subjective data. Although some parts of the process are highly structured, at other points the Commission places great reliance on the subjective judgments of licensees. Although this subjective element is necessary and appropriate in the ascertainment process, it makes correlation studies such as those submitted by WNCN Listeners Guild of questionable validity, and possibly very misleading. It is virtually impossible to reach a consensus regarding the value to place on any given observation. Reasonable people can disagree, not only as to the appropriate weight, but with regard to the appropriate criteria to use in establishing the success or failure of the experiment itself.

53. Finally, there is no demonstration that the listeners were generally dissatisfied with the subjects of the issue oriented programming offered by the exempt stations or that the choice of programming actually offered would have been different had ascertainment been required.<sup>51</sup> In other words, had ascertainment been required, and resulted in the same findings as did the Guild's survey, it appears to us that the exempt stations' programming, as offered without their having had to engage in the ascertainment process, was sufficiently related to the students' "ascertained" issues to have passed muster before the Commission under the current regulations. There is no showing that the exempt stations were less responsive to community issues than they would have been had ascertainment been required. Therefore, there is no showing of a significant public interest gain associated with the Commission's ongoing formal ascertainment requirement.

54. Another study regarding ascertainment was submitted by the Diocese of Cleveland. That study is described above in the review of the comments filed with regard to ascertainment. The principal conclusion of the study is that different stations, each of which is in the same market, developed nonidentical lists of needs and were responsive to different needs. This is said to demonstrate that stations cannot be considered knowledgeable about their communities. Assuming that there are no methodological problems with the study, we believe it sufficient to say that we would hope to see diversity reflected in programming with or without ascertainment. Indeed, the possibility that all stations in a community would program to meet the identical issues as a result of ascertainment would be a strong reason to jettison the requirement.<sup>52</sup> We believe that diverse programming is desirable and that the changes we are making in this proceeding are well suited to promote such diversity. Additionally, if, assuming *arguendo*, the Diocese's premise is correct and that ascertainment should result in the identification of the same problems by stations in the same community, but does not, one must question the validity of its conclusion that ascertainment should not be eliminated.

#### Ascertainment and Economically or Numerically Insignificant Segments of Society

55. We turn now to other major arguments raised in opposition to the elimination of ascertainment. One such argument was that absent ascertainment, stations would not seek out information relative to, or provide programs responsive to, issues important to either the community at large or, especially, to numerically or economically "insignifi-

<sup>51</sup> We agree with the Guild that the other Monticello station, WVOS, utilized a listing of problems and programs that made it difficult to analyze which issues were addressed. Yet several ascertainees expressed the opinion that WVOS was doing a good to excellent job with only two ascertainees, Harriet Feinman and Buddy Goldsmith, expressing serious displeasure with WVOS's performance.

<sup>52</sup> Even in the 1971 *Ascertainment Primer*, while noting that diverse stations might program to meet the same need but in different ways, we stated that stations still had substantial discretion as to which ascertained issues it should respond to. See, *Ascertainment Primer, supra*, pp. 672-673, and Question and Answer 25.

cant" elements of the community. As we discussed above, there are reasons why we believe that this will be an unlikely result.<sup>53</sup>

56. As noted, we are requiring licensees to determine what issues confront their community and to offer programming responsive to some of those issues. This obligation exists independently of broadcasters' statutory Fairness Doctrine obligations. Accordingly, some "ascertainment" will undoubtedly continue so that licensees can make intelligent choices with regard to what issues are present and warrant coverage. Thus, an extended discussion of whether marketplace forces are sufficient to dictate that result is unnecessary. What methodology a broadcaster utilizes to become informed of the issues facing his community is up to the individual licensee. However, a significant question has been raised, and warrants our attention, as to whether or not broadcasters in seeking out the advice of their communities will seek out the views of, and respond to the issues faced by, numerically or economically insignificant segments of their communities.

57. The argument has been made in the comments that while stations

57. The argument has been made in the comments that while stations might survey at least portions of their community absent an ascertainment requirement, they would not survey certain portions of the community. Generally this allegation contended that broadcasters would have no economic incentive to ascertain the needs of, and therefore to program to meet the needs of, groups that were not attractive to advertisers primarily because of their low numbers or low income. For the reasons explained in the section of this *Report and Order* concerning the non-entertainment programming guideline, and in Appendix D at paragraphs 32-36, we do not believe that this is a likely result of the action taken herein.<sup>54</sup>

58. To reiterate, structural measures have been, and are continuing to be developed to assure that groups hitherto absent from representation in the broadcasting community, both as licensees and employees, are represented. The *raison d'être* of these policies is to result in programming relevant to these groups. Minority groups especially are receiving the benefits of these Commission programs. As minorities are perhaps the principal groups mentioned as being among the groups that would lose relevant programming should ascertainment be eliminated, we think it important to point out that our structural policies have, in part, focused on attempting to assure the presence of relevant programming for minority groups. Additionally, as discussed in greater detail above, minority groups represent a large and ever increasing economic force which makes it likely that there would be advertiser support for programming directed to issues specifically related to minority groups as they move into the economic mainstream of society. This should assure programming responsive to the needs of minorities absent ascertainment.

59. Finally in this regard we would point out that although it is obvious that there is a fragmentation in the forming of radio stations, and in the audience, it is simplistic, if not outright condescending, to assume that any group in our richly pluralistic society is interested only in programming concerning its specialized issues. As we have previously found in confronting renewal challenges based upon claims that the licensee has offered insufficient programming specifically directed to particular groups:

The fundamental misconception reflected in this criticism is that somehow minorities are not interested in the problems and interests of the community, and that their needs are served only by programs devised specifically for those groups.

<sup>53</sup> See paragraphs 32-36, Appendix-D, *supra*.

<sup>54</sup> Needless to say, however, we would view intentional discrimination against low income or minority groups with the utmost gravity.

We have rejected this theory on a number of occasions. *The Evening Star Broadcasting Co.*, 27 F.C.C. 2d 316, 322, *aff'd sub nom., Stone v. F.C.C., supra*.<sup>55</sup> Indeed, we have concluded that many types of programming cannot be broken down into minority or majority orientation and have stated that, "Such a policy would constitute a doctrine of segregation."<sup>56</sup> Radio should contribute to the creation and maintenance of an informed populace. Stations must be responsive to community issues to this end. Their primary obligation is not to provide programming for any specific group or individual but to inform the community.

#### The Small Market Exemption

60. One final note regarding ascertainment is worthy of mention. By Commission *Order* released May 9, 1980, (FCC 80-277), we directed that the small market ascertainment exemption (SME) experiment be considered in the context of this proceeding. Those comments were considered in our reaching a resolution of the larger ascertainment question. Principally, they consisted of a comment filed by the WNCN Listeners Guild and a statement filed by Andrew Jay Schwartzman, Executive Director of Media Access Project.

61. WNCN updated its study discussed above. That update is said to bolster the purported findings of the earlier study that ascertainment exempt stations were significantly less responsive to community issues than were non-exempt stations or than they would have been had they conducted ascertainment. However, we believe that in addition to the flaws in the principal study, discussed above, the Guild has failed to adequately consider two items that surfaced as a result of the update of the study. First, as became apparent in the update, one of the exempt stations did, indeed, present a program dealing with transients prior to the Guild's filing of the study. WVOB listed a program on a proposed fingerprint law for transient workers as being among specific programs presented during the year ending January 31, 1980. Second, two complaints had been filed against an ascertainment exempt station, the other against a non-exempt station. Neither complaint argued that the station had not been responsive to community needs. With regard to the subject of complaints, the Guild contends that, "The fact that petitions to deny or informal complaints were or were not lodged, tells us nothing about whether exempt licensees adequately ascertained their community," (WNCN SME Comment, p. 10). We continue to believe that such complaints certainly tell us whether or not the listenership felt that community needs were being sufficiently addressed and therefore disagree with the Guild's conclusion in this regard. One final note; the Guild points out that one of the exempt stations utilized the same problems/programs list for a number of years. Both the "problems" and the "programs" listed were generic and not specific. At any rate the action being taken herein should result in a more specific record.

62. In adopting the *Order* in the small market exemption proceeding, we noted that a survey of citizens in exempt communities would have been expensive to undertake and would not have provided us with unambiguous evidence on the success or failure of the experiment. We stated that the complaint and petition to deny processes, as well as our evaluation of renewal applications, permitted us to gauge the results of the experiment. Over a three year period, we noted, the rate of petitions to deny renewal of license was lower in exempt communities than it was in non-exempt communities (for radio less than one half of one percent of the exempt radio stations were the subject of such petitions versus 2.3 percent of all radio stations) and that, in fact, only two of the petitions filed against renewal in exempt stations included ascertainment issues. Neither of those petitions had resulted in an adverse finding against the licensee as of the time of the *Order*. In view of the flaws in the WNCN study, discussed above, and our finding concerning complaints against exempt stations, we do not believe that such serious

<sup>55</sup> *Miami Valley Broadcasting Company, supra*, p. 185.

<sup>56</sup> *Columbia Broadcasting System, Inc.*, 46 F.C.C. 2d 903, 910 (1974).

questions have been raised with regard to the experiment that would prevent us from taking the action described above regarding ascertainment.

## Appendix G

### The Commercial Guidelines

#### A Brief History of Commercial Regulation

1. The Commission's concern with commercial practices has been marked by two basic features: a desire to prevent the use of scarce broadcast time primarily to promote private advertiser interests and a reluctance to adopt quantitative standards.<sup>1</sup> Hence, while the Commission has always closely scrutinized a licensee's commercial practices, the Commission has not specified any outer limit beyond which no licensee can ever transcend.

2. Concern about the commercial practices of broadcast stations goes back more than 50 years. In *Great Lakes Broadcasting Company*, the Federal Radio Commission stated: "Advertising must be accepted for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent abuse or overuse of the privilege."<sup>2</sup> The Commission also took actions that reflected concern about proposed and past commercial practices.<sup>3</sup>

3. In 1960, the Commission summarized its policy as follows:

With respect to advertising material, the licensee has the additional responsibility . . . to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.<sup>4</sup>

There were, however, no real standards by which to judge compliance with that policy since decisions prior to the 1960 *Policy Statement* were case-by-case rulings. As a consequence, E. William Henry, then Chairman of the Commission, testified before the House Committee on Interstate and Foreign Commerce in 1963, that he "did not know and no one could know" what the Commission's policy on overcommercialization was.<sup>5</sup>

<sup>1</sup> The concern over the possible abuse of the license privilege was one which arose early on in the history of broadcast regulation. For example, Secretary of Commerce and Labor, Herbert Hoover, asserted that:

Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public trust and to be considered primarily from the standpoint of the public interest to the same extent and upon the basis of the same general principles as our other public utilities. 67 Cong.Rec. 5484.

<sup>2</sup> 3 FRC Ann.Rep. 32, 35 (1929), *aff'd.*, 37 F. 2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930).

<sup>3</sup> For example, based on proposed or past commercial practices, the Commission has denied applications [ *R. E. Jackson*, 5 FCC 496 (1938); *Travelers Broadcasting Service Corporation*, 6 FCC 456 (1938)]; conducted hearings on renewal applications [ *The Community Broadcasting Co.*, 12 FCC 85 (1947); *The Walmac Co.*, 12 FCC 91 (1947); and *Michigan Broadcasting Co.*, 20 RR 667 (1960)]; considered commercial practices in comparing mutually exclusive applications [ *Sheffield Broadcasting Co.*, 30 FCC 579 (1961); *Fisher Broadcasting Co.*, 30 FCC 177 (1961)]; and granted short-term renewals [ *Gordon County Broadcasting Co.*, 24 RR 815 (1962)].

<sup>4</sup> *Programming Statement*, *supra*, at 2313.

<sup>5</sup> *H.R. Rept. No. 1054*, 88th Cong., 1st Sess. 24 (1963).

4. Chairman Henry's declaration occurred during Congressional hearings concerning a Commission rule making proceeding proposing commercial standards.<sup>6</sup> The Commission's proposal received strong opposition—an opposition punctuated by House ratification of legislation (H.R. 8316) in 1963 that would have prohibited any Commission rule prescribing "standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast services."<sup>7</sup> Although the Commission subsequently decided not to adopt the rule, it did warn broadcasters that it would still closely monitor commercial practices.<sup>8</sup>

5. New administrative alternatives to the case-by-case approach, however, began to be employed. In *Florida Renewals*,<sup>9</sup> the Commission granted the renewal application of stations with a record of heavy commercial loads, but requested a follow-up report on the number of complaints received, the number of times the licensee exceeded 18 minutes of commercial matter per hour, and a statement as to why its commercial policies were consistent with the public interest. In 1970, the Chief of the Broadcast Bureau, with Commission approval, sent a letter to Peoria Valley Broadcasting, Inc., licensee of WXCL. The letter, although never published, became a processing standard for the staff. It stated that the licensee's commercial policy "would obviate any problem with the commercial aspects of your operation at the next renewal period." That commercial policy specified "a normal commercial content of 18 minutes in each hour with specified exceptions . . ." The standards announced in the WXCL letter were later incorporated in the rules setting out the authority delegated to the Chief of the Broadcast Bureau.<sup>10</sup> The present delegation of authority with respect to commercial policy is set out below.<sup>11</sup>

6. Pursuant to the delegations of authority to the Chief of the Broadcast Bureau, the Commission has issued prehearing letters in cases where licensees have proposed commercial policies that greatly exceed the guidelines.<sup>12</sup> Licensees that exceed the proposals submitted to the Commission have been granted short-term renewals<sup>13</sup> or have been admonished,<sup>14</sup> according to the circumstances.

7. There have been very few cases on the subject. In an appeal growing out of a comparative proceeding, the Court asked the Commission to respond to several questions, including the following:

<sup>6</sup> The *Notice of Proposed Rule Making* was published at 28 Fed. Reg. 5158 (1973).

<sup>7</sup> *H.R. Rept. No. 1054, supra*, at 9.

<sup>8</sup> *Commercial Advertising*, 36 FCC 45, 49-50 (1964).

<sup>9</sup> 9 RR 2d 639 (1967); see also, *WDIX, Inc.*, 14 FCC 2d 265 (1968).

