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FCC LICENSE RENEWAL POLICY: THE BROADCASTING LOBBY VERSUS THE PUBLIC INTEREST

by Mildred Louise Everett

The federal government has the power to regulate radio and television under its power to regulate interstate commerce. Radio was first regulated by the Federal Radio Commission, established by the Radio Act of 1927.¹ This Act was intended to insure that "the broadcasting privilege will not be a right of selfishness" but would rather "rest upon an assurance of public interest to be served."² The Federal Radio Commission was reorganized into the Federal Communications Commission by the Communications Act of 1934.³ The 1934 Act, with amendments, is still the controlling law in broadcasting. The FCC is given broad power over the broadcasting industry, the most important aspect of which is licensing.⁴

The FCC assigns specific channels to licensees.⁵ The electronic spectrum in which broadcasting is possible is limited, and thus the number of available licenses is finite. With unregulated competition, large cities would be saturated with stations and smaller communities might have no stations. This situation is prevented by the FCC's distribution of channels based on population distribution.⁶

By statute, the only criteria for assignment of broadcasting licenses are that they be granted in the "public interest, convenience and necessity."⁷ These criteria have never been adequately defined.⁸ The Communications Act also requires that licensees meet prescribed standards⁹ of citizenship,¹⁰ character,¹¹ financial resources,¹² and technical ability.¹³ Additional criteria are examined

¹ Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

² 67 CONG. REC. 5479 (1926) (remarks of Representative White, House floor manager).

³ 47 U.S.C. § 301 (1970).

⁴ W. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS 45 (rev. ed. 1971).

⁵ 47 U.S.C. § 303 (1970).

⁶ *Id.*

⁷ *Id.* § 309(a) states: "[I]f the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

⁸ W. EMERY, *supra* note 4, at 307.

⁹ 47 U.S.C. § 308(b) (1970).

¹⁰ The Code provides that no broadcast licenses can be issued to any alien, foreign government, or corporation organized under the laws of any foreign government. If any officer or director is an alien or if more than 20% of the stock is owned or voted by aliens, the corporation cannot hold a license. There are also limitations on foreign ownership or control of a corporation owning more than 25% of the stock of a corporate applicant. *Id.* § 310(a).

¹¹ This requirement is not well defined. See, e.g., John Clarence Cook, 1 F.C.C.2d 1534 (1965) (license denied because of prior criminal record of applicant); Pacifica Foundation, 36 F.C.C. 147 (1964) (license granted, although membership in Communist party considered); Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964) (license denied because of past misrepresentations to the FCC). See generally Brown, *Character and Candor Requirements for FCC Licenses*, 22 LAW & CONTEMP. PROB. 644 (1957).

¹² The applicant must be financially able "to construct and operate the proposed station." 47 U.S.C. § 319(a) (1970). The FCC has been relatively liberal in making grants when there is proof that funds will be available to assure construction and initial operation of the station. W. EMERY, *supra* note 4, at 232.

¹³ Staffing, studio, and equipment plans should be adequate to effectuate the proposal. See W. EMERY, *supra* note 4, at 233. The FCC's general policy has been:

An indispensable element in passing upon any application for station licenses is the technical qualifications of the applicant. This does not mean that the

when a comparative hearing is held for the purpose of choosing among several qualified applicants. Because of the expansion of the media after World War II, the FCC was under pressure to develop specific criteria for determining who would receive licenses in both original and renewal situations.¹⁴ These criteria were adopted by the FCC in its 1965 Policy Statement on Comparative Broadcast Hearings.¹⁵ In determining which applicant would provide the best practicable service to the public, the Policy Statement required that the FCC look to a variety of factors, including: proposed program plans and policies,¹⁶ local ownership,¹⁷ integration of ownership and management,¹⁸ participation in civic activities,¹⁹ record of past broadcasting performance,²⁰ broadcasting experience,²¹ relative likelihood that proposals will be effectuated as shown by contracts made with local suppliers,²² carefulness of operational planning,²³ staffing,²⁴ and likelihood that economic injury will result to existing licensees.²⁵ Diversification of control over the mass media is also a primary factor.²⁶ The FCC has chosen to delineate the above criteria through adjudicative proceedings rather than by rulemaking. Thus, the criteria may be changed at any time, with no prior notice.

Since the basic standard of public interest, convenience, and necessity is a

applicant in every case must be personally qualified technically, but it does mean that if he is not personally qualified technically and does not propose to operate the station himself but through employees, then he should show that he has a competent staff to operate the proposed station for him, and their technical qualifications.

W.H. Kindig, 3 F.C.C. 313, 315 (1936).

¹⁴ The history is traced in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

¹⁵ 1 F.C.C.2d 393 (1965).

¹⁶ See *Sarkes Tarzian, Inc.*, 17 P & F RADIO REG. 905 (1959); *Hi-Line Broadcasting Co.*, 13 P & F RADIO REG. 1017 (1957) (good program "balance"); *Tampa Times Co.*, 10 P & F RADIO REG. 77 (1954); *The Tribune Co.*, 9 P & F RADIO REG. 719 (1954) (extensive local live broadcasts).

¹⁷ See, e.g., *St. Louis Telecast, Inc.*, 22 F.C.C. 625 (1957).

¹⁸ "The significance of the integration factor is based on our belief that there is more assurance that a proposal will be effectuated if the day-to-day operation is in the hands of an owner of the station than if the station is run by employees." *Hi-Line Broadcasting Co.*, 13 P & F RADIO REG. 1017, 1042 (1957).

