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Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996

LILI LEVI*

In 1969, public outrage derailed a bill providing that the Federal Communications Commission ("FCC" or "Commission") could not consider competing applications for broadcast licenses unless it first found that renewal of the incumbent's license would not be in the public interest.¹ Citizen groups claimed that eliminating comparative challenges to incumbent broadcasters was "back-door racism" and reinforced the under-representation of minorities in broadcasting.² They decried the bill as a "vicious . . . attempt to limit the efforts of the black community to challenge the prevailing racist practices of the vast majority of TV stations."³ When the FCC thereupon issued a policy statement adopting a similar reform of the comparative renewal process, it was reversed by

* Professor of Law, University of Miami School of Law. I am grateful to Angela Campbell, Tom Krattenmaker, Steve Schnably and Jon Weinberg for comments; to David Schwartz for research assistance; to Denise Polivy for editorial help; and to "The Hollow Men" for my title.

1. See, e.g., ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 210-13 (3d ed. 1982) (describing the delay and ultimate withdrawal of S. 2004 as a result of public outcry, despite early hopes of passage); *In re* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970), *rev'd sub nom.* Citizens Communications Ctr. v. FCC, 447 F.2d 1201 (D.C. Cir. 1971); *In re* Petitions by BEST et al. for Rule Making to Clarify Standards in All Comparative Broadcast Proceedings, 24 FCC 2d 383, 389 (1970) (Johnson, Comm'r, dissenting).

2. *Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong. 1st Sess., ser. 91-18 602 (1969) (statement of Absalom Jordan, National Chairman, *Black Efforts for Soul in Television*) [hereinafter *Hearings on S. 2004*].

3. KRASNOW ET AL., *supra* note 1, at 212 (quoting *Picket Lines Due*, BROADCASTING, Dec. 1, 1969, at 10). See also Henry Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 483 (1975); Hyman H. Goldin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014, 1020 (1970); *Pastore, and His Bill, Get Their Lumps*, BROADCASTING, Dec. 8, 1969, at 23.

the D.C. Circuit.⁴

Broadcasting was still the keystone of the FCC's regulatory framework at the time. The Commission's role in parceling out radio and television licenses was seen by many public interest groups as critical in the fight for equality of representation and diversity of views.⁵ Yet other FCC observers questioned the efficacy of the FCC's role.⁶ The debate over the proper license renewal process resulted in hundreds of law review pages⁷ and numerous sharply-worded opinions.⁸

Without even a nod at all these years of controversy, the Telecommunications Act of 1996 ("1996 Act," "new Act," or "Act")⁹ eliminated the traditional comparative renewal hearing for broadcast licenses and permitted the extension of license terms to eight years.¹⁰ In the shadow

4. *In re* Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970), *rev'd sub nom.* Citizens Communications Ctr. v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

5. See *Hearings on S. 2004*, *supra* note 2, at 498-506, 588-605. Cf. Comment, *Media Reform Through Comparative License-Renewal Procedures—The Citizens Case*, 57 IOWA L. REV. 912 (1972) (arguing for renewal process as possible means for broadcast industry reform).

6. See, e.g., Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971).

7. See, e.g., Anthony, *supra* note 6; Geller, *supra* note 3; Goldin, *supra* note 3; Rosel H. Hyde, *FCC Policy and Procedures Relating to Hearings on Broadcast Applications in Which a New Applicant Seeks to Displace a Licensee Seeking Renewal*, 1975 DUKE L.J. 253 (1975); Louis L. Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Bernard Schwartz, *Comparative Television and The Chancellor's Foot*, 47 GEO. L.J. 655 (1959); L. Andrew Tollin & Robert G. Kirk, *The Comparative Renewal Process: A New Approach Based on Old Law*, 1 COMM. L. CONSPECTUS 15 (1993); Durward J. Gehring, Note, Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings, 43 U. CHI. L. REV. 573 (1976); *Media Reform*, *supra* note 5; Mark B. Simons, Comment, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854 (1969); William H. Wentz, Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970). For earlier critiques of the comparative process, see, e.g., Thomas H. Wall, *Section 309 of the Communications Act—the Renewal Provision—a Need for Change*, 25 ADMIN. L. REV. 407 (1973); Edward P. Gallogly & George E. Meng, Note, *Television: The Public Interest in License Renewals*, 20 CATH. U. L. REV. 328 (1970).

8. For examples of criticism of FCC license renewal policies in Commission dissents and D.C. Circuit opinions, see *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979) (criticizing FCC's "institutional forms of decision making . . . [as] fall[ing] somewhere on the distant side of arbitrary"); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 728-29 (D.C. Cir. 1975) (characterizing FCC's comparative evaluation process as lacking rational structure); *In re* Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424, 432 (1970) (Johnson, Comm'r, dissenting) (citing to cases in which he and Comm'r Cox "urge[d] the application of some standards, however minimal, to the Commission's license renewal process"). See also Hyde, *supra* note 7, at 267, 277-78.

9. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

10. See *id.* §§ 203 (increasing maximum possible broadcast license term to eight years), 204

of the explicit statements in the Communications Act of 1934 that broadcast licenses not be considered property interests,¹¹ the 1996 Act requires the FCC to consider competing applications for broadcast licenses only after finding, pursuant to statutory factors, that the incumbent's license should not be renewed.¹² The Commission is instructed to grant the incumbent's renewal application if it finds that the station, in the preceding term, has "served the public interest, convenience, and necessity;"¹³ that there have been no "serious violations . . . of this Act or the rules and regulations of the Commission;"¹⁴ and that the licensee has not engaged in any "other violations . . . which, taken together, would constitute a pattern of abuse."¹⁵

This statutory provision achieves with no fanfare the renewal reform unsuccessfully sought by broadcasters for the past twenty-seven years. By contrast to 1969, the 1996 *New York Times* did not carry editorials critical of the rule.¹⁶ The change was greeted with virtual public silence.¹⁷ This strikingly different response was presumably large-

(amending the broadcast license renewal process). See also Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996, 61 Fed. Reg. 18,289 (1996) (to be codified at 47 C.F.R. pt. 1 & 73).

11. Federal Communications Act of 1934, ch. 652, 48 Stat. 1064, 47 U.S.C. §§ 151-613 (1994). Various provisions of the Communications Act of 1934 provide that broadcast licenses create no property rights. See, e.g., 47 U.S.C. § 301 ("no . . . licenses shall be construed to create any right, beyond the terms, conditions, and periods of the license"); 47 U.S.C. § 309(h) (a license "shall not vest in the licensee any right to operate the station . . . beyond the term thereof"). See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

In addition, the Communications Act of 1934 had provided that decisions to renew licenses must be "governed by the same considerations and practice which affect the granting of original applications." Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1084 (1934). Congress deleted this language in 1952 and substituted the requirement that renewals be granted if the "public interest, convenience, and necessity would be served thereby." Communications Act Amendments, 1952, § 5, 66 Stat. 714. See also 47 U.S.C. § 307(d) (1994); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 811 n.31 (1978) (describing 1952 amendment).

12. Telecommunications Act of 1996 § 204(a)(1), adding 47 U.S.C. § 309(k)(3)(B).

13. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(A).

14. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(B).

15. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(C).

16. KRASNOW ET AL., *supra* note 1, at 211. See also Symposium, *Panel III: Implications of the New Telecommunications Legislation*, 6 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 517, 528, 576-78 (1996) [hereinafter Fordham Symposium] (comments of Antoinette Cook Bush) (characterizing the Act as "a unique piece of legislation in that it had so much industry support, and very little direct consumer interest").

17. While some public interest groups filed comments calling for increased public interest obligations in response to the FCC's docket proceeding on the extension of license terms, few articles and little controversy appeared in the popular and trade press. See, e.g., Chris McConnell, *Broadcasters Praise Plan for Longer License Terms; Citizen Groups Want Change*

ly due to the fact that broadcast licensing is only a grain of sand in the lengthy and detailed 1996 Act. As Dean Krattenmaker points out, the new Act is an over-arching piece of legislation designed to deal architectonically with the broad contours of a converging telecommunications universe.¹⁸ It raises many more pressing issues than merely broadcast license renewal. Broadcasting is no longer the center of the regulatory universe; indeed, some could say that the few broadcast provisions of the 1996 Act—including the licensing sections—are attempts to bolster a mature and weakening industry.¹⁹

Telecommunications experts might also contest the substantive importance of the licensing provisions of the 1996 Act. Dean Krattenmaker, for example, concludes that the licensing provisions of the new Act are good in principle, but of “modest practical effect.”²⁰ He begins with the observation that the statutory license term extension and the renewal process reform “combine to grant virtually perpetual licenses to all radio and television stations.”²¹ This is, in his view, a positive development: by “greatly lower[ing] the regulatory costs of doing business as a broadcaster,”²² the legislation should lead to an additional number of stations on the air, operating at lower rates and therefore providing cheaper access.²³ Dean Krattenmaker suspects that licensees could negotiate better long-term investments in programming and talent by being able to “show lenders and investors that, so long as they abide by the rules, they have a statutory right to a renewal (and

Tied to Increased Public Interest Requirements, BROADCASTING & CABLE, May 27, 1996, at 15; *FCC Asks Congress for Help in Revising Regulations*, COMM. DAILY, Feb. 3, 1995, 1995 WL 6455245 (simply noting plan to “simplify” broadcast license renewals). Cf. Kim McAvoy, *GOP Wants to Revise License Renewal*, BROADCASTING & CABLE, Mar. 13, 1995, at 12 (noting some Democrats “balking” at renewal reform). In the scholarly context, a search of LEXIS generated only citations praising the license renewal revisions of the Act. See, e.g., Jim Chen, *The Last Picture Show: On the Twilight of Federal Mass Communications Regulation*, 80 MINN. L. REV. 1415, 1440-43, 1488-89 (1996) (lambasting the FCC’s comparative licensing process).

18. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 129-31 (1996). Indeed, the preamble to the statute reads as follows: “[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” The Joint Explanatory Statement of the Committee of Conference characterizes the project as designed “to provide for a pro-competitive, de-regulatory national policy framework . . .” H.R. CONF. REP. NO. 104-458, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

19. See, e.g., Glen O. Robinson, 29 CONN. L. REV. 289, 298 (1996).

20. Krattenmaker, *supra* note 18, at 157.

21. *Id.* at 133.

22. *Id.* at 152.

23. *Id.* at 152.

for a longer term).²⁴ Nevertheless, Dean Krattenmaker concludes that the licensing provisions of the Act do not reform broadcast law and policy very significantly because, "in practice, licensees who do not flout the FCC or its rules always get their licenses renewed."²⁵ The new provisions do not engender much controversy because they have been with us, *de facto*, for years.

In addition to his point-by-point evaluation of the pros and cons of the changes made by the Telecommunications Act of 1996, Dean Krattenmaker's underlying complaint about the Act as a whole is the variety of opportunities foregone by Congress. Broadcast licensing too is an area in which Dean Krattenmaker might say that Congress passed up opportunities. It addressed renewal, but said nothing about the process of initial licensing. In the renewal context, it explicitly abandoned the option of a vigorous comparative renewal process. However, it did not replace that process with a fully deregulatory model of licensing—an auction regime pursuant to which broadcast licenses would be considered property interests subject only to the regulatory constraints applicable to other commodities.²⁶

Both the Act's affirmative provisions and its roads not taken teach us something. Admittedly, although the comparative renewal process may have had an unquantifiable deterrent effect on incumbent performance, Dean Krattenmaker is probably right that the change in the hearing process at renewal is but a modest revision at the practical level. But the change has important rhetorical and symbolic meaning even if its practical significance is not seismic. In eliminating even the aspirational norm of a full-fledged comparison of competing applicants at the renewal stage, it abandons what was long articulated as a philosophical premise of the 1934 Communications Act: the FCC's role in selecting the applicant "best" advancing the public interest, convenience, and necessity.²⁷ While I will argue that considerations of policy and freedom of speech substantively support that abandonment, it is nevertheless wise to mark Congress' rejection of a procedural mechanism designed to enhance programming competition.

24. *Id.* at 152-53.

25. *Id.* at 156-57.

26. *Cf., e.g.,* Matthew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 NYU L. REV. 990, 1068-69 (1989) (arguing for a private property model).

27. *Cf. generally* Loftus E. Becker, Jr., *Comments on the "Telecommunications Act of 1996"* by Thomas G. Krattenmaker, 29 CONN. L. REV. 175, 181-85 (1996) (arguing against fully market-based approaches to telecommunications policy and noting society's need for education and information through mass electronic media).

Yet the significance of that rejection cannot now be assessed because Congress replaced the comparative renewal procedure with a significant amount of substantive FCC discretion. While the Act limited social engineering via license distribution, it also eschewed the auction model. Instead, Congress retained the public interest notion, but gave it no explicit positive content. Perhaps unwittingly,²⁸ it invited the possibility of direct pro-social content regulation. On the one hand, a fully market-oriented, deregulatory FCC could use section 204 of the Act to justify virtually automatic renewal of broadcasters in minimal compliance with technical and procedural FCC rules. If Dean Krattenmaker is right that the legislation prompts nothing more than the adoption of a low threshold for perpetual broadcast licensees whose fitness is judged by a mere rule-compliance standard,²⁹ then the 1996 Act's process change puts into question the extent to which the airwaves can continue to be characterized as public property and broadcasters be called public trustees.

On the other hand, this FCC, under Chairman Reed Hundt, may take the legislation's openness seriously. It may replace structural regulation indirectly designed to promote the public interest with an enhanced and content-based set of public interest obligations. These obligations may be crafted as targeted, limited, and directly content-based requirements—such as children's educational programming and reduced violence—based on Congressional findings of failures in broadcast programming. They could be programming elements of a new "deal" with broadcasters in return for the privilege of free and exclusive broadcast licenses.³⁰ The intellectual fulcrum of this new model of administration would be neither property nor the First Amendment. Instead, the fundamental touchstones could be contract and antitrust. Regulation would be warranted only in those speech contexts that are subject to market failure. It would be justified in the rhetoric of social contracts: in exchange for the low cost use of a public resource, broadcasters would agree to limited social obligations.

Dean Krattenmaker points to the meta-picture of the 1996 Act as a striking combination of pro-competitive structural deregulation and con-

28. *But see infra* notes 32-35 and accompanying text.

29. Krattenmaker, *supra* note 18, at 152.

30. Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11 (1996).

tent controls.³¹ Broadcast licensing may provide a fruitful—and troubling—venue in which to see that combination unfold.

