

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

In the Matter of

Request for Declaratory Ruling
Concerning Programming Information
in Broadcast Applications for
Construction Permits, Transfers and
Assignments

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1988; Released: September 13, 1988

By the Commission:

1. The Commission has before it for consideration a joint "Emergency Petition for Declaratory Relief" filed by the Office of Communication of the United Church of Christ, Action for Children's Television and the NOW Legal Defense and Education Fund, requesting the Commission to issue a declaratory ruling clarifying the type of information which applicants for broadcast station authorizations are required to provide as to proposed community issue-oriented programming. Specifically, petitioners request the Commission to declare that applicants for new broadcast station authorizations or for transfer or assignment of existing broadcast station authorizations are required to show "most significant community issue-oriented programming for an example quarterly period, with full information as to the duration, type and time of presentation of such programming." Petitioners claim that the Commission cannot make the statutorily required "public interest" finding prior to grant of the application in the absence of such information.

2. After careful review of the petition, we remain convinced that the current programming information requirement is fully consistent with the mandates of the Communications Act. Accordingly, we reject the specific information requirement advanced by petitioners. We will, however, take this opportunity to reaffirm that new, transfer and assignment applicants are required to provide a brief description of their planned programming service relating to issues of public concern facing the proposed service areas.

PETITION FOR DECLARATORY RELIEF

3. In support of their request for declaratory relief, petitioners note that under Section 309(a) of the Communications Act of 1934, as amended, the Commission is required to determine whether the public interest, convenience and necessity will be served by the grant of an application for a new station or for transfer or assignment of an existing authorization.¹ Petitioners maintain, citing the Commission's radio and television deregulation orders,² that issue-oriented programming responsive to the community is the essence of the public interest obligation. According to petitioners, the Commission, however, no longer is able to make the required public interest deter-

mination because it receives insufficient programming information upon which to base an affirmative finding. Petitioners state that the Commission has permitted applicants "to provide a 'brief narrative description' of proposed programming and public service efforts which can be only one sentence long with no specifics as to types or amounts of programming."³

4. Petitioners assert that the Commission must obtain certain information as to community issue-oriented programming, including how much and what type of programming is planned and when such programming will be aired, because this is the focus of the present overall scheme of broadcast regulation. They cite the statement of the U.S. Court of Appeals (D.C.) in *Office of Communication of the United Church of Christ v. FCC*⁴ that the obligation to provide community issue-oriented programming "simply cannot be fulfilled without licensees airing some irreducible minimum amount of broadcast minutes." Petitioners also assert that a licensee proposing an hour a day of issue-oriented programming during "graveyard hours" would not be meeting its public trustee obligations.

5. Petitioners contend that the present requirement not only precludes the Commission from making the required public interest determination, but prevents members of the public from demonstrating prior to the initial grant that the applicant will not serve the public interest over the length of the license term. They maintain that it is impossible to file a petition to deny with the specificity required under Section 309(d)(1) of the Communications Act⁵ because the public is not able to assess the applicant's plans as to the amount, type or airtime of its issue-oriented programming.

6. Petitioners, therefore, urge the Commission to require that an applicant's Program Service Statement include "the proposed most significant treatment of community issues during an example three month period, including when the applicant proposes to air it (whether during the 6:00 am to midnight period or at other times); how much the applicant roughly proposes; and the most significant issues relevant to the community of license the applicant proposes to address (including a description of the type of programming which will be use to air such issues)." They request that television applicants also be required to state how much issue-oriented programming will be aired during prime time.

DISCUSSION

7. In the radio and television deregulation orders, the Commission shifted its attention from the mechanics of the formal ascertainment process and quantitative programming guidelines to the continuing substantive obligation of broadcast licensees to discover issues in their communities and to provide responsive programming. In those orders, the Commission concluded that formal ascertainment requirements and quantitative guidelines as to the duration, type and time of presentation of nonentertainment programming were no longer a necessary or appropriate means by which to ensure station operation in the public interest, and that their elimination would provide licensees with increased flexibility in meeting the changing needs of their communities.⁶ The Commission also determined that it would afford licensees additional flexibility by permitting them to consider the programming of other stations in the same service when selecting their issue-responsive programming.