¹⁹ Civic participation in community affairs in the city in which the station is located is weighed more heavily than civic involvement in another community. See *Cherokee Broadcasting Co.*, 25 F.C.C. 92 (1958); *Tampa Times Co.*, 10 P & F RADIO REG. 77 (1954).

²⁰ See, e.g., *Sangamon Valley Television Corp.*, 22 F.C.C. 1167 (1957) (emphasis on past devotion to local live programming).

²¹ See *WHDH, Inc.*, 13 P & F RADIO REG. 507 (1957); *Indianapolis Broadcasting, Inc.*, 12 P & F RADIO REG. 883 (1957) (overriding both local residence and diversification of control); *Biscayne Television Corp.*, 11 P & F RADIO REG. 1113 (1956) (overriding diversification of control); *Scripps-Howard Radio, Inc.*, 11 P & F RADIO REG. 985 (1956) (overriding local residence).

²² See, e.g., *Hi-Line Broadcasting Co.*, 13 P & F RADIO REG. 1017 (1957); *The Travelers Broadcasting Serv. Corp.*, 12 P & F RADIO REG. 689 (1956); *Sacramento Broadcasters, Inc.*, 10 P & F RADIO REG. 615 (1955).

²³ See *Florida Gulfoast Broadcasters, Inc.*, 23 P & F RADIO REG. 1 (1962); *Loyola Univ.*, 12 P & F RADIO REG. 1017 (1956).

²⁴ See *Birney Imes, Jr.*, 17 P & F RADIO REG. 419 (1959) (competency of staff); *Tampa Times Co.*, 10 P & F RADIO REG. 77 (1954) (familiarity of staff with community).

²⁵ See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 YALE L.J. 135 (1957).

²⁶ "Diversification is a factor of primary significance. . . . Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area and, finally, generally in the United States." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

comparative and not an absolute standard, the FCC must determine which applicants will best serve the public interest. Where there are two or more mutually exclusive applications, the hearings on each application must be consolidated into one comparative hearing. This principle was first enunciated in *Asbacker Radio Corp. v. FCC*.²⁷

This Comment examines the significant developments, both substantive and procedural, in license renewal policy which have followed the 1965 Policy Statement. It is submitted that none of these policies and proposals adequately protect the public interest while assuring sufficient stability to the broadcasting industry. A proposal which would better balance these diverse interests is presented.

I. FIRST SIGNS OF CHANGE

A. *The 1965 Policy Statement*

The 1965 Policy Statement on Comparative Broadcast Hearings²⁸ was an attempt to set forth the criteria which the FCC had previously and would continue to take into account in choosing among original applicants for the same broadcasting license.²⁹ The FCC recognized that the assignment of broadcasting licenses is a complex and subjective area which does not lend itself to precise categorization or binding precedent.³⁰ Furthermore, it observed that membership on the FCC changes, and the views of individual Commissioners on the relative importance of various criteria may change.³¹ Thus, the criteria cannot be assigned absolute values. Nevertheless, this statement was of major importance because it categorically defined the criteria which would be considered by the FCC.

The primary objectives of the Policy Statement were to achieve "the best practicable service to the public and a maximum diffusion of control of the media . . ."³² An important aspect of the Policy Statement was its treatment of the significance to be attributed to any past performance by the applicant. "A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership per se, and will not give a preference because one applicant has owned stations in the past and another has not."³³

The 1965 Policy Statement specifically excluded the renewal situation, stating that different problems were raised in that type of contest.³⁴ Thus, it appeared that the controlling standard in renewal proceedings was still that

²⁷ 326 U.S. 327 (1945). This principle is known as the *Asbacker* doctrine. The consolidated, comparative hearing is necessary since to grant one application would be to deny the others without a hearing.

²⁸ 1 F.C.C.2d 393 (1965).

²⁹ See notes 16-26 *supra*, and accompanying text.

³⁰ "The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable." 1 F.C.C.2d at 393.

³¹ *Id.* The 7 members of the FCC are each appointed for 7-year terms, one term expiring each year. 47 U.S.C. § 4 (1970).

³² 1 F.C.C.2d at 394.

³³ *Id.* at 398.

³⁴ *Id.* at 393 n.1.

of *Hearst Radio, Inc. (WBAL)*.³⁵ The FCC had held in *WBAL* that in a comparative hearing an incumbent with a record of "satisfactory" service will be preferred absent gross violations of FCC rules. However, Commissioner Hyde, dissenting from the 1965 Policy Statement, stated that there was no rational or legal basis for the nonapplicability of the statement to renewal proceedings.³⁶ Under his view *WBAL* would no longer be controlling. His dissent formed the basis for later decisions by both the FCC and the Court of Appeals for the District of Columbia. For example, in a 1965 renewal case, *Seven (7) League Productions, Inc. (WIII)*,³⁷ the FCC applied the 1965 Policy Statement to the introduction of evidence, and it decided to give all parties in such a case an opportunity to present arguments as to the relative weight to be given each criterion. At this time the Court of Appeals for the District of Columbia Circuit, which had previously routinely approved renewals ordered by the Commission, expressed concern in two cases³⁸ that renewal applicants might be receiving an unfair advantage over new applicants because of exemption from the 1965 Policy Statement.

B. *Greater Boston Television Corp. v. FCC*

In *Greater Boston Television Corp. v. FCC (WHDH)*³⁹ the court of appeals held that the action of the FCC, in applying to what appeared to be a renewal proceeding⁴⁰ the same criteria it applied to new applications, was not arbitrary nor unreasonable nor in violation of a legislative mandate. This case marked the first time in broadcasting history that the FCC had refused to renew the license of a broadcaster with an "average" record of performance.⁴¹ This holding marked a significant departure from the FCC's decision in *WBAL*, eighteen years before.