<sup>10</sup> *Delegation of Authority*, 43 FCC 2d 638 (1973).

<sup>11</sup> 47 CFR §0.281(a)(7) provides that the Chief of the Broadcast Bureau may not grant applications exceeding the following criteria:

(i) Commercial AM and FM proposals in non-seasonal markets exceeding 18 minutes of commercial matter per hour, or providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the stations' total weekly hours of operation.

(ii) Commercial AM and FM proposals in seasonal markets (*e.g.*, resort markets) exceeding 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operations.

(iii) During periods of high demand for political advertising proposals exceeding either (a) an additional 4 minutes per hour of purely political advertising or (b) exceeding 10 percent of the station's total hours of operation in the applicable lowest-unit-charge period.

<sup>12</sup> See, *e.g.*, *Marion Broadcasting Co.*, 44 RR 2d 1045, 1046-1047, 1056 (1978).

<sup>13</sup> *Enid Radiotelephone Co.*, 67 FCC 2d 19 (1977).

<sup>14</sup> *CBS, Inc.*, 41 RR 2d 1350 (1977); *Chattahoochie Broadcasting Company*, 69 FCC 2d 1460 (1978).

1. Is the amount of TV time actually used in stating, singing or otherwise showing commercials a public interest consideration?
2. If so, should the Commission be required to consider the length and number of commercials proposed by the competing applicants in this case?<sup>15</sup>

In its supplemental brief, submitted in response to these questions, the Commission stated:

The amount of time devoted by television broadcast stations to advertising messages is one of the factors which the Commission may properly consider, and may assume significance in the public interest judgment in particular circumstances. The governing statute, decisions of the courts, and Commission precedent make this amply clear.<sup>16</sup>

The Commission urged that the circumstances of the case did not warrant remand for consideration of the commercial practices of the applicants. The case was not remanded, and the Commission's award of a construction permit to one of the applicants was affirmed. Other than to note the Commission's response, the matter was not further discussed by the majority of the panel,<sup>17</sup> although the dissenting judge did briefly comment on the matter.<sup>18</sup> Later, however, in *Citizens Communications Center v. FCC*, the Court stated that the "elimination of excessive and loud commercials" was one of several tests of "superior service" in comparative hearings between new and renewal applicants.<sup>19</sup>

8. In sum, although the Commission may and does review the commercial practices of licensees, the Commission has not adopted rigid rules. Nor has the Commission foreclosed the possibility that competitive market conditions may, under some circumstances, render the Commission's scrutiny unnecessary.

#### Summary of Comments

##### Introduction

9. The comments and reply comments summarized below involve the proposals in the *Notice* to modify or eliminate the commercial regulations.

Although no attempt was made to identify the specific suggestions of each commenter, this summary highlights the most important issues raised concerning the commercial guidelines, and provides a general sense of the position of most commenters. Named commenters ordinarily gave particularly extensive treatment to the specified areas, or were especially representative of the position taken by themselves and others.

##### Broadcaster Comments

10. The comments summarized here are from commercial broadcasters, broadcast networks, and broadcast trade organizations. This group expresses near unanimous approval of the preferred option to eliminate the commercial time guidelines, but also expresses some reservations on how the elimination would affect license renewal procedures. The major items discussed in these comments include: (1) the legality of the current rules, especially in light of recent "commercial speech" decisions of the United States Supreme Court, (2) the regulatory burden of the guidelines and their effect on radio advertising amounts in the current competitive environment, (3) public interest

<sup>15</sup> *South Florida Television Corp. v. FCC*, 4 RR 2d 2048 (1965).

<sup>16</sup> Supplemental Brief, p. 2, Case Nos. 18,873 and 18,880 in the United States Court of Appeals for the District of Columbia Circuit.

<sup>17</sup> *South Florida Television Corp. v. FCC*, 349 F. 2d 971 (D.C. Cir. 1965).

<sup>18</sup> *Id.*, at 973.

<sup>19</sup> 447 F. 2d 1201, 1213, n. 35 (D.C. Cir. 1971).

issues, including the potential advantages of guideline elimination, and (4) use of the guidelines on a voluntary basis whereby broadcasters could conclusively demonstrate satisfactory commercial service for purposes of license renewal.

#### Legality of Guidelines

11. The legal issue of the guidelines is addressed in two ways. Several broadcasters challenge the Commission's adoption of the current processing guidelines on the basis that they run counter to the legislative intent of the Communications Act, as well as the implication of later Congressional and Commission rejection of laws and regulations designed to limit commercial time. Broadcasters also underline the relatively recent attention given commercial speech by the Supreme Court as a matter of First Amendment law. Citing cases such as *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 765 (1976), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the commenters note that the Court has become increasingly sensitive to the interests of both consumers and advertisers in the free flow of commercial information, and that under these recent opinions the commercial guidelines are probably unconstitutional.

#### Burden of Guideline

12. Perhaps the most persistent theme of broadcaster comments is that the guidelines impose daily regulatory burdens on the broadcasters, but have nearly no effect on the amounts of advertising aired. The radio marketplace is said to be highly competitive, leading the great majority of broadcasters to stay well below the amount of commercial minutes permitted by the guidelines. Competition, not federal regulation, is said to make excessive commercialization self-defeating for radio broadcasters. The reply comment of American Broadcasting Company (ABC) may best summarize of the position of broadcasters: "It is simply too easy for the public to turn the dial." Broadcasters generally cite the data in the *Notice* and comments of other groups including the National Telecommunications and Information Administration (NTIA) indicating that the number of stations has increased dramatically in the past several years, especially since the wide-spread popularity of FM radio. They also note that other rule makings now being considered by the Commission would increase the number of available channels, stimulating more competition and further inhibiting excessive commercialization.

13. The National Association of Broadcasters (NAB), for example, emphasizes in reply comments that competition poses a double disincentive for broadcasters tempted to overcommercialize. Not only do listeners "tune out" stations with too many ads, but additionally advertisers are very sensitive to "commercial clutter," which decreases the effectiveness of individual ads. Charges that small markets are not subject to the competitive forces that limit commercialization are countered by citing the studies by the Commission and NAB which indicate that small markets have a lesser tendency toward heavy commercialization than some others. Broadcasters attribute this to two factors: (1) strong intermarket competition, especially acute for small markets with nearby cities, and (2) small commercial communities, insufficient to support high commercial loads. NAB also objects to what it claims is a "misinterpretation" of Commission data. Several opposition commenters compared the number of incidents where stations met or exceeded the current guidelines to the number of stations in a market. This, NAB avers, is unfair because the relevant comparison is the number of incidents of commercials in excess of 18 minutes per hour to the total number of programming hours. Relying on its own data using this comparison, NAB reports that among the 2,234 stations surveyed, over 96 percent of all radio hours contained 18 or fewer minutes of commercial time. Similarly, NAB and other broadcasters rebut those who argued that the current guidelines now create an upper barrier that would be broken by many broadcasters if removed by noting that the largest number of programming hours contain 12-14 minutes of commercial time, with declining numbers of hours above and below that amount.

## Public Interest Advantages of Eliminating the Guideline

14. Broadcasters also detail possible public interest advantages of the preferred option. Most prevalent is the idea that the concept of consumer satisfaction used in the *Notice* is a legitimate way for the Commission to apply the public interest standard of the Communications Act. Asserting that competition gives listeners, not advertisers or station owners, ultimate control over radio programming and advertising levels, broadcasters contend that listeners are the best persons with which to vest that control. They agree with the *Notice* that the commercial time limits of the guidelines are little more than "value judgments" by Commission personnel, and claim that listeners are a much more legitimate, direct, and otherwise preferable source of those value judgments. Consumer judgments, according to the broadcasters, would be much more quickly reflected in changes in the marketplace, and would force a more varied array of programming alternatives than now allowed by the rather uni-dimensional processing guidelines. The range of alternative commercial approaches that might be made available through elimination of the guidelines is said to be bounded only by listener preferences, and might range from nearly commercial free stations specializing in such things as beautiful music or classical music to stations that offered prolonged "swap shops" or "classified ads of the air."

15. So, too, some broadcasters agree with other commenters, such as the National Black Media Coalition (NBMC), who suggest that more advertising in some cases may better serve the public interest. More ads could mean cheaper spots for small market and minority advertisers, and thus encourage greater use of the medium by consumers and advertisers now artificially restricted from the market. At the same time this increased commercialization could help fledgling stations, especially in small markets or with experimental or minority formats, by increasing their revenues.

## Impact on Renewal Proceedings

16. The other major concern of commercial broadcasters involves the impact of the preferred option on license renewals, especially in the context of comparative hearings. Several of the broadcasters suggest that the guidelines become voluntary with broadcasters, and that by meeting them stations would make out a *prima facie* case of satisfactory commercial service that would be sufficient for license renewal. Broadcasters could still choose not to follow the guidelines, but would be allowed at renewal to demonstrate that their performance was also deserving of renewal. This system is said to serve the public interest because it would inject more certainty into the renewal processes, but would allow some stations to opt for differing approaches to commercial service. National Radio Broadcasters Association (NRBA) suggests a variation on this idea. NRBA would retain the guidelines to facilitate renewal but would tie them to the non-entertainment guidelines, imposing non-entertainment duties in proportion to each station's commercial load.

17. Another important concern for broadcasters was the proposal in the *Notice* that if the preferred option is adopted the Commission would monitor markets and make a market-wide evaluation of all stations in each market. If excessive commercialization occurred in these markets, the Commission would consider some remedy to stem those excesses. Licensees uniformly object to the concept, saying that it would indirectly reimpose the guidelines, could foster inconsistent and capricious action by the Commission, and would impose an inefficient regulatory burden on the broadcast industry.

## Non-Media Organizations

18. The comments summarized here are from organizations which do not have mass media issues as their primary focus. These commenters are most often concerned about the potential effects of the proposed changes on their ability to achieve their own missions, but many also offer their comments on behalf of the more general public interest. Churches provided the bulk of this category but several unions and other social and political action groups were also represented. Most of these commenters oppose

adoption of the preferred option on commercial guidelines largely as an adjunct to broader disapproval of the concept of radio deregulation, or as part of a more generalized distrust of advertising as the primary source of radio financing. Other organizations generally favor elimination of the commercial guidelines.

19. Both church and union organizations largely oppose the preferred option, or any relaxation of the current processing guidelines. Several are concerned that lack of commercial restrictions would generally decrease stations' sense of public service responsibility and correspondingly increase the power of advertisers. The United States Catholic Conference, for example, suggests that if the guidelines are lifted stations will test the "tensile strength" of consumer tolerance of advertising excesses, then operate just below that tolerance level. In reply comments they respond to those suggesting that the marketplace is now generally more limiting than the Commission's rules by contending that if that is true then the rules only affect the few potentially egregious violators. If so, they argue, the guidelines are of nearly no consequence or cost to the great majority of stations, but of great public interest value and should be retained.

20. Some organizations contend that lack of commercial restrictions would be undesirable because advertisers would become so powerful as to change the character of programming to more directly conform to commercial interests. The General Conference Mennonite Church, for example, cites scholar Herbert I. Schiller, and the 1979 *Carnegie Report on Public Broadcasting* to support its contention that if radio is commercially deregulated advertisers will further fabricate needs to increase sales, and "the entire cultural and social apparatus of the nation will become transformed by . . . the merchandizing of consciousness."

21. Some who oppose the elimination of the guidelines state that commercial radio avoids programs not conducive to commercial interests, and that this tendency would increase without the guidelines. American Federation of State, City, and Municipal Employees, for example, argues that advertiser influence leads to an anti-union bias, and suggests that to counter this influence the Commission should require a percentage of station profits be "reinvested in public affairs programs." The United Auto Workers Union is among those who suggest that the neo-classical economic analysis in the *Notice* is inappropriate here because advertisers are the consumers and the listening audiences are the product in advertising financed radio. This refers to the fact that advertisers are the most direct purchasers of broadcasting, buying "spots" of broadcast time designed to reach the greatest possible numbers of potential buyers. Although the probable consequence of this system is addressed in some detail in the *Notice*, several of these commenters emphasize the power to control programs that might result if the processing guidelines are eliminated.

22. Also, the variety of listener preferences and resulting measures of consumer satisfaction are said to be manipulated by advertising, and thus are not indicative of the greater diversity that might emerge if advertiser control were weakened rather than strengthened as the preferred option would presumably do. While agreeing with the *Notice* that there is some form of diversity through increased numbers of stations and greater format availability, this diversity is said to be greatly restricted because existing consumer preferences are largely molded by existing fare, which is in turn restricted by the narrow range of radio formats conducive to the sale of advertising.

23. Most political action organizations in this group oppose elimination of the guidelines because of concern that deregulation generally would decrease the broadcasters' sense of public trust and civic responsibility, and, as a result, broadcasters would ignore their causes and causes of other social and political action groups. Arguing that the guidelines have a strong symbolic effect, the Puerto Rican Legal Defense and Education Fund, for example, asserts that their elimination "may tip the power in favor of the advertiser, and the (increased commercial) time might come out of that now spent on minority programming." Several groups also share the concern of many individuals and media action organizations that since Public Service Announcements are the

functional equivalent of ads to listeners, stations will tend to decrease or eliminate the announcements to make room for more ads without increasing commercial "clutter."

24. Other of these organizations generally favor commercial deregulation. The American Federation of Small Business, for example, notes that most radio stations are small businesses and according to station financial reports only 67% of such stations declared a profit in 1978, presumably because of the burden of commercial and other regulations. The Washington Legal Foundation and the Mid-Atlantic Legal Foundation, emphasize the positive competitive impact of eliminating the limits, arguing that the increased competition would actually increase the control that audiences have on programming.

#### Media Action Organizations

25. The comments summarized here are from "public interest" law firms and other social and political action organizations which focus on the operation of the electronic mass media. These organizations largely oppose adoption of the "preferred option" of eliminating the commercial guidelines. Several generally oppose the preferred options in all four of the major categories addressed in the *Notice*, but find the elimination of the commercial guidelines least offensive to their positions. Many commenters object to the very theory of marketplace regulation and its application to commercial limits, while others disagree with either the application of the economic theory or the interpretation of the data. A few commenters claim elimination of the guidelines could strengthen minority broadcasting and increase commercial use of the medium by both consumers and advertisers because of decreased rates.