8. In implementing these determinations, the Commission adjusted its information requirements to the revised scheme of regulation. The Commission deleted rules requiring maintenance of comprehensive program logs, and implemented the issues/programs list requirement "as a means of providing the public and the Commission with the information necessary to monitor licensees' performance under the new regulatory scheme."⁷ Questions in application forms pertaining to the former ascertainment requirements and quantitative programming guidelines were deleted,⁸ and the Commission determined that new, transfer and assignment applicants need only provide a programming proposal directed to the new focus on community issue-responsive programming. Accordingly, under the revised scheme, applicants are now asked to provide "a brief description, in narrative form, of the planned programming service relating to the issues of public concern facing the proposed service area."⁹

9. Petitioners now contend that the information requirement for new, transfer and assignment applicants must be construed to require a specific showing of proposed community issue-oriented programming, including information as to the duration, type and time of presentation of such programming, to bring the requirement into compliance with the mandates of the Act. We do not agree. Petitioners seek to require of applicants an information showing equivalent to the showing produced by licensees on a quarterly basis to document actual compliance with their issue-responsive programming obligations. Petitioners apparently believe that this showing would enable the Commission and the public to determine at the initial authorization stage whether an applicant will fulfill those obligations. However, as the Commission has consistently recognized, a programming proposal is merely a prediction of future service and cannot serve the function envisioned by petitioners.¹⁰ In addition, to the extent the information requirement urged by petitioners is directed at determining the adequacy of an applicant's ascertainment efforts or at establishing specific programming promises as to the type, amount and time of broadcast of programming from which to later evaluate or measure the licensee's performance, it is patently inconsistent with the actions adopted in the deregulation orders. In those orders, the Commission deleted the formal ascertainment requirements, quantitative programming guidelines and the promise vs. performance programming standard, finding that their deletion would eliminate unwarranted regulatory costs and increase licensee flexibility in meeting the changing needs of the community. Petitioners have not demonstrated, nor do they even allege, that the present overall scheme of regulation is defective, and that a return to a system of formal ascertainment and quantitative guidelines is warranted.¹¹

10. Although we do not believe the specific requirements advanced by petitioners warrant further consideration, we nevertheless believe that we should address the questions raised by petitioners concerning our implementation of the programming information requirement. As noted above, petitioners cite several applications that have been filed with the Commission which contain a programming proposal written in general terms, without specific information as to the type and duration of proposed programming,¹² or which do not contain a programming service proposal, the applicant believing that none was required under our deregulation orders.

11. First, we note that the grant of an application that lacked a program service statement altogether resulted solely from inadvertent processing error. A programming service proposal clearly is required.¹³ Second, we believe it is clear that applicants are not required to provide the Commission with detailed programming proposals. In directing applicants to provide only a brief narrative description of their proposed programming service, the Commission tailored the information requirement to the revised regulatory scheme. Given the shift in focus from ascertainment methodology and quantitative programming guidelines to the substantive obligation to provide responsive programming,¹⁴ the Commission deleted the previous requirement for applicants to submit detailed programming proposals that documented the applicant's ascertainment efforts and established "promises" from which to later measure a licensee's performance. In its place the Commission implemented the requirement, consistent with the new flexibility accorded licensees, that applicants provide a brief narrative description of their proposed community issue-responsive service. The programming proposal currently required of applicants is intended, essentially, to satisfy the Commission that applicants are cognizant of the Commission's policies, and to serve as a representation that they will comply with them.¹⁵ In describing their proposed service, applicants may indicate an intent to provide service to an unserved significant segment of the community or propose to meet the needs of the community in general. To mandate a specific, detailed proposal from applicants would be inconsistent with the flexibility afforded licensees to adapt programming to changing marketplace incentives without regulatory intrusion.

12. In support of their assertion that the Commission's implementation of the requirement is defective, petitioners cite the statement of the Commission in *Deregulation of Radio* that, "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." 84 FCC 2d at 998. As indicated above, each applicant must supply sufficient information to indicate that it is aware of and intends to be responsive to the applicable regulatory requirements including particularly those set forth in the radio and television deregulation proceedings. To the extent that the quoted statement can be read to imply that a specific, detailed programming proposal is required, we believe it is inconsistent with the action adopted in the order and the Commission's general approach to programming regulation. We remain, moreover, unpersuaded that a more detailed or elaborate "mock-up" of an applicant's intentions would be useful either to the Commission or to other interested parties. At this stage in the process, the Commission is properly concerned with whether an applicant is committed to compliance with the Commission's rules and policies and not with what particular programs and formats will be broadcast, what specific issues may be ascertained to warrant coverage, and what quantity of what type of programming is projected for broadcast. To require information sufficient to make possible a complete broadcast programming "compliance audit," in some cases several years in advance of a station's commencing operation would, even if theoretically possible, be not only burdensome but inconsistent with the notion that a licensee's decisions in this area should be dynamic, taking into account not only issues as they arise but how these issues are addressed by others in the market as well.

