

COMMENT

FCC COMPARATIVE RENEWAL HEARINGS: THE ROLE OF THE COMMISSION AND THE ROLE OF THE COURT

Government efforts to regulate the commercial broadcasting industry did not begin in earnest until shortly after the First World War. Prior to that time, anyone who wanted to establish a radio station had to do little more than build a transmitter.¹ By the mid 1920's, however, it became apparent that limited spectrum space would not accommodate all persons desiring to operate broadcast stations, and that some form of federal regulation would be necessary. Responding to this need, Congress enacted the Radio Act of 1927.² In drafting this legislation, its authors were guided by the principle that the airwaves are a limited, precious resource that can be owned by no individual.³ To carry out this design and to bring order to the chaotic world of broadcasting, the Act established the Federal Radio Commission (FRC) with broad powers to license stations "as [the] public convenience, interest, or necessity requires."⁴ Subsequently, the Federal Communications Commission (FCC or Commission) replaced the FRC pursuant to the Communications Act of 1934,⁵ but the core-concept of public ownership was retained.⁶ In the spirit of public control, both the Radio Act and the Communications Act clearly stated that a licensee possessed no right to the continued use of its assigned frequency beyond the term of its license.⁷ Additionally, these Acts

¹ See FEDERAL COMMUNICATIONS COMMISSION, 25TH ANNUAL REPORT 11-13 (1959). Although the Secretary of Commerce did attempt to assert some degree of control over broadcast stations before World War I under authority granted him by the Radio Act of 1912, Ch. 287, 37 Stat. 302, adequate regulation was impossible because this legislation never contemplated commercial broadcasting. For example, while the Commerce Department had the power to license broadcasters, it could not assign a location, frequency, or power limitation to them. *Id.*

² Ch. 169, 44 Stat. 1162 (1927).

³ See *id.* at § 1, which states:

[T]his Act is intended to regulate all forms of interstate and foreign radio transmission and communications within the United States, its territories and possessions; to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, forms or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

Id. See also 67 CONG. REC. 5479 (1926) (remarks of Rep. White, floor manager).

⁴ Ch. 169, 44 Stat. at 1163. The specific powers of the Commission included the assignment of frequencies and broadcast sites, as well as the limitation of power output. *Id.*

⁵ 47 U.S.C. § 151 *et seq.* (1976).

⁶ See 47 U.S.C. § 301 (1976). The language in section 301 of the Communications Act is almost identical to that of section 1 of the Radio Act. See note 3 *supra*.

⁷ See Radio Act, Ch. 169, § 1, 44 Stat. 1162 (1927) (text of section 1 at note 3 *supra*); Communications Act, 47 U.S.C. §§ 301, 304, 309(h) (1976) (text below).

Section 301 provides in part:

required their respective Commissions to remove any incumbent licensee at the end of its license term and to replace it with a challenging applicant who, in the Commission's judgement, would better serve the public.⁸ It was believed that these provisions would act as a competitive spur to broadcasters, encouraging them to achieve and maintain programming of the highest possible quality.

Under the rule announced in the United States Supreme Court decision of *Ashbacker v. FCC*,⁹ the effective implementation of these provisions can be achieved only if the FCC gives full consideration to all license applicants seeking to operate a broadcast frequency, even when the frequency is already occupied by an incumbent broadcaster. Such consideration, the *Ashbacker* Court held, requires a comparative hearing.¹⁰ In this type of proceeding each applicant is given an opportunity to demonstrate that it can provide better service to the community than its opponents. The FCC, after hearing evidence and weighing all relevant differences between the competitors, then must pick the one that seems best equipped to serve the needs of the community.¹¹

With one possible exception,¹² comparative hearings involving the incumbent licensee always have resulted in the renewal of the licensee,

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

Section 304 provides:

No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 309(h) provides in part:

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein

⁸ See Ch. 169, 44 Stat. at 1162 (1927) (Radio Act), and 47 U.S.C. §§ 307(a) and (d) (1976) (Communications Act).

⁹ 326 U.S. 327 (1945).

¹⁰ See *id.* at 330.

¹¹ See *Johnston Broadcasting v. FCC*, 175 F.2d 351, 356 (D.C. Cir. 1949).

¹² In 1969 the FCC did replace WHDH-TV (Channel 5), Boston with a challenging applicant, but WHDH was operating on a four-month temporary license. It had never held a regular three year license and the FCC viewed WHDH as the equivalent of a new applicant. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *modified*, 17 F.C.C.2d 856 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

provided the licensee continued to satisfy certain minimum qualifications.¹³ To some this record suggests a bias in FCC policies favoring current licensees over newcomers.¹⁴ Such a bias is arguably in contravention of both the *Ashbacker* comparative hearing requirement, and of those provisions of the Communications Act that specifically withhold from a licensee any right to its assigned frequency beyond the term of its license. Entrenched broadcast interests have argued, however, that no illegal or unfair bias exists.¹⁵ They contend that some degree of preference for incumbent licensees is necessary to ensure that incumbents who are providing satisfactory service are not displaced solely on the basis of a challenger's assertion that it can do better.¹⁶ This argument has proved successful in persuading the FCC to provide preferences and thereby to protect licensees from renewal challenges.

Although the FCC accepts the logic of the argument favoring some form of renewal preference for incumbent licensees, it also recognizes the statutory limitations on its authority to provide such preference.¹⁷ In *Hearst Radio, Inc.*,¹⁸ the FCC, after discussing at length the need to provide incumbents with some preferential treatment, was careful to add that "the foregoing discussion of renewal preferences is not to be construed in any way as giving a licensee property rights to the use of a frequency—or any other rights or advantages over a competing applicant"¹⁹ Unfortunately, in spite of persistent efforts, since *Hearst*, the FCC has never succeeded in establishing a satisfactory balance between the policy considerations favoring preferences and the statutory language discouraging reliance upon them. In addition, although the courts have recognized the FCC's failings,²⁰ they only have concerned themselves with the legal half of the equation, avoiding policy problems. Thus, while the courts have been willing to tell the FCC what it may not do, they have given little help in suggesting alternative policies that might be permissible.²¹ As a result, the FCC apparently has concluded that the safest

¹³ Renewal and new applicants alike must meet prescribed standards of character, citizenship, solvency, and technical skill before the FCC may even begin to consider whether the grant of a license would serve the public interest, convenience or necessity. See 47 U.S.C. §§ 308(b), 319(a) (1976). In addition, through its rulemaking authority the FCC has placed absolute limits on the number and location of other broadcast facilities and daily newspapers an applicant may own. *E.g.*, 47 C.F.R. §§ 73.35, 73.240, 73.636 (1978). See generally *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-04 (1956).

¹⁴ See, *e.g.*, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 41, 4 Med. L. Rptr. 1502, 1503 (1978); *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 439 (1976) (Robinson, Commissioner, dissenting).

¹⁵ See *\$3 Billion in Stations Down the Drain?*, BROADCASTING, February 3, 1969 at 19.

¹⁶ *Id.*

¹⁷ See Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424-25 (1970) [hereinafter cited as *1970 Policy Statement*].

¹⁸ 15 F.C.C. 1149 (1951).

¹⁹ *Id.* at 1175.

²⁰ See, *e.g.*, *South Florida Television Corp. v. FCC*, 349 F.2d 971, 973 (D.C. Cir. 1965).

²¹ See *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *modified*, 463 F.2d 822 (D.C. Cir. 1972).

course is to establish no consistent policy. Instead, it has resorted to an *ad hoc* approach. Such a case by case analysis has provided the FCC with the flexibility it needs to reach the result it desires, while at least nominally adhering to the requirements of the Communications Act.²² The courts generally have acquiesced in this approach.²³

The courts' refusal to engage in a discussion of such an intractable policy question may be understandable, but it has prevented them from fulfilling their function of forcing the FCC to approach comparative renewal cases in a consistent and comprehensible manner. There are signs, however, that the era of complete judicial deference to the FCC in this area is at an end. In a recent case, *Central Florida Enterprises, Inc. v. FCC*,²⁴ the Court of Appeals for the District of Columbia remanded a comparative renewal case to the FCC because the court found that "the Commission's manner of 'balancing' its findings was wholly unintelligible."²⁵ This decision is certainly a sound first step toward the creation of a workable comparative renewal policy, but it is only a small first step. The burden of actually developing a functional policy remains with the FCC. Whether the Commission can produce a workable policy, and whether the court will continue to exercise scrutiny to ensure that the FCC does not fail in its duty, both remain open questions.

Several previous unsuccessful attempts by the FCC to develop an effective comparative renewal policy indicate that new efforts under *Central Florida* may fail.²⁶ These previous efforts, although not the products of judicial mandate, shed considerable light on the difficulties attendant upon such an undertaking. Not only must the Commission wrestle with a very complex legal issue, but it must do so under the scrutiny of the broadcast industry, a plethora of public interest groups, the Congress, and the judiciary. Under these circumstances it is not surprising that shortly before *Central Florida* was decided the FCC recommended to Congress that the comparative renewal process be abolished.²⁷

The prospects for a viable comparative renewal policy, however, are not entirely bleak. It is the purpose of this comment to suggest that from *Central Florida*, and other earlier court decisions that attempt to describe the legal parameters within which the FCC may make its policy choices, a workable comparative renewal policy can be fashioned. The comment begins by describing the procedural process involved in a comparative renewal hearing. It then

²² See *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 424, 439 (Robinson, Commissioner, dissenting).

²³ See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 705 (D.C. Cir. 1975) (Statement of Bazelon, C.J.).

²⁴ 598 F.2d 37, 4 Med. L. Rptr. 1502 & 2009 (D.C. Cir. 1978).

²⁵ *Id.* at 59, 4 Med. L. Rptr. at 2011.

²⁶ See 1970 *Policy Statement*, *supra* note 3; 22 F.C.C.2d 424 (1970); WHDH, Inc. 16 F.C.C.2d 1, (1969), *modified*, 17 F.C.C.2d 856 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970); Hearst Radio, Inc., 15 F.C.C. 1149 (1951).

²⁷ REPORT OF THE FEDERAL COMMUNICATIONS COMMISSION TO THE SUBCOMMITTEE ON COMMUNICATIONS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE (1976).

reviews the various policies the FCC has adopted over the years in its effort to objectify the decisionmaking process, and examines the reasons for their breakdown. Next, this comment examines the recent efforts of the court of appeals, in *Central Florida*, to force the Commission to adopt a satisfactory policy. Finally, an approach to the comparative renewal problem that meets both the policy objectives of the FCC and the legal requirements interposed by the courts will be proposed.

I. PROBLEMS WITH THE COMPARATIVE HEARING

Limited space on the various broadcast bands has always made it impossible for the FCC to accomodate everyone who desires and qualifies to operate a television or radio station. Hence, some type of selection process between mutually exclusive²⁸ applicants for licenses is essential. In practice, selections are made through a comparative hearing before the FCC. These hearings may involve comparison between original applicants, renewal applicants, or both. Development of standards to permit rational comparison has proved difficult for all concerned. This section describes the hearing process and introduces the major problem that has arisen with regard to the effectiveness of this process—finding a rational means of comparing new and renewal applicants.

A. *The Comparative Hearing Process*

Under the United States Supreme Court holding in *Ashbacker v. FCC*,²⁹ all applicants who file mutually exclusive petitions for broadcast licenses are entitled to participate in a single, comparative hearing at which the applicant thought most likely to serve the public interest will be awarded the license.³⁰ The Court based its holding in *Ashbacker* on a provision of the Communications Act that guaranteed a hearing to all applicants before they could be denied a license.³¹ This requirement, the Court reasoned, demanded a con-

²⁸ Mutually exclusive applicants are those who because of regulations or electrical interference cannot each be granted licenses. Generally the term refers to applicants for the same frequency in the same community. See Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, printed in *ACTIVITIES OF REGULATORY AND ENFORCEMENT AGENCIES RELATING TO SMALL BUSINESS: HEARINGS ON H. RES. 13 BEFORE SUBCOMMISSION NO. 6 OF THE SELECT COMMITTEE ON SMALL BUSINESS*, 89th CONG., 2ND SESS. A87, A112 (1966) [hereinafter cited as Jones].

²⁹ 326 U.S. 327 (1945).