I. FROM COMPARISON TO COMPLIANCE—THE SIGNIFICANCE OF THE ELIMINATION OF THE COMPARATIVE RENEWAL HEARING

The House Report on that part of the telecommunications legislation that was ultimately passed as the broadcast licensing portion of the Telecommunications Act of 1996³² characterized the renewal provision as little more than a procedural change: “The Committee believes this change in procedure will lead to a more efficient method of renewing broadcast licenses and should result in a significant cost saving to the Commission.”³³ The Committee appeared to ground this conclusion on the fact that the legislation:

does not alter the standard of renewal employed by the Commission and does not jeopardize the ability of the public to participate actively in the renewal process through the use of petitions to deny and informal complaints. Further, this section in no way limits the ability of the Commission to act *sua sponte* in enforcing the Act or Commission rules.³⁴

The Joint Explanatory statement of the Committee of Conference does not discuss the rationales for the change.³⁵

Despite claims of merely procedural effects, the elimination of the comparative renewal process signals an ideological change. Public interest renewal—whatever the standards to be used—is no longer even aspirationally to be a process of picking the best available applicant, but is rather to be one of making sure that the incumbent is “good enough.” The process—which was initially designed to be comparative

31. Krattenmaker, *supra* note 18.

32. The conference agreement adopted the House provisions with modifications to include the Senate provision requiring renewal applicants to attach a summary of comments regarding violent programming. See H.R. CONF. REP. NO. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 124, 178.

33. See H.R. CONF. REP. NO. 104-204, *reprinted in* 1996 U.S.C.C.A.N. 10, 91. The same attitude is reflected in the FCC’s characterization. FCC, Telecommunications Act of 1996 Enacts 21 Proposals to “Reinvent” Agency, 1996 FCC LEXIS 665 (Feb. 8, 1996) (noting that Act will “streamline” and “simplify” license renewal).

34. See H.R. CONF. REP. NO. 104-204, *reprinted in* 1996 U.S.C.C.A.N. 10, 91.

35. Telecommunications Act of 1996, Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 124, 178.

and lead to the selection of the "better" candidate—is now a pass/fail test for the incumbent alone. The effect of the procedural change that eliminates comparative renewal hearings is that there is no possibility of a comparison with regard either to performance or to any other comparative factor as between the incumbent licensee and a challenger.³⁶ So long as the incumbent even minimally meets whatever substantive standards have been established by the Commission for a basic renewal, there will be no comparison with an applicant with different—and perhaps better—promises. Furthermore, the Act virtually invites the FCC to grant short-term renewals (instead of flat denials of license) even to malefactors who have not met the statutory standards for renewal.³⁷

The legislative history of the 1996 Act suggests that the revision of renewal procedures is not a significant change because petitions to deny are still open as avenues for public comment on the question of whether an incumbent deserves renewal.³⁸ However, petitions to deny are not perfect substitutes for comparative hearings between challengers and incumbents. First, they present procedural obstacles. Although members of the public can file petitions to deny an incumbent licensee's renewal application for failure to operate in the public interest,³⁹ the Communi-

36. Comparative criteria need not relate only to programming; they can also focus on whether one or another applicant has an ownership structure more in keeping with the FCC's goal, for example, of diversity.

37. Telecommunications Act of 1996 § 204(a)(2), adding 47 U.S.C. § 309(k)(2), provides that if a licensee "fails to meet the requirements of this subsection, the Commission may deny the application for renewal . . . or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted." Even more tellingly, § 204(a)(3) of the Act, adding 47 U.S.C. § 309(k)(3), in setting forth the standards for denial of renewal applications, provides that the FCC can issue a denial order after a hearing and a finding "that no mitigating factors justify the imposition of lesser sanctions." *Id.* at § 204(a)(3).

38. See H.R. CONF. REP. NO. 104-204 at 123, reprinted in 1996 U.S.C.C.A.N. 10, 91. As noted above, the Senate bill (S. 652) was passed in lieu of the House bill (H.R. 1555) after its language was amended to contain much of the House bill text. The House Report on H.R. 1555 contains the following assessment: "The Committee notes that subsection (k) . . . does not jeopardize the ability of the public to participate in the renewal process through the use of petitions to deny and informal complaints." *Id.*

39. 47 U.S.C. § 309(d). Citizen standing was granted by the D.C. Circuit Court of Appeals in the WLBT case in 1966. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966) (noting our traditional dependence on members of the public to be private attorneys general). Obviously, the comparative challenge alone would not suffice. As the court noted in the process of granting citizen standing in renewal proceedings, "even when there are multiple competing stations in a [market], various factors may operate to inhibit the other broadcasters from opposing a renewal application. An imperfect rival may be thought a desirable rival, or there may be a 'gentleman's agreement' of deference to a fellow broadcaster in the hope he will reciprocate on a propitious occasion." *Id.* at 1004. It should also be

cations Act of 1934 requires such petitioners to make a prima facie showing—based on specific allegations of fact—that the grant would not be in the public interest.⁴⁰

Second, other than “family values” groups focused on sex and violence in programming, few public interest groups now serve as media watchdogs. As a result of the convergence of the mass media as described by Dean Krattenmaker,⁴¹ existing funding for public interest challenges is spread thinly over many other issues. Therefore, because the broadcasting system is no longer so central and because support for public interest challenges is scarce, it is unlikely that petitions to deny would fully take up the slack left by the elimination of the traditional comparative challenge. In addition, although petitions to deny by public interest groups are generally not primarily spurred by the desire for economic settlements,⁴² the FCC’s attempts to eliminate what it calls abuses in the comparative hearing and petition to deny processes suggest that there currently remain very few economic incentives for groups to mount challenges even to minimally qualified incumbent licensees.⁴³ Moreover, the FCC held in the radio and television deregulation

noted that § 204(a)(2) of the Act (codified as amended in 47 U.S.C. § 309(d)) amends § 309(d) to assure that standards for petitions to deny conform to the statutory renewal standards set up in the new § 309(k). Implementation Order, 61 Fed. Reg. 18,289 (1996).

40. 47 U.S.C. § 309(d). See also Office of Communication of United Church of Christ v. FCC, 779 F.2d 702 (D.C. Cir. 1985). On the difficulties faced by petitioners to deny, see, e.g., Ronald W. Fairchild, Note, *Use of Petitions By Minority Groups to Deny Broadcast License Renewals*, 1978 DUKE L.J. 271, 272-74, 284-85 (1978); Ronald W. Fairchild, Comment, *Petitioning to Deny Broadcast License Renewals*, 16 WASHBURN L.J. 375, 376-81 (1977).

41. See Krattenmaker, *supra* note 18, at 125-27.

42. First Report & Order, *Abuses of the Renewal Process*, 4 FCC Rcd 4780, 4785 (1989), *recon. denied*, 5 FCC Rcd 3902 (1990).

43. In a series of attempts to curb the strategic use of the comparative process for economic gain in both the renewal and new facilities contexts, the FCC limited the circumstances in which challengers can obtain cash settlements for withdrawal of their comparative challenges or petitions to deny. See Second Further Notice of Inquiry & Notice of Proposed Rulemaking, *In re Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 3 FCC Rcd 5179 (1988) [hereinafter *Second Further Notice of Inquiry & Proposed Rulemaking*]; First Report & Order, *Abuses of the Renewal Process*, *supra* note 42, at 4785.

In comparative renewals, for example, the rules prohibit any payment to competing applicants who seek to dismiss their applications prior to the Initial Decision stage. See 47 C.F.R. § 73.3523(b)(1). Thereafter, such dismissal payments cannot exceed the withdrawing party’s legitimate and prudent expenses in the comparative process. 47 C.F.R. § 73.3523(c). The limitation to legitimate and prudent expenses applies to settlements of petitions to deny as well. In addition, the FCC reviews, on a case by case basis, citizens’ agreements reached in exchange for withdrawals of petitions to deny. First Report & Order, *Abuses of the Renewal Process*, *supra*

lation decisions that stations facing petitions to deny can rely on the programming provided by other stations in the overall market in order to justify their own specialization and failure to program for all market concerns.⁴⁴ This further dilutes the likelihood of successful petitions to deny. It therefore reduces the incentives for public interest groups, whose resources are already thinly spread, to participate in the petition process at the broadcast level.

Finally, while the petition to deny can be a useful tool, it cannot realistically redress mediocre or acceptable, but not superior, broadcast service. The FCC has in the past emphasized the importance of broadcast service and the value of even minimal service over lack of service.⁴⁵ The argument that a broadcaster's programming should be better

note 42, at 4780-86 (describing differences in economic incentives for competitors and petitioners to deny.) See also Public Notice, FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy, 10 FCC Rcd 12182 (1995) (announcing temporary waiver of 47 C.F.R. §§ 73.3523(b)(1) and 73.3525(a)(3)); Goldin, *supra* note 3, at 1025 (discussing challengers' concrete economic incentives for critical scrutiny of licensee performance).

44. Deregulation of Radio, 84 FCC 2d 968 (1981), *recons. denied*, 87 FCC 2d 797 (1981), *aff'd in part* United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983)[hereinafter *Deregulation of Radio*]; Report & Order, *In re* the Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076, 1094, 56 Rad. Reg. 1005, 1019 (1984), *recons. denied*, 104 FCC 2d 357 (1986), *aff'd in part*, ACT v. FCC, 821 F.2d 741 (D.C. Cir. 1987) [hereinafter *Television Deregulation*]. See also Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1434 (D.C. Cir. 1983).

45. See, e.g., *In re* Applications of Hearst Radio, Inc. (WBAL), 15 FCC 1149, 1175-76 (1951); H.R. REP. NO. 961, 93rd Cong., 2d Sess. 17 (1974). See also Committee for Open Media v. FCC, 543 F.2d 861, 873 (D.C. Cir. 1976) (explaining that petitions to deny are disfavored because minimal service is better than none); Fidelity Television, Inc. v. FCC, 515 F.2d 684, 702, 707 (D.C. Cir. 1975) (noting that the value of minimal service would not be relevant in the comparative-hearing context where the issue is not the existence of service but who shall provide it), *cert. denied*, 423 U.S. 926 (1975); Gehring, *supra* note 7, at 597 n.127 (noting that the availability of a qualified applicant can encourage the FCC to deny renewal to an incumbent whose substandard performance is not sufficiently egregious to warrant complete loss of service by unconditional denial of renewal); Wentz, *supra* note 7, at 401 (discussing tendency of FCC to renew in petition to deny contexts because of uncertainty about substitute service).

The petition to deny may be less desirable than a competitive challenge with regard to diversification factors as well as performance issues. For example, in *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970), the court upheld the FCC's refusal to hold a hearing to deny a license renewal on the claimed grounds of fairness doctrine violations and insufficient diversification. With regard to the diversification issue, the court found that the level of cross-ownership of the renewal applicant satisfied the then-current multiple ownership rules of the Commission and that ordering a hearing would have been tantamount to a hearing on the desirability of those rules. Had this been a situation with a competing applicant, however, the incumbent's ownership structure would have been compared to the challenger's and might have led to demerits even if

is unlikely to sway the FCC in the absence of a live alternative to the incumbent. Admittedly, a desirable frequency should lead to an active initial licensing process when it becomes vacant, but the transition costs may still deter FCC non-renewal without a qualified challenger ready to step in immediately.

Nevertheless, that the petition to deny process may not be a full substitute for comparative renewal hearings does not mean that the renewal provision of the Telecommunications Act of 1996 is therefore necessarily undesirable. The adequacy of the renewal provision should be addressed in light of the historical background of comparative renewal.

A. *History of Comparative Renewal*⁴⁶

1. *The 1970 Policy Statement in Context:*

The 1934 Communications Act commands the Commission to grant license renewals only when they serve the public interest.⁴⁷ That mandate has been generally understood to require the agency to make the best choice in the public interest⁴⁸ and to employ a comparative process at least in form. In its 1970 Policy Statement, the FCC revised the conventional comparative format of the renewal scheme.⁴⁹ Like the renewal provision in the 1996 Act, the 1970 Policy Statement gave a conclusive comparative preference to an incumbent who could show that its program service during the preceding license term had been "substantially attuned to meeting the needs and interests of its area" and that the station's operation "ha[d] not otherwise been characterized by serious deficiencies."⁵⁰ Thus, while the hearing would still be comparative in form, a showing of substantial past performance without serious deficiencies would preclude further consideration of any challengers on their own merits.

The backdrop for the 1970 Policy Statement was the Commission's

it were independently adequate under then-current rules of the FCC.

46. The story of comparative broadcast renewals has been ably told in numerous sources. See, e.g., KRASNOW ET AL., *supra* note 1, at 207-32; Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5186-88. I will provide a mere sketch here.

47. 47 U.S.C. §307(c) (1994).

48. See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1122-23 (1993).

49. *In re* Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970), *rev'd sub nom.* Citizens Communications Ctr. v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

50. *Id.* at 425.

surprise non-renewal of incumbent television station WHDH in 1969.⁵¹ Even though the station's performance record was "favorable on the whole,"⁵² it lost out to a candidate with more desirable ownership characteristics pursuant to other comparative criteria.⁵³ Despite FCC attempts to cabin the significance of WHDH by subsequently focusing on the unique characteristics of the case,⁵⁴ an unsettled broadcast industry sought Congressional action.⁵⁵ When public challenges eroded the likelihood of legislation mandating a two-step renewal process,⁵⁶ the FCC issued the 1970 Policy Statement reforming its comparative renewal process. Although the 1970 Policy Statement did not go as far as the stalled legislation toward eliminating comparative renewal,⁵⁷ it attempted to assuage industry worries by adopting the conclusive preference for

51. *In re WHDH, Inc.*, 16 FCC 2d 1 (1969), *recon. denied*, 17 FCC 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).

52. *Id.* at 10.

53. *See id.* at 19. WHDH was a subsidiary of the *Boston Herald Traveler* newspaper. The diversification demerit which derailed renewal was based on this common ownership. *See id.* at 12-13.

54. On rehearing, the FCC issued a clarification, explaining that the lack of renewal expectancy was due to WHDH's unique status as a short-term licensee operating under a series of special temporary authorizations because of possible misconduct by its president. *In re WHDH, Inc.*, 17 FCC 2d 856, 872-73 (1969), *aff'd*, Greater Boston Television Corp., 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

55. *See KRASNOW ET AL.*, *supra* note 1, at 210-11; *In re* Petitions by BEST et al. for Rule Making to Clarify Standards in All Comparative Broadcast Proceedings, 24 FCC 2d 383, 389 (1970) (Johnson, Comm'r, dissenting).

56. *See KRASNOW ET AL.*, *supra* note 1, at 212-14.