#### The Marketplace and the Public Interest

26. The prevalent theme of opposition stems from disagreement with the economic and commercial theory undergirding the *Notice*. The marketplace theory was said to run counter to the public interest and the information needs of citizens in a democracy.

27. Asserting that the *Notice* would wholly substitute the commercial interests of broadcasters and advertisers for the public interest standard of the Communications Act, several of these commenters proceed to disagree with that construed substitution. Essentially, this disagreement rests on the assumptions that the marketplace is distorted in commercial broadcasting, and that even with optimum marketplace efficiency the public interest would not be wholly served. The marketplace is said not to work in broadcasting largely because: (1) advertisers are the most important consumers of the broadcast product, which in turn is said to be the audience; and (2) several segments of the broadcast audience are socially significant but commercially undervalued. Elimination of the commercial guidelines would presumably exacerbate these shortcomings, leading to increased programming power of advertisers and less programming in the public interest.

28. The idea that important audience segments are commercially unattractive and thus undervalued in programming decisions is held by several including Action for Children's Television (ACT) and WNCN Listeners Guild. Relying on evaluation of its own experience with children's TV programming, ACT claims that although children are highly impressionable and heavy broadcast consumers, there is little programming designed specifically to meet their needs and interests because they are demographically attractive to few advertisers. Other organizations identify other groups that may not be served well despite their numbers and social importance, including minorities, the elderly, the poor, and the handicapped.

29. Some commenters, including the San Diego Committee on Media, maintain that the theory of marketplace regulation of commercials is inconsistent with the needs of a democratic society. Reasoning that democracy depends on a politically informed citizenry, and that without commercial controls broadcasters would concentrate on only

commercially related information, these commenters argue that broadcasting should be set apart from such competitive commercial influences.

#### Alternative Economic Theory and Analysis

30. Some commenters in this group also identify alternative applications of the economic theory presented in the *Notice*, or offer different applications of the data appearing there, or supplied by other commenters. Two major points are stressed: (1) market control of advertising necessarily leads to advertising in excess of consumer "wants"; (2) the data indicate that existing guidelines cause minimal, if any, burden on the industry.

31. The joint comments authored by the American Civil Liberties Union, for example, press a different construction of the market system in the broadcasting context. The joint commenters state that the market does not regulate the amount of advertising listeners want, but the maximum amounts broadcasters can use to increase profits. Although audiences may want little advertising, they will tolerate much more so long as other wants are satisfied. According to the comment, this demonstrates that the market system does not operate to maximize the satisfaction of consumer wants in commercial radio, but instead creates a degree of persistent market failure.

32. Reply comments by Public Media Center (PMC) may most clearly represent those who gave an alternative interpretation of the commercial time data in the *Notice* and submitted by NAB. Rather than emphasizing the degree of compliance with the guidelines or the lower average of commercial minutes aired by the majority of stations, PMC underlines what it calls the "steady level of noncompliance" with the guidelines. This is said to be evidenced by 11.5% of stations violating them at least once over the period data were collected for the *Notice* and by violations during 3.5% of the broadcast hours surveyed by NAB. Similarly, United Church of Christ (UCC) and Committee for Community Access (CCA) suggest that while the guidelines are not responsible for the comparatively low average of commercial minutes, the clustering of a few stations around the maximums demonstrates that they deter those few stations which might engage in the most egregious excesses.

#### Lack of Burden

33. The regulatory burden on broadcasters, the Commission, and others allegedly created by the guidelines is also disputed by some of these commenters. PMC, for example, asserts that because the guidelines are voluntary rather than required, and because they create only infrequent and indirect government intervention while providing broadcasters with some certainty and security, the guidelines impose the least possible regulatory burden. Also, assuming that commercial regulations are mandated by the public interest standard of the Communications Act, PMC and others assert that the Commission is without the administrative authority to change the guidelines without a more detailed, specific, and convincing record detailing their ineffectiveness and inefficiency.

#### Alternate Proposals

34. Media action groups do not unanimously oppose the preferred option, and some who generally dissent from the preferred options in all four areas of deregulation express willingness to experiment with elimination of the guidelines. UCC, for example, states that it would rather retain the guidelines but contends that elimination might give radio broadcasters a "sense of enhanced freedom" and in light of the available data "might well have no significant impact at all." Thus, UCC would not object to experimental elimination if it is combined with a requirement for the airing of public

service announcements as proposed by Media Access Project (MAP) and considered in the *Notice of Inquiry in the Airing of Public Service* BC Docket No. 78-251.<sup>20</sup> Some groups representing minority interests, including the national offices of the National Black Media Coalition (NBMC) and American Women in Radio and Television (AWRT), give guarded support to guideline elimination. NBMC, for example, says that elimination of the guideline could strengthen Black radio by lifting the "artificially imposed shortage of radio airtime for advertising." This shortage is said to manifest itself in three ways: (1) absence of programs on which consumers can advertise, such as want-ads or consumer sell-a-thons; (2) increased price of commercial spots, which especially hurt small minority businesses; and (3) weakened ability of marginal Black stations to attract needed capital to support public service programming.

#### Government Agencies

35. The United States Department of Justice, Anti-trust Division, strongly supports elimination of the commercial limits. This is based on the assertion that appropriate levels of advertising in markets "can be better determined by individual licensees subject to the discipline of competitive forces than by government regulation." Assuming the value of the preferred option, the comment addresses three items others found problematic in this proceeding and determined that none should hamper elimination. Specifically, the comment concludes that the preferred option is within the discretionary power of the Commission, and that neither the Fairness Doctrine nor the comparative hearing process preclude the proposed deregulation.

36. The United States Office of Consumer Affairs applauds the efforts by the Commission to re-examine some of the core assumptions and policies of radio regulation. The comment supports significant reform and refinement of the requirements, but does not favor complete elimination of the current processing guidelines for commercial advertising. Specifically, the Office suggests that some guideline should be retained, and cites two problems with the Commission's marketplace analysis as applied to radio. First, they assert that the current rules tend to be self-executing, making it difficult to predict behavior of the licensees in an unregulated market. Second, specialized markets may be less susceptible to competition, thus more susceptible to commercial excess absent regulation.

37. The Council on Wage and Price Stability supports the preferred option based on the Commission's reasoning and data. However, it suggests the continued monitoring of stations and markets and selective reimposition of guidelines if excesses occur.

38. The United States Department of Commerce, National Telecommunications and Information Administration (NTIA) submitted extensive initial and reply comments strongly favoring elimination of the commercial guidelines. NTIA says that it considers the Communications Act "an early example of Congress endeavoring to use competition and marketplace forces as a regulatory tool," and would reassert that intention in the current radio market. Relying on its own studies and information as well as data in the *Notice*, NTIA finds that even small markets often have significant competition from both non-radio advertising media and from nearby radio stations. This competition is said to cause small market radio advertising to be self-limiting at the source. Further NTIA discusses commercial "clutter," which is discussed in more detail below.

39. NTIA also suggests that as a matter of both administrative and constitutional law, the processing guidelines should be more closely aimed at articulated harms and should be based on findings supported by evidence. Citing recent Supreme Court decisions in the "commercial speech" area, it finds that radio advertising is constitutionally protected speech under the First Amendment, and suggests that the guidelines

<sup>20</sup> This rule making was concluded with *Report and Order, Airing of Public Service Announcements by Broadcast Licensees*, BC Docket No. 78-251 (FCC 80-557), released October 27, 1980.

decrease both the amount of commercial information available to consumers, and the revenues available to broadcasters to support public service. As a matter of administrative law, it contends that although the processing guidelines are not a rule adopted pursuant to the rule making requirements of the Administrative Procedure Act and court decisions, they have the practical effect of such a rule and thus NTIA questions their continued validity.

40. Extensive reply comments by NTIA include more evidence and argument to the effect that the guidelines are "likely to be both unnecessary and anticompetitive." The anticompetitive idea, also raised by the National Black Media Coalition, and the joint broadcaster comments filed by Dow, Lohnes and Albertson, *inter alia*, suggests that the guidelines artificially interfere with the efficiency of usual market forces. The limits are said to raise the price of each ad, limiting the type of sponsors who can afford radio, and increasing prices for some consumer products because of the inability of producers to take full advantage of the economies of scale.

41. Reacting to the volume of commenters concerned about excessive commercials after deregulation, NTIA in reply comments reasserts its conclusion that the guidelines are largely unnecessary because of existing competitive forces. It counters the charge that specific format stations have extensive "market power" within their format which might lead to commercial exploitation with arguments that such power is largely overestimated. First, although listeners may have limited choices with a specific format, sponsors who buy based on desirable demographics rather than formats have several alternative choices. This "cross format competition" is said to reduce advertising excesses as sponsors avoid stations with commercial "clutter." Second, format competition is not the sole determinant of listener preference, thus weakening the supposed "market power" of specific format stations. NTIA utilizes results of a survey conducted for Associated Press by Frank Magid Associates and cited in the *Notice*. The survey indicates that listener preference is based not only on format but also on other program characteristics such as habit, news coverage, announcers, network programming, etc., thereby significantly lessening presumed "market power" based on format.

42. Further, NTIA takes issue with a statement in the *Notice* and repeated by some other commenters that stations with monopoly power could engage in commercial excesses. NTIA states: "We disagree. Radio stations that enjoy 'market power,' to begin with, are most likely to be found in smaller or rural markets where the aggregate commercial base is typically too sparse to sustain any substantial increases in commercial time. Moreover, economic theory indicates that radio stations with 'monopoly power' are at least as likely if not more likely to *restrict* commercial time than to increase it."

#### Summary

43. Commenters take widely divergent positions on the proposals to relax or eliminate the commercial time processing guidelines, but a substantial number say that some experimental changes likely would be of value. Broadcast industry commenters give near unanimous support for elimination of the guidelines, although many would retain them on a voluntary basis for use in comparative hearings for license renewal. Broadcasters highlight the regulatory burden of the guidelines as against their effectiveness, their continued legal validity, and the public interest values of elimination. Non-media organizations largely disfavor elimination of the guidelines. They are concerned that non-profit organizations would have fewer opportunities to use the medium to publicize their missions, fearing that an increase in commercials would displace PSAs, and that advertisers would have greater control over programming. Most media action organizations disapprove of the elimination of the commercial guidelines, often as an adjunct to broader objections to radio deregulation. However, several of these organizations think that experimental implementation might be of some value, especially for minority stations. Government commenters largely favor the preferred option of eliminating the guidelines, at least on an experimental basis, because they believe that competition more efficiently regulates the industry in this area.

## Discussion of Major Issues Raised in Comments

## The Economics of the Commercial Guidelines

44. The comments regarding the economic analysis and empirical research related to our proposal to remove the limits on advertising time fell into two major categories. One group of commenters provided additional empirical support for our proposal.<sup>21</sup> The second group of commenters criticized the empirical research of the FCC and others, or criticized the economic analysis.<sup>22</sup> This section provides both a summary and an analysis of those comments.

## Empirical Support for Elimination.

45. Briefly, our analysis of commercial time depends upon the interaction of the demand for advertising time by advertisers and the supply of time by broadcasters. The interaction of these forces determines both the price and quantity of time available for advertising. Our empirical analysis determined that the guideline is set above (*i.e.*, allows more minutes per hour of commercial time) than which the market suggests is the optimal quantity of advertising time. In fact, the overwhelming majority of broadcasters are considerably below the guideline during every hour of operation.<sup>23</sup> Three major commenters in this proceeding presented data which corroborates our findings.

46. NTIA performed a substantial econometric analysis of our data to isolate the most significant factors which determine the amount of commercial time.<sup>24</sup> NTIA suggests that one important limit on the amount of commercial time is advertising "clutter," a factor also considered in the "Discussion" section of this *Report and Order*.<sup>25</sup> As NTIA points out, the theoretical basis for the analysis of "clutter" is not well developed but empirical studies suggest that the phenomenon has an important impact on the amount of advertising aired by stations.<sup>26</sup>

47. The NTIA staff developed an economic model with which they examined structural factors that influence commercialization policy.<sup>27</sup> The most striking finding of their work was that audience share is not affected by varying levels of commercials within the range of commercial minutes found in their sample.<sup>28</sup> NTIA concludes from

<sup>21</sup> See, *e.g.*, Comments of the National Television and Information Administration, and the National Association of Broadcasters.

<sup>22</sup> See, *e.g.*, Comments of Citizens for Community Access, Eric Luskin, and Thomas David.

<sup>23</sup> Given that a guideline exists, it is likely that most broadcasters would keep their commercial time below what the guideline allows simply to serve as a buffer against the possibility of exceeding the guideline. However, it is extremely unlikely that the average station in each market (regardless of size and number of stations) would maintain a buffer of the magnitude reported in our study. Further, given that the risk of loss of a license because of over-commercialization is remote, there is little risk against which to buffer.

<sup>24</sup> See, Comments and Reply Comments of NTIA.

<sup>25</sup> Comments of NTIA, Appendix B, at 12-16. "Clutter" can be understood in two separate dimensions, the total amount of commercial time aired, and the concentration of adjacent commercials.

<sup>26</sup> *Id.*, at 13-16; and NTIA Reply Comments, Appendix B.

<sup>27</sup> NTIA Comments, Appendix B, at 16-31; and Reply Comments, Appendix A.