WHDH had been operating Channel 8 in Boston under a series of temporary licenses for approximately fifteen years. Although the FCC had always extended the license at the end of each period, which was generally one year,

³⁵ 15 F.C.C. 1149 (1951).

³⁶ 1 F.C.C.2d at 400-04.

³⁷ 1 F.C.C.2d 1597 (1965).

³⁸ *South Fla. Television Corp. v. FCC*, 349 F.2d 971 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); *Community Broadcasting Corp. v. FCC*, 363 F.2d 717 (D.C. Cir. 1966).

³⁹ *Greater Boston Television Corp. v. FCC (WHDH)*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *aff'g* *WHDH, Inc.*, 16 F.C.C.2d 1, *reconsideration denied*, 17 F.C.C.2d 856 (1969).

⁴⁰ Although the court of appeals categorized WHDH as a renewal applicant in the holding, it recognized that this was a unique situation:

Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case.

444 F.2d at 859.

⁴¹ For a detailed account of this case see Goldin, *Spare the Golden Goose—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Comment, *The Federal Communications Commission and Comparative Broadcast Hearings: WHDH as a Case Study in Changing Standards*, 10 B.C. IND. & COM. L. REV. 943 (1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970); Note, *FCC License Renewal Policy and the Right To Broadcast*, 52 B.U.L. REV. 94, 95-98 (1972).

it had never granted WHDH a full, three-year license. The court found that under this unique fact situation WHDH was neither a new applicant nor a renewal applicant, as those terms are generally construed. It was previously thought that the 1965 Policy Statement was applicable only to original applications and not to renewal hearings.⁴² However, since both the court and the FCC⁴³ found that WHDH was neither a new nor a renewal applicant, this case does not hold that the criteria in the 1965 Policy Statement apply to renewal proceedings. Nevertheless, many commentators⁴⁴ interpreted the case as establishing the principle that an incumbent licensee was to be given no preference over a challenger in a renewal proceeding. This was viewed as the beginning of a new activism by the FCC.⁴⁵

WHDH decided only that an average performance record does not merit a preference in a comparative hearing in a case which is neither a new application nor a renewal. While the actual shift by the FCC was minor, the practical result was major. Since it appeared that the FCC had overruled its policy towards preferences in renewal proceedings, the broadcasting industry moved to protect its interests. The possibility of a successful challenge to an incumbent was increased after WHDH, and the decision gave to citizen groups seeking improvement in the quality of programming or additional minority programming an increased amount of leverage in bargaining with licensees.

C. *The Pastore Bill*

While the decision of the FCC in *WHDH, Inc.* was still on appeal, the broadcasting industry decided to act to prevent application of the WHDH holding. This action took the form of Senate Bill 2004,⁴⁶ introduced by Senator John Pastore, Chairman of the Communications Subcommittee of the Senate Committee on Commerce. The Pastore Bill provided that the FCC could not consider any competing application until it had determined, after a hearing, that it would not serve the public interest to grant the application of the incumbent licensee.

The bill was based on the assumption that security of investment in the broadcasting industry will ultimately benefit the public.⁴⁷ Licensees must make

⁴² See notes 37, 38 *supra*.

⁴³ 16 F.C.C.2d at 8.

⁴⁴ See, e.g., Jaffe, *supra* note 41; Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970).

⁴⁵ See Comment, *The Federal Communications Commission and Comparative Broadcast Hearings: WHDH as a Case Study in Changing Standards*, 10 B.C. IND. & COM. L. REV. 943 (1969).

⁴⁶ S. 2004, 91st Cong., 1st Sess. (1969). The bill would have amended 47 U.S.C. § 309(a) (1970) by adding the following after the final sentence:

Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal of a broadcast license filed under section 308, may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds upon the record and representations of the licensee that the public interest, convenience, and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it shall deny such application, and applications for construction permits by other parties may then be accepted, pursuant to section 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied.

⁴⁷ *Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm.*

large initial investments in equipment, facilities, programming, and personnel, and technological changes require additional investments periodically.⁴⁸ Undoubtedly, this is an important consideration in the renewal challenge issue. The insecurity of licensing could have an immense impact on the ability of licensees to obtain capital and credit.⁴⁹ It could also inhibit experimentation and public service programming. However, broadcasting yields a high return on investment. The average VHF station not only recovers its investment within its initial license period, but also makes a profit.⁵⁰ Thus, the risk to the broadcaster involved in limiting his assurance of a license to three years with no guarantee of renewal is offset by the possibility of high profits.

Moreover, the effect of the bill would have been to remove the comparative aspect from renewal proceedings. A challenger would not have had an opportunity to show that the license should not be renewed on the basis that his application would better serve the public interest. Neither could a challenger participate in the required hearing for the purpose of presenting evidence to show that the renewal would not serve the public interest. The Pastore Bill would have largely precluded the entrance of new station owners into the broadcasting industry to replace those who might lose their licenses, which was precisely what the broadcasting lobby wanted.

Although the bill was popular among congressmen, senators, and the broadcasting industry,⁵¹ it was attacked severely in the Senate hearings by citizen groups.⁵² These groups argued that the bill was racially prejudicial⁵³ and that it would exclude community efforts at improving television programming.⁵⁴ Such opposition slowed the progress of the bill.

A majority of the FCC⁵⁵ also opposed the Pastore Bill on the basis that *WHDH* was a unique case and thus the FCC had not changed its license re-

on Commerce, 91st Cong., 1st Sess., pt. 1, at 22-30 (1969) (testimony of Frank P. Fogarty, vice president, Meredith Corp.).