57. As noted above, the 1970 Policy Statement was issued in response to strong political pressure to solidify the renewal expectancy. The then-pending Senate bill to achieve renewal reform—the Pastore bill—would have gone further than the Policy Statement by providing that the FCC could not consider competing applications at all until after first finding that the incumbent would disserve the public interest. *See Anthony*, *supra* note 6, at 107-09. Under this proposal, there would be a two-step process and the first step would not be comparative even in form. *See KRASNOW ET AL.*, *supra* note 1, at 214-15 (describing S. 2004); *In re* Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424, 424-25 (1970), *rev'd sub nom.* Citizens Communications Ctr. v. FCC, 447 F.2d 1201, 1208 (D.C. Cir. 1971) (setting out the applicable standards of the policy). Procedurally, under the 1970 Policy Statement, the question of substantial past performance was to be a threshold issue in a comparative hearing involving both the incumbent and the challenger, but limited to the single issue of past performance. If the incumbent were to prevail on this threshold issue and obtain the renewal preference, all other applications would be dismissed without a hearing on their own merits. If the incumbent were not to prevail on the substantial past performance criterion, the standard comparative hearing would take place. Yet, despite these procedural differences, the CCC court thought that the 1970 Policy Statement "administratively enact[ed] what the Pastore bill sought to do." *Citizens Communications Ctr. v. FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971). *But see Geller*, *supra* note 3, at 487 (criticizing this reading).

substantial past performance.

This 1970 Policy Statement was forcefully invalidated in *Citizens Communications Center v. FCC*⁵⁸ on the ground that it violated section 309 of the 1934 Act. The court relied on legislative history, the Supreme Court's decision in *Ashbacker v. FCC*,⁵⁹ and its own decision in *Johnston Broadcasting Co. v. FCC*⁶⁰ to find that the bifurcated renewal process of the 1970 Policy Statement deprived qualified challenging applicants of the right to be heard on the merits of their applications—a right to a full-fledged and fully comparative hearing guaranteed by the Communications Act.⁶¹ In all three sources, the *Citizens Communications Center* court saw a mandate that the renewal process be a truly comparative exercise in finding the best applicant.⁶² Such a selection exercise would require a comparison of all characteristics of the applicants, and not merely the threshold establishment of specific “positive characteristics,”⁶³ so long as all the applicants were minimally

58. 447 F.2d 1201 (D.C. Cir. 1971), clarified in 463 F.2d 822 (D.C. Cir. 1972).

59. 326 U.S. 327 (1945). *Citizens Communications Ctr.* appealed from the 1970 Policy Statement on the grounds that it violated the Constitution, the Administrative Procedure Act (“APA”), and the Communications Act as interpreted in *Ashbacker*. See generally *Citizens Communications Ctr.*, 447 F.2d at 1201-03. The APA violation claim was grounded on the notion that as a new rule, the Policy Statement should have been subjected to notice and comment rule-making rather than simply adopted as a policy statement. *Id.* at 1203. With regard to the Communications Act, the plaintiffs charged that the conclusive presumption process would violate § 309(e) as interpreted in *Ashbacker*. *Id.* at 1204.

60. 175 F.2d 351 (D.C. Cir. 1949).

61. The court did not reach the other grounds urged by the plaintiff.

62. The court quoted that part of the Federal Radio Commission's (“FRC’s”) 1928 report to Congress in which the agency characterized the public interest standard as a “comparative . . . standard [Due to channel scarcity,] the Commission must determine from among the applicants before it which of them will, if licensed, best serve the public.” *Citizens Communications Ctr.*, 447 F.2d at 1206-07 (quoting Federal Radio Commission, Second Annual Report to Congress 169 (October 1, 1928)).

With respect to case precedent, the *Citizens Communications Ctr.* court relied on *Ashbacker* and *Johnston* despite the fact that they involved mutually exclusive applications at the initial license assignment stage rather than in the renewal context. The court read *Ashbacker* to require a full comparative hearing where two or more applicants for licenses are mutually exclusive. *Id.* at 1211. It then characterized *Johnston* as defining a full hearing to include “a decision upon all relevant criteria” to determine the better qualified applicant. *Id.* at 1212.

63. *Citizens Communications Ctr.*, 447 F.2d at 1212 (quoting *Johnston Broad. Co. v. FCC*, 175 F.2d 351, 356-57 (1949)). In *Johnston*, the court had reasoned that: “[a] choice between two applicants . . . involves a comparison of characteristics. Both A & B may be qualified, but if a choice must be made, the questions is which is the better qualified . . . which would better serve [the public] interest.” *Johnston*, 175 F.2d at 356 (1949). According to the *Johnston* court, “the nature of the material, the findings and the bases for conclusion differ” when the question is whether an applicant is qualified as opposed to “when the purpose is to make a proper choice between two qualified applicants.” *Id.* Elements that might not be essential to

qualified.

The *Citizens Communications Center* court, which expressed concern about the 1970 Policy Statement's deterrent effect on the filing of renewal challenges,⁶⁴ clearly painted the comparative process as a mechanism for the selection of the better candidate through "healthy competition."⁶⁵ In the court's view, abandoning a comparative approach in the attempt to find the better applicant would jeopardize important communications policies. Specifically, the court feared that the 1970 Policy Statement's substantial performance standard would preclude comparative evaluations designed to enhance diversification of media ownership and the entry of minority groups into broadcasting.⁶⁶ Indeed, the *Citizens Communications Center* decision assumed that the effect of the 1970 Policy Statement "would certainly have been to perpetuate [the] dismaying situation" in which "no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities."⁶⁷

2. *The Role of Renewal Expectancy*

The *Citizens Communication Center* court's requirement of a full comparative hearing on license renewal did not specify either the factors or the standards to be considered. Records suggest that in the 1920s, during the heyday of AM-band congestion, the Federal Radio Commission ("FRC" or "Commission") frequently denied license renewals.⁶⁸ Subsequently, however, such renewals became *de rigueur*.⁶⁹ De-

basic qualification could become dispositive when choosing "between two applicants otherwise equally able." *Id.* In a gestalt-like finding, "[i]t must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases. In its judgment upon this evaluation, the Commission has wide discretion." *Id.* at 357.

64. *Citizens Communications Ctr.*, 447 F.2d at 1206, 1214.

65. *Id.* at 1214.

66. *Id.* at 1213 & n.36.

67. *Id.* On the positive side, it quoted a report of the U.S. Commission on Civil Rights to the effect that comparative licensing proceedings are "an effective mechanism for bringing about greater racial and ethnic sensitivity in programming, non-discriminatory employment practices, and other affirmative changes which otherwise might not take place." *Id.* at 1214 n.38 (quoting report). See also Gehring, *supra* note 7, at 597 (describing the hope of comparative renewal proponents that the process could open the broadcasting industry to racial minorities and other previously excluded social groups).

68. See MARC A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW CASES AND MATERIALS* 648 (5th ed. 1995); *Citizens Communications Ctr.*, 447 F.2d at 1207; See Simons, *supra* note 7, at 863-64; Wentz, *supra* note 7, at 370-71.

69. See, e.g., LUCAS A. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 85-86 (1987)

spite the clarity of the proposition that broadcast licensees do not have property rights in their licenses,⁷⁰ cases and FCC decisions uniformly assumed that the license "is more than a mere privilege or gratuity."⁷¹ Although renewal proceedings required comparing the incumbent's performance with the promises made by the challenging party, the Commission expressed a significant preference for incumbents. Courts and the FCC both read a "renewal expectancy" notion as implicit in the structure of the Communications Act of 1934.⁷²

(on the decreasing threat of non-renewal); Wentz, *supra* note 7, at 371. According to one study, although non-renewals increased in the 1970's, only 78 licenses had not been renewed by the FCC during the period 1934 to 1969. John D. Abel et al., *Station License Revocations and Denials of Renewal, 1934-1969*, 14 J. BROADCASTING 411, 411 (1970); Frederic A. Weiss et al., *Station License Revocations and Denials of Renewal, 1970-78*, 24 J. BROADCASTING 69, 69 (1980). See also *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503, 510 (D.C. Cir. 1982) (noting that no television licensee had ever been denied renewal); *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 42 (D.C. Cir. 1978) (on FCC's history of a "strong preference for renewal").

70. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); see generally *supra* note 11.

71. *L.B. Wilson, Inc. v. FCC*, 397 F.2d 717, 798 (1948). See also *Central Fla. Enters.*, 683 F.2d at 506 and authorities cited therein (recognizing the permissibility of some degree of renewal expectancy).

72. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Early precedent supported this view. See *Second Further Notice of Inquiry & Proposed Rulemaking*, *supra* note 43, at 5187 & n.75; *WOKO, Inc. v. FCC*, 153 F.2d 623, 632 (D.C. Cir. 1946), *rev'd on other grounds*, 329 U.S. 223 (1946) (referring to "compelling reasons" as basis for denying renewal to stations satisfactorily serving listeners); *Evangelical Lutheran Synod v. FCC*, 105 F.2d 793, 795 (D.C. Cir. 1939) ("the public interest requires . . . that existing arrangements be not disturbed without reason"). See Note, *Comparative License Renewal Hearings and the Protection of the "Public Interest"*; *Central Florida Enterprises v. FCC*, 92 HARV. L. REV. 1801, 1805-06 (1979) [hereinafter *Comparative License*] (noting the Commission's "consistent preference" for incumbents over the 45-year history of comparative renewal hearings); *Simons*, *supra* note 7, at 863-64 (describing early precedent recognizing presumptions in favor of license renewals for satisfactory incumbents). Later authorities also relied on the 1952 amendments to §307, which substituted the public interest standard for the prior mandate that renewals and new license applications be judged by the same considerations. See *supra* note 11. (The extent to which this 1952 amendment was seen as an endorsement of a strong renewal expectancy and the FCC's tilt in favor of incumbents is a subject of dispute. For articles taking this view, see *Geller*, *supra* note 3, at 497; *Hyde* *supra* note 7, at 260; *Comparative License*, *supra* at 1806 n.38). According to the D.C. Circuit Court of Appeals, Congress apparently amended the provision to preclude the inference that an incumbent could not adduce evidence of its past broadcast record. *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 41 n.4 (D.C. Cir. 1978). The Court in *FCC v. National Citizens Comm. for Broad.* quoted the amendment's legislative history to the effect that the earlier language was unrealistic and failed to reflect Commission renewal practice, and that the FCC had the "right and duty" to consider the overall performance of an incumbent station "against the broad standard" of the public interest. 436 U.S. 775, 811 & n.31 (1978) (quoting S. Rep. No. 44, 82 Cong., 1st Sess. 7 (1951)). The Court concluded that "Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a somewhat different basis from new

In articulating the reason for such a renewal expectancy in *Hearst Radio, Inc. (WBAL)*,⁷³ the Commission emphasized that failing to consider an incumbent's past broadcast record would not be in the public interest. Thus, the Commission stated that it would weigh an incumbent's past broadcast record along with other traditional comparative factors.⁷⁴ Although the Commission's language in *Hearst Radio*⁷⁵ and *Wabash Valley Broadcasting (WTHI - TV)*⁷⁶ did not attribute conclusive weight to past programming, the cases came to be widely understood as justifying almost automatic renewal of incumbents, even in the comparative hearing context, if they were not guilty of misconduct.⁷⁷

Formally, the renewal expectancy was only one of the comparative considerations entertained by the Commission in challenged renewals.⁷⁸ The other comparative factors were borrowed from the initial licensing context and paralleled the development of initial comparative criteria. Although *Ashbacher* established the necessity of the comparative hearing for mutually exclusive initial applicants, it did not define the substantive standards for comparison. Thus, until 1965, the Commission resolved hearings on an ad hoc basis, without established lists of comparative criteria or weights for the factors.⁷⁹ The comparative factors relevant in initial licensing hearings were systematized and articulated in the FCC's 1965 Policy Statement on Comparative Hearings.⁸⁰ Even

applicants." *Id.* at 810-11. See also Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5186-87; Geller, *supra* note 3, at 472-75 (on the legislative history of Section 307(d) of the Communications Act); *Comparative License* at 1806. The renewal expectancy notion was recognized and noted in *FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 782 n.5, 805-06 (1978) in the Court's discussion of the FCC's newspaper-broadcast cross-ownership policy.

73. *Hearst Radio, Inc. (WBAL) v. FCC*, 15 FCC 1149, 1175 (1951).

74. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5186.

75. *Hearst Radio*, 15 FCC at 1175-76.

76. 35 FCC 677 (1973).

77. See Anthony, *supra* note 6, at 106; Geller, *supra* note 3, at 475-476; Goldin, *supra* note 3, at 1020; Hyde, *supra* note 7, at 267; Jaffe, *supra* note 7, at 1694; Wentz, *supra* note 7, at 380-82. In *Hearst Radio*, for example, the incumbent had not integrated ownership and management and controlled an FM station, a television station and a newspaper in Baltimore. 15 FCC at 1183 (1951). Nevertheless "the clear advantage of continuing the established and excellent service now furnished by WBAL" was determinative. *Id.*

78. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5187.

79. See *id.* at 5187; Hyde, *supra* note 7, at 261-64; Robert J. Brinkmann, Note, *The Policy Paralysis in WESH: A Conflict Between Structure and Operations in the FCC Comparative Renewal Process*, 32 FED. COM. L.J. 55, 58-59 (1980).

80. Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). See Second Further Notice of Inquiry & Proposed Rulemaking Case, *supra* note 43, at 5185, 5187 (describ-

though that Statement was inapplicable in its terms to the renewal context,⁸¹ its structural comparative criteria of diversification of ownership and integration of ownership and management were subsequently borrowed in comparative renewals.⁸² However, despite the formally comparative process, the FCC consistently favored renewal applications in challenge situations until its initial decision in WHDH.

Renewal applications were preferred because the comparative renewal process required an uncomfortable balancing of two policy concerns.⁸³ On the one hand, the process was designed to serve as a "competitive spur" for better programming.⁸⁴ The threat of displacement by challengers promising better service was considered the right mechanism to prompt broadcasters to provide programming in the public interest and to discipline broadcaster incentives to air inadequate fare.⁸⁵ On the other hand, the FCC saw at least three good reasons in the public interest to maintain some stability and predictability in the broadcast industry. First, the Commission found that "an expectation of renewal is necessary to encourage broadcasters to make investments that would ensure quality programming."⁸⁶ Second, the Commission saw no guarantee that a challenger's promised "paper proposals" would match an incumbent's actual past performance record, and feared that replacing an incumbent could result in substituting inferior for acceptable service.⁸⁷ Finally, the

ing comparative criteria).

81. Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d at 393 n.1 (1965).