<sup>28</sup> The model they test specifies advertising minutes as the dependent variable with both audience share and various market structure variables as independent variables. The authors agree that there is also likely to be a "feedback" effect from advertising minutes to audience size since at some point people will probably stop listening if too much advertising relative to other programming is broadcast.

this that advertiser sensitivity to "clutter" is greater than that of audiences.<sup>29</sup> The reply comments filed by NTIA suggest two other possible structural factors. First, a Frank Magid Associates study of listener preferences showed a number of characteristics that influenced station selection.<sup>30</sup> The number of ads was not the most salient decisional factor for most listeners. Only for beautiful music format stations did commercial time rate as high as the second most important factor affecting the choice of station. Second, further econometric analysis by NTIA showed that stations broadcast more commercials during certain parts of the day and certain days of the week.<sup>31</sup> Drive time is the most popular time of day for both advertisers and audiences. The high level of commercialization during drive time suggests that broadcasters are merely extracting revenues when listeners have few alternatives and thus are less sensitive to the additional advertising. It is important to note that drive time is when stations usually air the greatest amounts of informational programming, especially news, leading to the assumption by some that the extra commercials may help pay for the more expensive informational programming.<sup>32</sup>

48. The National Association of Broadcasters (NAB) submitted data on the amounts of advertising reported by stations that subscribe to the NAB code. The data show that average advertising time in all markets is well below the processing guideline. The NAB study is significant because it examined a much larger number of stations and markets than the Commission study. Their study confirms the finding of the Commission study that the advertising guidelines are set well above current radio practice. One possible source of bias in the NAB study must be considered. Subscribers to the NAB code may systematically provide less commercial time than noncode stations.<sup>33</sup> While this is possible, the extent to which code stations fell below the guideline amounts suggests that it is competition, not code enforcement, that most effectively regulates current levels of commercialization.

49. The Diocese of Cleveland supplied local data on commercialization practices for three renewal periods (1967-1976). The data were collected in only one market, but the Cleveland study is consistent with the findings of the broader FCC and NAB studies. Although the comment generally disfavored the proposals in the *Notice*, no specific allegation was made regarding abuse of the commercialization guideline. The data for the AM stations show a *declining* trend in the number of minutes per hour devoted to advertising time from 1967-1970 to 1973-76.<sup>34</sup> While the average amount of time devoted to advertising declined, stations occasionally exceeded the 18 minute per hour guideline.<sup>35</sup> The proportion of stations exceeding the guideline declined while the total number of such incidents increased.<sup>36</sup> For both the 1970-73 and 1973-76 periods the

Therefore, they develop a two equation model so that they can explicitly consider this effect. Using standard econometric techniques (two-and three stage least squares estimations) they find the result reported *supra*. Since these equations are not reported we cannot make a complete analysis of their results and must take their findings as tentative. See, NTIA Comments, Appendix B, at 19 and 26.

<sup>29</sup> *Id.*, at 26. The point is that advertising messages lose their effectiveness due to the "clutter" effect before the audience becomes dissatisfied with the station.

<sup>30</sup> Reply Comments of NTIA, at 11-12. This, in fact, is the same study reported in the *Notice* at Table 17.

<sup>31</sup> *Id.*, Appendix A, n. 25, at 4.

<sup>32</sup> See the *Notice* at Tables 14 A & B, and 15 A - C.

<sup>33</sup> See, e.g., Reply Comments of the Committee for Community Access, at 29.

<sup>34</sup> The averages were 18.5% (11.1 minutes) for 1967-70, 16.3% (9.8 minutes) for 1970-73 and 15.3% (9.2 minutes) for 1973-76. This data was computed during the prime advertising time for each day of the composite weeks (6 AM to 6 PM).

<sup>35</sup> Of course, this is allowed 10% of the time as part of the guideline (up to 20 minutes).

<sup>36</sup>

1967-70    1970-73    1973-76

station exceeding the guideline most often was the station that also provided the most nonentertainment programming.<sup>37</sup> The data for FM stations show an increasing trend of advertising time over the 1967-76 period. The level was still lower than for AM stations, however, and no instance was reported of an FM station exceeding the 18 minute guideline.<sup>38</sup>

Criticisms of Empirical Studies

50. There were several criticisms by commenters of the empirical work supporting removal of the guideline. Summarizing the data, both the FCC and the NAB found the average level of advertising well below the guideline. Further, advertising levels were lower for both large and small markets than for medium sized markets. The Committee for Community Access (CCA), examining the FCC and NAB data, found a negative relationship between the number of commercial minutes per hour and the number of stations in the market.<sup>39</sup> This, they report, is contradicted by the statistical analyses performed by NTIA.<sup>40</sup> This contradiction is more apparent than real, and on close examination it becomes understandable. NTIA utilized a more sophisticated statistical technique than the FCC or the NAB. Using multiple regression analysis, NTIA was able to isolate and simultaneously develop correlations between advertising time and a number of other relevant variables, and thus found relationships not otherwise discernible.

51. Beyond this apparent anomaly between the NTIA and FCC/NAB data is the question whether small market stations presently "overcommercialize." CCA points out that the median commercial levels for stations in large vs. small markets is that between less than 300 seconds per hour and between 300 and 500 seconds per hour.<sup>41</sup> In neither the small nor large markets do the stations even come close to the 18 minute per hour (1080 second) guideline.<sup>42</sup>

number of incidents of 18 minutes of more	17	57	40
Percent of stations experiencing incidents	57%	46%	15.4%

37

	<u>1970-73</u>	<u>1973-76</u>
nonentertainment programming	54%	67.1%
number of incidents (6 AM-6 PM)	18	30

<sup>38</sup> The FM station averages were 6.3% (3.8 minutes) for 1967-70, 8.5% (5.1 minutes) for 1970-73 and 9.3% (5.8 minutes) for 1973-76. Again, these numbers were calculated for the 6 AM - 6 PM time period and were averages across the composite week.

<sup>39</sup> Reply comments of CCA, at 28-29.

<sup>40</sup> Comments of NTIA, Appendix at B, at 28 and Reply comments of NTIA, Appendix A, at 4. NTIA found that as the number of stations in the market increased so did the number of commercial minutes, other things equal.

<sup>41</sup> Reply comments of CCA, at 29. These are estimates provided by CCA and reflect the relative size of the difference.

<sup>42</sup> CCA alleges that stations in "medium" sized markets do approach 18 minutes per hour (based upon the Alabama-Georgia data) and, as a result, require continued regulation. A weighted average, using the data found in Table 19 in the Notice (for markets having between 4 and 10 stations), was calculated for the markets in the

52. CCA also argues that the NAB data for Class C markets (those with 15,000-100,000 populations) show numerous stations approaching the 18 minute guideline.<sup>43</sup> Although some stations in this category have more commercials, their commercial loads still do not seem cause for great alarm. The NAB charts indicate that only 4.5 percent of all drive time and 2.5 percent of all nondrive time hours have ads in excess of the guidelines. Further, only 25.4 percent of drive time and 24.1 percent of nondrive time hours have between 15 and 18 minutes of commercials. Finally, 45.9 percent of drive time and 51.3 percent of nondrive time hours have 10 or fewer minutes per hour of commercials.<sup>44</sup>

53. Thomas David provides an argument, based on the possibility of broadcaster collusion, that the guidelines should not be removed. In essence, he argues that broadcasters without the guidelines will have additional ability to act as monopolists, *i.e.*, small groups acting as joint profit maximizing cartels. This could be accomplished, according to David, either by increasing price or by increasing output. There are several reasons to question this prediction. First, broadcasters can now increase output because they are operating so far below the guideline. Second, and more to the point, a monopolist will generally charge a higher price than a competitive firm; however, this can only be accomplished by restricting output, not by expanding it. Further, monopolies (or joint profit maximizing cartels) will generally operate at a level of output such that expanding output would reduce rather than increase profits.<sup>45</sup>

54. The possibility of small market overcommercialization was also addressed by Thomas David. David used two tables from a Commission agenda item predating establishment of the guidelines in an effort to show what might happen if they are removed. David argues that the data, from stations in small markets, show a pattern of "excessive" commercialization.<sup>46</sup> Without additional information regarding the circumstances surrounding the collection of the data it is difficult to assess their significance. In any event, the fact that some stations may have aired more than 18 minutes of commercials per hour before the institution of the guidelines does not prove that many or most stations would do so if the guidelines are now removed.<sup>47</sup>

#### Other Concerns

55. The record in this proceeding reveals two other major concerns of the commenters that must be considered in some detail here: 1) the possibility of increased advertiser control of programming, and 2) the charge that commercial concerns will take precedent over the public interest concerns of broadcasters to the detriment of many public service organizations. Although we share the concern of those that press these conclusions in this matter, our careful consideration of them leads us to question the nexus between the commercial guidelines and these projected consequences of their elimination. First, the commenters, contrary to our judgment above, assume that broadcasters will increase

medium size category and shows an average of 446 seconds per hour. This is clearly below the 1080 seconds per hour currently allowed. Further, in these markets few stations exceed the guideline and those that do, do so far less than 10% of the time (as is permitted under current guidelines).

<sup>43</sup> *Id.*, at 209-30.

<sup>44</sup> Comment of NAB, Appendix B, chart 5.

<sup>45</sup> In more technical terms, the cartel will be in the inelastic region of its demand function in equilibrium (equilibrium being where marginal revenue equals marginal cost and marginal cost is greater than zero). Any expansion in output in this region leads to a drop in price that results in a net loss of profits.

<sup>46</sup> *Id.*, at 5, 10 and 13. The tables come from something identified as Renewal Agenda Item No. 5, October 15, 1969.

<sup>47</sup> The data cited by David were drawn from a number of multiple station markets. To examine one station in a market without also examining the remaining stations does not allow us the opportunity to determine whether the cited stations are the norm or the exception.

their advertising loads if we eliminate the guidelines. They conclude that this increased advertising will result in greater advertiser control over programming decisions and public service commitments. Second, we think these conclusions overestimate the power of the current guidelines. Third, if these problems do in fact arise, they would be more appropriately addressed through other regulations more directly and precisely suited to resolution of the particular problems. These general concepts are more specifically applied to the two problems below.

#### Advertiser Control of Programming

56. Several commenters, including especially churches, unions, and social, political and media action groups, suggested that without the guidelines advertisers would gain significant control over the operations of stations and would therefore become increasingly powerful in programming decisions. This idea was reinforced by the fact, discussed in the *Notice* and by several commenters, that broadcasting is largely an advertiser supported industry. Advertisers are the most direct source of broadcast revenues because they purchase advertising time. They do so largely on the basis of the presumed size and demographic characteristics of audiences. Similarly, several other commenters suggest that "commercially insignificant" audiences would be unserved or underserved if the guidelines were eliminated.

57. Although these are important concerns, we are not persuaded that elimination of our commercial guidelines will significantly affect them. At base, they are not connected as much to the question of *how much* commercial time should be allowed, as to the fundamental nature of commercial radio, *i.e.*, that it is supported almost exclusively by advertising revenues. Although we do not wish to deny the limitations and difficulties that the commercial character of the medium places on its use, that concern is not the subject of this rule making as proposed in the *Notice* and we are not here faced with compelling reasons to reject the basic attitude that we have held at least since the time of the *Great Lakes* decision.<sup>48</sup>

58. Another form of the argument is that commercial radio is endemically infused with the evil of advertising, and the Commission must insure that this evil does not entirely consume the public interest. From that perspective, the public interest is endangered by elimination of the guidelines because without them the evil would be unleashed to the detriment of the listening public. First, we are not convinced that advertising or advertisers are inherently bad. In fact, following the lead of the Supreme Court's recent "commercial speech" cases we would assert that much advertising has considerable value for the public as well as for advertisers. We do, of course, recognize that broadcasters can engage in commercial abuses, but our action here today leaves untouched our power to deal with advertising abuses. Instead our action recognizes that a certain amount of commercialization is not, by itself, sufficient to prove that a broadcaster is or is not fulfilling his public interest responsibility. A more flexible commercial policy should encourage broadcaster experimentation in this area, and the results may well benefit the public.

59. Second, we have no concrete evidence that eliminating the guidelines will substantially create the effects the commenters suggest, *i.e.*, increase the program power of advertisers to the detriment of the public interest. Although we think the tendency will be very limited, we expect that a few stations may increase their commercial loads beyond 18 minutes per hour. But there is no evidence in the record to suggest that even

<sup>48</sup> Although noncommercial and public radio stations now provide some radio service, the following statement from the *Great Lakes* case continues to have considerable validity: "If a rule against advertising were enforced, the public would be deprived of millions of dollars worth of programs . . . Advertising must be accepted for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege." 3 FRC Ann.Rep. 32, 35 (1929).

this would increase the programming power of advertisers or necessarily impair the public interest. The prevailing journalistic and programming ethic stresses the independence of the advertising and editorial departments of broadcast stations, and we have no evidence of a possible change in that ethic. Also untouched by this proceeding is the "long-standing bulwark of Commission policy" that "licensees have an affirmative, non-delegable duty to choose independently all programming for broadcast . . ."<sup>49</sup>

60. Third, although we do not deny that the commercial nature of radio has some effects on programming content, we do not think those effects are necessarily bad. Some such effects may be deleterious to the public interest, as when a station for example decides to air or not a program out of concern not to offend an important advertiser, and we do not endorse programming judgments made on that basis. However, if elimination of the guideline has any effect in this situation, it may be to reduce the program power of any individual advertiser. In any case, we think that the majority of programming decisions are made out of deference to the program choices of audiences, not advertisers. This is not just because broadcasters are altruistic or because they fear sanctions from the Commission if they ignore public needs and desires in their programming. It's largely because the advertisers who indirectly support most programming are more often interested in *audiences* for their advertising than in the content of the programs. This is the apparent genius of our system of commercial broadcasting, and we find no evidence in this record to indicate that eliminating the processing guidelines will upset or even significantly change that system.

61. Perhaps the most troublesome aspect of this issue is that raised by those who fear that "commercially insignificant" audiences will be unserved or underserved by commercial broadcasting after elimination of the guidelines. But this seems to be an issue not related so much to the guidelines as to the fact that radio is a commercial medium.

62. Perhaps more important, persuasive evidence suggests that many groups presumed to be unattractive to advertisers are, indeed, economically significant. This is discussed in more detail in other sections of this Report, and need not be repeated here. Beyond that we are not convinced that whatever "commercially insignificant" groups that do exist are left totally unserved by existing broadcasts, nor that they will be so significantly underserved as to alter our decision here. These groups are, of course, served in a general and not insignificant way by programming not specifically geared for them but available because others are likely to buy the advertised products.<sup>50</sup> In addition, these audiences are often served by broadcasters mindful of their more general public interest responsibilities as radio licensees. We must, also, recognize that these groups are served in other ways, often outside of commercial radio, for example, by public radio, and by public and private service organizations. And to again return to the most persistent theme of this section, we have no evidence that this is a matter substantially affected by our present guidelines, nor that it would be altered by their elimination.