Programming *per se* has rarely been an issue with respect to the new station applicant since our 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Moreover, the Commission's review of program format, ascertainment procedures, and quantified programming obligations have all either been eliminated or moved to later stages in the regulatory process in order to reduce speculation and focus on more objective factual issues. As clearly recognized in *Office of Communication of the United Church of Christ v. FCC* :

In modifying its policy, the Commission has chosen to value most highly the goal of preserving licensee discretion and flexibility in selecting the types of programming which are responsive to community issues. Seeking to maximize the journalistic discretion of licensees, especially in the constitutionally sensitive area of informational programming, is clearly consistent with the Commission's statutory duty to "chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." 707 F.2d at 1432 (citation omitted).

13. The Commission's approach also is consistent with the Commission's generally cautious view of programming proposals and its programming regulation in general. The Commission recognized the difficulties inherent in evaluating and comparing programming plans over 20 years ago, and has limited its reliance on mere proposals that are subject to change as conditions in the service area change.¹⁶ The Commission's earlier focus on formal ascertainment requirements and general programming guidelines rather than proposed or actual programming also reflected the limitations placed upon Commission regulation of programming by the First Amendment and the prohibition against censorship contained in Section 326 of the Act.¹⁷ The information requirement adopted and implemented by the Commission reflects those concerns.¹⁸

14. We also note that the Commission's concern with the relative value of ascertainment conducted long before a station would become operational led it in 1981 to change the point of review of the ascertainment documentation submitted by new television station applicants. Applicants were directed to submit their documentation with their license applications, and not with their applications for construction permit. In adopting this change, the Commission noted that significant delays in processing applications had arisen from challenges to an applicant's ascertainment, many of which could be characterized as "litigation over trivia." Ascertainment conducted between grant of the construction permit and filing of the license application would expedite the processing of applications and would result in "relatively current and more meaningful" ascertainment.¹⁹

CONCLUSION

15. On the basis of the foregoing, as well as our own experience in administering the approach during the past several years, we remain convinced that the current programming information requirement is appropriate under the present scheme of broadcast regulation and fully consistent with the mandates of the Communications Act. Accordingly, we will grant the petition only to the limited extent of reaffirming the present requirement.

16. Every applicant for initial construction permit or for transfer or assignment of an existing authorization is required to provide a brief description, in narrative form, of the planned programming service relating to the issues of public concern facing the proposed service area. This narrative need not take the form of the detailed programming proposal sought by petitioners, but it must be sufficient to evince an understanding on the part of each applicant of its obligation to provide programming responsive to the needs of the community.

17. Accordingly, IT IS ORDERED, THAT, pursuant to Section 1.2 of the Commission's Rules, the "Emergency Petition for Declaratory Relief" filed by the Office of Communication of the United Church of Christ, Action for Children's Television and the NOW Legal Defense and Education Fund IS GRANTED to the extent indicated herein, and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

¹ Section 309(a) states in part:

[T]he Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application.

² See *Deregulation of Radio*, 84 FCC 2d 968 (1981), *recon. denied in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 357 (1986), *aff'd in part and remanded in part*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

³ Petitioners cite several applications that have been filed with the Commission which do not contain a programming service proposal or which contain a proposal written in general terms indicating an intent to respond to issues of public concern through various programming services. As will be discussed, *infra*, applications must contain a brief narrative description of proposed programming plans, and, to the extent that applications do not contain such information, they may not be acted upon by the staff pursuant to delegated authority.

⁴ 707 F.2d at 1433.

⁵ Section 309(d)(1) states in pertinent part:

The petition shall contain specific allegations of fact sufficient to show . . . that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

⁶ The regulatory scheme developed in the deregulation orders generally was upheld on appeal. As discussed in note 7, *infra*, the Commission's orders in the radio deregulation proceeding were remanded for further consideration of the issues/programs list requirement. See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985). In *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), the court remanded the elimination of the children's television commercialization guidelines for further consideration.

⁷ *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC 2d 357, 359-60 (1986). In this order and in an order adopted the same day in BC Docket No. 79-219, 104 FCC 2d 505, the Commission refined the program record keeping requirements to provide that a licensee, on a quarterly basis, must compile "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." The Commission took this action in response to remand of its orders in BC Docket No. 79-219. See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Deregulation of Radio*, 96 FCC 2d 930 (1984); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985); *Deregulation of Radio*, 104 FCC 2d 505 (1986).