⁴⁸ A thorough examination of the background of the Pastore Bill is contained in Comment, *supra* note 44.

⁴⁹ See *Hearings*, *supra* note 47, at 25-30.

⁵⁰ According to FCC statistics the VHF stations recovered approximately 94% of their depreciated investment in tangible broadcasting properties in 1965, 84% in 1966, and 64% in 1967. 34 F.C.C. ANN. REP. 122, 126 (1968); 33 F.C.C. ANN. REP. 173, 176 (1967); 32 F.C.C. ANN. REP. 125, 126 (1966).

Earl K. Moore, general counsel of the National Citizens Committee for Broadcasting, testified that the average television station recovers its depreciated investment twice over with a reasonable return besides in a three-year license term. *Hearings*, *supra* note 47, pt. 1, at 114.

⁵¹ More than 100 congressmen and 23 senators quickly announced support for the bill. See generally *Hearings*, *supra* note 47.

⁵² *Id.* pt. 2. Statement of John Pemberton, Jr., Executive Director, American Civil Liberties Union, at 513; Rev. Everett C. Parker, Director, Office of Communication of the United Church of Christ, at 522; Absalom Jordan, National Chairman, Black Efforts for Soul in Television (BEST), at 601.

⁵³ *Id.* Statement of Absalom Jordan, at 601. He argued that it would exclude minorities from the opportunity to participate in policy decisions of the media in most large cities since broadcasters would be under little or no pressure to provide programming for minorities. There would be no incentive to allow minorities to purchase an interest in the stations.

⁵⁴ *Id.* See also *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971).

⁵⁵ Commissioners Bartley, Johnson, H. Rex Lee, and Cox were opposed to the Pastore Bill. Chairman Burch, Wells, and Robert E. Lee favored it. See the discussion by Commissioner Cox in Cox, *The Federal Communications Commission*, 11 B.C. IND. & COM. L. REV. 595, 620 (1970).

newal policy.⁵⁶ The FCC further argued that there was no indication that the stability of the broadcasting industry was so threatened that the benefits of competition should be foregone.⁵⁷ To avoid passage of the bill, the FCC promptly adopted its 1970 Policy Statement.

II. THE 1970 POLICY STATEMENT AND ITS CONSEQUENCES

A. *The Policy Statement*

While the Senate Subcommittee on Communications continued to hold hearings on the Pastore Bill, the FCC issued its 1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants.⁵⁸ This Policy Statement, designed as a compromise to the Pastore Bill, was apparently issued to pacify the broadcasting industry and to eliminate the confusion which had resulted following the *WHDH* decision.⁵⁹ The essence of the statement was:

[I]f the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted.⁶⁰

There were two considerations underlying this policy. First, the public should receive the benefits of a challenge, to the extent that where the public interest so requires a new applicant would be preferred. Second, the comparative hearing policy should not undermine the predictability and stability of broadcast operation.⁶¹

This Policy Statement was similar to the Pastore Bill in that it first required a hearing to determine whether or not the incumbent should have his license renewed, and only if the incumbent was disqualified could the challenger present his case. However, it differed from the Pastore Bill by allowing the challenger to participate in the first hearing to demonstrate his allegation that the incumbent's performance had been minimal.⁶² In this respect the 1970 Policy Statement helped to preserve the stimulus of "private attorneys general," in the form of citizen groups,⁶³ to protect the public interest.

⁵⁶ See Goldin, *supra* note 41, at 1020.

⁵⁷ Commissioner Bartley defended the advantages of the status quo:

The Commission strongly believes that the spur to a lagging broadcaster posed by the threat of competitors at renewal time is an important factor in securing operation in the public interest. . . . The existing procedures at renewal time provide a powerful supplement to our review capabilities in the form of potential competitors who will provide more than a minimal service to the public if the existing licensee is unwilling or unable to do so. The first question posed by S. 2004 then, is whether there is anything in the record of our administration of the act which indicates that the public interest in stability is so threatened that the great benefits of competition must be forsaken. We do not believe there is.

Hearings, *supra* note 47, at 376.

⁵⁸ 22 F.C.C.2d 424 (1970).

⁵⁹ *Id.* at 432 (Johnson, Commissioner, dissenting).

⁶⁰ *Id.* at 425.

⁶¹ *Id.* at 424.

⁶² *Id.* at 425.

⁶³ See Goldin, *supra* note 41, at 1025.

An important feature of this policy was that the renewal applicant had to rely on his record during the entire last license term.⁶⁴ No evidence of upgrading of his operation after a competing application had been filed was admissible. Neither would a licensee be able to render minimal service during the first two years, upgrade the year before renewal, and still expect to have his license renewed. This was designed to prevent a licensee from rendering minimal service throughout his term, only to improve his performance and retain his license if and when competition appeared. This was a significant departure from *WBAL*.

Senator Pastore indicated his general approval of the statement⁶⁵ and decided to defer action on his bill until the policy had a fair test. Others were not so easily placated. A serious weakness of the policy was that it did not adequately define the essential terms: "substantial performance," "serious deficiencies," and "minimal." In this respect the 1965 Policy Statement provided a much better guide. It set out specific criteria to be applied,⁶⁶ while the 1970 Policy Statement merely referred to dictionary definitions.⁶⁷ Another weakness was that the 1970 Policy Statement established two separate standards for renewals. Incumbents were judged by the vague standard of "substantial performance" if challenged, but they were only required to have rendered "minimal" service if not challenged.⁶⁸ If the public interest was to be protected by this Policy Statement, there should have been only one acceptable standard of performance—substantial.