#### Public Service and PSAs

63. The final point to be raised here is the projected effect of eliminating the guidelines on those public service organizations that greatly rely on commercial radio to help get their message to the public. This appears to be both a general and a specific concern. The general concern is that broadcasters without the guidelines would become more concerned with their advertising revenues and less concerned with their public

<sup>49</sup> *Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations*, 63 F.C.C. 2d 674, 690 (1977). See also, *Agreements Between Broadcast Licensees and Public*, 57 F.C.C. 2d 42 (1975).

<sup>50</sup> Also, as noted in Appendix D, some groups thought by commenters to be economically insignificant are of great, and ever increasing, economic significance.

interest responsibilities. The specific concern is that the public service announcements (PSAs) greatly relied upon by these organizations would be eliminated or substantially decreased. Our response to the general concern has already been adequately covered in the sections above where we deal with programming content. Most importantly, the evidence does not demonstrate a significant nexus between the guideline and the projected effect for us to grant it decisional significance. The PSA matter, however, requires additional discussion, if for no other reason than the large quantity of comment it precipitated.

64. As noted in an earlier section of this item, a great deal of the comments mistakenly assumed that PSAs had long been required of every radio broadcaster, and that this proceeding would eliminate that requirement to the detriment of those organizations and audiences that depend upon them. The fact is that PSAs have never been required by the Commission, and until September 26, 1980 individual stations were given little public service recognition for the airing of them.<sup>51</sup> This very recent PSA item was passed by the Commission partly out of concern that its previous policy, the one under which licensees operated during the pendency of this proceeding, may have discouraged PSAs rather than encouraged them.

65. The comments, data, and conclusions of that rule making are relevant here. In the *Notice* concerning the PSA inquiry the Commission asked the public to answer several questions about PSAs and although the research submitted was not uniform or complete, it allowed a general summary of some important aspects of the issue. Most relevant in this proceeding are those data related to the number and the timing of PSAs. These data indicated that while the Commission was generally neutral to station airings of PSAs: (1) stations averaged more than two hours per week, or about 1 to 1½ minutes per hour of PSAs; (2) the usual PSA ran approximately 30 seconds; and (3) PSAs seemed to be evenly distributed throughout the broadcast day, *i.e.*, they were not generally clustered in the "graveyard" hours nor during prime audience periods.<sup>52</sup> Inasmuch as the public and the Commission favors PSAs the Commission concluded that such performance was satisfactory and that no specific PSA requirement was necessary or desirable, deferring instead to the broad discretion of licensees in programming matters, and recognizing that such "decisions depend on the community to be served and each licensee's individual situation."<sup>53</sup>

66. Against this background of favorable past performance, we view with some skepticism charges that PSAs will significantly decline or disappear without the commercial processing guidelines. Broadcasters apparently use PSAs for their own reasons. Conversely stated, broadcasters apparently do not air PSAs because the Commission specifically requires them to do so, nor because of the commercial time guidelines. Therefore, we are not convinced that absent such direct regulations, broadcasters' reasons for airing PSAs will substantially change.

67. One aspect of the PSA issue that must be addressed was highlighted most forcefully in the reply comments of Public Media Center (PMC) and the testimony of Mr. Andrew Schwartzman of Media Access Project (MAP) at the panel discussion on September 16, 1980. Mr. Schwartzman said: "Public service announcements are to the listener essentially indistinguishable from commercials."<sup>54</sup> To the extent this assertion is true, it seems reasonable to assume that PSAs are part of the commercial "clutter" important to audiences and advertisers. MAP and others also assumed both that stations

<sup>51</sup> *Report and Order Re: Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, (hereinafter referred to as "PSA Report and Order"), BC Docket No. 78-251. RM-2712, (FCC 80-557), released October 27, 1980.

<sup>52</sup> *Ibid.*, at paragraph 8.

<sup>53</sup> *Ibid.*, at paragraph 42.

<sup>54</sup> Transcript, Deregulation Panel Discussion, Vol. 2, December 16, 1980, p. 197.

will substantially increase their commercial loads absent the guidelines, and that to do so without increasing their "clutter," stations will also eliminate PSAs.

68. This projected chain of events seems somewhat plausible, given the premises upon which it is based. However, it is dependent on at least three independent and rather speculative assumptions, all of which must be correct to bring about the demise of PSAs. These assumptions are: (1) that PSA's are the functional equivalent of advertising for audiences and advertisers, (2) that broadcasters will substantially increase commercial loads, and (3) that broadcasters will be willing to decrease or eliminate their PSAs. Although the first of these assumptions may be true, we are without hard evidence to substantiate it, and the second and third each seem highly unlikely. We have already seen that most broadcasters operate significantly below our commercial guidelines most of the time, and economic factors suggests that they would not be able to greatly increase their commercial minutes absent the current guideline. If, as we project, commercial loads to not change significantly as a result of this rule making, then there would be no reason under this analysis to expect any change in the amount of PSAs.

69. Further, even if the first two assumptions of these commenters prove correct, we are not sure that broadcasters would be willing to decrease their airing of PSAs. As we said above, broadcasters have aired a significant amount of PSAs in the past for their own reasons, not because we have specifically required it. Whatever has prompted broadcasters to air PSAs in the past is apparently untouched by this rule making. In addition the new PSA rule making extensively referred to above was designed to give "greater credit" to those using PSAs and thus encourage their appropriate use. For now, we decline to engage in the cumulative speculation urged upon us and to negatively prejudge the industry in an area where it has provided a record of substantial past performance. As we said in the recent PSA report: "Where we can achieve a goal without regulation, the public interest is well served . . . Thus, the public receives a substantial benefit at a lower regulatory cost, while the broadcaster is enabled to serve his particular community as it requires and not himself be required to meet an artificial standard of performance."<sup>55</sup>

#### Constitutional Policy

70. One persuasive source of our decision to limit our intervention in the advertising marketplace is the constitutional policy of the United States Supreme Court, revealed in several recent decisions, to limit advertising regulation out of respect for the First Amendment value of "commercial speech." In an essentially unbroken line of cases beginning in 1974, the Court has struck down several state regulations that either limited or banned advertising related to specific products, services, or subject matter. Although none of these cases dealt with the broadcast media, we think that the constitutional policy might provide a sufficient independent ground for our decision.

71. It is important to note from the onset that the traditional policy of the Supreme Court from the time of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), was that "purely commercial speech," like obscenity, was outside the ambit of the First Amendment. Later cases ostensibly followed that idea, but generally narrowed its application through various modifications until the entire concept was apparently repudiated in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 248 (1976). The basic thrust of this revision is summarized in *Bigelow v. Virginia*, 421 U.S. 809 (1975) which suggests that although not all regulation of advertising will be struck, neither will it be summarily upheld against a First Amendment challenge: "Regardless of the particular label a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."<sup>56</sup>

<sup>55</sup> PSA Report and Order, *supra*, at paragraph 51.

<sup>56</sup> 421 U.S. 809, 814 (1975).

Further, the Court observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."<sup>57</sup>

72. It is important to stress that these cases do not decide the instant issue, nor as they sufficiently similar for us to assume that the present guidelines would be invalidated by the Supreme Court as a matter of constitutional law and policy. Several distinguishing features separate them from the cases already decided, at least three of which deserve mention here. First, several of the cases included the particularly sensitive issue of "content based" regulation of communication in that they concerned specified types of ideas,<sup>58</sup> products,<sup>59</sup> or services.<sup>60</sup> Second, the regulations often had a rather comprehensive effect, making it difficult for the general public to obtain the related information. As such, they could be construed so as to effect total suppression which has been traditionally disfavored, rather than reasonable regulation.<sup>61</sup> Third, the cases did not deal specifically with broadcasting, nor with the special problems related to a federally licensed industry with a positive public interest obligation.<sup>62</sup> In fact, the "special problems of the electronic broadcast media" were often specifically deferred.<sup>63</sup>

73. The policy of the cases, however, clearly favors the free flow of commercial information. The Virginia pharmacy decision striking bans on drug price advertising is perhaps the most instructive in that it delineates the First Amendment value of such advertising from the view of buyers, sellers, and the general public welfare. There, for example, the Court said that the consumer's interest in the free flow of commercial information may be "as keen, if not keener by far, than his interest in the day's most urgent political debate,"<sup>64</sup> and found the facts before it especially compelling:

Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.<sup>65</sup>

74. Still the Court appeared to think that the most important aspect was the general societal advantage of unrestricted commercial information and refused to recognize a

<sup>57</sup> *Id.*, at 825-826.

<sup>58</sup> *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, U.S. (1980), 65 L.Ed 2d 319, decided June 20, 1980 (invalidating a utility commission order barring bill inserts expressing a utility's opinion or viewpoint on controversial issues of public policy).

<sup>59</sup> *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 248 (1976) (invalidating a state ban on advertising prices of prescription drugs).

<sup>60</sup> *Cary v. Population Services, Int'l.*, 431 U.S. 679 (1977) (invalidating a conviction for advertising the availability of abortion services), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (invalidating a total ban on advertising of attorney services).

<sup>61</sup> See, *Lovell v. Griffin*, 303 U.S. 44 (1938).

<sup>62</sup> However, several commercial speech decisions have involved enterprises subject to extensive state regulation. See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 4-5 (1979), *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Central Hudson Gas v. Public Service Commission of New York*, U.S. (1980), 65 L.Ed 2 341.

<sup>63</sup> See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). See also, *Warner-Lambert v. Federal Trade Commission*, 562 F. 2d 749 (D.C. 1977), 2 Med.L.Rptr. 2303.

<sup>64</sup> *Id.*, at 763.

<sup>65</sup> *Id.*

distinction between publicly "interesting" and "important" ads. Instead, the Court found that the realities of the marketplace pervaded the question:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable.<sup>66</sup>

The Supreme Court then considered the justifications proffered in support of the Virginia Law, and concluded that not all were without merit. However, the Court said that on close inspection "the State's protectiveness of its citizens rests in a large measure on the advantage of their being kept in ignorance."<sup>67</sup> The Court retorted:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.<sup>68</sup>

75. Against this background then it is useful to consider the Supreme Court "tests" used to determine whether or not a specific rule violates the Constitution. Clearly, not all regulation of advertising is unconstitutional. In a very recent decision the Court measured the propriety of a state ban on certain advertising by public utilities against three questions: "We must determine whether the prohibition is (i) a reasonable time, place or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest."<sup>69</sup> In another case decided the same day, the Court said that a four part analysis had developed in commercial speech cases:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>70</sup>

76. Assuming *arguendo* that broadcast advertising would be extended First Amendment protection,<sup>71</sup> and the absence of situations created by false and misleading ads,<sup>72</sup> or those fostering illegal activity,<sup>73</sup> the first part of each formula is easily applied to our guidelines. It seems clear that the guidelines serve a substantial government interest, and that they are reasonable time, place and manner restrictions, and thus would likely be declared constitutional if challenged.<sup>74</sup>

<sup>66</sup> *Id.*, at 765.

<sup>67</sup> *Id.*, at 769.

<sup>68</sup> *Id.*

<sup>69</sup> *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, U.S. (1980), 65 L.Ed.2d 319 326 (1980).

<sup>70</sup> *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, U.S. (1980), 65 L.Ed.2d 341 (1980).

<sup>71</sup> *But See*, notes 58 to 63, *supra*, and accompanying text.

<sup>72</sup> *See e.g.*, *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

<sup>73</sup> *See e.g.*, *Pittsburgh Press Co. v. Pittsburg Commission on Human Relations*, 413 U.S. 376 (1973).

77. As a matter of public policy, however, we think that the second parts of the tests lend great weight to our decision to eliminate the processing guidelines. These parts of the tests suggest that regulations should directly advance the relevant government interest, and that they be narrowly tailored or no more extensive than necessary to achieve the intended government policy. As discussed in considerable detail in the preceding sections of this discussion, the data from the record of this proceeding strongly suggest that the guidelines are no longer necessary. The commercial guidelines are not the primary reasons why broadcasters now limit their commercial loads, and eliminating them may have no substantial effect on broadcaster performance in this area. They appear more extensive than necessary to achieve our interest in curbing advertising excesses. As such, it seems that we have taken the most appropriate course today when we eschew broad advertising guidelines, and place our reliance on marketplace forces unless or until there is convincing evidence of their breakdown either locally or generally. In the future our ability to curb advertising excesses through the development of carefully tailored rules designed to curb specific types of abuses should greatly further the constitutional policy set by the Supreme Court in the "commercial speech" cases, as well as further our own administrative policies.

#### Program Logs

##### History

1. Comprehensive program logs similar to those kept today have been required since the beginning of radio regulation, but the official documents contain very little discussion of their regulatory purpose or effect. The first program logging rule was announced on February 16, 1931, and required all broadcasters to maintain both program and operating logs. The program logs were required to contain:

- (a) An entry of all station and all call announcements and the time made;
- (b) An entry describing each program broadcast, with the time beginning and ending. If phonograph records or electrical transcription are used, that fact should be noted.<sup>1</sup>

In 1934, the FRC republished its procedural rules and first codified its substantive rules. The logging rules became part of Section 172 and contained the essential elements of the present rules. Although the previous provisions were largely unchanged, the new version contained two additions: (1) the program descriptions were to be entered by categories "such as 'music,' 'drama,' 'speech,' etc." and (2) speeches by political candidates were to be specifically entered as such together with the name and political affiliation of the candidate.<sup>2</sup>

##### Summary of Comments

2. The Commission's proposal to eliminate program log keeping requirements for

<sup>74</sup> Although they predate the most important "commercial speech" cases, the Supreme Court decisions indicate that two prominent broadcast advertising cases survive. The cases, are *Banzhaf v. Federal Communications Commission*, 405 F.2d 1082, (D.C. 1968), and *Capital Broadcasting Company v. Mitchell*, 333 F.Supp. 582 (D.C. 1971), affirmed *sub nom.*, *Capital Broadcasting Company v. Acting Attorney General*, 405 U.S. 100 (1972).