⁸ Prior to the Commission's orders in the deregulation proceedings, applicants for new stations or for transfer or assignment of existing authorizations were required to conduct Commission prescribed ascertainment and were directed to: (1) document the means by which they ascertained the needs and interests of the public to be served by the station; (2) describe the significant needs and interests which they believed the station would serve during the initial license term; and (3) list typical and illustrative programming that they planned to air to meet those needs and interests. In addition, they also were required to state the minimum amount of time, between 6:00 a.m. and midnight, which they planned normally to devote each week to news, public affairs, local programming and all other programs (exclusive of sports and entertainment). Procedurally, both ascertainment and nonentertainment programming issues had been the subject of staff processing criteria. The staff was required to refer to the full Commission any application containing substantial ascertainment defects that could not be resolved by further staff inquiry or action, or any proposal containing less than a specified percentage of the identified categories of programming. Transfer and assignment applications also were to be referred to the full Commission if there had been an unjustified substantial decline in programming actually broadcast from that previously proposed by the transferor or assignor.

⁹ Noting that the evaluation of programming in the comparative new application process is not based on mere compliance with quantitative criteria, the Commission concluded that elimination of the guidelines would not affect the way in which programming is considered in that process. The designation of programming issues would continue to be available only where substantial or material differences exist between programming proposals. See *Deregulation of Radio*, 84 FCC 2d at 988; *Commercial Television Stations*, 98 FCC 2d at 1096. The Commission stated that where there is a programming issue in a comparative new application proceeding, the Commission would 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." 84 FCC 2d at 988. The Commission also noted that when material differences result in comparative consideration, the

focus would be the responsiveness of the program proposals and not "detailed inquiries into which or how many community leaders were contacted, by whom, *etc.*" 84 FCC 2d at 988; see also 98 FCC 2d at 1101.

¹⁰ The detailed programming information required of applicants prior to deregulation generally served to document ascertainment efforts and establish "promises" from which to later evaluate a licensee under the promise vs. performance standard. Licensees could alter these promises as conditions in the marketplace changed. As discussed in paragraph 14, *infra*, the Commission subsequent to the elimination of formal ascertainment requirements for radio in 1981, and prior to the elimination of these requirements for television in 1984, moved the point of review of ascertainment material of television station applicants from the construction permit stage to the license stage to ensure "relatively current and more meaningful" ascertainment.

¹¹ We note that to the extent petitioners seek to reimpose standards that were rejected in the deregulation proceedings, a petition for rule making, and not a petition for declaratory relief, would be the appropriate vehicle.

¹² Petitioners have challenged the grant of one such application. See *Family Media, Inc.*, 2 FCC Rcd 2540 (1987), appeal pending *sub nom. Office of Communication of the United Church of Christ v. FCC*, No. 87-1243 (D.C. Cir., filed June 4, 1987).

¹³ See Section 0.283(a)(7)(A) of the Commission's Rules, 47 C.F.R. Section 0.283(a)(7)(A).

¹⁴ In describing this obligation, the Commission stated:

[S]tations 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. 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.

Deregulation of Radio, 84 FCC 2d at 983 (footnote omitted).

¹⁵ Thus, for example, in the case cited *supra* note 12 involving an assignment application filed in 1986, we found the following programming proposal to satisfy these objectives:

The Assignee intends to offer programming relating to the issues of public concern facing the community of Baltimore. These issues will be addressed through a variety of non-entertainment and public affairs programming. The balance of the station's schedule will offer a unique format of twenty-four hour informational and entertainment programming.

The Assignee will also comply with the Fairness Doctrine in presenting programming which deals with issues of a controversial nature of public importance, will comply with the Commission's rules applicable to political candidates, and with the quarterly issues and programs list requirement.

¹⁶ When the Commission extricated itself from the practice of regularly comparing programming proposals in the comparative new licensing process, it stated:

Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 397 (1965) (no comparative programming issue ordinarily designated; issue to be added only if substantial and material differences exist between proposals).

¹⁷ See *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 44 FCC 2303, 2314-17 (1960).

¹⁸ As previously noted, petitioners contend that it is impossible to file a petition to deny with the specificity required under Section 309(d)(1) of the Communications Act with respect to proposed programming service because the public is not able to assess the applicant's plans as to the amount, type or airtime of its issue-oriented programming. This argument lacks merit, however, because as we have explained, detailed information on such matters is not essential to the public interest judgment that must be made before we can grant an initial or assignment or transfer application. Rather, as noted, in this context, the Commission is primarily interested in assuring that the applicants are aware of, and intend to comply with, rules governing programming service. The information filing requirements, as explained herein are, we believe, sufficient to enable both the Commission and petitioners to assess an applicant's compliance with these objectives so the required public interest finding can be made.

¹⁹ See *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 383 (1981).