³⁰ 326 U.S. at 333. Before *Ashbacker*, the FCC often awarded licenses for which there were competing applications without a hearing of any sort, and without indicating that any applicant, other than the successful one, was given even the slightest consideration. Indeed, during the four year period immediately preceding *Ashbacker*, the FCC decided 36 cases involving mutually exclusive applications, and of these, 22 were resolved without a hearing. 326 U.S. at 338 n.1 (Frankfurter, J., dissenting).

³¹ 326 U.S. at 333. Specifically, *Ashbacker* held that the FCC violated section 309(a) of the Communications Act, Ch. 652, 48 Stat. 1064, 1085 (1934). Since *Ashbacker*, Congress has amended section 309 so that hearings are now only required when an application presents a "substantial and material question of fact." Pub. L. No.

solidated proceeding because the grant of a license to one applicant has the effect of a denial to all remaining applicants.³² The *Ashbacker* doctrine has survived over the past 35 years as the only way to satisfy the dual requirements of the Communications Act that each applicant be treated fairly and that the public be provided with broadcasters of the highest possible quality.

Every comparative hearing poses two general questions: first, are the applicants minimally qualified to hold broadcast licenses, and second, of those who are qualified, which one will best serve the public interest, convenience or necessity? Under the Communications Act, every party seeking a broadcast license must meet certain standards of character, citizenship, financial ability, and technical skill before the comparative question of public interest, convenience or necessity will be addressed.³³ Additionally, the FCC has broad rulemaking and adjudicatory authority to define and add to this statutory list of qualifications.³⁴ If two or more mutually exclusive applicants pass this preliminary muster, only then will the FCC engage in a comparative analysis. While conceptually the minimum qualifications question must precede the direct comparison of the applicants, on a practical level, because so much of the evidence on both issues overlaps, the two questions usually are decided through a single proceeding.³⁵

The hearing process itself follows a detailed procedure. Whenever two or more parties apply for the same license, they are set for a hearing which involves the so-called "standard comparative issue"—the determination of which applicant would better serve the public interest.³⁶ The initial hearing

86-752, 74 Stat. 889 (1960) (codified at 47 U.S.C. § 309(e) (1976)). This change, however, does not diminish or alter the significance of *Ashbacker*, for whenever there are two or more non-frivolous applicants for mutually exclusive licenses, a "substantial and material question of fact" arises as to which competitor would better serve the "public interest, convenience, or necessity." See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1973). See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 41 (D.C. Cir. 1978); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972).

³² 326 U.S. at 333.

³³ See 47 U.S.C. §§ 307(a) & (d), 308(h), 319(a) (1976).

³⁴ See 47 U.S.C. § 303(f) (1976). For example, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Supreme Court upheld a Commission decision denying Storer a comparative hearing relative to the acquisition of a new frequency because Storer already held the maximum number of licenses permissible under FCC regulations. *Id.* at 203-04 (upholding 47 C.F.R. §§ 3.35, 3.240, 3.636 (1953)). And, more recently in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), the Court passed favorably upon other Commission regulations (47 C.F.R. §§ 73.35, 73.240, 73.636 (1978)) limiting the formation of newspaper-broadcast station combinations in a single community. *Id.* at 779. Of course, if any qualification issue involves a serious factual dispute a hearing may be required under section 309(e) of the Communications Act. See note 31 *supra*.

³⁵ See, e.g., *WHDH, Inc.*, 16 F.C.C.2d 1, 19 (1969).

³⁶ See, e.g., *Bartmess and Hansen*, 35 Fed. Reg. 16,064 (1970). See generally Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings*, 43 U. CHI. L. REV. 573, 575 (1976). Cf. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (discussing public interest test).

is held before an Administrative Law Judge (ALJ)³⁷ who takes evidence on whatever issues the Commission designates to be material in a particular case.³⁸ Each party is free to call witnesses, introduce evidence on its own behalf, cross-examine opposing witnesses, and challenge evidence produced by other parties, all in general conformity with the Administrative Procedure Act³⁹ and the Federal Rules of Evidence.⁴⁰ Following the hearing, if the judge finds that two or more of the applicants meet minimum qualifications, he must undertake a complete comparative analysis. The ALJ examines, compares, and makes findings with respect to the relative standing of the applicants on each issue identified as material at the start of the hearing. At the conclusion of the hearing the ALJ prepares an initial decision.⁴¹ Findings are expressed in terms of "preferences" or "demerits" of varying degree, which are awarded to the contestants on each factor considered.⁴² By reviewing the overall number and strength of the preferences and demerits earned by each competitor, as well as by considering the importance of the categories in which they were achieved, a winner is determined.⁴³ Appeals from the determination of the ALJ may be made directly to the full Commission by filing exceptions.⁴⁴ Upon appeal, the Commission may decide to accept additional evidence on its own initiative, or it may accept the factual record created by the ALJ in its entirety, restricting its review to questions of law and policy.⁴⁵ Finally, review of Commission decisions may be had in the Court of Appeals for the District of Columbia, and ultimately by writ of certiorari in the Supreme Court of the United States.⁴⁶

Traditionally, the court of appeals has exercised only limited review of Commission decisions. Although under oft cited and seemingly broad dicta in *Johnston Broadcasting Co. v. FCC*,⁴⁷ the court demands that consideration be given to every "material difference" between applicants,⁴⁸ as a practical matter this restraint is minor. The FCC traditionally has exercised virtually complete discretion in determining which substantive matters are material with respect

³⁷ In earlier FCC opinions an ALJ was referred to as a Hearing Examiner. *E.g.*, *WHDH, Inc.*, 16 F.C.C.2d 1 (1969).

³⁸ See 47 C.F.R. §§ 1.221, 1.243 (1978).

³⁹ 5 U.S.C. § 551 *et seq.* (1976).

⁴⁰ See 47 U.S.C. § 409 (1976) (incorporating APA); 47 C.F.R. § 1.351 (1978) (relating to evidence). Additional evidentiary rules peculiar to FCC proceedings are laid out at 47 C.F.R. §§ 1.352-1.364 (1978).

⁴¹ See 47 C.F.R. § 1.267 (1978).

⁴² See, *e.g.*, *RKO General, Inc.*, 44 F.C.C.2d 123, 227 (1973); *TV-9, Inc. v. FCC*, 495 F.2d 929, 941 n.2 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 986 (1974). In the latter case, the preference-demerit continuum was confused by the court of appeals through the introduction of the term "merit". Merit, the court explained, "is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference." *Id.*

⁴³ As to preferences generally, see *Jones*, *supra* note 28, at A107.

⁴⁴ See 47 C.F.R. §§ 0.365, 1.276 (1978).

⁴⁵ See 47 C.F.R. § 1.276 (1978).

⁴⁶ See 47 U.S.C. § 402 (1976).

⁴⁷ 175 F.2d 351 (D.C. Cir. 1949).

⁴⁸ *Id.* at 357.

to the public interest.⁴⁹ While the court of appeals has the duty to set aside arbitrary or capricious decisions by the FCC,⁵⁰ both in theory and in practice this limitation has been of little importance. Judicial review of FCC decisions interpreting the public interest is inherently difficult due to the subjective character of the public interest inquiry, and due to potential intrusion into communications policy matters committed exclusively to the FCC.⁵¹

As a result of the very limited review provided by the courts, the procedural regularity imposed upon the FCC as a result of *Ashbacker* has not produced a consistent policy approach to comparative renewal hearings. So long as the Commission provides a unitary hearing for all mutually exclusive applicants, it is free to judge the applicants by virtually any standards it deems to be appropriate.⁵² It is even possible for the Commission to employ an "analytical methodology" in one case that is in marked conflict with the approach used in the immediately preceding case, and upon at least one occasion it has done so.⁵³ In the following section the reasons for such drastic policy shifts are explored.

⁴⁹ See *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *rehearing*, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957), where the court stated:

It [the FCC] has the duty, in choosing between competing applicants, to decide which would better serve the public interest. Where that interest lies is always a matter of judgment and must be determined on an *ad hoc* basis. The broad statutory standard of "public convenience, interest, or necessity" is not susceptible of precise or comprehensive definition. Its meaning cannot be impressed in a formula of general application. The responsibility for making the determination is committed to the Commission, subject to the limitations that it must proceed within constitutional and statutory bounds and that it must not act arbitrarily or capriciously.

Id.

⁵⁰ See *id.* at 18, and 5 U.S.C. § 706 (2) (A) (1976).

⁵¹ See *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956), which states:

The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought may both be rational. All such matters are for the Congress and the executive and their agencies. They are not for the judiciary.

Id. at 206.

⁵² *Id.* See also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), in which Justice Frankfurter explained that such limited review is permissible because "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Id.* at 138.

⁵³ See Geller, *A Modest Proposal for Modest Reform of the FCC*, 63 GEO. L.J. 705, 716 and n.63 (1975). In a striking example of the agency's sweeping discretion, within

B. Comparative Hearings and Renewal Preferences: The Problem

Whenever parties seek mutually exclusive licenses, the comparative process outlined above comes into play. It is essentially applicable to both renewal proceedings—those proceedings at which the incumbent licensee seeks to renew its license—and non-renewal proceedings—where none of the contenders is an incumbent applicant for the frequency sought. In case of either renewal or non-renewal proceedings, it is very difficult to make comparisons between the applicants. In the non-renewal context, the problem involves finding fair and effective criteria for judging and comparing the untried proposals and promises of each applicant. When a renewal applicant is included in the process, the problem becomes even more difficult, for in addition to the need for reliable criteria, a method must be found to account for the inherently unequal positions of new and renewal applicants. The obvious distinction between these two classes of applicant is that an incumbent has a demonstrable record of performance with the frequency in question as evidence of its capabilities, while a challenger's ability to carry out its proposal only can be estimated by resort to far less reliable factors. The establishment of satisfactory standards by which to compare an operating broadcasting facility and an untried proposal to replace that facility has proven to be almost impossible for the FCC. Below the problems associated with comparing incumbents and challengers are discussed.

1. Renewal Preferences: The Great Unequalizers

Renewal preferences may be defined as devices employed by the FCC to account for the different positions occupied by renewal and new applicants. They allow the FCC to give an incumbent licensee an edge over a challenger on the basis of a broadcast record or some other consideration applicable only to the incumbent.⁵⁴ The chief distinction between renewal preferences and other means of evaluating mutually exclusive applicants is that renewal preferences do not arise as a result of a comparison between applicants, but rather are the product of an evaluation of the incumbent alone. As a simple illustration, where on the basis of a head to head comparison the challenger appears to come out slightly ahead, the renewal applicant might still win the license because, on the basis of past performance, the Commission has greater confidence that the incumbent actually will be able to carry out its proposals.

the course of a single day it reversed in one case a long-standing policy against giving preference for a superior programming proposal of an applicant where all of the applicants presented meritorious plans. Then, in the very next case, it resurrected the just-abandoned view. *Compare* KTRM, Inc., 19 F.C.C. 161 (1954) with *Tribune Co., Tampa Florida*, 19 F.C.C. 100 (1954), *aff'd sub nom. Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956).

⁵⁴ See, e.g., *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1175 (1951); *RKO General, Inc.*, 44 F.C.C.2d 123, 137 (1973), *aff'd sub nom. Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 702 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 926 (1975). See generally Hyde, *FCC Policy and Procedures Relating to Hearings, Etc.*, 1975 DUKE L.J. 153, 258-59 [hereinafter cited as Hyde] (Mr. Hyde is past chairman of the FCC).