<sup>1</sup> *General Order No. 106*, Fifth Annual Report of the Federal Radio Commission for the Fiscal Year 1931, p. 96. No explanatory statement accompanies the *Order*. The only hint of the reason for the requirement comes from an earlier *Order* wherein the FRC expressed disapproval of station use of recorded music rather than live music. In that earlier *Order* the FRC allowed recorded music but required stations to expressly acknowledge each use on the air.

<sup>2</sup> *Federal Radio Commission: Rules and Regulations*, §172(A), (1934).

commercial radio stations did not generate a wide range of opinion, argument or analysis. Most commenters addressing this issue appeared to be of either the general opinion that logs are unnecessary (but that records would continue to be kept in some form as a business decision) or that mandatory program logs of some type are essential to public and Commission supervision of station operation. While some comments spoke to what may be thought of as more tangential issues, the above two positions generally represent the tenor of the comments filed in this regard.

3. Much criticism of our present logging requirements is expressed in the comments, with broadcasters characterizing them as unduly burdensome and some citizens' groups complaining of the tedious and voluminous nature of the information compiled. Where broadcasters generally favor our proposed elimination of the requirements, many others urge that records be mandated as a means of monitoring station performance, assessing compliance with such programming and commercial limitations as might be retained, and evaluating the effects of any deregulation measures adopted. To this end, several comments propose simplified logs covering only non-entertainment and commercial matter or automatically kept logs which would eliminate the paperwork burden. While specific formats for logs were not as a rule suggested, one commenter, Stewart M. Hover, contends that uniform records are essential for station-by-station comparison. Another, Michael Carnes, urges that we require logs but only require their retention for two years, after which they would be given to interested parties such as community groups.

4. Many broadcast commenters cite the results of a General Accounting Office study that claims an annual regulatory burden (due to logging) of 18,000,000 hours and a cost per station of \$650-\$1,200 depending upon the wage rate used to compute the dollar cost.<sup>3</sup> Four individual stations submitted estimated costs of from \$1,562 to \$7,500.<sup>4</sup> Finally, one commenter indicated that the logging requirement utilized over 8,700 pieces of paper for one year;<sup>5</sup> while another commenter claimed that 50% of the time of both the station director and a secretary was devoted to minding the required logs.

5. In addition to the elimination of logging requirements, we proposed as our preferred option that licensees make available for public inspection such records as they voluntarily maintain. Commenting licensees uniformly oppose this proposal. Good business practice, they contend, requires good records, making logs of some sort necessary for all station operators. Voluntarily kept records are likely to contain billing and other financial data and, they argue, the confidentiality of such data would be compromised by public disclosure.

6. With respect to the disclosure of non-confidential information, some broadcasters report little or no use of present logs while others recount incidents of logs supporting "harassing" petitions to deny renewal applications. Non-licensee commenters, in contrast, tend to view public disclosure as essential to effective regulation, permitting local groups to assess station performance. Off-the-air monitoring, suggested by some broadcasters as a substitute for publicly available logs, is dismissed by many non-licensees as impractical, costly, and imprecise, forcing reliance on recollection rather than on a written record.

#### Discussion

7. The apparent value of program logs is their use to monitor the program performance of stations. They are used by the public to support complaints to

<sup>3</sup> See, "Federal Paperwork: Its Impact on Small Business," General Accounting Office, November 17, 1978, p. 43.

<sup>4</sup> See, Comment of WTMT, at 3 (\$1,562); Comment of WKBR, at 2 (\$3,000); Comment WWTR, at 3 (\$6,500); and Comment of WPLM, at 2 (\$7,500).

<sup>5</sup> Comment of KFIN, at 1.

broadcasters, and by the Commission to investigate alleged violations of Commission rules and to make other determinations in the licensing process. The Commission has used the logs to insure compliance with several of its rules, most importantly with the quantitative guidelines for nonentertainment and commercial programs. Several commenters suggested that, even if the guidelines were eliminated in these two areas, the programming logging requirement should remain to allow the public and the Commission to measure the effects of these rule changes.

8. Although we agree that some monitoring may be useful, we are not convinced that the present logs are the most effective and efficient mechanism for several reasons. First, the present program logs are far more comprehensive than is necessary for most monitoring of programming and thus impose an expense that is difficult to justify. Second, their format and detail make them very difficult for the public and the Commission to use. Perhaps most important, the principal information obtainable from logs, by their very nature, relates to quantity. Inasmuch as this rule making signifies our policy decision to allow audiences through the marketplace to more directly determine the appropriate quantity of such programming, our continued program logging requirement becomes largely irrelevant.

9. Beyond the nonentertainment and commercial guidelines where quantity is the essence of the Broadcast Bureau's delegated authority, the Commission has used the logs as indicia of compliance with two other types of program requirements: (1) the specific announcement requirement of the Emergency Broadcast System (EBS), and (2) the more general program requirements such as those related to political broadcasting and the Fairness Doctrine. The record in this proceeding leads us to the conclusion that program logs are not necessarily the most efficient way to monitor station compliance with these program obligations.

10. As we indicated in the *Notice*, the EBS announcements may be best suited to a logging requirement, and can be kept in the operating logs without a significant impact on the present system.<sup>6</sup> The program logs are less useful in monitoring compliance with the more general program requirements, such as Fairness Doctrine. Specifying the date, time, and duration of programs, the logs yield little useful data on the public interest value of listed programs. The comments of the National Black Media Coalition (NBMC) may best represent those who have used the logs to monitor the program performance of stations. Asserting at the onset that some means of programming monitoring is necessary, NBMC said: "We agree, however, with those who point out that much of the material which must be logged is worthless to groups seeking to evaluate and improve the media. In fact, NBMC has often been at a loss to explain to groups monitoring program logs how to decipher them."<sup>7</sup>

11. Elimination of the logs will not significantly change our current public interest oversight process. The substance of a Fairness Doctrine complaint, for example, does not require complainants to present a comprehensive list of all programming potentially relevant to each complaint, even though such a requirement might not have been unreasonable given the past public availability of the logs. Instead, complainants must, *inter alia*, state "the basis for the claim that the station presented only one side of the question."<sup>8</sup> This does not require that complainants constantly monitor the station's programs, but rather that they state their reasons for the complaint, and show that their knowledge of the station's programming is sufficiently extensive to provide a substantial basis for the complaint.<sup>9</sup> Although this system does require some diligence, it provides a

<sup>6</sup> Radio licensees now have the option of logging EBS announcements in either the program or the operating logs. See Sections 73.1800(b)(5) and 73.1820(a)(1)(iv).

<sup>7</sup> Comments of the National Black Media Coalition, p. 17-18.

<sup>8</sup> See, *In the Matter of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C. 2d, 17-21 (1974).

<sup>9</sup> *Ibid.*, at 19.

reasonable avenue for lodging well-founded complaints, and gives the Commission and broadcasters some protection against unwarranted and capricious complaints.

#### Appendix-J\*

##### Changes to Application Forms

1. Given our resolution of the non-entertainment guideline, ascertainment, and commercial guideline issues renewal applicants need no longer answer the following questions on FCC Form 303-R, the Application for Renewal of License for Commercial AM or FM Radio Broadcast Stations: 11, 12, 14, 15, 16, 17, 18, and 19. Until new forms are available, applicants should consider question 13 to read:

Has the applicant placed in the public inspection file at the appropriate times its annual list of those *issues* which, in the applicant's judgment, warranted treatment by station and typical and illustrative programming in response thereto?

We are not unmindful that we also currently have under consideration a so-called "postcard" renewal procedure (BC Docket No. 80-253). The changes in Commission regulations being made in this proceeding will be taken into account in any form that might be adopted as a result of that proceeding.

2. Other FCC Forms must also be amended to reflect our determination in this proceeding. These are FCC Forms 301 ("Application for Authority to Construct a New Broadcast Station or Make Changes in an Existing Broadcast Station"), 314 ("Application for Consent to Assignment of Broadcast Station Construction Permit or License"), and 315 ("Application for Consent to Transfer of Control of Corporation Holding Radio Broadcast Station Construction Permit or License").

3. In FCC Form 301, the principal changes will have to be made to Section IV-A. In that Section, Parts I ("Ascertainment of Community Needs"), II ("Past Programming"), III ("Proposed Programming"), IV ("Past Commercial Practices") and V ("Proposed Commercial Practices") will be deleted in their entirety. A new Part I (entitled "Proposed Programming") will be added instructing the applicant as follows:

Attach an Exhibit (No. ) briefly describing your planned program service in narrative form.

Applicants will thereby be committed to a programming proposal so that, should there be material differences, a determination can be made as to the designation of a comparative programming issue. In the portion of Section IV-A currently entitled "Instructions, General Information and Definitions for AM-FM Broadcast Application," the following modifications will be necessary:

- (a) Instruction 1 will be amended to delete the words "Ascertainment of Community Needs (Part I)", "Proposed Commercial Practices (Part V)" and the words "Proposed Programming (Part III)" will be amended to read, "Proposed Programming (Part I)";
- (b) Instruction 2 will be amended to read, in pertinent part, ". . . unless there is proposed *an increase of facilities . . .*" (new portion underlined);
- (c) Instruction 3(b) will be amended to delete the words, "or commercial practices." The portion of this instruction concerning program formats may be revised depending upon the resolution by the Supreme Court of the case, *Federal Communications Commission v. WNCN Listeners Guild*, Case No. 79-824;

\* No "Appendix-I" was included to avoid confusion with Roman numeral 'I'.

- (d) Definitions 9 ("commercial matter") and 12 ("Composite Week") will be deleted; and

Finally, "Attachment B" will be eliminated from Section IV-A.

4. In FCC Forms 314 and 315, too, the principal changes will occur in Section IV-A. In the portion entitled "Instructions, General Information and Definitions for AM-FM Broadcast Application," the following changes will have to be made:

- (a) The title of the Section will be amended to read, "Instructions and General Information for AM-FM Broadcast Application";
- (b) Instructions 2, 3(c), 4, 6 and the Definitions will be eliminated; and
- (c) Instruction 1 will be modified to delete the words "Ascertainment of Community Needs (Part I), Proposed Programming (Part III), Proposed Commercial Practices (Part V)."

Additionally, Section IV, Parts I ("Ascertainment of Community Needs"), II ("Past Programming") and III ("Proposed Programming"), Part IV ("Past Commercial Practices") and Part V ("Proposed Commercial Practices") will be deleted in their entirety. However, a new Part I will be added, entitled "Proposed Programming," consisting of the following:

Attach an Exhibit (No. ) briefly describing the (assignee's) (transferee's) planned program service in narrative form.

Additionally, a new Part II will be added, entitled "Program Format(s)," and will consist of the following instruction:

Attach an Exhibit (No. ) signed by the applicants setting forth a description of the station's past and proposed program format(s). The description of the station's past format should briefly describe the station's format(s) during the past 12 months.

This latter requirement is being retained pending the Supreme Court's determination in the case *Federal Communications Commission v. WNCN Listeners Guild, supra*. In the event that the case is determined in the Commission's favor, steps will be taken to amend this part of Section IV-A, as well. Additionally, "Attachment B" will be deleted from Section IV-A. Finally, with regard to Forms 314 and 315, we are eliminating the requirement for the transferor, or assignor as the case may be, to sign the application as currently required in Part VII, "Other Matters and Certification." The signature of transferor or assignor will still be required at other places in the relevant applications.

#### STATEMENT OF CHARLES D. FERRIS, CHAIRMAN

##### Re: Radio Deregulation

Today we have translated the rhetoric of "deregulation" into reality. No longer will radio broadcasters be required to follow empty governmentally required procedures and compile stacks of paperwork. Instead they will be able to follow their own path in determining how to serve their community's needs and interests in ways that reflect the realities of today's radio market.

I expect that active dialogue between radio stations and their communities will continue, without the rigidified "ascertainment" guidelines of the past. In today's dynamic radio market, a station's failure to listen to and address local interests and issues will result in

economic penalties at least as severe as those the Commission could impose.

The elimination of commercial time limits will free the Commission from monitoring disc jockeys who add a few minutes of their own creativity to an ad agency's 30-second copy. And the elimination of program logging will let radio stations decide themselves how best to keep a record of their programs and commercials for their advertisers and internal purposes.

Finally, our decision to keep a legal obligation on each radio station to air issue-oriented programming to meet local community concerns guarantees against the unlikely absence of an economic market for news and local issue-oriented programming in some communities.

We cannot always be absolutely certain of each deregulatory step we take. But we can attempt to compile as full a record as possible before taking off past regulatory burdens. In this case we have given the public several opportunities for comment, held panel discussions, and debated the issue fully within our Commission. We have undertaken an exhaustive survey on how the radio marketplace functions in the area of commercialization and news and informational programming. I am pleased that we have finally acted, and acted in a responsible manner.

I look forward, years from now, to the ultimate vindication of this action, which can only come from the test of time as the marketplace functions with less government intrusion and more discretion given to radio stations to determine the way in which they will carry out their Communications Act obligations.

#### STATEMENT BY COMMISSIONER JAMES H. QUELLO

##### In Re: Deregulation of Radio

I wholeheartedly support today's Commission action deregulating radio broadcasting. The Commission's withdrawal from the areas of ascertainment, commercial limits, non-entertainment programming quotas and program log-keeping represent a significant deregulatory foot in the door.

However, only legislation can provide real meaningful deregulation dealing with license terms, political broadcasting, Section 315, the Fairness Doctrine and government involvement in program formats. I hope the Commission in the future will make well-reasoned, appropriate recommendations to Congress.

#### CONCURRING STATEMENT OF COMMISSIONER ABBOTT WASHBURN

##### Re: Radio Deregulation

It's been said: "Many a man in love with a dimple makes the mistake of marrying the whole girl." I hope the Commission's infatuation with the deregulation dimple won't prevent us from looking for the imperfections and uncertainties in this *Report and Order* when it

comes back to us on reconsideration. I had hoped that these improvements could have been made by releasing the document as a *Further Notice of Proposed Rulemaking*, instead of a *Report and Order*.