82. Seven (7) League Productions, Inc., 1 FCC 2d at 1597 (1965) (holding that the 1965 Policy Statement would also govern the introduction of evidence in comparative renewal hearings). See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970); Hyde, *supra* note 7, at 266-67; See *Comparative License*, *supra* note 72, at 1802 & n.7.

83. See, e.g., Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5185.

84. See *id.* at 5185; See also *In re* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424, 424-25 (1970) ("statutory spur").

85. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5185. "Specifically, by permitting challengers to file competing applications at the end of an incumbent licensee's renewal term, it was thought that broadcasters would have the incentive to put forward their best programming efforts at serving the needs and interests of their communities of license so that they would be able to prevail in the event there were a comparative license renewal hearing." *Id.*

86. See *id.* at 5185 (noting FCC's prior rationale that "comparative renewal proceedings cannot function as a 'competitive spur' to licensees if their dedication to the community is not rewarded."). See also Notice of Inquiry, *In re* Matter of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 88 FCC 2d 120, 123 (1981) (on comparative renewal reform); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 858 (D.C. Cir. 1970) (expectancies provided to induce investments, thus furthering the public interest).

87. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5185-

Commission worried that the public interest would not be served by a "haphazard restructuring" of the broadcast industry that might result from comparing incumbents and challengers as if they were both new applicants on equal footing.⁸⁸

Although the *Citizens Communications Center* decision required full-fledged comparative renewal hearings and rejected the FCC's summary procedure introduced in the 1970 Policy Statement, the court specifically recognized the legitimacy of stability arguments and did not eliminate the notion of a renewal expectancy. Rather, it conceded that superior performance, while not the single dispositive factor, "should be a plus of major significance in renewal proceedings."⁸⁹ The *Citizens Communications Center* court did not itself define the standard to be used for renewal expectancy. It did note that "superior" performance ordinarily meant "far above the average,"⁹⁰ and gave some hints as to what might satisfy such a standard.⁹¹

Despite the strength of this language, the rationale for renewal expectancy remained powerful for the FCC. Although the agency paid lip service to the comparative hearing requirement, the renewal expectancy remained a virtually dispositive factor.⁹² Critics claimed that the FCC manipulated the comparative hearing requirement by undervaluing non-renewal expectancy factors.⁹³ The FCC's performance threshold for

86. See also *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 805, 807 (1978); *Hearst Radio, Inc. (WBAL) v. FCC*, 15 FCC 1149, 1175 (1951).

88. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5186; *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1982). The D.C. Circuit acknowledged that rulemaking is "preferable to ad hoc license renewal proceedings as an occasion for restructuring the broadcast industry." *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 53 n.79 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 957 (1979).

89. *Citizens Communications Ctr. v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). In addition, in footnote 35, the court also suggested that the FCC commence rulemaking proceedings "to articulate the standards by which to judge superior performance." *Id.* at 1213 n.35. Without such articulated standards, the court feared that the incumbent would have a temptation "to lapse into mediocrity and seek the protection of the crowd." *Id.*

90. 463 F.2d 822, 823 (D.C. Cir. 1972) (quoting Webster's Dictionary).

91. *Id.* The Court's suggestions—of reduced commercials and "quality programs"—were substantive and did not shy away from content. *Id.*

92. See *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503, 506 (D.C. Cir. 1982) (indicating that the FCC had in the past raised renewal expectancy to an irrebuttable presumption in favor of the incumbent); *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978); Gehring, *supra* note 7, at 592-93 (charging that the result of *Citizens Communications Ctr.* has not been to stop the Commission from applying the 1970 Policy Statement, but merely to stop it from admitting it is doing so).

93. See, e.g., *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 50-51 (D.C. Cir. 1978) (noting the conversion of diversification and integration from structural to functional inquiries). See also

renewal expectancy was also subject to fluctuation.⁹⁴ Although the Commission declined to adopt quantitative guidelines for its renewal standard, it established in its 1977 Report that renewal expectancies would depend on the degree to which the incumbent's past programming was "sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal."⁹⁵ This substantial performance standard was to be a factor in the comparative hearing, along with the factors enumerated in the 1965 Policy Statement.⁹⁶ The weight to be accorded to the legitimate renewal expectancy would depend on the facts of each case (as would the significance of the other comparative considerations), presumably depending on how good the past performance would be shown to be.⁹⁷

Recently, the Commission's statement of the basis of renewal ex-

FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 810-11 (1978) (recognizing diminished importance of diversification in renewals); Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5188; See *Comparative License*, *supra* note 72, at 1804, 1807 (on skewing effect of functional approach).

94. See Brinkmann, *supra* note 79, at 69-70.

95. Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process, 66 FCC 2d 419, 430 (1977) [hereinafter 1977 Report], *aff'd sub nom.* National Black Media Coalition v FCC, 589 F.2d 578 (D.C. Cir. 1978). The FCC had commenced a notice of inquiry in 1971 to address the question of the adoption of quantitative standards for local programming, news and public affairs. See Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971); Further Notice of Inquiry, 31 FCC 2d 443 (1971); Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 367 (1973), Third Further Notice of Inquiry, 43 FCC 2d 1043 (1973). After six years of inquiry, in its 1977 Report, the FCC finally decided not to adopt quantitative criteria for the renewal expectancy. It did so for a number of reasons. First, since meeting the proposed program guidelines would only be a prima facie indication of substantial service (which could be upset on a further evidentiary showing), quantitative standards would not, in fact, provide a high level of certainty. 1977 Report, *supra* at 428. Moreover, as the guidelines provided a range of permissible programming percentages, selecting the precise standard from the range would predictably become a point of contention and undermine certainty. *Id.* In any event, even a clear history of substantial service would not guarantee renewal, since any preference awarded for it could not terminate the hearing in favor of the incumbent licensee. *Id.* Moreover, many stations might spread their resources thinner in order to comply with the standards, thus potentially reducing program quality. And finally, the FCC feared that since licensees would predictably adopt the FCC's articulated quantitative standards as their minimum standard for this type of programming, they would interfere with licensee programming discretion without a showing of a clear and substantial public interest benefit. *Id.*

96. 1977 Report, *supra* note 95, at 430. The Commission further clarified by stating that the focus initially would be on the renewal applicant's program service during the preceding license term. Some of the elements that would be considered particularly relevant were the licensee's responsiveness to ascertained community needs (including minority interest concerns), and its broadcast of news, public affairs, and local programming, as well as cultural, educational, foreign-language, prime-time, children's, agricultural, and religious programming. *Id.*

97. Central Fla. Enters., Inc. v. FCC, 683 F.2d 503, 506 (D.C. Cir. 1982).

pectancy has been whether the licensee's past broadcast service has been "meritorious in meeting the needs and interests of listeners or viewers in its community of license and service area."⁹⁸ The renewal expectancy carries "significant weight" when evaluated against the structural factors of integration and diversification in the 1965 Policy Statement.⁹⁹ "Even greater weight may be accorded to this renewal expectancy if a licensee's past record is found to be superior."¹⁰⁰

Despite what might be deemed the FCC's disingenuous and illusory adherence to the dictates of *Citizens Communications Center*, the D.C. Circuit at first accepted the Commission's approach.¹⁰¹ Thereafter, in *Central Florida I*,¹⁰² the D.C. Circuit scathingly criticized the FCC's renewal conclusions, based on "administrative 'feel,'" for being arbitrary and opaque to judicial review.¹⁰³ Notwithstanding the language in *Citizens Communications Center* implying the "superior performance" trigger for renewal expectancy, however, the D.C. Circuit subsequently conceded that renewal expectancies could derive from merely substantial or meritorious service.¹⁰⁴ Indeed, the court in *Central Florida II*¹⁰⁵ af-

98. Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5185.

99. *Id.* at 5185. The Commission has previously suggested that primary reliance on diversification as a comparative criterion in the renewal context could "unfairly disadvantage" incumbents with good programming records who are in compliance with the FCC's multiple ownership rules but might still not have as diversified a firm structure as a challenger. *Id.* at 5188-5189. See also David Solomon, *Cellular Radio Comparative Renewal Proceedings: A Legislative Proposal for Elimination*, 39 FED. COM. L.J. 195, 202 n.40 (1987) (arguing in the cellular context that without a renewal expectancy, "a challenger with no other media interests could almost always beat an incumbent."). In affirming the FCC's authority to "grandfather" most existing broadcast-newspaper combinations, the Supreme Court characterized the FCC's practice in the renewal context as similarly weighing diversification as a "somewhat secondary factor" as compared to past performance. *FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 809. See also *id.* at 806.

100. Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5185 ("the weight of the renewal expectancy is measured on a sliding scale in accord with the strength of the licensee's past broadcast record").

101. See, e.g., *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 926 (1975). See also Gehring, *supra* note 7, at 593 (on the manipulation of facts and comparative factors to reach the conclusion that the two applicants in *Fidelity* were equal).

102. *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978).

103. *Id.* Judge Wilkey condemned decision-making by administrative intuition as falling "somewhere on the distant side of arbitrary." *Id.*

104. *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503, 506 (D.C. Cir. 1982). The court did say that the strength of the expectancy would depend on the merit of the past record. *Id.* Any lack of clarity in the opinion has been attributed by commentators to the fact that the court amended its initial opinion to take account of the Supreme Court's decision in *FCC v. National Citizens Comm. for Broad.*, in which the Court characterized the FCC as having "recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]'" 436

firmed the FCC's interpretation of the full hearing required under *Citizens Communications Center*.¹⁰⁶ So long as the Commission did not "raise[] renewal expectancy to an irrebuttable presumption in favor of the incumbent,"¹⁰⁷ and so long as it weighed all the factors at the same time and with an eye to the public interest,¹⁰⁸ it could permissibly attribute renewal expectancies of varying strength and weight depending on the merit of the incumbent's past record.¹⁰⁹ As is evidenced by its subsequent affirmance of a license renewal for a radio station that did virtually nothing more than duplicate the programming of its co-owned AM station in the same market,¹¹⁰ the D.C. Circuit ultimately insisted on the form of a full hearing under *Citizens Communications Center* without requiring truly "superior" service as the substantive standard for renewal expectancy.¹¹¹ While "automatic license renewal clearly is improper,"¹¹² the FCC need not justify each finding of renewal expectancy by showing that it advances the three-fold rationale for permitting such expectancies.¹¹³ Moreover, the D.C. Circuit has accepted the FCC's policy of weighing structural factors such as diversification and integration less than renewal expectancies.¹¹⁴ Despite the court's continuing recitation of its concern that the FCC "not revert to an irrebuttable presumption in favor of the incumbent,"¹¹⁵ it has not overruled the FCC's renewal approach.¹¹⁶

U.S. at 805 (1978) (citations omitted). See Brinkmann, *supra* note 79, at 87 (stating that "the D.C. Circuit amended its opinion to drop language conclusively holding that the *Citizens* superior service standard was the prerequisite of a renewal expectancy"); *Comparative License*, *supra* note 72, at 1808 n.51.

105. *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982)

106. *Id.* at 506-07. In the 1978 decision, the court did not define "meritorious" service, but its decision could be read to imply that such service should be "above average" or at least not "substandard." See Brinkmann, *supra* note 79, at 88-89.

107. *Central Fla. Enters.*, 683 F.2d at 506.

108. *Id.* at 506-07 n.16.

109. *Id.* at 506.

110. *Victor Broad., Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983).

111. *Id.* The court in *Victor Broadcasting* accepted the FCC's finding of "superior" service by the incumbent, suggesting that such service is the basic requirement for renewal expectancy. *Id.* at 762. However, as the dissent pointed out, the FCC did not assess the station's non-duplicated programming and the agency's own policies characterize program duplication as inefficient. *Id.* at 768, 772, 774-75 (Wilkey, J., dissenting).

112. *Id.* at 761.

113. *Id.* at 765.

114. *Id.* at 765. The Supreme Court as well has acquiesced in the FCC's practice of giving renewal expectancy even for substantial or average service. See *FCC v. National Citizens Comm.-for Broad.*, 436 U.S. 775, 782-83 & n.5 (1978); *Comparative License*, *supra* note 72, at 1809.

115. *Victor Broad.*, 722 F.2d at 765.

116. See Chen, *supra* note 17, at 1441 (accusing the D.C. Circuit of eventually acceding to

3. *The FCC's Ambivalence Regarding Program Content:*

Licensing policy is the perfect screen against which to see the FCC's ambivalence about its role regarding broadcast content. The traditional comparative factors—at the initial licensing level—are structural factors designed to lead indirectly to the proper mix of programming and diversity of ideas without direct content intervention. By contrast, the issue of programming is directly content-based. Although it did not impose specific programming requirements, the Federal Radio Commission early on took the position that each licensee should offer “a well-rounded program schedule, in which entertainment, religion, education and instruction, important public events, discussions of public questions, weather, market reports, news and matters of interest to all members of the family find a place.”¹¹⁷ On at least two noteworthy occasions, the Commission denied license renewals on grounds squarely based on its disapproval of programming content.¹¹⁸ The FCC's “Blue Book” continued an assumption that regulation would be concerned with programming, establishing the norms for public service responsibility of broadcast licenses.¹¹⁹ In its subsequent Report and Statement of Policy,¹²⁰ the Commission described fourteen categories of programming “usually necessary to meet the public interest, needs and desires of the community” and representing a “well balanced programming structure.”¹²¹ The Commission's quantitative processing guidelines were also

the FCC's pro-incumbent presumption).

117. F. KAHN, DOCUMENTS OF AMERICAN BROADCASTING 150-51 (3d ed., 1978).

118. *Trinity Methodist Church v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 53 S.Ct. 317 (1933) (denying renewal to Reverend Shuler for his vituperative sermons and sensational attacks against public officials); *KFKB Broad. Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931) (rejecting renewal application of Dr. Brinkley, whose “Medical Question Box” program dispensed medical advice). Admittedly, at least in *KFKB*, the FCC relied on the notion that Dr. Brinkley's programming evidenced his use of the station for private, personal purposes rather than for the public interest. Moreover, his programming might have been thought to be misleading and redolent of consumer fraud. Nevertheless, in both cases, content rather than structure was the underlying ground of non-renewal. *See also* Simons, *supra* note 7, at 863. *Cf.* *Mayflower Broad. Corp.*, 8 FCC 333 (1940) (renewing license but criticizing station for editorializing).

119. Federal Communications Commission, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 11-12 (1946) (establishing affirmative duty to consider program service in FCC public interest determinations). *See also* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 75 (1994).

120. Report and Statement of Policy, Re: Comm'n *en banc* Programming Inquiry, 44 FCC 2303 (1960), *aff'd sub nom.* *Suburban Broadcasters v. FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 US 821 (1962).