There are generally three reasons given for the use of renewal preferences in comparative renewal hearings. First, the preferences are endorsed because the incumbent's past performance naturally is the best predictor of its ability to serve the public interest.⁵⁵ Second, preferences for incumbents are thought necessary to counterbalance the automatic advantage possessed by new applicants who are able to make sweeping promises of public service in their proposals without being hindered by a record of actual performance.⁵⁶ Third, it has been argued that renewal preferences should be awarded to promote the public interest in stability in the broadcast industry.⁵⁷

The logic of the first reason is self-evident. An incumbent's previous broadcasting performance is probably the most useful criterion available for predicting the quality of future public service.⁵⁸ It simply is reasonable to assume that a superior licensee will continue to perform well. Conversely, a poor performer is likely to remain poor. Indeed, no one seriously contends that past performance of an incumbent should be excluded totally from consideration in a comparative renewal hearing.⁵⁹

The second justification cited for renewal preferences centers on the advantage possessed by new applicants by virtue of their ability to "tailor" their proposals to satisfy the FCC. Incumbent licensees do not possess this ability because they are bound to an existing institutional structure and record of performance. In the absence of renewal preferences, simply by exercising a little care in designing its proposal and in selecting its opponent, a newcomer could ensure its own success by making promises that reach beyond the established record of the license holder. Were it not for renewal preferences to account for the superior reliability of performance over promises, challengers would have an overwhelming advantage. It is contended, therefore, that a preferential treatment is essential to offset these advantages of the challenger.⁶⁰

The third argument commonly made in favor of a renewal preference concerns the need for stability in the broadcast industry. Renewal preferences promote stability because they effectively ensure that incumbents will retain their licenses, provided their performance is satisfactory. Stability is needed, it is argued, to attract the necessary capital to produce high quality program-

⁵⁵ See Hyde, *supra* note 54, at 258.

⁵⁶ See *id.* at 259.

⁵⁷ See *id.* at 258-59; 1970 Policy Statement, *supra* note 17, at 425.

⁵⁸ See *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1175 (1951).

⁵⁹ In 1952 Congress amended section 307(d) of the Communications Act by deleting the provisions subjecting renewal applicants to "the same considerations" as new applicants and substituted language which held both renewal and new applicants to a standard of "public interest, convenience and necessity." Ch. 879, § 5, 66 Stat. 714 (1952). Presumably this change was made to avoid any inference stemming from the original language to the effect that an incumbent licensee's broadcast record could not be considered. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206 n.13 (D.C. Cir. 1971). Even before the amendment, however, the FCC had clearly held that past performance of a renewal applicant may be considered in a comparative renewal hearing. See *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1175 (1951).

⁶⁰ See Hyde, *supra* note 54, at 259.

ming. If a licensee is faced with a substantial risk that its license will be lost within three years, it will be reluctant to invest any substantial sum of money into the station, and creditors will be reluctant to make loans to entities in such a precarious position.⁶¹ Obviously, without capital, licensees will be unable to serve adequately the public interest. All three of these policies are undeniably reasonable, but the reasonableness of the objective does not necessarily affect the legality of the particular means chosen by the FCC to carry these policies out.

2. The Legal Status Of Renewal Preferences

There are two distinct legal bases under which renewal preferences may be attacked. The first argument against renewal preferences is that they deny a challenger a genuine comparative hearing as guaranteed under *Ashbacker v. FCC*.⁶² The second point in opposition to preferences is that they violate those provisions of the Communications Act that withhold from a licensee any right to its assigned frequency beyond the term of its license.⁶³ With respect to the *Ashbacker* issue, under the Communications Act as interpreted by that case, applicants for mutually exclusive licenses are entitled to a consolidated hearing at which their ability to serve the public interest will be fully compared.⁶⁴ The FCC has recognized that renewal preferences are a threat to this process because they are awarded solely on the basis of an incumbent's record.⁶⁵ No comparison between applicants is involved. The FCC's interpretation of *Ashbacker*, however, has not completely precluded it from considering renewal preferences in making a comparison. Rather, the Commission views *Ashbacker* as merely reducing the role non-comparative criteria may play in the process.⁶⁶

In determining the legality of a renewal preference under *Ashbacker*, logically the weight to be given to the preference is critical. If the *Ashbacker* doctrine and renewal preferences are to coexist successfully within the framework of the Communications Act, renewal preferences must be limited in scope to prevent them from overwhelming factors upon which the applicants may be directly compared.⁶⁷ Provided the renewal preference is merely one consid-

⁶¹ See *RKO General*, 44 F.C.C.2d 123, 137 (1973).

⁶² 326 U.S. 327 (1945).

⁶³ These provisions are: 47 U.S.C. §§ 301, 304, 309(h) (1976). See note 7 *supra* for the text of these provisions. See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

⁶⁴ 326 U.S. at 333, discussed in text at notes 29-32 *supra*.

⁶⁵ See *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1175 (1951).

⁶⁶ Cf. *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1211 (D.C. Cir. (1971)) (accepting the need to reconcile renewal preferences with *Ashbacker*); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Etc.*, 66 F.C.C.2d 419, 422-23 (1977) (same) [hereinafter cited as *1977 Policy Statement*].

⁶⁷ If a licensee's record of performance is weighted so as effectively to permit it to overcome all other criteria, then the award of a preference to the incumbent based upon its performance precludes any comparison between the applicants. The case has already been decided; the renewal applicant has won. Clearly, if a renewal preference of such magnitude were actually utilized it would be found to be in violation of *Ashbacker*, but a renewal preference of somewhat lesser significance, which

eration among many in comparing the public service potential of the applicants, it should be accepted as a valid factor.⁶⁸

The second restriction on renewal preferences is based on provisions in the Act that forbid the vesting of any right in the incumbent to the renewal of its license. Since renewal preferences provide incumbents with an advantage in comparative hearings it can be said that they create certain vested renewal rights.⁶⁹ Not all renewal preferences, however, are held to bestow illegal rights upon incumbents; rather, the general view is that only preferences based solely on a renewal applicant's status as incumbent create illegal rights. Such preferences may be labeled *per se* preferences.⁷⁰ *Per se* preferences may be contrasted with other, *earned* preferences, which may be acquired by an incumbent only on the basis of performance.⁷¹ *Per se* preferences are illegal, it is argued, because giving an inalienable advantage to a license holder is seen as the equivalent of vesting it with a right in the frequency.⁷² Conversely, earned preferences, because they are not automatic, are not seen as establishing any impermissible right, provided the standards by which they are earned reflect an inquiry into the public interest.⁷³ The distinction between earned and *per se* preferences, while clear in theory, often becomes blurred when a preference is awarded in an actual case. It is frequently alleged that an earned preference often can be obtained so easily that it becomes *per se* in nature.⁷⁴ Thus, a preference which in form is earned may still be attacked as *per se* and, therefore, illegal.⁷⁵

Both of these restrictions on the use of renewal preferences have hindered the FCC substantially in the development of a consistent and predictable approach to these proceedings. The limitations distort the comparative process because they interfere with the Commission's ability to consider fully certain legitimate policy concerns, such as the need for stability in the broadcast industry, and they stand to prevent proper examination of material evidence, such as an incumbent's broadcast record.

would not completely short circuit the comparative process, arguably would be permitted. See *Central Florida Enterprises v. FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971), *clarified by* 463 F.2d 822 (D.C. Cir. 1972).

⁶⁸ See note 67 *supra*.

⁶⁹ See 1977 *Policy Statement*, *supra* note 66, at 420.

⁷⁰ See, e.g., *id.* See also Hyde, *supra* note 54, at 259.

⁷¹ See, e.g., Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 398 (1965) [hereinafter cited as 1965 *Policy Statement*].

⁷² See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 712 (D.C. Cir. 1975) (statement of Bazelon, C.J.).

⁷³ See *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 and n.35 (D.C. Cir. 1971).

⁷⁴ See *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). See generally Hyde, *supra* note 54, at 259-60.

⁷⁵ See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 712 (D.C. Cir. 1975) (statement of Bazelon, C.J.).

II. COMPARATIVE HEARINGS AND RENEWAL PREFERENCES: FCC POLICIES

In an effort to provide a rational comparative renewal policy, while observing statutory restrictions, the FCC has created over the years three distinct comparative renewal policies. These pronouncements of policy—(1) the *Hearst* doctrine,⁷⁶ (2) the *1965 Policy Statement*,⁷⁷ and (3) the *1970 Policy Statement*⁷⁸—each took substantially different approaches to the problem.

A. The *Hearst Doctrine*

*Hearst Radio, Inc.*⁷⁹ presented the FCC with its first comparative renewal case following *Ashbacker*.⁸⁰ In *Hearst*, the incumbent, Hearst Radio, a subsidiary of the Hearst media empire⁸¹ was challenged by Public Service Radio, a corporation created exclusively for the purpose of obtaining Hearst's license to operate radio station WBAL, Baltimore, Maryland.⁸² In making the comparative assessment the FCC determined that the material issues were: (1) the financial position of each applicant; (2) their programming proposals; (3) the participation of the respective owners in the management of the station (integration); (4) ties of the owners to the community to be served; (5) ownership of other media outlets (diversification); (6) prior broadcasting experience of the owners; and (7) staffing proposals.⁸³ All of these "criteria" had been used before *Hearst* in non-renewal comparative hearings.⁸⁴ Because here a renewal applicant was involved, however, the value to be given each criterion had to be determined in light of Hearst's record of performance.⁸⁵ Where relevant, the Commission explained, "[e]xcellent performance as a licensee will be given favorable consideration where we find a reasonable likelihood that such performance will continue. On the other hand, a record of poor service, or of marginal service with no indications of efforts to improve such service, will be given due weight in appraising the likelihood of effectuation of the licensee's proposals."⁸⁶

In applying this evaluative process to the facts of *Hearst*, the FCC concluded that although the programming of Hearst was "unbalanced with respect to an overabundance of commercial programs and commercial religious programs, and . . . lacked a desirable amount of time devoted to local activities and sustaining programs,"⁸⁷ it nevertheless met the standard of "excellent" performance.⁸⁸ This characterization of the Hearst programming record en-

⁷⁶ See *Hearst Radio Inc.*, 15 F.C.C. 1149 (1951).

⁷⁷ See *1965 Policy Statement*, *supra* note 71. See also *Seven (7) League Productions*, 1 F.C.C.2d 1597, 1598 (1965).

⁷⁸ See *1970 Policy Statement*, *supra* note 17.

⁷⁹ 15 F.C.C. 1149 (1951).

⁸⁰ 326 U.S. 327 (1945).

⁸¹ See *Hearst Radio Inc.*, 15 F.C.C. 1149, 1151-53 (1951).

⁸² See *id.* at 1168-71. (Public Service was a newly created corporation at the time of the challenge).

⁸³ *Id.* at 1176-83.

⁸⁴ See *id.* at 1176.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1175.

⁸⁷ *Id.* at 1177.

⁸⁸ *Id.* at 1183.

abled the FCC to utilize the record to the benefit of the incumbent in the consideration of five of the seven comparative criteria. Under both the criteria of programming and staffing the FCC favored Hearst based upon the superior reliability of its proposals as demonstrated by its record.⁸⁹ With respect to the factors of integration, community involvement, and diversification, all of which are designed primarily to guarantee a licensee's sensitivity to community needs, the FCC neutralized Hearst's inferior showings relative to its opponent on the grounds that these criteria deserved no weight where a broadcast record demonstrated that the incumbent was meeting the needs of the locality it served.⁹⁰ No advantage was given to either applicant on the basis of the two criteria (financial position and prior broadcasting experience) which were unaffected by Hearst's broadcast record. Thus, Hearst won preferences on two criteria, Public Service won no preferences, and on the remaining five factors no advantage was given to either party. On this basis Hearst was granted the license.⁹¹

In *Hearst*, and in subsequent cases following the *Hearst* example, the FCC generally took a conservative approach to comparative renewal hearings, preferring the certainty and stability of an incumbent licensee to the promise of improved service offered by a challenger.⁹² Although the Commission was cognizant of its obligation to provide a genuinely comparative hearing without placing too much emphasis on non-comparative criteria, it did not permit this legal limitation to thwart it in its duty to license the best qualified applicant from a public service perspective. Because explicit renewal preferences were restricted by law, the FCC resorted to more subtle forms of preference, made possible by the case-by-case analysis of factors contained in the *Hearst* doctrine. This approach effectively denied a challenger a truly comparative proceeding, just as would a per se renewal preference. In fact, *Hearst* itself is a good example of a case in which earned preferences were achieved so easily that they were in effect hidden per se preferences. Nevertheless, in deference to the expertise of the FCC the courts were reluctant to overturn a Commission decision that appeared to be based on a legitimate exercise of discretion, but in fact rested on a per se renewal preference.⁹³

⁸⁹ See *id.* at 1177-79 (with respect to programming), and at 1183 (with respect to staffing).

