RADIO DEREGULATION AND THE PUBLIC INTEREST: *OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST v. FEDERAL COMMUNICATIONS COMMISSION*

I. INTRODUCTION

In 1981, the Federal Communications Commission (FCC) eliminated its regulation of the commercial radio industry in four major areas.[1] First, it abrogated its long-standing requirement that commercial radio broadcasters provide their listeners with a specific amount of nonentertainment programming.[2] As a result, radio stations are no longer required to broadcast any specific quantity of public affairs or public service programs. Second, the FCC eliminated the ascertainment method it had previously devised.[3] Commercial radio stations are no longer required to administer an elaborate survey to a specified cross-section of their potential listening audience to determine which issues are important to them.[4] Third, the FCC abandoned its recommended limit on advertising minutes per broadcast hour.[5] Finally, the FCC eliminated its requirement that radio stations keep minute-by-minute logs of their programming content.[6] Since its inception

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[1] Deregulation of Radio, 46 Fed. Reg. 13,888 (1981). *See infra* notes 2-7 and accompanying text.

[2] 46 Fed. Reg. 13,890-97 (1981). The FCC's guidelines called for AM radio stations to offer 8% nonentertainment programming and for FM stations to offer 6%. *Id.* at 13,890. Nonentertainment programming included news, public affairs, public service announcements, and religious programs. *Id.* at 13,890-91. Stations proposing to offer less than the recommended percentage were not barred from doing so, however, the applications of those stations were not routinely processed by the FCC. *Id.* at 13,890.

[3] *Id.* at 13,899. Ascertainment is the process by which radio stations discover the needs, tastes, and desires of their communities or service areas. *See id.* at 13,897-900; *See also infra* notes 167-73, 243-47, 259-60 and accompanying text discussing elimination of the ascertainment requirement.

[4] *See* 46 Fed. Reg. 13,890, 13,897-900 (1981). On remand, the FCC modified its policy regarding ascertainment. *See infra* notes 243-47, 259-60 and accompanying text. 46 Fed. Reg. 13,900 (1981).

[5] The FCC has monitored licensees' commercial practices but has not formally specified an absolute maximum amount of advertising time permitted per broadcast hour. *Id.* at 13,900-03 (1981). However, the FCC has questioned whether licensees offering more than 18 minutes of commercial time per broadcast hour have done so in the public interest. *Id. See, e.g.*, Florida Renewals of Licenses, 9 RAD. REG. 639 (P & F) (1967) (short-term renewal issued to broadcaster whose records showed excessive commercial time). *See also infra* note 178 and accompanying text.

[6] 46 Fed. Reg. 13,903-04 (1981). The FCC had required licensees to compile a comprehensive record of the type and timing of program content and to make the logs available for public inspection. *Id.* at 13,903.

in 1934, the FCC had developed these requirements to clarify broadcasters' obligation to operate in the public interest.[7] The rationale behind eliminating the guidelines in 1981 was "to reduce the paperwork and other burdens on commercial radio stations without having a substantial adverse impact upon the public interest."[8]

In *Office of Communication of the United Church of Christ v. Federal Communications Commission*[9] (*UCC v. FCC*), the FCC's deregulation of the commercial radio industry withstood its first judicial challenge. The Court of Appeals for the District of Columbia expressed "several serious reservations"[10] about the FCC's actions but ultimately held that the deregulation was not arbitrary, capricious, or an abuse of the FCC's discretion.[11] The court, therefore, upheld much of the deregulation plan.[12] It remanded the portion of the FCC's decision that eliminated the program log requirement.[13] In the past, the logs had been essential in obtaining concrete evidence of a radio station's service in the public interest.[14] On remand, the FCC instituted a modified record-keeping system which will, in theory, continue to provide documentation of programming aired by a licensee in response to issues of importance to the community.[15]

This Comment will discuss the FCC's role in broadcast regulation, the method it employs to determine whether a licensee is operating in the public interest, and the challenge to the FCC's deregulation of commercial radio. The decision in *UCC v. FCC* upholding the FCC's deregulation of nonentertainment programming, ascertainment, and commercial practices was premised on its acceptance of the FCC's contention that despite

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7 *See* In re Deregulation of Radio, Notice of Inquiry and Proposed Rulemaking, 73 F.C.C.2d 457, 459 (1979).

8 46 Fed. Reg. 13,888 (1981).

9 707 F.2d 1413 (D.C. Cir. 1983).

10 *Id.* at 1418.