A Staff Study for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce⁶⁹ found several more faults in the Policy Statement. It concluded that the 1970 Policy Statement denied procedural due process since qualified applicants were denied a full hearing as required by section 309(e) of the Communications Act⁷⁰ and by the *Ashbacher* doctrine.⁷¹ It also found that by substituting for a comparative hearing a unilateral determination of renewal based solely on the licensee's past performance, the policy failed even to attempt to license the best qualified applicant. Under this system of determination a challenger could indeed be the best qualified but not obtain a license if the incumbent had rendered substantial performance. In that situation the challenger would not even get a hearing to demonstrate his superiority since the incumbent's license would be renewed on the basis of the first hearing. The Staff Study concluded that the policy rejected diversification of media control as a licensing criterion. That rejection was in contradiction of the Communications Act⁷² and the 1965 Policy State-

⁶⁴ 22 F.C.C.2d at 427.

⁶⁵ See Krasnow, *The Ninety-First Congress and the Federal Communications Commission*, 24 FED. COM. B.J. 97, 103 (1970).

⁶⁶ See notes 16-26 *supra*, and accompanying text.

⁶⁷ "Thus, the word 'substantially' is defined as 'strong; solid; firm; much; considerable; ample; large; of considerable worth or value; important' (Webster's New World Dictionary College Edition, p. 1454); the word 'minimal' carries the pertinent definition, 'smallest permissible' (*Id.* at p. 937)." 22 F.C.C.2d at 426.

⁶⁸ *Id.*

⁶⁹ See Krasnow, *supra* note 65, at 146.

⁷⁰ 47 U.S.C. § 309(e) (1970).

⁷¹ The Staff Study was supported in this finding by the decision in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

⁷² 47 U.S.C. § 314 (1970).

ment.⁷³ The Staff Study further argued that the policy overruled the three-year license limit by virtually assuring existing broadcasting interests license continuation through the "substantial performance—serious deficiencies" test. This objection emphasizes the fact that the definitions employed in this Policy Statement are exceedingly vague.⁷⁴ The fact that no challenging applications were filed in the first ten months following issuance of the Policy Statement, whereas eight were filed in the preceding year, was evidence that the Policy Statement served to eliminate competition.⁷⁵

In effect, the Policy Statement administratively "enacted" what the Pastore Bill sought to enact, although slanted slightly more toward the public interest point of view than toward that of the broadcasting lobby. It eliminated the confusion under *WHDH* and set forth a definite renewal policy. This policy had the effect of a summary judgment on the pleadings since a full hearing would seldom be held. The summary judgment approach of the policy, however, was diametrically opposed to both statutory and case law.

B. *The Citizens Case*

The 1970 Policy Statement was vigorously attacked by petitioners in *Citizens Communications Center v. FCC*,⁷⁶ an action by two public interest groups⁷⁷ and two applicants competing for different licenses.⁷⁸ Petitioners contended⁷⁹ that the Policy Statement was invalid under section 309(e) of the Communications Act⁸⁰ as construed by the Supreme Court in *Ashbacker Radio Corp. v. FCC*.⁸¹ The FCC argued that the Policy Statement was not a final order, nor was it ripe for review. In the alternative, it argued the Policy Statement was a valid exercise of FCC authority.⁸² After dismissing the ripeness and finality arguments of the FCC,⁸³ the *Citizens* court declared the 1970 Policy State-

⁷³ See note 26 *supra*.

⁷⁴ See note 68 *supra*, and accompanying text.

⁷⁵ There were 8 competing applications out of approximately 250 renewal applications. See Staff Study cited in Krasnow, *supra* note 65, at 18 n.101.

⁷⁶ 447 F.2d 1201 (D.C. Cir. 1971).

⁷⁷ Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST) are nonprofit organizations, organized to improve radio and television service, to promote responsiveness of the broadcast media to the local community, to improve the position of minority groups in media ownership, access and coverage, and to present generally a public voice in FCC proceedings. They have appeared in numerous proceedings before the FCC. Brief for Petitioners at 4, *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

⁷⁸ Hampton Roads Television Corp. and Community Broadcasters of Boston, Inc. were applicants for television licenses who had filed competing applications in Norfolk, Virginia, and Boston, Massachusetts, respectively.

⁷⁹ CCC and BEST appealed under 47 U.S.C. § 402(a) (1970) and 28 U.S.C. § 2342 (1970) seeking review of: (1) the 1970 Policy Statement, (2) an order of the FCC dismissing a request by CCC and BEST to institute rulemaking proceedings to codify standards for all comparative proceedings, 21 F.C.C.2d 335 (1970), and (3) an FCC order denying reconsideration of the 1970 Policy Statement and further refusing to institute rulemaking proceedings, 24 F.C.C.2d 383 (1970). Hampton Roads and Community Broadcasting appealed under the same statutes, seeking review of the FCC's denial of reconsideration of the 1970 Policy Statement and refusal to institute rulemaking. 447 F.2d at 1202 n.2.

⁸⁰ 47 U.S.C. § 309(e) (1970).

⁸¹ 326 U.S. 327 (1945).

⁸² 447 F.2d at 1204.