121. *Id.* at 2314.

triggered by percentages of programming.¹²²

Even under this regime, however, broadcasters had significant discretion as to what could be aired. The FCC did not dictate specific programming or viewpoints. In addition, the Commission began to focus on responsiveness to the community as a key element of licensees' public interest obligations after 1960, and increasingly distanced itself from criteria directly addressing programming. Having asserted that "[t]he principal ingredient" of the licensee's public interest obligation was the effort "to discover and fulfill the tastes, needs and desires of his service area,"¹²³ the FCC subsequently adopted a detailed policy for ascertaining community needs rather than continuing to rely on FCC-defined categories of public interest programming.¹²⁴

While retaining the public interest obligation for all broadcast licensees, the FCC in the *Deregulation of Radio*¹²⁵ and *Television Deregulation*¹²⁶ decisions significantly deregulated non-entertainment programming obligations. Rejecting the traditional listing of types of programming "usually necessary to meet the public interest,"¹²⁷ the Commission defined the licensee's programming obligation simply as the provision of issue-responsive programming to its community.¹²⁸ This procedural approach to performance requires broadcasters simply to maintain quarterly issues/programs reports reflecting their most issue-responsive programming for their communities.¹²⁹ Currently, besides enforcing the new

122. KRATTENMAKER & POWE, *supra* note 119, at 78-79.

123. Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, 44 FCC 2303, 2312 (1960).

124. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650 (1971).

125. *Deregulation of Radio*, *supra* note 44.

126. *Television Deregulation*, *supra* note 44.

127. Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, 44 FCC 2303, 2314 (1960).

128. *Deregulation of Radio*, *supra* note 44, at 977-82; *Deregulation of Radio*, Reconsideration Order, 87 FCC 2d 797, 804 (1981); *Television Deregulation*, *supra* note 44, 98 FCC 2d 1076, 1091 (1984). The deregulatory initiatives eliminated the FCC's formal process for ascertainment of community needs. Instead, the Commission requires renewal applicants to use any reasonable means to determine the issues facing their communities.

129. Along with the elimination of specific guidelines for the community ascertainment process, the radio and television deregulation decisions eliminated the requirement that commercial broadcast stations maintain program logs. Instead, the stations must place in their public inspection files quarterly reports listing programs that have provided the stations' most significant treatment of community issues during the preceding quarter. *Deregulation of Radio*, 104 FCC 2d 505, 506-07 (1986); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements of Commercial Television Stations (Reconsideration)*, 104 FCC 2d 357 (1986); 73 C.F.R. § 3526(8)(i), (9) (1996).

children's educational television requirements, the Commission does not regulate programming categories or specific requirements regarding the amounts of news, public affairs and non-entertainment programming to be aired.¹³⁰

Its turn to a vision of programming review focusing on consumer rather than FCC concerns may reflect the Commission's increasing sensitivity to the conflict between public interest license renewal and free speech interests.¹³¹ To the extent that the public interest standard would require the agency to select the best applicant by comparing specifics of hourly programming, such a review would be overly intrusive. Thus, even the FCC's "categorical" attempt to call for balanced programming—by elevating certain categories (such as news and public affairs)—could be seen as an attempt to make the selection process more objective and predictable.¹³² But applicants could easily enough structure their files to satisfy the FCC's articulated content standards.¹³³ The ascertainment model would call for even less FCC intrusion into the definition of the public interest.

After the early years, the Commission did not base non-renewal of licenses solely on programming.¹³⁴ The most common ground for non-

130. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 5 FCC Rcd 3092 (1990). The FCC adopted its new children's educational television rules on August 8, 1996. Broadcast Services; Children's Television, 61 Fed. Reg. 43,981 (1996) (to be codified at 47 C.F.R. pt. 73) They include a three-hour per-week processing guideline which will permit staff-level renewal approval.

131. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5181; Gehring, *supra* note 7, at 577; Donald Gruenwald, *Should the Comparative Hearing Process Be Retained in Television Licensing?*, 13 AM. U. L. REV. 164, 183 (1964); Weinberg, *supra*, note 47, at 1101. See KRATTENMAKER & POWE, *supra* note 116, at 78-79 (noting the strategic effect of "promise versus performance" renewal standards).

132. Weinberg, *supra* note 47, at 1123.

133. See, e.g., KRATTENMAKER & POWE, *supra* note 116, at 78-79. Cf. Jaffe, *supra* note 7, at 1695, 1697 (remarking on applicant tailoring of proposed programming prior to the 1965 Policy Statement); *Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) (noting that with any recipe-like selection system, "applicants would immediately start to adopt the specified ingredients solely to satisfy the Commission, and would feign them . . ."); *Central Fla. Enters.*, 86 FCC 2d 933, 1016 (1981) (arguing that integration and diversification factors should be less central in renewal cases because "[c]hallengers could easily structure their proposals to be superior to the incumbent's . . ."); Jonathan Blake, *FCC Licensing: From Comparative Hearings to Auctions*, 47 FED. COMM. L.J. 179, 180 (1994).

134. BARRY COLE & MAL OETTINGER, *RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE* 134 (1978) (noting that answers to programming questions on renewal questionnaires have never by themselves resulted in denials of renewal); FRANKLIN & ANDERSON, *supra* note 68, at 651-54; . See also *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and *United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (discussing FCC's renewal of license for

renewal was misrepresentation to the FCC and other non-speech-related considerations.¹³⁵ Even when the agency adopted a more procedural approach to public interest review and compared programming promises and performance, licenses were never assigned to others solely because the incumbent failed to live up to its prior programming promises.¹³⁶ While the agency purported to weigh the merit of the incumbent's past programming in order to assess the appropriate degree of renewal expectancy to be granted, in fact it did not compare the substantive programming evidence in order to select the "better" programming proposal pursuant to administrative criteria of good non-entertainment programming.

Consistent with its increasing disengagement from broadcast content review, the FCC expressed its doubts about the comparative renewal process. The 1970 policy statement implicitly cast doubt on the traditional comparative process. In 1976, the FCC explicitly recommended to Congress that it eliminate comparative renewal hearings.¹³⁷ It did so

WLBT despite clearly racist programming services); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (affirming FCC's renewal without hearing of station airing blatantly anti-Semitic programming).

135. FRANKLIN & ANDERSON, *supra* note 68, at 650-51; Weiss et al., *supra* note 69, 76-77 (also noting that "[p]rogramming related offenses . . . were usually part of a longer litany of charges against the licensee.") See generally Brian C. Murchison, *Misrepresentation and the FCC*, 37 FED. COMM. L.J. 403 (1985) (collecting renewal cases involving misrepresentation and criticizing FCC's approach).

136. COLE & OETTINGER, *supra* note 134, at 134; KRATTENMAKER & POWE, *supra* note 119, at 78-79. Even in uncontested renewal applications, the FCC's approach became increasingly less content-invasive. At first, the Commission applied an unquantified, general public interest standard. Then, it adopted quantitative, albeit informal, "processing guidelines" pursuant to which renewals would only be flagged for full Commission review if they did not meet certain amounts of specified categories of programming. See Weinberg, *supra* note 48, at 1123-24, 1187; COLE & OETTINGER, *supra*, note 134, at 137-43. POWE, *supra*, note 68. Then, it moved to a regime in which programming information did not have to be submitted for uncontested filings and renewals would be virtually content-free and automatic. Weinberg, *supra* note 48, at 1124; *Television Deregulation*, *supra* note 44; *Deregulation of Radio*, *supra* note 44; *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees*, 49 Rad. Reg. 2d 740 (1981), *aff'd sub nom.* *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983). Admittedly, however, the objectionable character of the licensee's broadcasts was one factor in a series of non-renewals in the 1960s and 1970s. Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221, 250 (1996).

137. Report of the FCC to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives Re: *The Comparative Renewal Process* (1976), *cited in Central Fla. Enters.*, 598 F.2d at nn. 4, 62; 1977 Report, *supra* note 95, at 429. See also COLE & OETTINGER, *supra* note 134, at 142; Brinkmann, *supra* note 79, at 100. The FCC again voted in 1981 to recommend to Congress that section 309 be amended to provide for a two-tiered approach to renewals. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process* (Notice of Inquiry), 88

on the ground that the process intrudes excessively into broadcaster discretion without spurring broadcasters to provide the best possible public service performance.¹³⁸ When Congress did not pass such reform legislation, the FCC commenced a rulemaking proceeding addressing reform of the renewal process,¹³⁹ “mak[ing] plain that the Commission would prefer to leave all programming considerations completely to the marketplace.”¹⁴⁰

The D.C. Circuit as well has been sensitive to the problems associated with FCC review of content in broadcast licensing. In the renewal context, the court has rejected “functional” approaches to the analysis of comparative factors because they implicate First Amendment concerns.¹⁴¹ The court has also recently voiced some fundamental doubts about the FCC’s role in comparative selection between mutually exclusive applicants for new licenses:

Common sense, not to mention the First Amendment, counsel against the Commission’s trying to decide what America should see and hear over the airwaves. Further, the ability to pick persons and firms who will be “successful” at delivering any kind of service is a rare one, however success might be de-

FCC 2d 120, 121 n.1 (1981).

138. It should be noted, however, that one of the Commission’s rationales for its view was that the existing criteria for evaluating license performance were adequate to assure adherence to the public interest standard. Those criteria were part of the renewal processing rules (subsequently eliminated in the radio and TV deregulation dockets).

139. Notice of Inquiry, *In re* Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process, 88 FCC 2d 120 (1981); Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Third Further Notice of Inquiry & Notice of Proposed Rulemaking, 4 FCC Red 6363 (1989). Of course, the Act mandated termination of the Commission’s proceeding considering reform of the comparative renewal process. Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 61 Fed. Reg 18,289, 18,290 (1996) (to be codified at 47 C.F.R. pts 1 and 73).

140. Notice of Inquiry, *In re* Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 88 FCC 2d 120, 131 (1981) (statement of Comm’r Fogarty concurring in the result).

141. See *Central Fla. Enters., Inc. v FCC*, 598 F.2d 37, 54 (D.C. Cir. 1978). See also *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) (rejecting FCC attempts to evaluate whether renewal in a given case would not only formally satisfy structural comparative criteria, but also actually advance the underlying goals of those criteria); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (upholding FCC’s elimination of programming questions in its uncontested renewal questionnaires so long as the agency had enough information to determine broadcaster compliance with FCC policies, despite dissent’s claim that statute requires individualized programming reviews for each licensee at renewal).

fined; that is why it commands generous rewards in the market.¹⁴²

B. *Assessments of the Change*

The history of comparative renewal demonstrates that, as a result of the extreme weight accorded to renewal expectancy, the notion of a full-fledged comparison between incumbent and challenger has historically been honored in the breach. Therefore, apart from the possibility that the competitive renewal process may, by its existence, have a deterrent effect on the incumbent, it is likely that Dean Krattenmaker is descriptively correct that the change in renewal process in section 204 of the 1996 Act will not itself lead to any results significantly different from those under the previous renewal regime.

Nevertheless, the legislative change suggests a change in ideology (or, at least, in rhetoric and symbol) and poses a normative question. As noted above, the FCC and the courts, in considering standards for license renewal, have been ambivalent about the balance between stability and competition. Despite a history of *de facto* automatic renewals, the licensing rhetoric has always been comparative. Selection of the best candidate has consistently been expressed as the public interest goal. To the extent that a critic might fault the FCC's comparative renewal process for the predictability of its results, she might blame the enforcement method rather than the notion of comparative renewal *per se*. Instead of taking that route (or even sticking with the traditional ambivalence and balancing), the new regime—with its elimination of comparative renewals and its preference for short-term renewal alternatives—opts entirely in favor of the stability norm. This raises the question of whether the elimination of comparative renewal is good or bad in principle.

In theory, comparative renewal could assure the best practicable service to the public in programming and enhance the independent goal of diversification. In principle, the renewal decision could rest not only on programming issues, but also on structural characteristics such as the effect of non-renewal on diversification in ownership of the mass media. Without such a process, advocates have claimed, the broadcast industry would be unrepresentative and increasingly lacking diversity.¹⁴³

142. *Bechtel v. FCC*, 10 F.3d 875, 886 (D.C. Cir. 1993).

143. See *supra* notes 2, 3 (regarding minority groups' views of the comparative process). See

As the *Citizens Communications Center* court noted, the comparative renewal hearing could theoretically serve to increase minority representation and ethnic sensitivity. Advocates of the comparative process would argue that without it, no serious mechanism of public accountability would be in place.¹⁴⁴

Even if broadcast licensees were virtually never displaced simply as a result of renewal challenges, without broadcaster misconduct, the possibility of such challenges could serve to discipline broadcasters in two ways. First, the possibility of challenges at renewal time may have a deterrent effect, generally constraining extreme licensee behavior. Second, the possibility of comparative challenges and petitions to deny might serve as bargaining chips to extract programming and other concessions from powerful incumbents.¹⁴⁵

Advocates of the pre-1996 Act status quo could also question whether these license-renewal and term-extension rules, when combined with the other aspects of the Telecommunications Act of 1996, will reduce diversity.¹⁴⁶ For example, although the 1996 Act does not entire-

also Gehring, *supra* note 7, at 597 (noting proponents' view that comparative renewal encourages licensees to strive to render the best possible service and provides a mechanism whereby excluded social groups such as racial minorities can gain access to the airwaves).

144. In assessing its abuse of process rules, the FCC stated that its reforms had been successful in the comparative renewal context in reducing the number of competing applications, suggesting that "settlement limitations are working to weed out non *bona fide* applicants in the comparative renewal context . . ." Amendment of Section 73.3525 of the Commission's Rules Regarding Settlements Among Applicants for Construction Permits, 5 FCC Rcd 3921, 3922 (1990). This suggests that even if a significant percentage of comparative renewal challenges were strategic in the past, the rule changes led to a pared-down process of *bona fide* competition. It is these *bona fide* competitors that the 1996 Act rule eliminates if the incumbent's operation passes muster. Advocates of the comparative process could argue that this change is particularly harmful because, although strategic comparative challenges filed only to extract settlement payments would not advance the advocates' substantive goals, *bona fide* competitors could mount precisely the kinds of challenges that would enhance broadcast diversity.

145. Minority groups have succeeded in the past in negotiating for diversity-related employment and program-improvement promises from incumbent broadcasters in return for pledges not to contest renewal applications. See, e.g., *Media Reform Through Comparative License - Renewal Procedures - The Citizens' Case*, *supra* note 5, at 930, 934; COLE & OETTINGER, *supra* note 134, at 228-29. Admittedly, this indirectly constraining effect is probably more relevant to petitions to deny by public interest groups than to comparative challenges by competing applicants because public interest groups interested in program promises are not likely to seek to operate the incumbent's station. Although the new Act does not eliminate petitions to deny, its structural preference for short-term renewals over flat denials also reduces the possibility of such strategic uses of petition withdrawals.