11 *Id.* at 1422 (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976)). Under the Administrative Procedure Act, a reviewing court is required to hold unlawful and set aside any "agency action, findings and conclusions [the court determines to be] . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . ." *Id. See infra* text Part IV discussing FCC Rulemaking and Judicial Review. For a general discussion of recent decisions of the Court of Appeals for the District of Columbia's reviewing actions of the Federal Communications Commission, see Boudreau, *To Defer or Not to Defer: The Question for the D.C. Circuit in Reviewing FCC Decisions*, 36 FED. COM. L.J. 293 (1984). The Comment also contains a critique of the court's review in *UCC v. FCC*, *id.* at 306-09.

12 707 F.2d at 1426-43.

13 *Id.* at 1442.

14 *Id.* at 1441.

15 *See In re* Deregulation of Radio, Second Report and Order, 96 F.C.C.2d 930, 941-43 (1984). *See also infra* notes 239-42 and accompanying text.

these policy changes, broadcasters would be held to their "bedrock obligation"[16] to operate in the public interest. The court's refusal to allow the FCC to eliminate the program log requirement emphasizes its concern for preserving the public's right to challenge broadcasters' fulfillment of the public interest obligation.

It is clear that the public, prospective competitors, and the FCC still possess the right to challenge a broadcaster's compliance with the public interest mandate. However, the deregulatory measures upheld by the court as well as subsequent FCC actions will, as a practical matter, impede that right. Broadcasters no longer have to fulfill any specific requirements in order to demonstrate their operation in the public interest. Thus, there appears to be no specific basis upon which to challenge a broadcaster's service in the public interest. Furthermore, the FCC's recent decision to completely eliminate its requirement that licensees document their ascertainment procedures[17] derogates from the Supreme Court's interpretation of the public interest standard requiring broadcasters, as trustees of the public airwaves, to be accountable to the public.

II. BACKGROUND—COMMUNICATIONS REGULATION AND INTERPRETATION OF THE PUBLIC INTEREST STANDARD

Current broadcast regulation has its roots in the Radio Act of 1912 (1912 Act).[18] Under the 1912 Act, the Secretary of Commerce and Labor was responsible for issuing broadcast licenses to all applicants.[19] The 1912 Act was construed narrowly[20] and the Secretary's duties were merely ministerial. The Secretary had no power to refuse to grant a license to any applicant[21] and no

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16 707 F.2d at 1420.

17 96 F.C.C.2d at 942-43.

18 Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1174, *repealed by* Communications Act of 1934, ch. 652, § 602a, 48 Stat. 1064, 1102 (1934).

19 37 Stat. 302, 303 (1912).

20 *See* Jacobs, *Radio Deregulation: Minority Broadcasters, The New System of Broadcast Control*, XII NAT'L B.A.L.J. 41, 42 (1983).

21 *See* Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923) *dismissed per stipulation*, 266 U.S. 636 (1924). The court determined that, in enacting the Radio Act of 1912, Congress intended to fully regulate the radio industry and vested no discretion in the Secretary of Commerce and Labor regarding the issuance of licenses. 286 F. at 1006. Therefore, upon a writ of mandamus, the court compelled the Secretary to perform his ministerial license-granting function. *Id.* The Secretary had discretion only to select a wavelength for operation that would result in the least possible interference with other broadcasters. *Id.* at 1007.

authority to regulate broadcasting.[22] As a result, the number of radio stations multiplied at an enormous rate.[23] Individual operators selected their own wavelengths and time periods for transmissions, thereby creating interference between the stations.[24]

Fifteen years later, Congress determined that governmental coordination was necessary to control the proliferation of stations and to reduce the interference between them.[25] It enacted the Radio Act of 1927 (1927 Act),[26] which created a five-member Federal Radio Commission (FRC). In addition to license-granting powers, the FRC was given the ability to redistribute and reclassify frequencies and to control station power, thus reducing interference between stations.[27]

The 1927 Act did not specifically empower the FRC to regulate the content of radio programming.[28] The FRC did, however, regulate aspects of program content based on its power to regulate broadcasting in the public interest. In *KFKB Broadcasting Association v. Federal Radio Commission*,[29] the FRC relied on the public interest standard in its decision to deny a renewal application. Radio station KFKB broadcast a program featuring Dr. Brinkley, whose listeners mailed in descriptions of their medical problems.[30] The doctor read those letters on the air and prescribed homemade remedies which were sold to the listeners.[31] The FRC refused to renew KFKB's license because it viewed Dr.

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22 United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). The court stated that "[t]he Secretary of Commerce is required to issue the [radio broadcast] license subject to the regulations in the [Radio] act [of 1912]. The Congress has withheld from him the power to prescribe additional regulations." *Id.* at 617.