⁹⁰ *Id.* at 1179-81. For example, the diversification criteria is intended to protect against overconcentration of media outlets which might limit the public's access to diverse opinions and sources of information. In *Hearst*, the incumbent held licenses to an additional radio station and a television station in Baltimore, and owned one of the two major daily newspapers in that city while the challenger held no media interests. *Id.* at 1180-81. Normally these facts would result in a preference for the challenger. See *id.* at 1181. Because the record showed that no adverse impact on the Baltimore listening public resulted from this concentration of media, however, the FCC awarded no preference. *Id.*

⁹¹ *Id.* at 1183.

⁹² See, e.g., *Sunbeam Television Corp.*, 38 F.C.C. 805 (1965), *aff'd sub nom.* *Community Broadcasting Corp. v. FCC*, 363 F.2d 717 (D.C. Cir. 1966); *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963).

⁹³ See text and notes at notes 74-75 *supra*.

The Commission's camouflaged *per se* renewal preferences may be loosely divided into two groups: (1) those achieved under the guise of the Commission's power to select and define the criteria by which applicants are to be judged, and (2) those that took effect through the false characterization of evidence to be considered in a comparative hearing. The first group of camouflaged preferences were made possible by the far-reaching discretion of the FCC in areas of communications policy. Because the courts deferred completely to the Commission in the determination and definition of the standards by which mutually exclusive applicants were to be judged,⁹⁴ the FCC was able to make some facet of an incumbent's broadcast record relevant in many of the criteria it employed.⁹⁵ In this manner the FCC was able to divide a renewal preference into several components, each part of which seemed small, but which in sum was always decisive in the award of the license. Renewal preferences of such magnitude, even if they were not illegal as *per se* preferences, might be viewed under *Ashbacker* as endangering the comparative nature of a hearing.⁹⁶ But the FCC so successfully entangled these preferences with other policy considerations that it became impossible to assess objectively the extent of their impact. Under such circumstances the courts were helpless to attack FCC opinions.⁹⁷

The second category of disguised *per se* preferences involved characterizations of evidence. These preferences were implemented by the misapplication of qualitative terms to describe broadcast performance. This occurred when the FCC assessed the evidence surrounding a broadcast record and labeled it with a descriptive term indicative of the quality of the record. Such labeling was necessary because *Hearst* did not establish any objective standards by which to measure broadcast performance, and instead called for subjective, case-by-case judgments regarding an incumbent's record.⁹⁸ Due to this lack of a rigid evidentiary standard, it was easy for the Commission to exaggerate the quality of a renewal applicant's record. This process of characterization can be seen at work quite clearly in *Hearst*, where the FCC declared *Hearst's* performance to be excellent in spite of its obvious and serious flaws.⁹⁹ Its effect in *Hearst* was to permit the Commission to grant a preference to an incumbent when it had not been earned. The award of such a preference is at least arguably *per se*, and therefore illegal under the Communications Act.¹⁰⁰

B. The 1965 Policy Statement and WHDH

As more and more cases were decided under the *ad hoc* approach of *Hearst*, the potential for administrative abuse of discretion inherent in the doc-

⁹⁴ See *id.*

⁹⁵ See, e.g., text and notes at notes 89-90 *supra*.

⁹⁶ See text at notes 62-67 *supra*.

⁹⁷ See, e.g., *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

⁹⁸ See *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1176 (1951).

⁹⁹ See text at notes 85-89 *supra*.

¹⁰⁰ See text and notes at notes 69-74 *supra*. See generally Geller, *A Modest Proposal for Modest Reform of the FCC*, 63 GEO. L.J. 705, 715 (1975).

trine became increasingly manifest, and hence the focus of mounting criticism.¹⁰¹ The FCC responded to this criticism by developing an entirely new policy. This policy, embodied in the *1965 Policy Statement*,¹⁰² and first applied in *WHDH, Inc.*,¹⁰³ was directed primarily at bringing some structure, and therefore, consistency to the comparative renewal process. To achieve this end the FCC made three significant changes in the process: (1) it limited the scope of the hearing to specific, predesignated criteria;¹⁰⁴ (2) it provided precise structured definitions of the criteria that described what the Commission was looking for in an applicant; and (3) it identified the broadcast record as a distinct and independent criterion.¹⁰⁵

First, the *Policy Statement* declared that henceforth the standard criteria by which competing applicants normally would be judged would be limited to (1) diversification of control of the media of mass communications, (2) full time participation in station operation by owners, and (3) broadcast record.¹⁰⁶ The Commission sought to limit the number of criteria to be considered in the usual case because it concluded that the traditional approach of permitting parties to introduce evidence on a broad range of topics rarely added significantly to the quality of the decision, and often produced considerable confusion.¹⁰⁷ The FCC selected these three criteria because it determined that they served the dual public interest objectives of providing the best possible service to the public, and maximizing diffusion in media control far better than did other criteria.¹⁰⁸

Second, the *1965 Policy Statement* defined the three criteria in terms of more specific sub-criteria.¹⁰⁹ For example, with respect to the diversification

¹⁰¹ See, e.g., *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677, 684 (1963) (Bartley, Commissioner, dissenting); Jones, *supra* note 28, at A165-A167. See generally Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959); see also Hyde, *supra* note 54, at 261.

¹⁰² 1 F.C.C.2d 393 (1965). When initially issued, this statement addressed problems with *non-renewal* comparative hearings, but excluded comparative renewals from its coverage. *Id.* at 393 n.1. *Seven League*, 1 F.C.C.2d 1597 (1965), decided five months after the *Policy Statement* was released, adopted the statement for use in comparative *renewal* hearings. *Id.* at 1598. As originally drafted, the *Policy Statement* was to apply to comparative renewal hearings in the first place, but several Commissioners at that time feared that the abandonment of *Hearst* would endanger the stability in the broadcast industry that the Commission had so carefully cultivated. Hyde, *supra* note 54 at 265-66.

¹⁰³ 16 F.C.C.2d 1, 81 (1969), *rehearing*, 17 F.C.C.2d 956 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁰⁴ To avoid any obvious conflict with *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949) which demands that the FCC consider all material differences between the parties, the Commission appended to the *1965 Policy Statement* a provision permitting the addition of the other criteria in an individual case upon a showing by an applicant that the extra factor is substantially material. 1 F.C.C.2d at 399.

¹⁰⁵ See *1965 Policy Statement*, *supra* note 71.

¹⁰⁶ *Id.* at 394-96, 398.

¹⁰⁷ *Id.* at 394.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 394-96, 398.

criterion, the Commission stated that it was concerned with all forms of media ownership by an applicant, print as well as broadcast, and that it would consider:

- (1) controlling interest in other media to be more significant than minority ownership interests;
- (2) ownership of media outlets in or near the area of proposed service to be of greater importance than ownership of outlets in other parts of the United States;
- (3) ownership of media outlets with a large circulation or audience to be more important than ownership of outlets that cover a limited area;
- (4) ownership of nationally or regionally important outlets to be of greater significance than ownership of outlets that are not so important;
- (5) ownership of outlets in a non-competitive market to be of greater significance than ownership of outlets in a competitive market.¹¹⁰

The rationale of providing structured definitions, such as the ones described above, was rooted in the belief that they would promote objective consistency in the manner in which the Commission awarded preferences.¹¹¹

Third, the 1965 *Policy Statement* abandoned the practice established in *Hearst* of considering broadcast records only to the extent that they were material in the evaluation of other criteria, and made the incumbent's broadcast performance an independent criterion.¹¹² As under *Hearst*, however, the FCC would continue to give weight only to an exceptional record; an average performance would continue to be a neutral factor.¹¹³ The FCC made this change because it concluded that past performance was an independent index of future performance.¹¹⁴ With these three major adjustments in policy the FCC hoped to objectify its analysis and eliminate charges that it unfairly favored incumbent licensees through an excessive use of renewal preferences.

The first case decided under the 1965 *Policy Statement*, *WHDH, Inc.*,¹¹⁵ demonstrated the impact of this change in policy. It was the first case

¹¹⁰ *Id.* at 394-95.

¹¹¹ *Id.* at 393-94.

¹¹² *Id.* at 398.

¹¹³ *Id.* In *Hearst* the FCC said "excellent" performance would be given favorable consideration. 15 F.C.C. at 1175. In the 1965 *Policy Statement* the threshold for the award of preference was described as "unusually good" performance. 1 F.C.C.2d at 398. Whether the Commission intended to alter the standard by the use of these two descriptive terms is unclear. As shall be shown in a subsequent section of this comment such seemingly unimportant changes in wording in the renewal preference standard were later to be given substantial significance. See text and notes at notes 173-75, 190-200 *infra*.

¹¹⁴ See 1 F.C.C.2d at 398.

¹¹⁵ 16 F.C.C.2d 1 (1969), *rehearing*, 17 F.C.C.2d 856 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although it was in *Seven (7) League Productions*, 1 F.C.C.2d 1597 (1965), that the FCC formally adopted the 1965 *Policy Statement* for application in comparative renewal hearings, *Seven League* was terminated before the Commission or a hearing examiner issued an opinion. See *Seven (7) League Productions, Inc.*, 7 F.C.C.2d 513, 516 (1967).

in which an incumbent licensee, meeting all of the minimum requirements, was denied the right to continue broadcasting.¹¹⁶ WHDH involved a challenge by three parties to the television license that authorized operation on Channel 5 in Boston, Massachusetts, held by WHDH, Inc., a wholly owned subsidiary of the Boston Herald-Traveler Corp.¹¹⁷ All WHDH, Inc. stock was voted by the president of the Herald-Traveler, but the parent corporation was not involved actively in establishing the broadcast policy of WHDH.¹¹⁸ In addition to its association with the Boston Herald-Traveler, one of the two major daily newspapers then publishing in Boston, WHDH, Inc. also owned two radio stations in the city.¹¹⁹ The three challengers were corporations owned by various residents of the Boston metropolitan area, some of whom in each corporation proposed to participate in the station management.¹²⁰

The FCC in applying the 1965 *Policy Statement* to the above facts, found WHDH, Inc. deficient relative to its challengers under the comparative criteria of diversification and integration.¹²¹ Furthermore, the FCC held that these shortcomings could not be offset by WHDH's broadcast record which, because it failed to show unusual sensitivity to public needs and interests, could be characterized merely as "average" and, therefore, not deserving a preference.¹²² As a result WHDH, Inc. became the first incumbent to lose a comparative renewal hearing.¹²³

¹¹⁶ See Comment, *FCC License Renewal Policy: The Broadcast Lobby Versus the Public Interest*, 27 Sw. L.J. 325, 328 (1973).

¹¹⁷ WHDH, Inc. was originally licensed under somewhat unusual circumstances. As a wholly owned subsidiary of the Boston Herald-Traveler Corp., WHDH, Inc. originally won the right to broadcast on Channel 5 in Boston, Massachusetts in 1957. WHDH, Inc. 22 F.C.C. 767 (1957). Upon appeal, however, the court of appeals, while upholding the Commission based on the record before it, remanded the case for further proceedings regarding alleged *ex parte* contacts between George McConaughy, Chairman of the FCC, and Robert Choate, President of WHDH. *Massachusetts Bay Telecasters v. FCC*, 261 F.2d 55, 67 (D.C. Cir. 1958), *cert. denied*, 366 U.S. 918 (1961). Upon remand the FCC again found in favor of WHDH, but this time restricted it to a four month license term. WHDH, Inc., 33 F.C.C. 449, 454 (1962). The abbreviated term was selected because the Commission believed that the actions of Mr. Choate compromised the character of WHDH as a licensee, and as a result the FCC desired to review the licensee grant at an early date. *Id.* As a result, the challengers asserted that WHDH, Inc. was not a regular renewal applicant, and should be denied any favorable consideration that it normally might derive from its record of performance. The FCC rejected this argument and deemed WHDH to be a renewal applicant. WHDH, Inc., 17 F.C.C.2d at 865.

¹¹⁸ See 16 F.C.C.2d 29, 35, 37 (initial decision).

¹¹⁹ *Id.* at 259.

¹²⁰ The three challengers were Boston Broadcasters, Inc. (BBI), Charles River Civic Television, Inc., and Greater Boston T.V. Co., Inc. BBI and Greater Boston were owned exclusively by individuals from the Boston area. 16 F.C.C.2d 29, 98, 165. All of Charles River's voting stock was held by the Charles River Civic Foundation whose trustees were all Boston area residents. *Id.* at 105, 107-35. Additionally, the Foundation held options on all outstanding non-voting stock, which at the time was held by the various trustees as individuals. *Id.* at 105-07.