⁸³ *Id.* at 1206. The court did not decide other issues raised. Petitioners had also contended that the Policy Statement was adopted in violation of § 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970), since it should have been the subject of a rulemaking

ment invalid since its summary judgment procedure would deny a challenger a full hearing as required by section 309(e) of the Communications Act.⁸⁴ The court found that the Policy Statement violated the *Ashbacher* doctrine by turning a competing application into a petition to deny renewal rather than granting a full, comparative hearing.⁸⁵

The *Ashbacher* doctrine, and the line of cases which followed it, is one of the most important developments in American administrative law.⁸⁶ Although *Ashbacher* required a full, comparative hearing in the case of two original applications, it has been recognized as also applicable to renewal applications. The FCC implicitly accepted the *Ashbacher* doctrine as applicable to renewal proceedings in the 1970 Policy Statement. However, an attempt was made by the FCC, through the 1970 Policy Statement,⁸⁷ to dilute the *Ashbacher* doctrine. Under the 1970 Policy Statement, during the initial phase of a comparative hearing, the renewal applicant would be given the opportunity to establish the substantiality of its record. If this was done, the Hearing Examiner would halt the proceeding and make a determination to grant the renewal. Only if the renewal applicant could not show that its record was without serious defect, would a full, comparative hearing be held.⁸⁸ The court in *Citizens* drew a fine line between *Ashbacher* and the 1970 Policy Statement regarding the promises made by the FCC in each.⁸⁹ Prior to the decision in *Citizens*, the FCC in *Ashbacher* had promised a full hearing to the applicant on the application, only after the competing application had been granted.⁹⁰ The Supreme Court said in *Ashbacher* that such a promise was an "empty thing."⁹¹ The *Citizens* court found that in the Policy Statement the FCC at least "must be given credit for honesty."⁹² The "full hearing" requirement of section 309(e) of the Communications Act, as interpreted by *Ashbacher*, was simply denied to license renewal challengers.⁹³

In reaching its decision in *Citizens*, the court did not merely invalidate the Policy Statement to the extent that it did not provide a full hearing. The court also set out specific factors which were to be included in developing standards for the FCC to follow in lieu of those in the Policy Statement.⁹⁴ Incumbents were to be judged primarily on their records of past performance.⁹⁵ The in-

proceeding, and that the Policy Statement restricted and chilled the exercise of first amendment rights.

⁸⁴ 447 F.2d at 1211.

⁸⁵ *Id.* at 1210 n.28.

⁸⁶ *Id.* at 1211. See also note 27 *supra*, and accompanying text. The line of cases following *Ashbacher* includes: *Overseas Nat'l Airways v. CAB*, 426 F.2d 725 (2d Cir. 1970); *Pollack v. Simonson*, 350 F.2d 740 (D.C. Cir. 1965); *Northwest Airlines v. CAB*, 194 F.2d 339 (D.C. Cir. 1952).

⁸⁷ If the FCC had not accepted *Ashbacher* it would not have had to allow the challenger a hearing at all.

⁸⁸ Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d at 428.

⁸⁹ 447 F.2d at 1211.

⁹⁰ 326 U.S. at 330.

⁹¹ *Id.*

⁹² 447 F.2d at 1211.

⁹³ *Id.*

⁹⁴ *Id.* at 1213-14.

⁹⁵ "Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through. . . . At the same time,

cumbent must have rendered "superior service" as evidenced by elimination of excessive and loud advertising, delivery of quality programming, and whether and to what extent the incumbent had reinvested the profit from his license for the benefit of his audience.⁹⁶ Diversification of control of the media was to continue to be a major factor in both renewal and original licensing.⁹⁷

The result of *Citizens* was a return to the criteria enumerated in the 1965 Policy Statement. *Citizens* finally made it clear that the 1965 Policy Statement applies to renewal as well as to original applications. Incumbents no longer have an advantage per se.⁹⁸ Mere past broadcasting experience is of little significance under *Citizens*.⁹⁹ This can be an impediment to the applicant who owns other stations since diversification of control of the media is once again being emphasized.¹⁰⁰ Since the standards for awarding a license are much more precise in the 1965 Policy Statement than in the 1970 Policy Statement, all parties involved should now know what standards they are expected to meet. Licenses awarded after *Citizens* should be more likely to go to the best qualified applicant. *Citizens* was truly a triumph for the public interest lobby.

However, soon after *Citizens* was decided the broadcast lobby resumed its efforts to protect incumbent licensees. Several bills were introduced in the ninety-second Congress which again would have given the incumbent a preference in renewal proceedings. The National Association of Broadcasters (NAB) supported a bill by Representative James T. Broyhill¹⁰¹ which would extend the license period from three to five years. The incumbent would be granted renewal if he could demonstrate that his past performance had reflected a "'good faith effort' to serve his community, and that he has 'not demonstrated a callous disregard for law or the [FCC's] regulations.'"¹⁰² Action was not taken on any of these proposals in the ninety-second Congress.

C. The Administration Proposal

More than twenty license renewal bills have been introduced in the ninety-third Congress.¹⁰³ Most are similar in content to, and are based on, the NAB Bill.¹⁰⁴ One of these is an administration proposal.¹⁰⁵ Drafted by the Office of Telecommunications Policy, the bill would provide for a five-year license

superior performance should be a plus of major significance in renewal proceedings." *Id.* at 1213.

⁹⁶ *Id.* at 1213 n.35.

⁹⁷ *Id.* at 1213 n.36.

⁹⁸ For a detailed analysis of the *Citizens* case, see Note, *supra* note 41.

⁹⁹ 447 F.2d at 1212-13.

¹⁰⁰ See Note, *supra* note 41.

¹⁰¹ H.R. 539, 92d Cong., 1st Sess. (1971); see *Whitehead Bill Joins the Crowd Seeking To Ease Renewal Trauma*, BROADCASTING, Jan. 1, 1973, at 24. See also *Conservatives Apply Against "Post" Stations in Florida*, BROADCASTING, Jan. 8, 1973, at 16-17.