23 Comment, *The FCC's New Equation for Radio Programming: Consumer Wants—Public Interest*, 19 DUQ. L. REV. 507, 514 (1981) (citing C. STERLING & J. KITROSS, STAY TUNED 510 (1978)). For example, in 1920 there was one radio broadcasting station on the air. Seven years later, there were almost 700 radio broadcasting stations. Comment, *supra* note 23, at 514 n.43.

24 *See* 73 F.C.C.2d at 460.

25 *Id.* at 461-64. *See also* Comment, *supra* note 23, at 514-15.

26 Radio Act of 1927, *repealed by* Communications Act of 1934, 48 Stat. 1064.

27 Radio Act of 1927, 44 Stat. 1163, § 4(a). The Federal Radio Commission's (FRC) mandate under the 1927 Act was to take actions regarding the radio industry "as [the] public convenience, interest, or necessity require[d]." *Id.* § 4. The FRC was vested with the general authority to promulgate regulations "not inconsistent with the law as it may deem necessary . . . to carry out the provisions of [the] Act." *Id.* § 4(f). Thus Congress specifically delegated to the FRC powers beyond the ministerial duties prescribed by the 1927 Act, provided the FRC exercised such power in furtherance of the public interest. *Id.*

28 Section 29 of the 1927 Act did, however, prohibit obscene, indecent, or profane language on the airwaves. 44 Stat. 1173. In addition, Section 18 of the 1927 Act mandated that licensees providing airtime to any legally qualified political candidate provide equal opportunities for all other qualified candidates for that office. *Id.* at 1170.

29 47 F.2d 670 (D.C. Cir. 1931).

30 *Id.* at 671.

31 *Id.* The doctor prescribed "tonics" prepared according to his own formulas.

Brinkley's practice as contrary to the public interest.[32] On appeal, KFKB argued that the FRC's license denial constituted a form of censorship and a prior restraint of broadcast programming in violation of the 1927 Act.[33] The court held, however, that the FRC had simply fulfilled its statutory mandate by considering whether KFKB's performance was in the public interest.[34] The court upheld the FRC's discretionary judgment in interpreting the public interest standard.[35]

The Communications Act of 1934 (Communications Act) replaced the 1927 Act and established the Federal Communications Commission (FCC) to replace the FRC.[36] The FCC regulates all interstate and foreign communications by wire and radio, including broadcast, telephone, and telegraph.[37] The Communications Act directs the FCC to issue and renew broadcast licenses only if it finds that "the public interest, convenience and necessity would be served thereby."[38]

Although the public interest language is broad, the Supreme Court has endorsed the standard as a workable guideline for the FCC's regulation of the broadcast industry.[39] The Court has held that the standard is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. . . . Underlying the [Communications] Act is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting. . . ."[40]

The public interest standard is not merely an amorphous concept. The provisions of the Communications Act specifically refer to individual licensees[41] and applications,[42] and it is in this

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Money received for the prescriptions was paid to the station and presumably used for advertising the tonics in the future.

32 *Id.*

33 *Id.* at 672.

34 *Id.*

35 *Id.* The court noted that its review of the FRC's decision was limited to a determination of whether questions of law and findings of fact were supported by substantial evidence. The FRC's decisions were to be conclusive unless the court determined that such findings were clearly "arbitrary or capricious." *Id.* (citing 46 Stat. 844, (amending Radio Act of 1927, 44 Stat. 1169)).

36 Communications Act of 1934, 47 U.S.C. §§ 151-610 (1982).

37 *See id.* §§ 151-153.

38 *Id.* § 307(d).

39 *See, e.g.*, Federal Radio Commission v. Nelson Bros. Bond and Mort. Co. (Station WIBO), 289 U.S. 266 (1933) (denial of license by FRC upheld as a reasonable evaluation of the public interest standard).

40 FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) (FCC's comparative analysis of competitors for broadcast license upheld as reasonable under the public interest standard).

41 *See, e.g.*, 47 U.S.C. § 307 (1982).

42 *See, e.g.*, 47 U.S.C. §§ 308-309 (1982).

context that the public interest standard is applied. For example, section 309 of the Communications Act directs the FCC to "determine, in the case of *each* application filed with it . . . whether the public interest, convenience and necessity will be served by the granting of such application. . . ."[43]

The Supreme Court has stated that the public interest standard is not "so indefinite as to confer an unlimited power."[44] Rather, the standard has, for over fifty years, provided a flexible yet judicially enforceable guideline for the FCC's exercise of its authority.