¹²¹ See 16 F.C.C.2d 1, 12-13.

¹²² *Id.* at 10-11. See also 1965 *Policy Statement*, *supra* note 71, at 398.

¹²³ 16 F.C.C.2d 19-20.

Without reflecting on the correctness of the outcome, the application of the 1965 *Policy Statement* in *WHDH* must at least be viewed as an improvement over the *Hearst* doctrine with respect to its forthright use of defined and pre-designated criteria. In particular, by isolating the broadcast record criteria from the comparative criteria, the FCC made it possible for the court of appeals to determine quickly the standard of performance required to earn a renewal preference, and the weight being accorded to it. Thus, the court was provided with a basis by which it could judge the Commission's compliance with the Communications Act with respect to the award of renewal preferences. Whether or not one agreed with the result in *WHDH*, there is little room for doubt as to how that result was reached.

C. The 1970 Policy Statement

The 1965 *Policy Statement* and its progeny, *WHDH*, did not long survive as the prevailing doctrine in the field of comparative renewal hearings. The broadcast industry, perceiving *WHDH* to be a serious threat to the presumably large number of licensees that had merely average (rather than "unusually good") broadcast records,¹²⁴ immediately mobilized, seeking judicial and legislative reversal of the case.¹²⁵ Apparently, as a result of this industry pressure, the FCC just one year after *WHDH*, announced a new policy regarding comparative renewal hearings in its 1970 *Policy Statement*.¹²⁶

¹²⁴ \$3 Billion in Stations Down the Drain? BROADCASTING, Feb. 3, 1969, at 19. Since *WHDH* limited renewal preferences to those licensees with "unusually good" records (see text accompanying note 122 *supra*), average broadcasters were suddenly left with no protection against a challenger's superior ability to tailor its application to FCC standards (see text at notes 56, 60 *supra*). As a result the security of their licenses was placed in considerable jeopardy.

¹²⁵ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841-49 (D.C. Cir. 1970); Comment, *F.C.C. License Renewal Policy: The Broadcasting Lobby versus the Public Interest*, 27 Sw. L.J. 325, 329 (1973).

¹²⁶ 22 F.C.C.2d 424 (1970); Comment, *F.C.C. License Renewal Policy: The Broadcasting Lobby versus the Public Interest*, 27 Sw. L.J. 325. The events following *WHDH* that ultimately resulted in the 1970 *Policy Statement* may be summarized as follows: Upon rehearing in *WHDH*, the FCC, apparently feeling the pressure generated by sharp industry criticism, issued a second opinion that significantly curtailed the scope of the original holding. See *WHDH, Inc.*, 17 F.C.C.2d 856 (1969). In what it claimed was a clarification of its first opinion, the Commission declared that *WHDH* was a *sui generis* case. *Id.* at 872-73. Essentially it distinguished *WHDH* from other comparative renewal hearings on the grounds that *WHDH, Inc.* was only a four-month licensee and hence more like a new applicant than a renewal applicant. (Under the Communications Act, 47 U.S.C. § 307(d) (1976), the normal (and maximum) license term is three years.)

Although the distinction made in the rehearing is probably a reasonable one, it is not merely a clarification, but a significant departure from the original decision. *WHDH* in its initial form clearly was intended to apply to *all* renewal applicants facing comparative challenges. Even in the rehearing opinion the FCC was forced to concede that it originally had deemed *WHDH, Inc.* to be a renewal applicant. 17 F.C.C.2d at 865-66. There is little logic in expressly conferring this status on *WHDH, Inc.*, and then holding that it is to be treated as if it were not a renewal candidate. See also, *WHDH, Inc.*, 16 F.C.C.2d 1, 9-10 (1969). (In discussing the applicability of the broadcast record test found in the 1965 *Policy Statement*, 1 F.C.C.2d 393, 398 (1965), to

The 1970 *Policy Statement* took an approach that made the incumbent's broadcast record the overwhelmingly dominant factor in the hearing. Under the new procedure if the licensee could demonstrate,

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.¹²⁷

If the incumbent was found to have provided "substantial" service, therefore, renewal would be automatic. A comparison between the incumbent and its challengers would take place only if the Commission concluded that the renewal applicant's broadcast record did not meet the substantial service standard.¹²⁸ The FCC provided little guidance regarding the elements of

WHDH, Inc. it is clear that the FCC was speaking in terms of its applicability to *all* renewal applicants.) The reason for this modification by the FCC would appear to be the recognition that *WHDH* was destined for certain reversal through legislation, which would significantly reduce FCC discretion in comparative renewal situations. The Commissioners seemed to hope that the limitation of *WHDH* to its facts would kill the momentum building behind such a bill. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 848-49 (D.C. Cir. 1970).

In spite of the rehearing opinion, the broadcast industry continued to push for legislative reform. *Id.* at 849. The focus of their attention was S.2004, 91st Cong., 1st Sess. (1969), a bill designed to reverse not only *WHDH*, but *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), as well. S. 2004 called for a two-tier hearing process. In the first hearing the sole issue would be the renewal of the incumbent. The second hearing would involve a comparative evaluation of the challengers. Unless the FCC found during the first hearing that the incumbent had behaved contrary to the public interest, the incumbent would be renewed, and the hearing completely terminated without giving consideration to any challenger's application at the second tier.

S. 2004 would have destroyed the competitive spur built into the Communications Act. It would have foreclosed any direct comparison between challengers and incumbents, and reduced the standard for renewal to one of minimum public service. Because the approach was diametrically opposed to that of the FCC, a majority of the Commissioners opposed S. 2004. See Cox, *The Federal Communications Commission*, 11 B.C. IND. & COM. L. REV. 595, 620 (1970). When it became apparent that the clarification of *WHDH* contained in the rehearing opinion would not be enough to deter Congress from pursuing legislation designed to restructure comparative renewal hearings, the FCC of its own authority undertook to formulate a new comparative renewal policy satisfactory both to itself, and to those favoring more drastic measures. This compromise policy was embodied in the 1970 *Policy Statement*.

¹²⁷ 22 F.C.C.2d at 425 (footnote omitted).

¹²⁸ There was substantial similarity between the 1970 *Policy Statement* and S. 2004, the very legislation the *Policy Statement* sought to prevent. See note 126 *supra*. Like S. 2004, the *Policy Statement* in effect called for a two stage hearing in which the first part was restricted to matters concerning the renewal of the incumbent, and the second phase consisted of a comparative analysis, if necessary. The *Statement*, however, differed from S. 2004 in two important respects: (1) the proceedings under the 1970 *Policy Statement* were technically viewed as unitary rather than as two separate hearings; thus challengers were permitted to participate in the first phase of the hearing and introduce evidence showing that the performance of the incumbent was inadequate; and (2) during the first part of the hearing the incumbent, in order to avoid a comparison, had to show that its record was "substantial," rather than just minimally ac-

substantial service, expecting standards to evolve through the hearing process.¹²⁹ The Commission did, however, make it clear that the term encompassed the average broadcaster,¹³⁰ thereby providing the protection the broadcast industry sought.

The *1970 Policy Statement*, although substantially different from the *1965 Policy Statement*, shared with the earlier document a high degree of clarity and candor in explaining the FCC's view with respect to the scope of its legislative mandate in the field of comparative renewal hearings. Both statements held out the promise of making the comparative renewal process understandable to the participants and to the courts, something the *Hearst* doctrine surely had failed to do.¹³¹ The *1970 Policy Statement*, however, suffered from a serious legal defect. Because it provided for the award of a conclusive renewal preference based upon the incumbent's broadcast record, it arguably denied challengers their right to a complete comparative hearing as guaranteed under *Ashbacker*.¹³² Apparently recognizing this danger, the FCC asserted that the *1970 Policy Statement* was nothing more than a reformulation of the *Hearst* doctrine,¹³³ which the courts consistently had upheld.¹³⁴ There is, however, a significant distinction between *Hearst* and the *1970 Policy Statement*. Under *Hearst* the Commission never conceded that a renewal preference ever could be absolutely conclusive of the comparative issue. No matter what the circumstances, all of the criteria were to be examined.¹³⁵ Conversely, the award of a renewal preference under the *1970 Policy Statement* explicitly pre-empted

ceptable. Although the *1970 Policy Statement*, like S. 2004, provided a renewal preference of sufficient magnitude to override all other considerations, the FCC saw the *Statement* as an improvement over S. 2004, primarily because it demanded a higher level of performance from broadcasters before they could be guaranteed renewal. Compare *1970 Policy Statement*, 22 F.C.C.2d 424 (1970) with S. 2004, 91st Cong., 1st Sess. (1969) (which sought to amend 47 U.S.C. § 309(a) by adding:

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 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 station previously licensed to the renewal applicant whose renewal was denied.

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

¹²⁹ 22 F.C.C.2d at 426.

¹³⁰ *Id.* at 426-27.

¹³¹ See text at notes 92-100 *supra*.

¹³² See text and notes at notes 64-68 *supra*.

¹³³ 22 F.C.C.2d at 425.

¹³⁴ See, e.g., *South Florida Television Corp. v. FCC*, 349 F.2d 971 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); *Community Broadcasting Corp.*, 363 F.2d 717 (D.C. Cir. 1966).

¹³⁵ See, e.g., *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963).

the consideration of other criteria. This difference between the two procedures was central to a subsequent challenge to the *1970 Policy Statement* in the Court of Appeals for the District of Columbia.¹³⁶

As noted earlier, the court of appeals traditionally had exercised very limited review of comparative renewal cases.¹³⁷ As a result of this policy, the FCC in its implementation of the *Hearst* doctrine had been able to secrete renewal preferences of perhaps excessive magnitude in its opinions without risking a rebuke from the court.¹³⁸ When the FCC unmasked these renewal preferences and made them the centerpiece of the *1970 Policy Statement*, it became impossible for the court to ignore them any longer. Almost immediately after it was issued, the *1970 Policy Statement* was challenged in the Court of Appeals for the District of Columbia. In that challenge, *Citizens Communications Center v. FCC*,¹³⁹ the court was confronted with the issue of whether the FCC could grant a challenged incumbent renewal without going through the formalities of a full comparison. The case was brought by two public interest groups¹⁴⁰ and two applicants for television licenses.¹⁴¹ These petitioners sought to have the *1970 Policy Statement* set aside as violative of the full hearing requirements described in *Ashbacker* and section 309(e) of the Communications Act.¹⁴² They alleged that the Commission, in granting automatic renewal to any licensee that had a "substantial" broadcast record, foreclosed to challengers their statutory right to a hearing on whether they might be able to provide service more substantial than that provided by the incumbent.¹⁴³

The court of appeals found this argument to be persuasive, and therefore, struck down the *Policy Statement*.¹⁴⁴ While holding that *Ashbacker* prevented the use of conclusive renewal preferences, the court, in extensive dicta, described in greater detail than it ever had previously, its view of the legitimate parameters of a comparative renewal hearing.¹⁴⁵ The court ac-

¹³⁶ See *Citizens Communications Center*, 447 F.2d 1201, 1203-05 (D.C. Cir. 1971).

¹³⁷ See text and notes at notes 47-51 *supra*.

¹³⁸ See *Fidelity Television Inc. v. FCC*, 515 F.2d 684, 705 (D.C. Cir. 1975) (statement of Bazelon).

¹³⁹ 447 F.2d 1201 (D.C. Cir. 1971), *clarified by* 463 F.2d 822 (1972).

¹⁴⁰ The two groups were Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST), two non-profit organizations created to improve the responsiveness of broadcast media to community needs and promote media ownership by minorities. *Id.* at 1202 n.2.

¹⁴¹ The two license applicants were Hampton Roads Television Corp., challenging a renewal applicant in Norfolk, Virginia, and Community Broadcasting of Boston, Inc., seeking to displace a television licensee in Boston, Massachusetts. *Id.*

¹⁴² These petitions were filed pursuant to 47 U.S.C. § 402(a) (1970) and 28 U.S.C. § 2342 (1970), which permit any party aggrieved by a final order of the FCC to seek to have that order enjoined, set aside, amended, or suspended by the court of appeals. See *id.*; see also 28 U.S.C. § 2344 (1970).