146. "Diversity" has always been a multi-layered notion in broadcasting. In its *1965 Policy Statement*, for example, the FCC stated that promotion of diversification of control was one of its two central regulatory goals (the other being "best practicable service to the public"). Policy Statement on Comparative Broad. Hearings, 1 FCC 2d 393, 394 (1965). [hereinafter 1965 Poli-

ly eliminate the structural regulations with regard to broadcast ownership, it makes significant changes in the anti-concentration rules.¹⁴⁷ A number of mega-mergers already have taken place in the telecommuni-

cy Statement]. The Commission saw value in diversity both as "a public good in a free society" and because it is desirable "where a government licensing system limits access by the public to the use of radio and television facilities." *Id.* Increasing competition and diversity is said by the FCC to lead to two positive results: broadened access to the broadcast medium and the probability of a diversity of views on the air. By the 1950s, the FCC had developed the ownership issue into "a positive policy of assuring maximum diversity of ideas through the diffusion of media ownership." Hyde, *supra*, note 7, at 262. This criterion was deemed inherently desirable. *Id.* at 263. Broadened access to the mass media was in turn seen as a particular potential benefit to minority groups previously excluded from station ownership. See Gehring, *supra* note 7, at 597. In 1969 and 1970, advocates of comparative renewal argued against its elimination on the basis of concerns about both ownership and content diversity. See *supra* notes 1-3.

Some have disputed the FCC's position that diversity in programming follows deconcentration. For a recent argument that only concentrated broadcasters can market high quality programming in a competitive leisure market, see Chen, *supra* note 17, at 1445, 1448-49, 1486-89 (relying on broadcast economists' claims that monopoly in a locality could enhance diverse programming). *But cf.* KRATTENMAKER & POWE, *supra* note 119, at 42-43 (suggesting that even if monopolists offer more choices in some ranges, diversity of programs is to be expected once firms become numerous). It is beyond the scope of this Comment to analyze the strong claim connecting monopoly and diversity and to distinguish the embedded concepts of high quality programming, format diversity, and viewpoint diversity. Suffice it to say that advocates of comparative licensing who rely on the process' potential to enhance diversity argue that there are separate benefits to be gained from both ownership and content/viewpoint diversity. They also suggest a specific correlation between minority ownership and an increase in programming aimed at minority audiences. See *id.* at 100. See also *Comparative License*, *supra* note 72, at 1812 (arguing that excessive emphasis on renewal expectancy "interferes with the policy favoring an increased number of voices in the broadcast industry, a policy which is served by taking into account . . . diversification and minority participation." (footnote omitted)). *Id.*

147. Telecommunications Act of 1996 § 202, 110 Stat. at 110-11. As marked by Dean Krattenmaker, the Act eliminates the restrictions on the number of radio and television stations that can be owned nationally by one entity (although it does retain a national audience cap for television). § 202(a), (c), 110 Stat. at 110-11; KRATTENMAKER, *supra* note 18, at 168-69. Local restrictions are still in place, however. For example, restrictions on the number of radio stations that a party can own in one market are retained, with the specific upper limit of ownership to be determined depending on the size of the market. Telecommunications Act of 1996 § 202(b)(1), 110 Stat. at 110. Prohibitions on television "duopoly"—ownership by one entity of more than one television station in a market—are also retained, although the Act requires the FCC to determine whether to retain or modify the rule. Telecommunications Act of 1996 § 202(c), 110 Stat. at 111.

Commentators note that the remaining restrictions on multiple ownership at the local level are "largely a concession to the Clinton administration" because of its concern that complete elimination of the rules would result in undue media concentration and reduced diversity and localism. Fordham Symposium, *supra* note 16, at 520-21 (comments of Antoinette Cook Bush). Changes in administration priority could lead to changes in these rules. This is particularly possible because the statute requires a biennial review by the FCC. Telecommunications Act of 1996 § 202(h), 110 Stat. at 111-12.

cations world.¹⁴⁸ Under these circumstances, and in light of the Act's antitrust-gearred anti-concentration approach (rather than the more expansive commitment to diversity under the prior Communications Act regime), those who would wish to maximize diversity for its own sake and to promote minority voices might wish for a stringent comparative renewal process in lieu of the total abdication in the new Act.¹⁴⁹

Yet, comparative hearings for renewals have been subject to searing criticism for numerous failings. The comparative renewal process under the 1934 Act has been consistently criticized for, among other things, expense, subjectivity and inconsistency.¹⁵⁰ It has been particularly challenged because of the active market in station licenses.¹⁵¹ It has been

148. The most recent of the agglomerations has been the announced purchase of the Infinity radio stations by the newly combined Westinghouse-CBS entity. Steve McClellan, *The Remaking of CBS*, BROADCASTING & CABLE, July 15, 1996, at 4-5. *But see Westinghouse/Infinity Merger Opposed*, BROADCASTING & CABLE, Sept. 2, 1996, at 20 (noting Spectrum Detroit's petition to deny). *See also* Fordham Symposium, *supra* note 16, at 523-24 (comments of Antoinette Cook Bush, forecasting "continued consolidation and vertical integration in the broadcast industry"); Chen, *supra* note 17, at 1420, 1458, 1489-91 (noting concentration and consolidation in mass communications and mergers involving the networks).

149. Admittedly, mergers do not decrease minority ownership if they merely consolidate non-minority owned enterprises. But neither do they increase the diversity that the FCC has in the past touted both for its own sake and for its contribution to a robust marketplace of ideas. In addition, even mergers that do not affect minority ownership may decrease the diversity of content, ideas, and viewpoints. Rejecting projections that the market will dictate an appropriate level of diversity of ideas regardless of firm structure and ownership, advocates of the comparative renewal process would surely take the reduction in the FCC's structural regulations as suggesting that the renewal process should carry the weight of enhancing diversity of all sorts.

150. *See, e.g.,* Anthony, *supra* note 6, at 39-50; Michael Botein, *Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation*, 6 GA. L. REV. 743, 752-54 (1972); Geller, *supra* note 7, at 501-03, 511-13; Jaffe, *supra* note 7, at 1695, 1700; Wentz, *supra* note 7, at 397-98. *Cf.* Henry Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1067 (1962) (on failings of comparative criteria in initial licensing contexts). *See also* Tollin & Kirk, *supra* note 7, at n.3 (on cost of renewal challenges); Spitzer, *supra* note 26, at 999; *Citizens Communications Ctr.*, 447 F.2d at 1205 n.7 (on expense of application in top markets); *Monroe Communications Corp. v FCC*, 900 F.2d 351, 359 (D.C. Cir. 1990) (Silberman, J., concurring) (calling all renewal factors "in a sense fictitious").

151. The reason is that, after the initial license has been assigned, there are few realistic limitations on the further transfer by the licensee of that station. Under § 310(d) of the Communications Act of 1934, license transfers do not require a full-fledged hearing in which other applicants can be reviewed comparatively with the proposed transferee. *See* 47 U.S.C. §301(d). Instead, the FCC is permitted to engage in a review of whether or not the proposed transfer would be inconsistent with the public interest. In practice, that review is not searching. Even in the recent past, the FCC has approved transfer applications despite charges that the proposed transferee would be an inappropriate license holder. *See, e.g.,* Steven A. Lerman, Esq., 74 Rad. Reg. 2d 743, 9 FCC Rcd 7112 (1994) (permitting assignment of radio station to Infinity Broadcasting Corp. despite objections that assignee was unfit due to violations of indecency

condemned for failing even on its own terms because of the overwhelming role of the renewal expectancy.¹⁵² It has also been charged with being inherently and definitionally unworkable.¹⁵³

With regard to the claimed disciplining effects of the comparative renewal process, indirect bargaining for the public interest may not be the best and most efficient option from a policy-making prospective. It may well be that, as a society, we would be better off if the FCC were to impose and truly enforce strict equal-employment-opportunity requirements rather than permit the piecemeal elaboration of policy initiatives through comparative renewal challenges and strategic deployment of petitions to deny. At a minimum, such processes raise the question of which public interest groups have been involved in negotiations with broadcasters.¹⁵⁴ Moreover, the Commission has been implementing various rules in its "abuse of process" dockets that make it harder to use the renewal process strategically.¹⁵⁵ In addition, the deterrent value of the comparative hearing is not easily quantified. While the potential expense of the hearing process must have had some constraining effect on broadcasters over the years, a history of renewals of even egregiously bad stations must have reassured broadcasters that a broad range of performance would be deemed to warrant the virtually determinative effect of renewal expectancy.¹⁵⁶

When comparative renewal is nothing more than an expensive for-

rules by the Howard Stern Show broadcasts on its other situations).

In addition, the FCC eliminated its three year anti-trafficking rule in 1982. Amendment of the Commission's Rules Regarding Applicants for Voluntary Assignments or Transfers of Control, 47 Fed. Reg. 55,924 ¶ 28 (1982), *cited in* *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993). (From 1962 to 1982, the FCC's policies had discouraged assignments of stations held for less than three years. Procedures on Transfer and Assignment Applications, 32 FCC 689, 691 (1962), *cited in* *Bechtel*, 10 F.3d at 880.) The agency declined to reinstate the rule in 1989. Amendment of section 73.3597, 4 FCC Rcd 1710, 1710 ¶ 4 (1989), *cited in* *Bechtel*, 10 F.3d at 880. It did, however, adopt a one-year holding period for stations won in comparative hearings. *See Bechtel*, 10 F.3d at 879-80. Thus, the notion of imposing the extreme cost of comparative licensing renewal hearings on all parties seems, to critics, to be inconsistent with the rest of the fluid market in broadcast properties.

152. *Citizens Communications Ctr.*, 447 F.2d at 1204.

153. *See, e.g.*, 1977 Report, *supra* note 95, at 429; Anthony, *supra* note 6, at 111-12; Brinkmann, *supra* note 79, at 93; Gehring, *supra* note 7, at 574, 589. *Cf.* Wentz, *supra* note 7, at 391.

154. *See* COLE & OETTINGER, *supra* note 134, at 229-32.

155. *See supra* notes 43, 144.

156. *See* *Victor Broad., Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983) (affirming renewal of station duplicating programming of other co-owned station in market); POWE, *supra* note 69, at 90-92 (describing the extraordinary WLBT story); Geller, *supra* note 3, at 489-96 (describing *Moline* and *KHJ-TV*).

mal exercise to confirm an incumbent, it is entirely wasteful and inefficient. Even when it is undertaken seriously and in good faith, its value depends on the assumption that the FCC can determine the better applicant—and, indeed, that there is the possibility of an incontestable consensus on what would be better service and who would provide it. Criticisms of the comparative renewal process do not have to rest on the allegation that the FCC was disingenuous in its application of renewal standards. In the end, it may be that the FCC cannot meaningfully choose between applicants and identify the “best” applicant in a comparative renewal hearing. The comparative hearing only gives the Commission the choice of competing applicants. At most, even in theory, it could only pick the “better” candidate. Moreover, it may be that the Commission is particularly unable to pick the best applicant if it cannot make direct content distinctions. After all, it is likely that all applicants are reasonably qualified or can make their applications so appear.¹⁵⁷ Even if it could properly make content comparisons, on what basis could the FCC legitimately select among programs? Such comparative analysis cannot be done without a normative basis. Selecting one party over another is not a value-neutral choice. Both the criteria selected for comparison and the application of the selection criteria are fully normative. For example, even if the FCC could uncontroversially select the better applicant from the programming vantage point, it would often have to choose between the applicant with good programming and the applicant with other desirable characteristics. That broadcast regulation historically has had multiple (and sometimes conflicting) goals will necessarily be reflected in the renewal process.

At some level, the ideal-type of the comparative hearing process places a lot of content-related responsibility in the FCC’s hands.¹⁵⁸ One

157. See *Central Fla. Enters.*, 598 F.2d at 59 n.7 (quoting Judge Leventhal’s dissent in *Star Television, Inc. v. FCC*, 416 F.2d 1086, 1089, 1094-95, cert. denied, 396 U.S. 888 (1969) in which he expressed doubt about the FCC’s ability to distinguish on principle among all the reasonably qualified candidates in comparative hearings).

158. The best arguments against the comparative hearing are that it potentially involves the FCC in excessive content review of broadcasters’ editorial discretion and does not provide sufficient benefits to outweigh its costs. I thank Dean Krattenmaker for his suggestion that opponents of the comparative hearing might focus on the many other ways to improve programming—for example, by expanding outlets and covering costs. This approach would lack the disadvantage associated with comparative hearings requiring impossible comparisons between the value of encouraging investments and the value of competing promises as to programming. By contrast, the mere recitation of the fact that hearings are lengthy and expensive does not necessarily lead to any particular conclusion. There are alternatives to throwing out the baby with the bath water. For example, one might require limitations of time for the hearings, or limi-

might think it troubling to have the FCC decide which would be the "best" of the competitors. Given that the selection is not a value-neutral task, there could be significant constitutional problems with a truly full-fledged comparative process as potentially envisioned in the CCC case. As is demonstrated by the uncomfortable response of the D.C. Circuit in circumstances in which the FCC did use a functional, content-oriented approach, a very searching type of content-oriented role for the FCC is disturbing.¹⁵⁹

In addition to the First Amendment-based anxiety about searching content comparisons, there is also the practical uncertainty about comparative hearing criteria in a post-*Bechtel* world.¹⁶⁰ In *Bechtel v. FCC*, the D.C. Circuit struck down the integration of ownership and management as an arbitrary and capricious standard in comparative hearings for new license assignments.¹⁶¹ Moreover, some doubt may be cast on

tations on the permissible amount of data on key issues. The winner of the hearing could be required to pay large fees except as waived for educational groups or underrepresented groups. This would create incentives for faster and better hearing processes. Other reforms as well might be suggested. Thus, the litigation-like character of hearings in the past need not serve as an impenetrable barrier to process reforms in the future. Even if the hearings were changed procedurally, however, far more serious problems with the comparative process would remain.

159. See *supra* text accompanying notes 141-142.

160. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). See also Lee G. Petro, *A New Trial for Solomon: Comparative Hearings After Bechtel II*, 4 COMM. L. CONSPICUOUS 221 (1996).