*Non-Entertainment Programming Guidelines*

I concur in the decision to eliminate the non-entertainment programming guidelines while retaining a generalized obligation to offer programming responsive to community issues. What do we mean by "a generalized obligation?" This is not at all clear from our document. Without a fuller explanation, I fear that the broadcasters will be unable to discern what it is the Commission expects of them. The result will be a good deal of uncertainty and differences of interpretation.

I also wonder how the general public will react to our conclusion that market forces can be relied upon to assure programming responsive to community needs. There are significant portions of a station's community that have little market power—such as the elderly, the urban poor, and the handicapped. How, then, will the marketplace assure these groups of programming responsive to their needs?

The *Order* states that we will leave it up to the individual broadcaster's judgment as to whether the needs of particular segments of the community will be served adequately by other radio stations and, if so, the broadcaster then is free to focus on his own special audience and its special interests and needs. But suppose a group of citizens says his judgment is wrong and alleges that its particular needs are *not* being served in the community by any other station. How would the Commission respond?

In order to determine whether the broadcaster's judgment was reasonable, we would need to study that market as a whole and all of the stations licensed to it individually. Determining whether a particular group's needs in a particular marketplace environment are adequately addressed is a very difficult judgmental question—especially so for a regulatory body sitting in Washington.

I have to say that I'm troubled by our jettisoning the requirement for news broadcasts. *News and public affairs* have always been thought of as twins in American radio. Here we are requiring the coverage of issues of concern to the community—that is, public affairs—and yet there is no requirement for news, local or national. Along these lines, I am interested in hearing more in response to Commissioner Brown's suggestion that local issues be addressed by locally produced programming. After all, under the 1934 Act, localism is the heart of our broadcasting system.

Finally, I am concerned that even if a station faithfully serves its own special audience, the licensee may not necessarily have fulfilled its statutory obligation. The Act speaks of the broadcaster's responsibility to serve the "community of license" not its obligation to serve a particular listenership. Frequently, the two are very different things.

While the Courts have permitted the Commission great latitude to interpret the Act, our authority does not extend to altering the community of license concept. We may be vulnerable on appeal by appearing to tamper with it.

For all of the above reasons, I am concurring in the non-entertainment programming portion of the document, and hope that it may be improved before becoming final. Inevitably, there will be Petitions for Reconsideration. These and the responsive comments will help make us more fully aware of the problems, so that we will be able to tighten and clarify the document. It is clear that honing is necessary in view of the fact that three Commissioners concurred and one dissented.

#### *Commercial Guidelines*

When we issued the *Notice of Proposed Rulemaking*, I dissented to eliminating the 18-minute limit for commercial matter. I said: "The public *expects* us to indicate reasonable limits beyond which a broadcaster is over-commercializing and imposing on the listening audience." The 18-minute standard is in the NAB Radio Code, and the fact that we have adopted it in our guidelines has, perhaps, encouraged adherence to the Code limit. Now that we are dropping it, what recourse do we have against flagrant abusers who grossly over-commercialize? Such broadcasters are very few in number, it is true, and as the document states, the marketplace will probably take care of most of them. But if it doesn't, and if we receive complaints, I'm told by the lawyers that we can deal with them through the authority of the statute, which requires that licensees operate in the public interest. So I am withdrawing my objection to the commercialization deregulation.

#### *Ascertainment*

The Commission's ascertainment process, in my view, has contributed to the development of a healthy dialogue between broadcasters and public groups and leaders at the local level. With today's action we are eliminating the formal ascertainment requirement. This does *not* eliminate the obligation of stations to remain open and accessible to their communities. That obligation remains as important as ever, but the mechanics are left to the parties directly involved, the station and the station's community.

#### *Program Logs*

I support eliminating our program log keeping requirement, since we have decided to eliminate the guidelines for non-entertainment programming and commercial practices.

## CONCURRING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

## In Re: Deregulation of Radio—Report and Order

## I. INTRODUCTION

In concur in this Report and Order not because it “deregulates” radio—it does not—but because it rationally refines the public interest obligations of radio station licensees in light of the contemporary reality of the radio marketplace. That reality, as embodied in the extensive record in this proceeding, establishes a compelling *prima facie* case for the proposition that less regulation and more reliance on radio market forces will continue to meet the public interest goals and objectives which are this Commission’s statutory responsibility to accomplish. As I stated at the outset of this proceeding, “We are under no mandate to prefer particular regulation simply for its own sake. Indeed, we have a continuing responsibility to reassess the costs and benefits of our regulatory means and ends to ensure that the public interest is being served in fact as well as in theory.”<sup>1</sup> For the most part, I believe we have met that responsibility in this proceeding.

It is critical to distinguish and emphasize what this Report and Order does and, more importantly, what it does *not* do. First and foremost, it does *not* abandon the statutory public interest standard to the “marketplace,” as originally proposed.<sup>2</sup> We have clearly and emphatically rejected this proposed abdication. This Report and Order does *not* excuse radio licensees from their public interest obligation to be sensitive and responsive to the needs and interests of their communities and to direct program service to those needs and interests. It does *not* allow radio licensees to shift their individual public interest obligations to the “marketplace.” It does *not* allow “100% commercial” stations. It does *not* abdicate this Commission’s ultimate responsibility to pass on licensee performance in either the petition-to-deny or the comparative renewal process.

This Report and Order *does* rely on the multiplicity of radio outlets and marketplace forces in reducing the regulatory procedures imposed on licensees. It *does* eliminate the costly and burdensome formal ascertainment process and requirements while retaining the salutary ascertainment principle. It *does* eliminate the vague and erratically enforced “quantitative” standards of the “staff-processing” nonentertainment programming “guidelines,” substituting an annual 5-to-10 issue/program listing as the bedrock public interest obligation. It *does* allow for individual licensee specialization in nonentertainment programming, but it does so under a standard that reasonably ensures that overall community needs and interests will still be met by the

<sup>1</sup> Statement of Commissioner Joseph R. Fogarty, Concurring in Part; Dissenting in Part, 73 FCC 2d 606, 607 (1979).

<sup>2</sup> *Id.* at 610–11.

radio medium. It *does* rely on market forces to control and limit radio commercialization by eliminating the commercial "guidelines," but it does so based on a strong record indicating that such reliance is both reasonable and in the larger public interest.

I address each of these actions—and non-actions—in some detail in order that these judgments, distinctions, and expectations are made clear.

## II. ELIMINATION OF THE COMMERCIAL TIME "GUIDELINES"

The record in this proceeding provides solid support for the thesis that economic forces in both small and large radio markets will naturally limit commercialization to levels acceptable to the public interest. Simply stated, a radio licensee who overindulges in commercials is going to lose his audience to another station. It must also be recognized that the Commission's involvement in commercial limitations has never enjoyed strong Congressional support.<sup>3</sup> Most significantly, the commercial "guidelines," which track the National Association of Broadcaster's Code, are not without antitrust policy problems in terms of their potential to limit artificially the quantity and hence maintain the price of radio advertising to the detriment of consumers and advertisers alike. The record further provides strong evidence that our important policies favoring increased minority ownership and program diversity may be impeded or retarded by these limitations.

On balance, I believe, therefore, that the commercial guidelines should be removed in favor of the more natural limitations of competitive forces working in the radio marketplace. While there may be significant short-run increases in commercialization as radio licensees test their markets, over the long run commercial patterns should stabilize at levels not unlike those presently obtaining. If contrary to these expectations of record excessive commercialization becomes the industry standard, the Commission will have the clear responsibility to re-enter the field with remedial regulation.

## III. ELIMINATION OF THE "STAFF PROCESSING GUIDELINES" ON AMOUNT OF NON-ENTERTAINMENT PROGRAMMING AND PREFERENCE FOR "WELL-BALANCED" NON-ENTERTAINMENT PROGRAMMING SERVICE.

This Report and Order eliminates the "staff-processing guidelines" with respect to raw amounts of nonentertainment programming broadcast by radio licensees. It also withdraws past Commission policy preferring a system of radio service in which each licensee must present "well-balanced" nonentertainment programming designed to serve, at least in part, the entire spectrum of its community's significant groups and their particular problems and interests. In its stead, this Report and Order constructs a new policy allowing

<sup>3</sup> See, e.g., Report and Order, Appendix G, par. 4.

individual licensee nonentertainment programming "specialization" in radio markets where the number of stations reasonably ensures that overall community problems and interests will be met. At the same time, we are specifying a "bedrock" licensee public interest obligation to offer programming responsive to community issues in the form of a requirement that each licensee annually list 5 to 10 issues to which responsive programming was directed, together with a description of how the licensee determined those issues were of importance to its community and how each issue was treated, including date, time, and duration of the program material addressed to the issue.

As I emphasized at the outset of this proceeding, the critical goal and policy of Commission regulation has been to ensure that broadcast stations serve as sources of information on the issues which confront our democracy and its citizenry.<sup>4</sup> It bears repeating here that "[W]e have allocated a very large share of the electromagnetic spectrum to broadcasting chiefly because of our belief that this medium can make a great contribution to an informed public opinion."<sup>5</sup>

While the matter is not entirely free from doubt, I believe that the rule and policy amendments effected by this Report and Order are faithful to and, indeed, may even strengthen the pursuit of this fundamental goal of an informed public opinion. Given the specification of an annual 5 to 10 issue/programming listing requirement for each radio licensee, I can concur in the elimination of the current nonentertainment programming quantitative guidelines on the theory and expectation that absent such guidelines significant amounts of informational material will continue to be available on radio. Here, it must be remembered that the existing staff-processing guidelines have been just that—"guidelines"—and were never intended as binding standards or requirements. This reluctance to enforce a rigid adherence to quantitative standards has stemmed from the realization that "quantity" does not necessarily equal "quality," as well as from a genuine lack of confidence in the wisdom and validity of any minimal percentage standard that might be chosen by a government agency.<sup>6</sup>

I believe that as a substitute for quantitative "guidelines," the annual 5 to 10 issue list requirement strikes a better balance, in the context of contemporary radio, between the need for a public interest "bottom-line" and the equally important concept of deference to licensee discretion. The emphasis is ostensibly where it should be: on the licensee's actual program service product and its responsiveness to community problems, not on raw amounts of time, on artificial program categories, or on the formalistic process by which issues are

<sup>4</sup> Separate Statement of Commissioner Joseph R. Fogarty, 73 FCC 2d at 609-10.

<sup>5</sup> *Fairness Report*, 39 Fed. Reg. 26372, 26375, 48 FCC 2d 1, 10 (1974).

<sup>6</sup> See *Formulation of Policies Relating to the Broadcast Renewal Applicant* (Docket 19154) Separate Statement of Commissioners Benjamin L. Hooks and Joseph R. Fogarty, 66 FCC 2d 433, 435-36 (1977).

selected. At the same time, however, as in all other areas of Commission broadcast policy, there is no substitute for licensee reasonableness and good faith. Compliance with the annual listing requirement should evidence that reasonable, good faith effort on the part of each radio broadcaster to contribute to an informed public opinion in his community. Ideally, that compliance should indicate a commitment to in-depth and not merely cursory treatment of the public issues selected for coverage. This obligation, together with Fairness Doctrine compliance, is now the "*sine qua non*" for radio license renewal.

I believe that the record evidence in this proceeding indicates that most radio licensees will honor this responsibility and commitment and will not abuse their enhanced discretion. However, I also believe that a word of gentle but clear warning is appropriate. While this Report and Order emphasizes that the Commission's review will no longer focus on the mere *amount* of nonentertainment programming broadcast by the radio licensee, it should be obvious that a licensee cannot comply with its continuing issue programming obligation by doing little or nothing. In this regard, I agree with the Report and Order that "A station with good programs addressing public issues and aired during high listenership times but amounting to only 3% of its weekly programming may be doing a superior job to a station airing 6% nonentertainment programming little of which deals in a meaningful fashion with public issues or which is aired when the audience is small."<sup>7</sup> But, it should be equally plain that a station purporting to meet its program service obligation by addressing only one or two 30-second PSAs a month to five issues over the course of a year will be doing an *inferior* job. The point I wish to emphasize here is that while we are not going to be concerned with quantity as such, if radio licensees regard their increased discretion as an invitation to see how low they can go, then those licensees will inevitably lead the Commission back into the "numbers game" which we have sought to avoid. This point is underscored by the clear statement in the Report and Order that the nonentertainment programming obligation applies to each individual licensee and cannot be shifted to the "marketplace." I trust that forewarned is forearmed.

I also share some of the concerns about "local" programming expressed by Commissioner Brown in his Dissenting Statement. I agree that both our allocation principles and the public interest standard emphasize that we expect licensees to operate their stations as local outlets for local expression of views. However, it also should be observed that the Commission has never established a rigid requirement that local community problems and interests can only be met by locally originated programming. Clearly, local issues can be addressed—and often in a superior fashion—by programming which is

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<sup>7</sup> Par. 52.

not indigenously produced. Today, it is a truism that national problems are local problems, and often vice versa. PSAs produced by national public service organizations can respond effectively to issues of local concern, and the services of national news organizations can contribute effectively to local informational needs.

More fundamentally, I do not agree with the characterization that this Report and Order permits radio licensees to rely entirely on outside sources for their annual 5 to 10 issue informational programming. The pertinent language of the Report and Order warrants full reiteration here:

We continue to be concerned that stations serve their local communities. This might often mean that stations use locally produced programs to meet their community issue obligation. This does not preclude, however, the use of other programs which address issues of importance to the community.<sup>8</sup>

While perhaps not a model of precision and clarity, I think this language expresses the principle fairly well: Radio broadcasters have full flexibility to use programming from any and all sources to satisfy their community issue programming obligation, but that discretion must be exercised consistent with their continuing responsibility to serve as local outlets for local expression. FCC regulation, like the law in general, is not insensitive to matters of degree, and radio licensees should be expected to share that sensitivity. Any licensee who relies exclusively on non-local programming to satisfy his community issue obligation should be prepared to demonstrate the reasonableness of that decision.