¹⁴³ 447 F.2d at 1203-05.

¹⁴⁴ *Id.* at 1214.

¹⁴⁵ The court stressed the requirement of *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 356 (D.C. Cir. 1949), that the FCC must base its decision on a comparison

knowledge of the propriety of utilizing earned and non-conclusive renewal preferences under limited circumstances. It endorsed the proposition that incumbent licensees should be judged primarily on their record of performance, and with this in mind declared that "superior" performance should be a "plus of major significance in renewal proceedings."¹⁴⁶

On the surface *Citizens* appeared to mandate a return to the 1965 *Policy Statement*. First, if "superior" performance (*Citizens*) is equated with "unusually good" performance (1965 *Policy Statement*),¹⁴⁷ the threshold for the award of a renewal preference is the same in both cases. In addition, the procedure for making comparisons between incumbent and challenging applicants on criteria other than broadcast record was identical. Neither the 1970 *Policy Statement* nor *Citizens* abandoned the 1965 *Policy Statement* criteria. The 1970 *Policy Statement* merely restricted the inquiry to cases where the incumbent could not show that its service had been substantial, and *Citizens* required only that this distinguishing restriction be eliminated.¹⁴⁸ Finally, and most importantly, *Citizens*' prohibition on conclusive renewal preferences meant that broadcast record could be considered at most a factor of "substantial importance," as it had been under the 1965 *Policy Statement*.¹⁴⁹ Thus, *Citizens* appeared to leave the FCC little procedural latitude beyond the 1965 *Policy Statement*.¹⁵⁰

of the applicants based on all relevant factors. *Id.* at 356-57. See also text at notes 29-32 *supra*. Moreover, the court criticized the now abandoned approach of *Hearst*, 15 F.C.C. 1149 (1951), and *Wabash Valley*, 35 F.C.C. 677 (1963), because of the insurmountable advantage it gave to incumbents on the basis of their status. 447 F.2d at 1208.

¹⁴⁶ 447 F.2d at 1213.

¹⁴⁷ 1 F.C.C.2d at 398.

¹⁴⁸ See *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971).

¹⁴⁹ 1 F.C.C.2d at 398.

¹⁵⁰ The interpretation of *Citizens* that saw a return to the 1965 *Policy Statement* was accepted by the Commission, by commentators and, for a time, even by the court of appeals itself. See, e.g., *Central Florida Enterprises, Inc. v. FCC*, 4 Med. L. Rptr. 1502, 1505 (D.C. Cir. 1978), modified, 4 Med. L. Rptr. 2009 (D.C. Cir. 1979) (full text of modified opinion appears at 598 F.2d 37); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 703 (D.C. Cir. 1975), cert. denied, 423 U.S. 926 (1975); *RKO General Inc., v. FCC*, 44 F.C.C.2d 123, 130 (1973), aff'd sub nom. *Fidelity Television, Inc. v. FCC*, 515 F.2d 84 (D.C. Cir. 1975), cert. denied, 423 U.S. 926 (1975). See generally Comment, *F.C.C. License Renewal Policy: The Broadcasting Lobby versus the Public Interest*, 27 Sw. L.J. 325, 335 (1973). This analysis, however, does not fully capture some of the more subtle ramifications of the case. Specifically, the court in declaring that "incumbent licensees should be judged primarily on their records of past performance," *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971), strongly suggested that the comparative criteria, such as diversification and integration, be given minimal weight in evaluating an incumbent. Because the 1965 *Policy Statement* relies heavily on criteria other than broadcast record to assess renewal applicants, it seems unlikely the *Citizens* court intended to require a return to the 1965 *Policy Statement* approach to comparative renewal hearings. See Comment, *Comparing the Incomparable: Towards a Structural Model for F.C.C. Comparative Broadcast License Renewal Hearings*, 43 U. CHI. L. REV. 573, 591 (1976).

Interpreting *Citizens* as mandating adherence to the 1965 *Policy Statement* also ignored what *Citizens* did not say with respect to renewal preferences. Although the

III. CENTRAL FLORIDA ENTERPRISES V. FCC: HOPE FOR A RATIONAL POLICY

Following *Citizens*, the FCC returned to the procedure of the 1965 *Policy Statement*. In substance, however, Commission policy more closely resembled *Hearst*.¹⁵¹ While its opinions were steeped in the language of the 1965 *Policy Statement*, the FCC revived the techniques it had pioneered in *Hearst* to award additional renewal preferences to incumbents.¹⁵² The court of appeals, at

court did declare that "superior" performance should be a plus of major significance," 447 F.2d at 1213, it did not explicitly preclude the possibility that lesser performance might earn a plus of lesser significance. If additional preferences were to be permissible, *Citizens* differs from the 1965 *Policy Statement*. It was widely assumed that the court, through its silence, was restricting the award of renewal preferences to superior performers, but such an assumption is not supported by any positive language in the opinion. It is true that a plus of major significance for superior performance and a demerit precluding renewal for insubstantial performance were the only means mentioned in *Citizens* by which a performance record could be factored into a comparative renewal decision. *Id.* But if they were the only means available, for what is presumably the vast majority of stations (those providing service somewhere in between these two extremes), broadcast record would be a neutral factor. It is difficult to square this interpretation of *Citizens* with that portion of the opinion which favors the use of broadcast records as the *primary* tool in evaluating licensees. Broadcast record evaluation cannot be both a major component of the process and available only to a handful of stations.

Further support for the proposition that *Citizens* did not endorse the use of the 1965 *Policy Statement* in a renewal context may be found in *Greater Boston Television Corp. v. FCC*, 444 F.2d 641 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1970), *aff'g WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *rehearing*, 17 F.C.C.2d 856 (1969). Although the applicability of the 1965 *Policy Statement* to comparative renewal hearings was not in controversy in *Greater Boston*, the court in dicta noted that if the issue had come before it there would have been a question "whether the Commission had unlawfully interfered with legitimate renewal expectancies implicit in the structure of the [Communications] Act." *Id.* at 854. In view of this expressed concern, coming as it did just six months prior to *Citizens*, it seems unlikely that the court intended to adopt the 1965 *Policy Statement* for use in renewal cases. *Citizens* at no time discussed the question the court had raised in *Greater Boston* regarding the 1965 *Policy Statement*, nor did it suggest in any way that the court had concluded that its doubts were unfounded.

For the reasons discussed above, *Citizens* need not, indeed should not, be interpreted as mandating a return to the 1965 *Policy Statement* approach to comparative renewal hearings which required unusually good past performance before any renewal preference could be awarded. Undeniably, however, if *Citizens* is read uncritically such an erroneous interpretation easily may be made. In fact in two subsequent cases panels of the Court of Appeals for the District of Columbia interpreted *Citizens* to apply the 1965 *Policy Statement*. See *Central Florida Enterprises v. FCC*, 4 Med. L. Rptr. 1502 (D.C. Cir. 1978); *Fidelity Television, Inc.*, 515 F.2d 684 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 926 (1975). In the former case, however, the court, upon rehearing, was apparently persuaded that its reading of *Citizens* was in error for it then endorsed a more flexible rule regarding renewal preferences. See *Central Florida Enterprises v. FCC*, 4 Med. L. Rptr. 2009-10 (D.C. Cir. 1979).

¹⁵¹ See, e.g., *Cowles Florida Broadcasting*, 60 F.C.C.2d 372 (1976), *rehearing*, 62 F.C.C.2d 953 (1977), *rev'd sub nom.* *Central Florida Enterprises v. FCC*, 598 F.2d 37 (D.C. Cir. 1978); *RKO General*, 44 F.C.C.2d 123 (1973), *aff'd sub nom.* *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 926 (1975).

¹⁵² See text at notes 92-97 *supra*, with respect to their techniques.

first, appeared to assume a posture of deference to Commission judgments. In reviewing FCC decisions the court did not examine critically the manner in which criteria were applied to ensure that challengers were not being prejudiced unfairly by hidden renewal preferences.¹⁵³ Recently, however, in *Central Florida Enterprises v. FCC*, the court of appeals has indicated that it now is prepared to take a more active role in reviewing FCC actions.¹⁵⁴ Both the FCC opinion that provoked this response from the court, as well as the court's opinion, are described and analyzed in this section with a view toward the potential impact of this case on future proceedings.

A. *The FCC Opinion: Cowles Florida Broadcasting*

In *Cowles Florida Broadcasting*¹⁵⁵ a single challenger sought to displace a television licensee in Daytona Beach, Florida. The incumbent, Cowles Florida Broadcasting, was a wholly owned subsidiary of Cowles Communications, Inc. (CCI), the holder of several other broadcast and print media interests.¹⁵⁶ CCI did not involve itself in the day to day management of the station, preferring to delegate this responsibility to local management personnel.¹⁵⁷ Over its most recent three year license term Cowles had compiled a generally favorable, but not exceptional, broadcast record.¹⁵⁸ The challenger, Central Florida Enterprises, was incorporated specifically for the purpose of mounting this challenge against Cowles.¹⁵⁹ Its shareholders, who were predominantly from the Daytona Beach area, asserted that they were motivated by "certain inadequacies" in Cowles's management of the station.¹⁶⁰ Central Florida proposed to involve some of its shareholders in the management positions. This direct participation in station affairs was necessarily limited, however, due to the lack of broadcasting experience amongst the owners.¹⁶¹ In designating the case for hearing the FCC, at Central Florida's urging, directed that two additional factors, beyond the standard criteria of the *1965 Policy Statement*, be explored: (1) whether Cowles had violated Commission rules by moving its main studio from Daytona Beach, the city of assignment, to Orlando,¹⁶² and (2) whether the mail fraud allegedly engaged in by five wholly owned subsidiaries of CCI reflected adversely upon the character qualifications of Cowles as a licensee.¹⁶³

¹⁵³ See, e.g., *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir. 1975), cert. denied, 423 U.S. 926 (1975).

¹⁵⁴ See *Central Florida Enterprises v. FCC*, 598 F.2d 37, 49-51, 4 Med. L. Rptr. 1502, 1509-11 (D.C. Cir. 1978).

¹⁵⁵ 60 F.C.C.2d 372 (1976), rehearing, 62 F.C.C.2d 953 (1977), rev'd sub nom. *Central Florida Enterprises*, 598 F.2d 37 (D.C. Cir. 1978).

¹⁵⁶ 60 F.C.C.2d 372, 393.

¹⁵⁷ *Id.* at 411.

¹⁵⁸ 62 F.C.C.2d at 955-56.

¹⁵⁹ See *Central Florida Enterprises, Inc.*, 22 F.C.C.2d 260, 260-64 (1970).

¹⁶⁰ *Id.* at 261.

¹⁶¹ 60 F.C.C.2d at 411-12.

¹⁶² *Id.* at 373. See generally 47 C.F.R. § 73.613 (1978).

¹⁶³ 60 F.C.C.2d at 373. The FCC also designated certain engineering questions as special issues, but they are not relevant for the purposes of this discussion. See *id.*

In deciding the case in favor of Cowles the FCC determined that neither the factors suggested by Central Florida, nor the standard criteria, required a finding against Cowles. Regarding the studio move, although the FCC found that Cowles had shifted its main studio site out of the city of assignment in violation of FCC rules, the Commission declined to award a demerit to Cowles on the grounds that, (1) "there was little evidence the . . . move involved a deliberate corporate decision to defy the Commission's rules,"¹⁶⁴ and (2) Cowles maintained auxiliary facilities in Daytona Beach, hence, there had not been a downgrading of service to that area.¹⁶⁵ On the mail fraud question, although the FCC found that fraudulent practices pervaded CCI's five magazine subscription sales subsidiaries, and that it was inconceivable that CCI could have been unaware of the corruption,¹⁶⁶ the Commission declined to hold the sins of CCI and its other subsidiaries against Cowles.¹⁶⁷ Thus, the FCC concluded that the supplemental issues provided no basis for favoring Central Florida.

With respect to the standard criteria described in the 1965 *Policy Statement*, the Commission minimized Central Florida's advantages. On the diversification of control criterion the FCC found Central Florida to hold a clear advantage over Cowles because, unlike Cowles, Central Florida had no other media interests.¹⁶⁸ But, the Commission held that this preference was of little decisional significance because, (1) all Cowles's additional media interests lay outside the Daytona Beach area, and (2) Cowles, by permitting a local and autonomous management team to operate the station, insulated the station

¹⁶⁴ *Id.* at 390, 399.