¹⁰² *Whitehead Bill Joins the Crowd Seeking To Ease Renewal Trauma*, BROADCASTING, Jan. 1, 1973, at 24.

¹⁰³ See *Renewal Relief Gains New Favor in New Congress*, BROADCASTING, Jan. 15, 1973, at 31.

¹⁰⁴ See authorities cited note 101 *supra*.

¹⁰⁵ BROADCASTING, Jan. 15, 1973, at 10. The full text of the bill is reprinted in *The Words that Go with the Music in the Whitehead Doctrine*, BROADCASTING, Jan. 1, 1973, at 20. The bill is entitled: "A bill to amend the Communications Act of 1934 to provide that licenses for the operation of a broadcast station shall be issued for a term of five years, and to establish orderly procedures for the consideration of applications for the renewal of such licenses."

period. Renewal would be based on the licensee's having met the standards of (1) having been substantially attuned to the needs and interests of the community and having demonstrated a good faith response to those needs, and (2) having afforded a "reasonable opportunity for the discussion of conflicting views on issues of public importance . . ."¹⁰⁶ Only if the FCC found, in a preliminary hearing, that the incumbent did not merit renewal would a challenger be allowed a hearing. The administration proposal is an effort to "restore equilibrium to the broadcasting industry."¹⁰⁷ Administration spokesmen say the bill seeks to balance the competing goals of the Communications Act requiring broadcasters to operate in the public interest while denying the FCC the power to censor licensees for failure to do so.¹⁰⁸ The major advantages of the bill, according to the administration, are: (1) that it would extend the license term from three to five years; (2) that it would eliminate the requirement for a comparative hearing whenever a competing application is filed against a renewal applicant, and a hearing would be held only if a "substantial question" regarding the licensee's performance was raised; (3) it would prohibit ad hoc restructuring of the broadcasting industry through "manipulation of broadcast-renewal criteria"; and (4) it would prohibit the FCC from "considering its own predetermined program criteria in applying ascertainment and fairness standards."¹⁰⁹

It is apparent that the administration proposal would violate section 309(e) of the Communications Act¹¹⁰ and the *Ashbacker* doctrine. Again, a challenger is denied a full hearing until after the preliminary hearing is held. Procedurally, the hearing process would be the following.¹¹¹ The challenger would be allowed to include in his application "specific allegations of fact sufficient to show that grant of the application for renewal would be *prima facie* inconsistent with"¹¹² the two standards to be considered.¹¹³ He would be allowed to file affidavits of persons with personal knowledge of these facts. The renewal applicant would have an opportunity to file a reply alleging other facts or denials of allegations, supported by affidavits. The FCC would then make a summary judgment upon the basis of the application, the pleadings filed,

¹⁰⁶ *The Words that Go with the Music in the Whitehead Doctrine*, BROADCASTING, Jan. 1, 1973, at 20.

¹⁰⁷ See *OTP's Whitehead Ticks Off Four Major Virtues of License-Renewal Bill*, BROADCASTING, Jan. 15, 1973, at 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 47 U.S.C. § 309(e) (1970). The section requires that [i]f, in the case of any application to which subsection (a) [requiring that the public interest, convenience and necessity be served in granting a license] applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate.

¹¹¹ Proposed § 307(d)(3); see note 105 *supra*.

¹¹² *Id.* § 307(d)(3)(A).

¹¹³ *Id.* § 307(d)(2).

and "other matters which it may officially notice."¹¹⁴ The standard for granting renewal in the summary proceeding would be that if "there are no substantial and material questions of fact and . . . a grant of the application to renew the license would be consistent with [the two standards], it shall grant such application, terminate the proceeding and issue a concise statement of the reasons for its finding."¹¹⁵ If the FCC determines that there is a substantial and material question of fact, or if for any reason the FCC is unable to find that the grant of the renewal application would be consistent with the standards for renewal, it would proceed with the section 309(e) hearing.¹¹⁶

At first glance section 309(e) of the Communications Act and section 307(d)(3)(B) of the proposal appear to say the same thing. The difference is in the standard to be applied and how that standard is interpreted. Section 309(e), as interpreted in *Citizens*, would allow a full, comparative hearing whenever the challenger was legitimate and not merely making a "strike" application. The administration proposal is calculated to make certain that there is no "substantial and material question of fact" which would warrant a full hearing. It requires merely "good faith" efforts to be responsive to community needs and a "reasonable opportunity" for discussion of conflicting views. The standards are so minimal and so vague that a challenger would have difficulty in showing in the pleadings that an incumbent had not met them. Further, there is not even a preliminary hearing in which the challenger may confront the incumbent. Only if the FCC is unable to make a summary judgment is a hearing held. Clearly, the spirit, if not the letter, of the law is violated by this proposal.

Another supposed advantage of the bill is that the license term would be extended from three to five years.¹¹⁷ This might reduce the licensee's financial risk somewhat by giving him a longer period in which to recover his initial investment. However, as discussed above,¹¹⁸ most VHF stations not only recover the initial investment but make profits in the initial three-year license period. Thus, this change would be of greatest benefit to marginally productive stations. The extended license period might be of more value in programming, however, since it takes time to develop new programs.¹¹⁹ Also, the longer license period might give licensees an incentive to develop more public-service programming on which the profit, if any, would not be as large as for commercial programming. Whether or not broadcasters would do so is another question. Broadcasters would be so well protected at renewal time under the administration proposal that it is doubtful that many would sacrifice profits for public service. In summary, the public could be the beneficiary of significant programming developments and increased public service programming if the license period were increased from three to five years, but it probably would not be under this particular proposal.