The critical core of this Report and Order is the decision to modify the Commission's long-standing policy requiring each licensee to provide "well-balanced" nonentertainment programming designed to serve the broad cross-section of its community's constituent groups and their particular problems, needs, and interests. This Report and Order partially modifies that policy to allow nonentertainment programming specialization by licensees in large radio markets where the number of stations and the diversity of their informational programming services gives assurance that overall community problems and interests will be met by overall market performance. Thus, if a radio licensee can demonstrate that some other station(s) can be reasonably relied upon to meet the informational needs and interests of a particular constituent element of his community, that licensee may focus his nonentertainment programming efforts on other audience needs and interests.

Leaving aside for the moment the question of what constitutes "reasonable reliance," the fundamental issue presented is whether allowing such individual licensee nonentertainment programming specialization is in the public interest. For me, this is the most difficult matter decided by the Commission in this proceeding for there are

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<sup>8</sup> Par. 71.

serious and substantial arguments on each side of the issue. On balance, and not without certain hesitation, I concur in the Commission's decision to permit nonentertainment program service specialization.

Against this decision, it may be argued that allowing specialization will lead to licensees ignoring significant community groups and interests with tacit FCC blessing. More fundamentally, there is the argument that the public interest is best served by requiring that every radio station *expose* its particular audience to a broad cross-section of community issue programming (whether that audience wishes to hear it or not). That such community cross-section programming may be *available* by turning the dial across the AM/FM bands is not enough, according to this argument; maximum *exposure* to that cross-section should be the regulatory goal.

While the foregoing arguments are not without appeal to a traditional interpretation of the public interest standard, I believe we have to recognize that specialization in both entertainment and nonentertainment programming is a "fact of life" in contemporary large market radio. By recognizing this fact in our regulatory policy, we also recognize that such specialization may lead to more particularized, in-depth treatment of community issues with greater appeal and value to radio listeners, both as members of constituent groups and as members of the community at large. Here, we also have to acknowledge that the existing "well-balanced" policy has by no means guaranteed a perfect or even substantial match of radio service and community group needs on a station-by-station basis. If issue programming responsive to minority and other significant group needs and interests is available across the radio dial, I think we are hard pressed under our First Amendment regime to find a valid rationale for government imposition of a requirement that each station must nonetheless fit itself into the same "well-balanced" service mold with respect to its nonentertainment programming. The ultimate public interest—"the right of the public to receive suitable access to social, esthetic, moral, and other ideas and experiences"<sup>9</sup>—is, I believe, better served by allowing informational programming specialization as an option of licensee discretion.

While I therefore concur in principle with the Commission's decision to allow radio licensee nonentertainment programming specialization, there remains the matter of the standard of "reasonable reliance" which will allow a licensee to specialize its informational program service. The Report and Order holds that while nonentertainment programming will remain a subject for consideration in both petition to deny and comparative renewal proceedings, the Commission's concern will focus on whether the licensee offered issue-responsive programming, and, if it chose to specialize, whether that decision was

<sup>9</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

reasonable from the standpoint of the availability of nonentertainment program service being provided by other stations in the market to segments of the community not served by the specializing licensee. While this standard makes sense to me in theory, the practical efficacy of this approach will again depend on the reasonableness and good faith of radio licensees. Here, the Report and Order is clear on the point that "In all cases . . . the burden will be upon the licensee to demonstrate, if called upon to do so, that its determination was reasonable."<sup>10</sup> This discussion plainly indicates that a radio licensee cannot merely look at *Broadcasting Yearbook* summaries of the entertainment formats of the other stations in his market for the basis of "reasonable" judgments on what particular informational programming is available in that market. A "Soul" music format does not *ipso facto* imply a minority-oriented informational service, nor does a "Big Band" format connote nonentertainment program offerings for the elderly. Reasonable reliance on the radio marketplace requires particular, affirmative knowledge of that market. The *ad hoc* review standard of "reasonable reliance" prescribed by this Report and Order is not an invitation to fast shuffle community needs and interests all around the town. I do not wish to inhibit radio licensees from specializing their nonentertainment programming, but they must be on clear notice that their discretion to specialize is bounded by the overall performance of their markets in serving overall community needs and is further tied to a fair and accurate reading of that overall market performance.

Before leaving this aspect of the Report and Order, it needs to be observed that although we are no longer requiring "News" and "Public Affairs" as discrete program categories, our action does not sanction the complete demise of these two service offerings. The plainly-stated expectation of this Report and Order is that significant amounts of news programming will still be available to radio audiences, although not necessarily on every station. Failure of this expectation will mandate Commission review of our theory of radio marketplace reliance serving the public interest. As for "Public Affairs," the essence and importance of this type of programming is still embodied in the two-prong statutory obligation of the Fairness Doctrine: To cover controversial issues of public importance, and to afford reasonable opportunity for the presentation of contrasting views on those issues covered. Nothing in this Report and Order changes—or could change—this fundamental licensee obligation.

#### IV. ELIMINATION OF THE FORMAL ASCERTAINMENT REQUIREMENTS AND PROCEDURES

It is important to emphasize that while this Report and Order eliminates the formal ascertainment procedures and requirements for radio licensees, it leaves intact the fundamental ascertainment princi-

<sup>10</sup> Par. 54.

ple that radio broadcasters must be sensitive and responsive to the issues facing their communities. Given the great multiplicity of radio outlets, it is not unreasonable to allow competitive forces and broadcaster self-interest to ensure compliance with this essential principle. We are eliminating only the formalistic ritual of the ascertainment process which, in my judgment, now serves only as an elaborate petition-to-deny insurance policy for radio licensees and does little, if anything, to ensure actual programming responsive to community problems and interests. While these formal procedures and requirements may have served a "sensitizing" purpose in the past, their present and future value as a legitimate regulatory tool is severely undercut by the costly paperwork and resource displacement burdens they impose.

This action does not, however, give licensees the license to turn a deaf ear and an unseeing eye to their communities. While we are leaving the process of ascertainment to the reasonable, good faith discretion of radio licensees, this Report and Order plainly states that "It would be inconsistent with the exercise of good faith judgment for a broadcaster to be 'walled off' from its community."<sup>11</sup> We emphasize here that radio licensees must "maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station's attention."<sup>12</sup> Thus, as a minimum requirement radio licensees must maintain an "open door" policy which allows for the fullest input from their communities with respect to their program decision-making process. This obligation should not be regarded as a last vestige of ascertainment but as a fundamental requirement with which all radio licensees, as public trustees, will be expected to comply. Furthermore, although we will no longer be concerned with the particular process by which licensees determine their public issue programming, we will require licensees to indicate how they identified the issues they chose to cover as being of importance to their communities, thus maintaining the important linkage between the principle of ascertainment and program service. These minimal requirements, together with the obligation to maintain the annual issue/programming listing in the station's public file, should provide a good basis on which to continue the licensee-community dialogue that is at the heart of our public trustee system of broadcasting.

#### V. ELIMINATION OF THE PROGRAM LOG REQUIREMENTS

Since program logs have been generally of use to the Commission in assessing licensee compliance with the existing nonentertainment programming and commercial guidelines, the elimination of those

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<sup>11</sup> Par. 69.

<sup>12</sup> *Id.*

guidelines in large measure removes the rationale for the existing program log requirements. Radio licensees will still be required to maintain their public files, including their annual issues/program listings and associated material. I believe that this continuing public file requirement will afford interested members of the licensee's community adequate access to information necessary to evaluate licensee performance in terms of both qualitative and quantitative factors. While the public file requirement will not provide the data on station commercialization necessary to evaluate licensee and market performance under the Commission's new permissive commercial policy, I think it reasonable to rely on the monitoring efforts of interested members of the public, such efforts appearing neither too complicated nor unduly burdensome.

#### VI. CONCLUSION

Whether or not the Commission labels it as such, this Report and Order is the beginning of an "experiment." It is an experiment testing the theory that less regulation and more reliance on competitive radio market forces will continue to meet, if not also enhance, the public interest in this important medium of communication. I believe the record and analysis in this proceeding provides reasonable assurance that this theory is workable. I think it deserves a fair opportunity to succeed. At the same time, our policy assumptions and performance expectations have been clearly stated as the predicate for our actions in this Report and Order. If experience in the real-world radio marketplace shows these assumptions to be in error and leaves these expectations unfulfilled, then the Commission will have the clear duty to revisit its actions.<sup>13</sup>

Given the sound and fury—and the dubious legality—of the "preferred options" set out in the original Notice of Proposed Rule Making, I can understand how in some quarters the intentions and credibility of this Report and Order may be subject to question. I emphasize that the actions, if not also all the rhetoric, of this Report and Order represent a sharp and clear departure from those original proposals. I concur in these actions, firmly believing that they keep faith with the public interest standard, and that we are committed to take remedial action if that faith proves to have been misplaced.

#### DISSENTING STATEMENT OF COMMISSIONER TYRONE BROWN

#### RE: RADIO DEREGULATION

In 1934 there were fewer than 600 radio broadcast stations in the United States. Today there are more than 9,000 providing a greater degree of program specialization than anyone expected in the early years. In light of this vast increase in the number of radio broadcast

<sup>13</sup> *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979).

outlets, we opened this proceeding to determine whether we should eliminate our commercialization guidelines, quantitative nonentertainment programming guidelines, our formal ascertainment requirements and our second-by-second program logging requirements.

We license radio stations to specific communities so they can provide programming services to those communities. For me, therefore, the central issue in this proceeding has been the proposal to eliminate our quantitative nonentertainment programming guidelines. Assuming those guidelines are dropped, how does this agency make the necessary finding, for *each* station presented for renewal, that the licensee has sufficiently served "the public interest, convenience and necessity" to justify retention of the license?

In expressing tentative support for substantial simplification of our regulatory approach to radio, I have emphasized that I believe "local public service programming—in the broadest meaning of the phrase—is the cornerstone of the broadcaster's obligation to serve his local community."\* Because of today's decision places far too little emphasis on this bedrock principle, I reluctantly dissent.

In the place of the nonentertainment programming guidelines, the majority substitutes a general licensee obligation to program to issues relevant to its community or target audience. Proof of the broadcaster's performance will take the form of a list of local issues or informational program areas it has dealt with, including a description of why it chose those issues or program areas for presentation.

I encouraged the Commission to adopt such a list. It will serve two very important purposes: First, kept in the station's local public inspection file, it will serve as a basis for discussion for local listeners who may wish to discuss the station's programming decisions with management. Without such a document, the dialogue between the community and station management, which we all wish to encourage, would be severely inhibited. Secondly, the list will provide the Commission with a record on which to make the necessary affirmative public interest finding at renewal time—evidence of a licensee's compliance with its basic public interest obligation.

Until the open Commission meeting on this matter, I believed it was agreed that the critical list would focus on the licensee's locally originated programming. For more than 45 years, this Commission's consistent interpretation of the Act, in our approach to geographical allocation as well as in our statements on programming,\* has required the licensing of *local* stations which must serve as *local* outlets for *local*

\* Remarks of Commissioner Tyrone Brown before the 17th Annual Southern California Broadcasters Association Public Service Workshop. Los Angeles, California (Dec. 8, 1978) (Mimeo No. 10397).

\* See e.g., *Public Service Responsibility of Licensees* (the "Blue Book") (1946); *En Banc Programming Inquiry Statement*, 44 FCC 2303, 2311 (1960) ("[A]ppropriate attention to local live programming is required.")

expression of views. The majority today drastically revises this approach to permit radio broadcasters to rely entirely on outside sources for their informational programming.

I do not for a moment believe that most radio licensees will stop airing locally originated informational programming or dismantle their local origination capabilities. After today's decision, however, some few may. Because I believe the provision of programming which includes local discussion of issues is the *sine qua non* of radio service in the public interest, I would tell those who would abandon this principle that they should seek another line of business.

CONCURRING STATEMENT OF COMMISSIONER ANNE P. JONES

In Re: Deregulation of Radio (BC Docket No. 79-219)

By this action the Commission relieves radio of regulatory "guidelines" on commercials and nonentertainment programming and requirements on program logging and ascertainment of community needs. I applaud this action. I must say, however, that I consider it quite a modest deregulatory step, especially in view of the newly imposed requirement of an annual listing of issues and responsive programming, which I believe is neither necessary nor desirable. I especially object to the part of this new requirement which requires "a brief description of how the licensee determined each issue to be one facing his community." (Report and Order, paragraph 71) As with the formal ascertainment we are eliminating, this new requirement is irrelevant to the question whether the issues addressed by the licensee are indeed "facing the community" and whether the programming presented in response to them constitutes meaningful service to the community. The requirement is, in effect, residual ascertainment, and I believe that it may in time lead to resurrection of the formal ascertainment which we should today be burying for all time.

In my view it is clear from the record in this proceeding that the vast majority of radio broadcasters today operate in markets where they must serve the needs and interests of their audience or lose that audience to competitors. In these conditions there is no need for regulation to ensure that radio broadcasters serve their communities responsibly. They must do so to stay in business.

It is also clear from the record in this proceeding that many individuals and organizations are apprehensive that deregulation of radio may result in failure by some broadcasters to fulfill their public interest responsibilities. There is also some apprehension that deregulation may result in failure by some broadcasters to serve some needs which do not equate with economic demand. To the first of these apprehensions my response is that we do not, and cannot, in this proceeding abrogate the statutory obligation of broadcasters to serve the public interest, and we can deal with the few who may fail to fulfill that obligation without continuing to saddle the entire industry with unnecessary regulatory burdens. To the second apprehension my

response is that where competitive forces are at work paternalistic regulation is unnecessary and ultimately self-defeating.

In my view it is high time for this Commission to remove itself as completely as possible from the radio market place. The audience is at least as competent as we are to decide what service it desires from radio, and nearly everywhere in the country listeners can tune in a station which provides the service they desire and tune out any which does not. I therefore concur with enthusiasm in this action by the Commission and urge it to move promptly to give radio the fullest possible relief from regulatory restrictions and requirements which, whatever their prior purpose and justification, are not justified today.

My own inclination at this point is to eliminate all nontechnical regulation of radio. I realize that that degree of deregulation would require amendment of the Communications Act, but I believe that the record in this proceeding amply justifies our recommendation to Congress that it give serious consideration to just such amendment.