¹⁶⁵ *Id.* at 390.

¹⁶⁶ *Id.* at 391-92, 403. Ultimately CCI negotiated a plea bargain with the Justice Department whereby the five subsidiaries would agree to plead *nolo contendere* to fifty counts of mail fraud (ten each) and accept a collective fine of \$50,000. *Id.* at 391-92.

¹⁶⁷ *Id.* at 405-06. The Commission did note, however, that under more extreme circumstances the non-broadcast related activities of a parent corporation could have an adverse impact upon an applicant's character qualifications. *Id.* at 406. See generally Report on Uniform Policy as to Violations of the Laws of the United States, 42 F.C.C.2d 399 (1951). Nevertheless, the Commission has been lax in enforcing this policy. See *General Electric Co.*, 45 F.C.C. 1592 (1964); *Westinghouse Radio Stations, Inc.*, 44 F.C.C. 2778 (1962) (non-broadcast subsidiaries of G.E. and Westinghouse were convicted of bid-rigging and price-fixing valued at \$1.75 billion annually. It was characterized by then Attorney General William P. Rogers as involving "as serious instances of bid-rigging and price-fixing as have been charged in the more than half century life of the Sherman Act." 44 F.C.C. at 2779. Yet the FCC deemed this behavior to be not sufficiently serious to deny license renewal). More recently, the FCC did refuse to renew three television licenses held by RKO General, Inc. at least in part because of the misconduct of its parent corporation, General Tire & Rubber Co. In this case, however, there was also substantial evidence that RKO itself also engaged in certain improper business practices. Specifically, RKO was alleged to have been involved in a scheme to pressure companies into placing advertising with RKO stations as a condition of doing business with General Tire. Additionally, there was evidence that RKO had given the FCC misleading information in an effort to cover-up certain of these activities. See *RKO General, Inc.*, ___ F.C.C.2d ___ (1980); *FCC Finds RKO is Unqualified as TV Licensee*, *The Wall Street Journal*, Jan. 25, 1980 at 6 col. 1 (quoting the Commission).

¹⁶⁸ 60 F.C.C.2d at 407.

from its other holdings, thereby achieving the functional equivalent of diversification.¹⁶⁹ Similarly, under the integration criterion, which measures the owners participation in day to day station management, the FCC, while admitting that Central Florida was "somewhat stronger" than Cowles,¹⁷⁰ again offset this advantage on the grounds that the local and independent management of the incumbent produced the functional equivalent of integration.¹⁷¹ As for broadcast record, the FCC declared Cowles's performance to be "superior" within the meaning of *Citizens*, and therefore, a major renewal preference was awarded.¹⁷² This renewal preference was deemed to outweigh Central Florida's advantages on the other criteria. Thus, Cowles was awarded a new license.

Significantly, six months after its decision to renew Cowles over the challenging application of Central Florida, the FCC, of its own motion, reconsidered its characterization of Cowles's broadcast record, and backed down a bit from its previously laudatory appraisal of Cowles. The Commission in this second opinion claimed that it had used the term "superior" in describing Cowles's performance to indicate that the service provided was "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."¹⁷³ The Commission explicitly declared that it did *not* mean to convey the impression that it believed Cowles's record to be exceptional.¹⁷⁴ To clarify matters, the FCC recharacterized Cowles's record as "substantial". But the Commission left undisturbed the "plus of major significance" it had received for its record.¹⁷⁵ The clarification, therefore, did not affect the outcome of the hearing.

The *Cowles* opinion was nothing short of incredible. The Commission found Cowles to be in violation of FCC rules with respect to its studio move, and found CCI, Cowles's parent corporation, to be involved in a massive mail fraud scheme. But the Commission elected to ignore completely these factors.¹⁷⁶ The FCC then undercut the 1965 *Policy Statement*, to which it claimed to be adhering, by converting its structural criteria to functional equivalents.¹⁷⁷ In so doing, the Commission wiped out the advantages the challenger, Central Florida, held on these criteria, and, in effect, provided Cowles with disguised renewal preferences, similar to those provided under the *Hearst* doctrine.¹⁷⁸

The procedure of the FCC in *Cowles* amounted to the award of disguised renewal preferences because in deciding that Cowles had provided the func-

¹⁶⁹ See *id.*; 62 F.C.C.2d at 956-57.

¹⁷⁰ 60 F.C.C.2d at 411.

¹⁷¹ *Id.* at 415. See also Comment, *Comparative License Renewal Hearings and the Protection of The Public Interest*, 92 HARV. L. REV. 1801, 1807-08 (1979).

¹⁷² *Id.* at 421.

¹⁷³ 62 F.C.C.2d at 955.

¹⁷⁴ *Id.* at 955-56.

¹⁷⁵ *Id.*

¹⁷⁶ See text at notes 162-67 *supra*.

¹⁷⁷ See text at notes 168-71 *supra*.

¹⁷⁸ See text at notes 93-97 *supra* with respect to *Hearst*.

tional equivalent of both diversification and integration in its broadcast operation, the FCC gave Cowles credit for something only a licensee could achieve. While there may be considerable logic in acknowledging the steps a renewal applicant has taken to avoid the effects of overconcentration of media interests and of absentee ownership, these efforts should be evaluated as part of the incumbent's performance record, not as mitigating factors under the integration and diversification criteria. Because these elements of a licensee's record are renewal preferences, they properly should be considered with other renewal preferences in a single criterion. In this way, upon review the courts may ascertain more readily the overall weight being accorded these preferences, and hence, whether the opinion conforms to the requirements of *Ashbacker*.¹⁷⁹

The manner in which the FCC characterized Cowles's broadcast record distorted the intent of the *1965 Policy Statement* to an even greater extent than its above described treatment of the diversification and integration criteria. It was the Commission's position that Cowles's "substantial" performance was sufficient to override the advantages of Central Florida on every other factor considered. This policy is virtually indistinguishable from the one articulated in the *1970 Policy Statement*, which was struck down emphatically by the court in *Citizens*.¹⁸⁰ The Commission even went so far as to use the same descriptive term in *Cowles* ("substantial") that it had employed in the *1970 Policy Statement*, seemingly daring the court of appeals to overturn the judgment.

B. *The Court Reaction: Central Florida Enterprises v. FCC*

In *Central Florida Enterprises v. FCC*¹⁸¹ the court of appeals accepted the Commission's apparent dare, and vacated and remanded *Cowles*. The court was critical of the FCC for the way it discounted the supplemental issues of mail fraud and studio location, and for the manner in which it belittled Central Florida's advantages under the integration and diversification criteria.¹⁸² The court also found the Commission's discussion of Cowles's broadcast record to be unintelligible.¹⁸³

¹⁷⁹ See text at notes 204-09 *infra*.

¹⁸⁰ See text at notes 142-44 *supra*. The only distinction between the *1970 Policy Statement* and *Cowles* was that under *Cowles* it was at least theoretically possible for Central Florida to have overcome Cowles's renewal preference whereas under the *1970 Policy Statement* the renewal preference would have been absolutely conclusive. This is an especially thin distinction, however, considering the sizable advantage Central Florida appeared to have until the FCC so adeptly minimized it.

¹⁸¹ 598 F.2d 37 (D.C. Cir. 1978), 4 Med. L. Rptr. 1502 (D.C. Cir. 1978) and 4 Med. L. Rptr. 2009 (D.C. Cir. 1979). (In citing to *Central Florida* it will not be possible to give parallel cites in every instance because the Federal Reporter does not contain all of the language appearing in the Media Law Reporter. This disparity is the result of a modification in the opinion. The Federal Reporter contains only the modified version of the opinion, while the Media Law Reporter contains the original opinion and the modification order.)

¹⁸² See *id.* at 49-50, 4 Med. L. Rptr. at 1509-10.

¹⁸³ *Id.* at 60-61, 4 Med. L. Rptr. at 2012-13.

Regarding the studio move and mail fraud issues, the court found untenable the rationale of the Commission in deciding to ignore Cowles's shortcomings. The court held the studio move deserved greater consideration because it involved a clear violation of FCC rules. The court considered it unwise for the FCC to ignore a violation of its own rules, even where the breach was harmless, because such an approach might foster future disregard for the rules where licensees conclude that their conduct is not contrary to FCC policy.¹⁸⁴ As for the mail fraud problem, the court held that it was unreasonable for the FCC to dismiss the matter on the grounds that Cowles was not involved in the alleged crimes because Cowles and the offending CCI subsidiaries possessed several common officers.¹⁸⁵

In considering the integration and diversification criteria, the court found the Commission's use of a functional analysis to be tantamount to the elimination of these factors.¹⁸⁶ A functional approach meant that the challenger not only had to show that it held an advantage under the structural definitions of these criteria, but also that the deficiency of the incumbent produced an adverse effect on the licensee's performance.¹⁸⁷ The court considered this additional requirement to be an impossible burden for most challengers to bear.¹⁸⁸ Elimination of these criteria, without implementing alternative criteria, the court reasoned, destroyed all bases for comparison between challengers and incumbents. The Commission's approach, therefore, effectively denied challengers their right to a comparative hearing.¹⁸⁹

Turning to the Commission's handling of Cowles's broadcast record, the court at first simply rejected the Commission's award of a renewal preference to Cowles for a "sound" performance as inconsistent with *Citizens* which restricted renewal preferences to those licensees with "superior" records.¹⁹⁰ In the course of denying an FCC petition for rehearing *en banc*, however, the original *Central Florida* panel modified its opinion.¹⁹¹ The new opinion, rather than finding any specific legal impediment in the FCC's approach, simply held that the Commission's treatment of Cowles's broadcast record was so cryptic as to be "completely opaque to judicial review."¹⁹²

The revision of the *Central Florida* opinion was brought about by the court's decision to expand the availability of renewal preferences. Instead of limiting preferences to broadcasters with "superior" records, the court expressed a willingness to accept preferences awarded for "meritorious service."¹⁹³ Although the court did not define meritorious service, it did make it clear that it is a lower standard than superior service.¹⁹⁴ The court was not

¹⁸⁴ *Id.* at 51-52, 4 Med. L. Rptr. at 1511.

¹⁸⁵ *Id.* at 52, 4 Med. L. Rptr. at 1511-12.

¹⁸⁶ *Id.* at 56, 4 Med. L. Rptr. at 1515.

¹⁸⁷ *Id.* at 54, 56, 4 Med. L. Rptr. at 1513, 1515.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ 4 Med. L. Rptr. at 1505.

¹⁹¹ 4 Med. L. Rptr. at 2009-10.

¹⁹² 598 F.2d at 61, 4 Med. L. Rptr. at 2013.

¹⁹³ *Id.* at 43-44, 4 Med. L. Rptr. at 2009-10.

¹⁹⁴ *See id.*

sure, however, from the FCC's opinions whether what the Commission described as the "substantial" performance of Cowles was sufficient to earn a preference under the "meritorious service" test.¹⁹⁵ Thus, the court concluded that there was no basis for reconsideration of its previous order.¹⁹⁶

Central Florida represents a significant departure from prior court policy regarding FCC comparative renewal decisions.¹⁹⁷ First, the court appears to be announcing that it no longer will defer to the Commission's judgment when it suspects that the FCC is abusing its broad discretion by providing an unwarranted preference to an incumbent.¹⁹⁸ Second, in modifying its opinion, the court abandoned the interpretation of *Citizens* that restricts the award of renewal preferences to broadcasters with superior records.¹⁹⁹ Thus, at the same time the court was attempting to end the FCC practice of hiding renewal preferences amongst supposedly comparative criteria through stricter scrutiny of FCC opinions, and it was offering an alternate method of accounting for the valid concerns embodied in those hidden preferences by easing the terms under which a licensee can earn a legitimate renewal preference.²⁰⁰

¹⁹⁵ *Id.* at 60-61, 4 Med. L. Rptr. at 2012-13.

¹⁹⁶ *Id.*

¹⁹⁷ Compare 598 F.2d at 43-44, 4 Med. L. Rptr. at 2009-10 with *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971) for the purpose of contrasting the "meritorious" and "superior" standards.