The third "advantage" of the proposal is a direct attack on the renewed

¹¹⁴ *Id.* § 307(d)(3).

¹¹⁵ *Id.* § 307(d)(3)(B).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 307(d)(1).

¹¹⁸ See notes 47-50 *supra*, and accompanying text.

¹¹⁹ W. EMERY, *supra* note 4, at 375.

emphasis on the diversification of control of the media factor. However, the proposal ignores the fact that it was the court in *Citizens*,¹²⁰ and not the FCC, which placed greater emphasis on this factor. The FCC clarified its stand in the 1970 Policy Statement:

[W]hatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct . . . are alleged, the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings.¹²¹

Thus, this part of the proposal would have absolutely no effect on the FCC's attitude towards these types of changes.

The fourth virtue of the proposal, prohibiting the FCC from considering predetermined program criteria, clearly gives the advantage to the incumbent. If there are no predetermined criteria to be met it would be practically impossible for a challenger to make a case sufficient to insure a hearing. The incumbent would have to have performed at an extremely low level to lose his license on this basis, and few would risk the consequences. It would be a simple matter merely to perform minimally, and to have the license renewed because the challenger could not prove a failure to meet the criteria if no criteria existed other than those vague ones in the proposal.¹²²

If adopted, the administration proposal would do a great disservice to the public interest in broadcasting. Like the Pastore Bill, it would virtually insure the renewal of licenses. There would be no incentive for broadcasters to improve their service, and potential new applicants would be discouraged from serving their roles as "private attorneys general" because of the futility of their challenge. It should not be adopted.

The FCC has not yet formulated its position on the administration proposal.¹²³ It has been considering proposals for revamping its license renewal procedures and policies. One set of guidelines under consideration for determining what stations merit preferences at renewal time would be barred by the administration bill.¹²⁴ It appears that the FCC will not take action in this area until it can be determined whether or not Congress is going to act.

III. CONCLUSION

Many alternatives¹²⁵ have been proposed to balance the competing interests

¹²⁰ See note 97 *supra*, and accompanying text.

¹²¹ 22 F.C.C.2d at 428.

¹²² These are the familiar "good faith effort" and "reasonable opportunity" standards. See § 307(d)(2) of the proposal, *supra* note 105.

¹²³ See *Conservatives Apply Against "Post" Stations in Florida*, BROADCASTING, Jan. 8, 1973, at 16.

¹²⁴ The guidelines consist of percentages of different kinds of programming. *Id.*

¹²⁵ See, e.g., Jaffe, *supra* note 41; Comment, *supra* note 44. One unique proposal calls for a license term of up to 6 years, with the possibility of a hearing after 3 years. At that time the FCC would either extend the license for another 3 years or issue a warning that the licensee's performance was unsatisfactory and he is in danger of losing his license at renewal. At the end of the 6-year period there would be 3 possibilities: (1) no challenge—the license is renewed; (2) challenge by a preferred applicant (one who had successfully challenged at the end of 3 years)—if the preferred applicant prevails he receives the license, otherwise the incumbent's license is renewed; (3) challenge by a competing applicant (one

of the public and the broadcasting lobby. In the past, whenever a change was actually made it was a radical change. The 1965 Policy Statement and its interpretation in *WHDH* favored the public. The pendulum swung to the broadcasters' side in the Pastore Bill, and was tempered by the 1970 Policy Statement. However, the 1970 Policy Statement, while having a good balance, violated the Communications Act and the *Ashbacher* doctrine. It was replaced by the decision in *Citizens*, once again a very pro-public interest effect. If any of the current proposals in Congress, all of which are based on the NAB supported bill, are adopted, there will once again be a shift in favor of the broadcasting lobby. Surely a compromise is possible.

There is nothing objectionable in increasing the license term to five years. Reasonable criteria which can be judicially interpreted can be formulated. Those criteria considered under the 1965 Policy Statement are reasonable and can be interpreted by the court when necessary. The ultimate criterion should be "Who will give the best service?" Certainly, ad hoc restructuring of the broadcasting industry should be prohibited. If new criteria are to be considered, or if changes are to be made in the importance of existing criteria, this could be done through the FCC's rulemaking procedures, which are prescribed by the Administrative Procedure Act.¹²⁶ Most importantly, a full, comparative hearing should be compulsory in the renewal process. It should be dispensed with only if the FCC finds that the challenger merely is making a "strike" application. Such a finding would be a final order and thus ripe for judicial review. This would preserve the challenger's rights.

A compromise of this type would protect the interests of the broadcasting industry. It would give the industry the longer license term it seeks. It would protect broadcasters from having to defend against "strike" applications. Further, it would assure broadcasters that the FCC could not arbitrarily change the criteria for renewal. A broadcaster would know where he stood, and, if conscientious, he would not have to worry about not having his license renewed. If he had a record of superior performance he would have an advantage over a challenger with no past broadcasting record. This would protect the conscientious broadcaster from challengers who deliberately made unrealistic promises of better performance solely in order to obtain the license.

At the same time the public interest would be protected. Specific criteria would be considered in the renewal proceeding. This would allow the challenger to build a case against the incumbent and at the same time show that he offers the best service available because he does meet the criteria. The compulsory full, comparative hearing would give a challenger a chance to be heard.

who had not challenged before)—if the competing applicant prevails, the incumbent retains his license for 3 years and the competing applicant becomes a preferred applicant. See Comment, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854, 876-77 (1969).

¹²⁶ Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970).