161. Prior to *Bechtel*, the FCC had a comparative policy of preferring applicants who promised that the station's owners would participate in its management. Although such an "integration" criterion had its roots in early FCC cases, see *Bechtel*, 10 F.3d at 877, it was most strongly articulated in the *1965 Policy Statement*, 1 FCC 2d 393 (1965). There, the Commission said that integration of ownership and management was both inherently desirable and more likely to lead to "the best practicable service." *Id.* at 395. The *1965 Policy Statement* and subsequent rulings provided that integration credit for a competing applicant could be "enhanced" by such factors as local residence in the proposed service area, civic participation, and minority status. *Id.* at 395-396.

The court in *Bechtel* held that continued application of the integration preference would be arbitrary and capricious. 10 F.3d at 887. It did so because the Commission's rules did not ensure permanent integration, *id.* at 879-80; because of the lack of evidence regarding the policy's benefits, *id.* at 880-81; because of the excessive weight of the integration factor, *id.* at 881-82; and because the court did not accept the FCC's positive arguments for integration, *id.* at 886. It found that the integration policy did not serve the FCC's stated goal that "stations perform better when managed by those with the 'most direct financial interest' in the venture." *Id.* at 882-83. The court found "trivial" the goal that day-to-day management decisions be made by those with the greatest legal responsibility for the station. *Id.* at 883-84. It discounted the FCC's arguments that integrated owners are more likely than absentee owners to have an active interest in the station's operations, *id.* at 884, and that on-site owners have better sources of information. *Id.* at 884-85. Finally, with respect to the FCC's claim of greater objectivity for the integration factor as a structural rather than content-based criterion, the court concluded that such objectivity is "illusory," with "every step . . . packed with subjective judgments, some

the diversification criterion as the basis for initial licensing decisions under the 1965 Policy Statement on comparative hearings. The Telecommunications Act of 1996 makes significant changes in the multiple ownership rules that affect radio and television.¹⁶² It may well be, then, that the traditional application of the diversification criterion under the 1965 Policy Statement would no longer be appropriate under the changed assumptions about competition underlying the 1966 Telecommunications legislation. Furthermore, the FCC still has not closed its pending proceeding on standards for comparative hearings, leaving the process currently in limbo.¹⁶³

Finally, some would argue that in a world in which so many other information and entertainment options are available to the public, we need not worry as much as we otherwise might about the FCC's ability to select the "best" possible broadcaster. Fans of deregulation might argue that choice and competition—particularly because over-the-air broadcasting is only one of an increasing array of information sources available to the American public—mean that consumers would be able to express their programming preferences and have them met.¹⁶⁴

generic, some ad hoc." *Id.* at 885.

162. See *supra* note 144. See also Margaret L. Tobey & Phuong N. Pham, *The Broadcast Ownership Provisions of the Telecommunications Act of 1996*, 14 COMM. LAW. 6 (Summer 1996); Fordham Symposium, *supra* note 16, at 520-28 (comments of Antoinette Cook Bush describing ownership provisions and industry consolidations); Robert A. Burka, *New Radio Limits Raise Antitrust Concerns*, BROADCASTING & CABLE, Apr. 29, 1996, at 23.

163. Proposals to Reform the Commission's Comparative Hearing Process, Report and Order, 6 FCC Rcd 157 (1990); *In re* Reexamination of the Policy Statement on Comparative Broadcast Hearings, Notice of Proposed Rulemaking, 7 FCC Rcd 2664 (1992); Further Notice of Proposed Rulemaking, 8 FCC Rcd 5475 (1993); Reexamination of the Policy Statement on Comparative Broadcast Hearings, Second Further Notice of Proposed Rulemaking, 9 FCC Rcd 2821 (1994). For a nice summary of the problems with the 1965 Policy Statement, see Weinberg, *supra* note 47, at 1116-20. *Bechtel* led the FCC to freeze both comparative renewal applications and mutually exclusive proposals for new broadcast facilities while it examined its comparative criteria. FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994); Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689 (1994). The FCC's delay in resolving the comparative process issue led to the filing of a recent lawsuit seeking to compel adoption of new criteria for selection among mutually exclusive applicants for new broadcast stations. Harry A. Jessell, *Radio Applicants Take FCC to Court*, BROADCASTING & CABLE, Sept. 2, 1996, at 20.

164. See Second Further Notice of Inquiry & Proposed Rulemaking, *supra* note 43, at 5186; Chen, *supra* note 17, at 1505-06 (arguing generally that intermodal competition constrains market power even of large, consolidated entities and that regulation by the FCC is misguided and harmful). As I rely principally on other harms associated with the traditional comparative renewal scheme, a searching assessment of this claim is unnecessary. However, this rationale for deregulation is contested by fans of regulation, particularly in a climate of consolidation, because of doubts about the current extent of intermodal competition, and in light of the advertiser-supported character of broadcasting. Moreover, the argument is based on an assumption that

Given the demise of the integration criterion, the discomfort with extremely searching comparisons of content or format, the changes in the diversification and anti-concentration rules under the Telecommunications Act of 1996, and the continuing FCC inquiry on comparative hearing standards, there is a nice question of precisely what a comparative renewal hearing would have looked like if section 204 had not been passed. Apart from the affirmatively beneficial results posited by Dean Krattenmaker,¹⁶⁵ I think there are good policy reasons to avoid an invigorated conception of the comparative renewal hearing process.

Ultimately, perhaps Dean Krattenmaker is right to focus not on the ideal type of a comparative hearing, but rather on the traditional process itself. Perhaps the real answer to the question of diversity of ideas and ownership is that comparative renewal hearings did not in practice support that goal in the past, and that, therefore, we should simply and directly achieve diversity *inter alia* through well-crafted minority-ownership policies enforced by the FCC.¹⁶⁶ In statutorily recognizing that comparative renewal hearings did not work, Congress opted not to reaffirm the traditional rhetoric of the comparative mechanism of selec-

the satisfaction of indirectly expressed consumer preferences, rather than a vision of superior programming, is the appropriate goal of public policy. After all, it may be that consumers want "merely average" service. Then the market will not promote superior service instead of mediocre programming. This deregulatory justification thus begins from a vantage point far removed from the traditional aspiration that comparative criteria be used to discern those applicants capable of providing "superior" service.

165. Ultimately, Dean Krattenmaker makes an empirical claim in his piece (although not strongly) that administrative and regulatory costs could be avoided by broadcasters as a result of the changes in the broadcast licensing rules. Dean Krattenmaker does not specifically identify the cost savings he posits. One might presume that the savings would concern comparative hearing and legal fees. While that cost could potentially be quite high, it is questionable whether the new rule in fact necessarily diminishes such fees. Might it not in fact cost significant sums to show that an incumbent has been following the rules? Moreover, to the extent that there has been a strong renewal expectancy in the historical record, I am not sure about the accuracy of Dean Krattenmaker's claim that the rule change is likely to have a positive effect on programming and talent contract terms. As renewal has been par for the course, in practice, one would expect that concerns about non-renewal would not have significantly affected contract negotiations involving the typical broadcast station under the old regime. Therefore, one might wonder with Dean Krattenmaker about the significance to contract negotiations of the formal elimination of comparative renewal.

166. Admittedly, the question of diversity in ownership is perceived as requiring careful FCC study in light of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). The FCC is currently engaged in a review of its minority-oriented policies in light of that decision. Chairman Hundt has publicly reaffirmed his commitment to "continuing the cause of including minorities and women in the communications revolution." Federal News Service Washington Package Transcript, National Press Club Luncheon Speaker Reed Hundt, July 27, 1995.

tion. Yet, in changing the renewal procedure, it did not eliminate FCC discretion and the possibility of more direct FCC impact on broadcaster conduct via the renewal mechanism.

II. SUBSTANTIVE RENEWAL STANDARDS AND THE BASIS FOR A NEW "DEAL"¹⁶⁷

Although it eliminated the comparative hearing and the conceit that the FCC could select the best broadcaster from such a comparison, Congress did not in fact go very far in the new Act's license renewal provisions. It did not take the opportunity completely to eliminate the notion of the public interest from the licensing process. Instead, it provided a non-comparative renewal standard leached of explicit content and capable of serving as an invitation to radically different kinds of governmental intervention. By contrast to this view, Dean Krattenmaker's article could be read not only to propose that section 204 makes a modest change, but also to assume a relatively narrow, compliance-based interpretation of the 1996 Act's renewal requirements.¹⁶⁸ In fact, I think that substantively this new statute is quite open-ended.

Strikingly, by contrast to the extent to which the legislation micro-manages standards—for example, with regard to local ownership restrictions—the new Act does not define the renewal standards to be used in connection with section 204. In its April 12, 1996 Order implementing the broadcast license renewal provision of the Act, the FCC adopted a two-step renewal procedure pursuant to which comparative renewals are eliminated with respect to renewal applications filed after May 1, 1995. The Order, which restated the statutorily described process, explicitly declined to provide definitions of the renewal standards to be used. It stated simply that: "[i]t is our present intent to continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the new renewal process."¹⁶⁹ This leaves the future very open and reinforc-

167. Hundt & Kornbluh, *supra* note 30.

168. See also PETER W. HUBER ET AL., THE TELECOMMUNICATIONS ACT OF 1996 69 (1996) (concluding that the elimination of comparative hearings "will limit the FCC's ability to deny renewals on the basis of program content").

169. Order, *In re* Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 61 Fed. Reg. 18,289 (Apr. 25, 1996). The Commission released a Notice of Proposed Rulemaking on the question of extending broadcast license terms to eight years as permitted (but not mandated) by §203 of the 1996

es a significant amount of discretion in the FCC.

The standard for renewal as defined by the 1996 Act has two parts: the affirmative prong of public interest operation and the compliance element.¹⁷⁰ With regard to the question of operation in the public interest, neither the statute nor the FCC answers the question of how one is to test such operation.¹⁷¹ Ignoring, for the moment, any constitutional problems, one possibility is to have the FCC engage in a subjective evaluation of whether the station has operated in the public interest. Even that subjective evaluation could be either about content, or about structural issues, or both. Yet another possibility is to eschew a subjective review by the FCC of the desirability of a station's programming in favor of a procedural approach focusing on issue-responsiveness. Some have read this into the Commission's statement of intention to continue to apply existing precedent in the renewal context. They have concluded that the public interest requirement of the new Act will be deemed satisfied by licensees' showings of programming responsive to ascertained community issues.¹⁷² If we focus on the Commission's renewal history in 1995, we might conclude that even under the new legislation, the most likely cause for denial of renewal applications would be violations of FCC ownership rules, lack of candor before the Commission, or inadequate compliance with equal employment opportunity requirements.¹⁷³ In keeping with the radio and television deregulation Orders' preference for procedural reviews of content,¹⁷⁴ the issue-responsiveness approach would address the question of public interest operation at a rather minimal, unintrusive level of review. Particularly in light of the meager showing required by the quarterly issues-programs lists that broadcasters have filed since the deregulation decisions, the public interest operation standard could be close to a dead letter from the point of view of programming if no more stringent review of issue-responsiveness is to take place by the FCC.

Act. NPRM in Docket No. 96-90, 61 Fed. Reg. 17,864 (Apr. 23, 1996).

170. See *supra* text accompanying notes 10-15.

171. As Professor Glen Robinson has put it, "plainly the 'public interest' phase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy-maker (under the supervision of the courts, of course)." Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 16 (Max D. Paglin, ed., 1989).

172. See, e.g., Mark D. Schneider, *Renewal Procedures and Expectancy Before and After the Telecommunications Act of 1996*, 14 COMM. LAW. 9, 10 (Summer 1996).

173. *Id.* (listing and characterizing grounds of recent non-renewal cases).

174. See *supra* notes 125-29.

The compliance aspects of the standard are similarly undefined. Each could be narrow or broad. For example, what should count as a serious violation? How are we to define the notion of violation? Will we limit it to adjudicated violations? Even with regard to the more minor infractions, how is the FCC to determine what should count as a pattern of abuse? Overall, the question remains against what the concept of compliance is to be tested. Moreover, the 1996 Act does not provide any guidance for or limitations on the kinds of rules and regulations the FCC can adopt in articulating its presumptive understanding of the public interest or its regulatory role. In other words, while the renewal or non-renewal of a station's license depends on whether serious violations of such rules have been proven, or upon whether non-serious violations are sufficient in number to amount to a pattern of abuse, the legislation does not provide any limitations on the substantive regulations as to which those assessments should be made. Therefore, the question of whether the non-renewal provision of the Act should be considered retrogressive or progressive from a civil libertarian's point of view would seem to depend largely on whether or not the FCC rules which are to serve as the benchmark in the renewal process are themselves formal and editorially unintrusive.¹⁷⁵

Dean Krattenmaker has noted in his article that if stations comply with FCC rules, they probably will be automatically renewed.¹⁷⁶ A totally deregulatory FCC would lead to automatic renewal for perfectly average compliance and little if no content review. At best, in keeping with notions of the public interest in a post-deregulation world, the only significant question for the FCC would be whether some issue-responsive programming had been aired by a station as described in its quarterly issues-programs reports. This would not be significantly different from current enforcement standards.

On the other hand, the statute may leave a significant opening for the FCC to put a particular kind of bite into the renewal process. To the extent that the agency reads the criterion of operation in the public-interest as a separate requirement with actual content—and, indeed, as addressing programming content—it could use the new statute as an occasion for direct-content regulation as a *quid pro quo* for the removal or diminution of structural constraints. Public statements by Reed Hunt,

175. I mean here to refer to traditional free speech/press advocates. It should be noted that the First Amendment is also invoked in the broadcasting context by those who argue for regulatory interventions in behalf of "the public's right to know."

176. See Krattenmaker, *supra*, note 18 at 134.

Chairman of the Commission, suggest a particular vision of such direct content involvement.¹⁷⁷

Chairman Hundt has dismissed the FCC's traditional rules to safeguard the public interest as "vague to the point of meaninglessness."¹⁷⁸ While characterizing the current requirement of issue-responsive programming as "a laudable goal," he has despaired that its "meaning in practice is hopelessly indeterminate."¹⁷⁹ Accordingly, he has identified a "turning point" in the history of broadcasting and called for a change in the FCC's requirements of its licensees.¹⁸⁰ Asking broadcasters to "renew the deal" between themselves and the public "in a way that gives meaning to [their] public interest responsibilities," the Chairman has signaled a new and different interpretation of the licensee's mandate to operate in the public interest, convenience and necessity.¹⁸¹

Chairman Hundt's approach suggests that the public interest requires certain limited kinds of programming obligations for broadcasters, to be targeted for renewal review by the FCC:

This option entails translating the broadcasters' duty to serve the public interest into a limited number of clear and concrete requirements—rules that are understandable and enforceable If we renew the public's deal with broadcasters, these few specific public interest requirements would be virtually the only requirements on broadcasters. The FCC would continue to extract itself from the business of meddling in the strictly commercial aspects of broadcaster's businesses. But we would have to agree, finally, to real requirements for broadcasters.¹⁸²

Chairman Hundt identifies these obligations as based on Congressional concerns and not self-generated FCC requirements. For example, he focuses specifically on Congressional guidance in four areas: the need for children's educational programming under the Children's Television Act of 1990; the 1934 Act's requirements that radio and television broadcasters provide equal opportunities and, when relevant, the lowest-

177. Reed E. Hundt, *The Public's Airways: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996); Hundt & Kombluh, *supra* note 30.