¹⁹⁸ 598 F.2d at 41, 4 Med. L. Rptr. at 1504. "[I]t is the judicial function to insure that such discretionary choices as are entailed in these proceedings are rigorously governed by traditional principles of fairness and administrative regularity." *Id.*

¹⁹⁹ See *id.* at 43-44, 4 Med. L. Rptr. at 2009-10. See also note 150 *supra*, as to whether the "superior" standard was the exclusive test justifying some form of renewal preference under *Citizens*.

²⁰⁰ This renewal preference pressure valve was not present in the original version of *Central Florida*. See 4 Med. L. Rptr. 1502 (D.C. Cir. 1978). In fact, the primary effect of the modification was to lower the threshold at which renewal preferences could be earned. Ostensibly, this change was made to reflect the Supreme Court's opinion in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which the court of appeals apparently at first overlooked. (*National Citizens* was decided three months before the court of appeals issued its first opinion in *Central Florida*.) *National Citizens* concerned the legality of a Commission order directing certain daily newspaper-broadcast facility combinations located in a single city to divest themselves of one of their media interests. *Id.* at 779. In the course of upholding this order the Court briefly discussed renewal preferences, stating that "a licensee who has given meritorious service has a legitimate renewal expectanc[y]." *Id.* at 805. Thus the rewrite of *Central Florida* appears to have been designed to account for this language. The first version of *Central Florida*, however, was not necessarily at odds with *National Citizens*, for the Supreme Court, in discussing the award of renewal preferences for "meritorious" service, relied upon the "superior performance" language in *Citizens Communications Center* for authority. See *id.* Therefore, the court of appeals easily could have dismissed the use of the phrase "meritorious service" in *National Citizens* as loosely phrased dicta intended to be synonymous to "superior performance." Indeed, this is not only a plausible interpretation, but probably the correct one as well. The court of appeals, however, apparently decided to make use of the superior/meritorious distinction to provide a safety valve, which upon reflection, the court determined was necessary.

To aid the court in its oversight role, *Central Florida* also reaffirms the FCC's obligation to provide the court with sound reasoning for its conclusions.²⁰¹ Where the court once would accept uncritically FCC holdings in deference to the agency's supposed expertise, it now demands that the Commission explain, with some precision, the bases for its decisions.²⁰² To make it easier to review the Commission's compliance with *Ashbacker*, the court requires "that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria."²⁰³ By isolating all of the various renewal preferences from the comparative criteria and by demanding clear justifications for their existence and magnitude, the court should be able to see more clearly the impact renewal preferences are having on the process, and be able to make judgments more confidently as to whether they are breaking down the comparative process.

IV. ESTABLISHING APPROPRIATE ROLES FOR THE FCC AND THE COURT AFTER *CENTRAL FLORIDA*

The difficulty the court faces as it attempts to keep the FCC within the law without interfering with the discretionary licensing authority reserved to the Commission is compounded by the current comparative renewal procedure which often obscures rather than clarifies the capabilities of the applicants. New applicants, usually organized for the sole purpose of making a license challenge,²⁰⁴ invariably are able to out-perform their incumbent opponents on criteria such as integration and diversification.²⁰⁵ Thus, a licensee, if it is to prevail, must depend upon its broadcast record. Where an incumbent wins on the strength of its record while losing on every other factor the spectre of FCC bias is raised. While often this reaction may be justified, it also may be the product of a superficial score card approach to the analysis. It is natural to expect that the applicant that wins the most preferences would win the license. When such an applicant loses on the basis of a single preference awarded to its incumbent opponent, a sense that it has been treated unfairly is understandable. When the offsetting preference received by the incumbent is for broadcast performance, a factor exclusively applicable to the incumbent, the sense of injustice is understandably magnified. What often is lost sight of, however, is the superior value of past performance as a predictor of future

²⁰¹ Compare *Central Florida Enterprises v. FCC*, 598 F.2d 27, 49, 4 Med. L. Rptr. 1502, 1510-11 (D.C. Cir. 1978) with *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 356-57 (D.C. Cir. 1949).

²⁰² See *Central Florida Enterprises v. FCC*, 598 F.2d 37, 49, 4 Med. L. Rptr. 1502, 1510-11 (D.C. Cir. 1978).

²⁰³ *Id.* at 61, 4 Med. L. Rptr. at 2013.

²⁰⁴ See, e.g., *Central Florida Enterprises, Inc.*, 22 F.C.C.2d 260, 260-64 (1970); *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1168-71 (1951); *RKO General, Inc.*, 44 F.C.C.2d 149, 188-89 (1969) (initial decision).

²⁰⁵ See, e.g., *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 407, 411 (1976); *WHDH, Inc.*, 16 F.C.C.2d 1, 19 (1969); *RKO General, Inc.*, 44 F.C.C.2d 149, 225-26 (1969) (initial decision).

performance relative to the value of criteria such as integration and diversification. Consideration of a broadcast record's predictive value in the context of a comparative renewal hearing is essential. The present procedure, fundamentally one of point by point comparison, however, makes proper consideration of noncomparative criteria, such as broadcast record, difficult. Noncomparative factors appear to destroy the balance of the procedure. As a result, analysis of comparative renewal proceedings often focuses on whether an incumbent's record can justifiably offset its inferior showing on other criteria, rather than on which applicant shows a greater potential for public service.

There is one small, simple, and obvious adjustment in the present practice which could do much to solve this problem. The use of the comparative criteria to evaluate incumbents should be ended. As an alternative, incumbents should be judged solely on their performance as licensees, while only challengers would be assessed through the application of the so-called comparative criteria. Then, on the basis of the independent evaluation of each applicant, a judgment would be made as to which one will best serve the public interest, convenience and necessity. This approach to comparative renewal proceedings would provide a full and fair hearing for all applicants so long as an incumbent's performance as a licensee could not produce an insurmountable advantage. The 1970 *Policy Statement*, which also proposed to judge incumbents solely on the basis of broadcast record, was struck down by the court of appeals in *Citizens* because it created conclusive preferences, not because it eliminated direct comparisons.²⁰⁶ In fact, shortly after *Citizens*, in *A.H. Belo Corp.*,²⁰⁷ the FCC, drawing upon language in *Citizens* which stated that "incumbent licensees should be judged primarily on their records of past performance,"²⁰⁸ announced a policy whereby renewal applicants were to be evaluated by their records, while new applicants were to be judged on the basis of integration and of local residence of owners.²⁰⁹ This policy is substantially identical to the one proposed here. Before *Belo* was decided, however, the FCC abandoned its newly created policy.²¹⁰ Under the then prevalent interpretation of *Citizens*, which restricted the award of renewal preferences to licensees with superior records, the *Belo* policy was unworkable because, for all of those broadcasters with less than superior broadcast histories, there was no basis for evaluation. The modified version of *Central Florida*, however, by permitting the award of renewal preferences to meritorious performers, effectively removes this obstacle to the *Belo* approach.

A return to a *Belo* type policy would eliminate two significant shortcomings of the present comparative renewal process. First, the identification of renewal preferences would be far easier because every consideration favoring the incumbent would be by definition a renewal preference. Keeping renewal

²⁰⁶ See *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1212-13 (D.C. Cir. 1971).

²⁰⁷ 40 F.C.C.2d 1131 (1973).

²⁰⁸ *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971).

²⁰⁹ *A.H. Belo Corp.*, 40 F.C.C.2d 1131, 1133 (1973).

²¹⁰ *Belo Broadcasting Corp.*, 47 F.C.C.2d 540, 543-44 (1974).

preferences distinct from other preferences is essential if the courts are to be able to review FCC decisions for potentially illegal renewal preferences, which give incumbents unfair advantages. Second, such a policy would insulate the incumbent from the hazards of evaluation under the comparative criteria, which tend to exaggerate a licensee's deficiencies. Since actual performance is a far better predictor of public service potential than the comparative criteria, where broadcast history is available the comparative criteria should be given little weight. Where an applicant has no record, however, necessity dictates that comparative criteria be relied upon exclusively.

The inescapable fact is that the comparative criteria possess tremendously different predictive significance depending on whether they are being applied to a renewal or original applicant. This fact is obscured too easily when the applicants, at least in part, are compared directly on the basis of these criteria. Because the criteria provide a simple basis for point by point comparison, there is a tendency to view them as an equitable means of evaluation, but the fairness of applying these criteria to new and renewal applicants alike is illusory. In fact, the criteria strongly favor new applicants because they have the flexibility to conform to them. Thus, any comparison on the basis of these criteria results in a distorted picture of the applicant's relative merits as licensees. To avoid such distortion, the attempt to make such comparisons should be abandoned.

Of course if renewal applicants are evaluated by their record of performance, and new applicants are judged by some other criteria designed to predict their future performance, they no longer will be in head to head competition on particular criteria. This might seem to be a considerable sacrifice, but the notion that direct comparisons provide any kind of basis on which to assess applicants is erroneous. Surely the history of the comparative renewal process provides ample support for this assertion. An incumbent licensee and a challenger are two very different entities. It is simplistic to think that they can be compared directly on the basis of a single set of criteria in order to predict which one is likely to best serve the public interest as a broadcaster. Rather, these two classes of applicants must be accepted as incomparable on the basis of identical criteria, and each must be measured against the criteria best suited to predicting its future as a licensee. Only after these evaluations are complete should members of each class of applicant be pitted against each other. Admittedly, such a comparison would be highly subjective, but this is the fundamental nature of the choice that the law requires the FCC to make.

Recognizing the subjectivity of the comparative renewal decisions made by the FCC, makes the need for increased oversight by the courts more readily apparent. While it is primarily for the Commission, not the court, to fashion and implement licensing policy, it is the duty of the court to oversee the FCC, and to set aside agency action that is not in compliance with the law. As *Central Florida* recognized, an appropriate first step in the court's review function is to require that the FCC articulate its policy and clearly describe how it applies that policy in each case.²¹¹ This step alone, however, is not necessarily sufficient to guarantee FCC adherence to the law.

²¹¹ See text and note at note 203 *supra*.

Where the FCC has provided an intelligible explanation for a licensing decision the court must, as a next step, closely scrutinize the rationale to ensure that there are no subtle biases in favor of a particular class of applicants. While the court in the past has rejected FCC policy pronouncements that obviously favored incumbents over challengers, it has allowed more discreet policies that have the same effect to stand.²¹² If judicial oversight is to be meaningful, the court must attempt to discover underlying renewal preferences and demand that those that are not justifiable be eliminated. The difficulty with this second step is that it to some degree involves the court in policy matters that have been delegated by Congress to the FCC. Whether the award of a particular renewal preference represents a reasonable policy judgment or an illegal bias is often a close question, and some deference should be given to FCC determinations in this regard. The court, however, cannot abandon its function of review, and to the extent that review requires the courts to make subjective evaluations parallel to those of the Commission, it must do so. Merely because a Commission policy is reasonable, it is not necessarily legal. It is the obligation of the courts to be the final arbiter of this question.

CONCLUSION

A decade ago in this law review a comment on comparative renewal hearings expressed the hope that *WHDH* would mark "the beginning of a new activism on the part of the FCC."²¹³ These hopes, however, were not realized, as the FCC's failure to stand by *WHDH* made that decision more an anomaly than a landmark. In *Central Florida* the Court of Appeals for the District of Columbia has indicated a willingness to assume an activist role to force the Commission to establish the equitable comparative renewal policy it was unable to forge following *WHDH*.²¹⁴ As a result, in the aftermath of *Central Florida*, just as in the days immediately following *WHDH*, a practical and fair comparative renewal policy seems within reach.

While it is the function of the FCC to establish a policy, the success or failure of that policy is dependent upon the willingness of the court to review aggressively agency actions. Because FCC determinations in the comparative renewal context are necessarily highly subjective, it is essential that the court actively oversee the Commission. Without the concerted involvement of the court, the forces that impinge upon the FCC decisionmaking process, which have consistently favored renewal applicants, are likely to continue to overwhelm the due process rights of challengers that are provided by the Communications Act and *Ashbacker*.

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²¹² Compare *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir. 1975), cert. denied, 423 U.S. 926 (1975), with *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

²¹³ Comment, *The Federal Communications Commission and Comparative Broadcasting Hearings*, 10 B.C. IND. & COM. L. REV. 943 (1969).

²¹⁴ See text and notes at notes 197-203 *supra*.