178. Hundt & Kombluh, *supra* note 30, at 12.

179. *Id.* at 13.

180. *Id.* at 11.

181. *Id.* at 16.

182. *Id.* at 16.

unit charge for political campaign advertising; the prohibition on indecent broadcasts outside of a safe harbor pursuant to the Public Telecommunications Act of 1992; and the 1996 Act's own requirement that television manufacturers install "V-chips" to help parents block exposure to sexual or violent or other indecent material.¹⁸³

Having identified the areas of importance to Congress, Chairman Hundt suggests that the FCC regulate in those areas by adopting objective and verifiable criteria for all of them.¹⁸⁴ He is interested in promoting "clear, unambiguous, concrete, and tradable duties."¹⁸⁵ Consistent with this view, for example, the FCC has recently required that broadcast licensees provide three hours of educational programming per week to satisfy a renewal-processing guideline.¹⁸⁶ A new type of regulatory mind-set, which might be described as antitrust-based, appears to be behind this approach. In the view of Chairman Hundt, for example, the market should prove regulatorily adequate to permit the flourishing of

183. See Hundt, *supra* note 177, at 1089-90. Chairman Hundt has alerted us that: [it] is time for a sea change in FCC policy and practice regarding the public interest standard. The Commission should aim to promulgate a few clear rules that set forth concrete requirements, are testable in court by any broadcaster who objects to their application, and are enforceable by the FCC in a predictable manner that makes license renewal proceedings efficient and meaningful. In particular, with regard to positive requirements, broadcasters should be required to provide a specific amount of educational programming for children. In addition, we need a new deal providing candidates with free access to the airwaves. With regard to negative requirements, broadcasters ought not show indecent or violent programs during the day or evening hours, when large numbers of children are likely to be in the audience. However, broadcasters might be permitted to show programming suitable only for adults at earlier times of night if they rate their shows so that they can be read and screened out by computer chips in televisions, set-top boxes, or other such devices.

Id. at 1096.

184. See Hundt & Kornbluh, *supra* note 30, at 16: There are two choices for how we can proceed. As a society, we can renew the deal between broadcasters and the public in a way that gives meaning to the public interest responsibilities of broadcasters If broadcasters reject these terms, then the public may consider an alternative: giving up on the deal and starting all over. Broadcasters would have no public interest requirements. They would have no special privileges either.

Id.

185. See *id.* at 19; See also Hundt, *supra* note 177, at 1094.

186. Report & Order, Broadcast Services; Children's Television, MM Docket 93-48, 61 FR 43981, 1996 FCC LEXIS 4306 (Aug. 8, 1996). The new rules define core children's educational programming and provide that if a station has regularly aired at least three hours per week of such programming between 7:00am and 10:00pm, it will have the Children's Television Act portion of its license renewal application approved by the Commission staff automatically. See 47 C.F.R. § 73.671 (1996). See also Lawrie Mifflin, *It's Now Law: 3 Hours of Children's TV!*, N.Y. TIMES, Aug. 9, 1996, at A16.

broadcast speech except in a few identified areas of market failure. There, it would be appropriate to establish objective and concrete content requirements in order to provide market correctives. Accordingly,

this means the FCC should deregulate virtually all commercial aspects of broadcasting, because they are best left to the market, while we improve our rules in those areas where market forces will not deliver the services Congress and the public interest require. Congress has determined that market forces are unlikely to produce desirable amounts of children's educational programming and campaign information, and may produce a "race to the bottom" with respect to indecency and violence.¹⁸⁷

Depending on how it is in fact enforced, this might be seen as a contractarian sort of administrative model.¹⁸⁸ In other words, according to this model, the FCC would give up the possibility of a direct role in overall content review. A Commission with Chairman Hundt's agenda would not be interested in administrative correction of the overall "vast

187. Hundt, *supra* note 177, at 1091. With respect to children's educational programming, for example, Chairman Hundt has argued that because "[a]dvertising dollars follow desirable viewers . . . [and] children constitute a smaller potential audience than adults . . . [m]arket forces in this instance work in opposition to the interests of society" Hundt & Kornbluh, *supra* note 30, at 15. Therefore, regulatory requirements that broadcasters air children's educational programming are necessary to adjust the reality that "[a]dvertisers value children less than adults as a potential market, but society benefits more from educating children than from entertaining adults." *Id.* Otherwise, "[i]f broadcasters are not obligated to provide public interest programming that the market fails to generate, . . . it will be exceedingly difficult to explain to the American people why digital spectra worth billions of dollars should be given to broadcasters and not auctioned to the highest bidder." *Id.* at 17.

188. The Chairman's "deal" and "contract" rhetoric is pronounced. In a speech at the National Press Club, for example, he proposed that "broadcasters in each community should develop a contract for kids and community:"

In each market all broadcasters would state concretely and specifically how they intend to give parents a choice of high quality, decent, non-violent and educational programming. And how they would give parents in the community the power to choose it. In each market broadcasters would tell their audience, at the beginning of the period of their licenses to use the public airwaves, what exactly they intend to do for kids and the communities they serve. And then we at the Federal Communications Commission would base the renewal of these licenses on the success or failure that the broadcasters had in performing the way they promised. Market by market the broadcasters contracts for kids and community would give real meaning on a local level to public interest obligations. No more vagueness, no more confusion. In each market we would have clear commitments by which to measure whether broadcasters have met their public interest obligations.

Federal News Service Washington Package Transcript, National Press Club Luncheon Speaker Reed Hundt, July 27, 1995.

wasteland" of television.¹⁸⁹ This would be an attractive option, given the constitutionally questionable role of such direct overall content review.¹⁹⁰ Yet the Hundt FCC could develop a new contractarian model of regulation in which broadcasters enter into social contracts with regard to identified areas of expected market failure, in return for which they are otherwise subject to minimal regulation. This means, then, a regime of structural deregulation, joined with direct but targeted content regulation. A contractarian Commission would also give up indirect and quasi-procedural content directives such as the fairness doctrine, all in return for assertedly specific, objective and easily enforceable criteria for certain kinds of programming obligations, both negative and affirmative.¹⁹¹

The model of an interventionist agency with a public mandate to spur the most powerful mass medium to provide programming in the public interest—that is to say the FCC of the Kennedy administration—was followed by the FCC of the Reagan administration, with its wholesale deregulatory bent on both the content and structural fronts. Newton Minow, President Kennedy's FCC Chairman, publicly challenged broadcasters to do something about the vast wasteland on television.¹⁹² Mark Fowler, FCC Chairman under President Reagan, said television is nothing more than a toaster with pictures.¹⁹³ The Reed Hundt Commission—enabled by the fact that the Congress did not define the public interest or eliminate it as a benchmark for licensing in

189. The characterization of the television day as a vast wasteland is probably Chairman Newton Minow's most-quoted bon mot. NEWTON MINOW, *EQUAL TIME* 45, 52 (1964); KRASNOW ET AL., *supra* note 1, at 47.

190. Chairman Hundt recognizes the pitfalls of overall programming requirements:

If our rules actually require something—and something unknowable—of broadcasters, they might be rejected as constitutionally intolerable because they might permit abuse. It is the fact that they actually require nothing of broadcasters that has mitigated the potential injury to constitutional principles. But this is certainly not sufficient justification for vague standards that give the public nothing in exchange for the valuable public resource broadcasters are permitted to use.

Hundt & Kornbluh, *supra* note 30, at 13.

191. The Act itself may be read to lend support to such a policy-based interventionist interpretation. For example, the Act requires all renewal applicants to list complaints they have received about violent programming aired by the station. Telecommunications Act of 1996 §204(b) (*codified* at 47 U.S.C. 308(d)). This requirement effectively requires the FCC to consider such complaints at renewal. It also prompts organized "public issue groups" to file letters. Responsive self-censorship by broadcasters is likely. See HUBER ET AL., *supra* note 168, at 69.

192. See *supra* note 189.

193. Caroline E. Mayer, *FCC Chief's Fears: Fowler Sees Threat in Regulation*, WASH. POST, Feb. 6, 1983, at K6. See also Hundt & Kornbluh, *supra* note 30, at 17.

the 1996 Act—may adopt a middle-of-the-road position between the Kennedy and Reagan models of FCC licensing. Although Chairman Hundt has said that notions of democracy and citizenship support his proposals,¹⁹⁴ he does not endorse broad-based FCC attempts to ensure democratic discourse on the broadcast medium.¹⁹⁵ He simply requires payment of a discrete toll.

Despite this regulatory sea-change, however, Dean Krattenmaker may note that the 1996 Act's renewal provisions might not increase the rate of non-renewals. After all, that non-renewal of a license is a draconian punishment may suggest that renewals would likely remain virtually automatic even in the world of the Hundt FCC. Since the new Act eliminated comparative renewal hearings, a denial of renewal could result in the loss of a broadcasting service if no other applicants come forward after the denial. One might fear that the FCC would still renew all but the most grossly inadequate applicants in order to avoid a service shut-down.

However, mechanical renewal of barely adequate broadcasters is not the only—or even the most likely—possibility. First, it is unlikely that those applicants who would have been challengers had we still had comparative renewal hearings would decline to participate in the initial hearing for the station whose incumbent failed the renewal standard. If they would have been willing to brave the power of the renewal expectancy in the traditional comparative renewal hearing, they would surely participate in an initial comparative hearing without the expectancy element weighing so heavily in the balance.

Second, because the public interest obligations contemplated by Chairman Hundt are characterized as quantitative and “objective”—and because they eliminate the definitional uncertainty of a comparative system—future compliance with FCC rules and operation in the public interest may be thought by the FCC to be much easier and more automatic.¹⁹⁶ Therefore, because the nature of the regulatory regime is as-

194. See, e.g., Hundt & Kornbluh, *supra* note 30, at 20 (describing the democratic value of children's educational programming); Hundt, *supra* note 177, at 1097 (discussing public interest requirements as advancing First Amendment goals of public deliberation and democratic self-government).

195. Chairman Hundt has publicly opposed the resuscitation of the fairness doctrine, for example. See, e.g., Neil Hickey, *Revolution in Cyberia: As the FCC, the Congress, and Megamedia Redraw the Map, Who Will Tell the People*, COLUM. JOURNALISM REV., July/Aug. 1995, at 40, 47.

196. This is not to say that the rules to be promulgated by such an FCC would in fact be “objective.” Rather, it is to suggest that the FCC's belief in the objectivity of these rules might

serted to make compliance easier, the FCC might be less reluctant to withhold the non-renewal or short-term renewal sanctions from broadcasters than it would have been under the 1934 Act.

Most importantly, the significance of a shift in the regulatory priorities should not be ignored even if the actual rate of non-renewal does not increase. The threat of non-renewal may in fact become more meaningful in the future than it was under much of the 1934 Act's history. It might well lead to more effective FCC control of some areas of broadcast content under the new Act, without being reflected in any clear enforcement statistics at renewal time.

It is beyond the scope of this Comment to evaluate the specific public interest requirements being crafted by the Hundt FCC. It should be noted in general, however, that such a possible contractarian vision of the FCC's role might disturb both progressive critics of the mass media and broadcast-First Amendment purists. The former might argue that the FCC passed up the opportunity to constrain the increasing commercialization, commodification, and political imbalance of radio and television. They might claim that the Commission abandoned the overall public interest by permitting itself to be bought off with a few hours of children's television and promises of a few minutes of free air time for political advertisements.¹⁹⁷

The latter—First Amendment purists such as Dean Krattenmaker—would object to broadcasting's continuing second class citizenship vis-à-vis the First Amendment in such a Hundt regime. These advocates might point to the manipulability of the Hundt standards and challenge the Chairman's claims of objectivity and verifiability in public interest regulation. They might question whether the new regulations would satisfy their goals any more than did the traditional comparative renewal process. They might also worry about the potentially homogenizing effect on public discourse of regulatory interventions guided principally by the political causes of the moment. In sum, they might question both the wisdom and constitutionality of direct content regulation of broadcasting at this late point in the day.¹⁹⁸

affect its expectations of broadcaster compliance.

197. Cf. Becker, *supra* note 27, at 176-80.

198. Cf. Concurring Statement of Comm'r James H. Quello, Report and Order on Children's Television Programming Rules, 11 FCC Rcd 10660, 10766 (expressing concern that rationale for children's television requirement is too broad and could be used to justify other types of quantitative programming requirements by future Commissions).

IV. CONCLUSION

I suspect that comparative renewal as historically understood did not satisfy its intended goals. I agree with Dean Krattenmaker's observation that its demise would not make much practical difference, all else being equal. Therefore, and in light of important First Amendment interests, the decision to eliminate the possibility of a true point-by-point comparison as suggested under CCC is probably the better part of valor from the policy standpoint. That is not to say that I am sanguine about the desirability of mediocre broadcasting or resigned to a communications landscape with little diversity. Rather, it is only to say that a truly reinvigorated comparative renewal standard would be problematic, while the continuation of the FCC's traditional approach would do not much more than waste money on predictable results.

At the same time, we should not lose sight of the fact that the open-ended nature of the new statutory standards for renewal provides the opportunity for some real changes in renewal policy. Given that a property/auction model has not been adopted by Congress, I would hope that the 1996 Act's change in renewal process would not be interpreted by the FCC as an invitation to abdicate any licensing oversight in favor of rubber-stamping renewals without searching review of compliance with the Act and FCC rules. In the same breath, to the extent that the licensing changes in the 1996 Act provide an opportunity to see a new model of administrative agency operation and a revived public interest obligation, I would urge that these changes raise many questions as to the neutrality, administrability, and fairness of this kind of technocratic response to conservative or mainstream moral concerns. Without suggesting that I am not concerned about violence on television, smut on the air, or inadequate children's educational programming, I think that significant thought should be given to what precisely we can gain from the kinds of quantitative interventions that a contractarian model of renewal administration might promise. The extent to which such a hybrid model will in fact become a reality under the current FCC is an important question. An assessment of such a development is an exercise for another day.