III. The Public Interest Standard and The FCC's Program Content Policy

The FCC has never made specific demands of broadcasters with respect to program content requirements. It has refrained from dictating which programs *must* be broadcast to meet the public interest standard of the Communications Act. However, the FCC has, since 1946, identified programming characteristics that it considers significant in determining whether a licensee has met the public interest obligation.[45]

The FCC's 1946 *Report on Public Service Responsibility of Broadcast Licensees*[46] stressed the need for a balanced program format. In this policy statement, known as the *Blue Book*,[47] the FCC stated that balanced programming includes coverage of local issues, interests, activities, and talent.[48] There was no absolute quantitative standard set in the *Blue Book*. Determining the proper balance of programming was left to the discretion of licensees.[49]

Three years later, the FCC issued its *Report on Editorializing by Broadcast Licensees*.[50] This document formalized the Fairness Doctrine[51] which requires, *inter alia*, that "broadcaster[s] must give

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43 47 U.S.C. § 309(a) (1982) (emphasis added).

44 National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (quoting *Nelson Bros. Co.* 289 U.S. at 285) (upholding the FCC's prohibition against "chain broadcasting" as an exercise of the agency's power to regulate broadcasting in the public interest).

45 Jacobs, *supra* note 20, at 44.

46 Report on Public Service Responsibility of Broadcast Licensees, *cited in In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968, 1040 (1981).

47 46 Fed. Reg. 13,883-892 (1981).

48 *Id.*

49 *Id.* at 13,923.

50 *Id.* at 13,892.

51 *Id.* at 13,917. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the FCC's requirement, based on 47 U.S.C. § 315, that broadcasters provide reply time for personal attacks in the context of controversial public issues). *See also infra* notes 69-76 and accompanying text.

adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views."[52] The FCC stressed the responsibility of licensees to devote a reasonable amount of time to discussion of public issues,[53] but it did not set forth definitive standards for specific types of programming.

In 1960 the FCC prescribed "the major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located."[54] The programming elements identified were as follows:

> (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.[55]

The FCC justified its interference in the area of programming on the scarcity theory,[56] which maintains that since there is limited space on the broadcast spectrum and limited access to the spectrum, those persons licensed to use the airwaves may be "burdened by enforceable public obligations."[57]

The FCC's right to burden broadcasters with public obligations has consistently been upheld by the Supreme Court. The Court's first decision on this issue was *National Broadcasting Co. v. United States*.[58] In that case, the Supreme Court endorsed the FCC's power to promulgate regulations affecting radio program content. In 1938 there were over 300 radio stations affiliated with one of three radio networks.[59] The networks and their affiliates generally entered into

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52 395 U.S. at 377 (citations omitted).

53 Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-50 (1949). *See* 46 Fed. Reg. 13,917 (1981).

54 Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2314 (1960).

55 *Id.* at 2314.

56 *See* Comment, *supra* note 23, at 517-18. The use of the scarcity doctrine as a basis for media regulation has been criticized as conflicting with the first amendment. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREE EXPRESSION 656-67 (1970); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 226-29; Goldberg & Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1, 26-30 (1978).

57 707 F.2d at 1427 (citing Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966)). Congress envisioned a regulatory scheme for the broadcast industry as a balance of private ownership by licensees "tempered by public service responsibilities." 707 F.2d at 1427.

58 319 U.S. 190 (1943).

59 *Id.* at 197.

three to five-year agreements which restricted the type and amount of programming the affiliates could broadcast and the networks could sell. Affiliated stations typically were prevented from broadcasting programs of other networks,[60] and networks were obligated not to sell their programs to other radio stations within a specified territory.[61] The FCC found that as a result of these restraints, the public was, on some occasions, deprived of the opportunity to hear programs of interest and importance.[62] Thus, the behavior of the networks and affiliates with respect to program content amounted to a failure to operate in the public interest.[63] The FCC decided that it would no longer grant licenses to applicants who were parties to these agreements.[64]

The Supreme Court approved the FCC's consideration of program content as a basis for its evaluation of the stations' service in the public interest.[65] The FCC's role was not limited to that of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other."[66] The Communications Act "[places] upon the Commission the burden of determining the composition of that traffic."[67] Furthermore, application of the public interest standard requires a comparison of services rendered by broadcast licensees.[68]

In *Red Lion Broadcasting Co. v. FCC*,[69] the Court again upheld the FCC's right to make policy decisions affecting program content. At issue in *Red Lion* was the FCC's imposition of a duty on broadcasters to provide equal time for responses to political editorials and to personal attacks in the context of controversial public issues.[70] The broadcasters in *Red Lion* alleged that this FCC policy abridged their first amendment freedoms of speech and press.[71] The Court, how-

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60 *Id.* at 198-200.

61 *Id.* at 200-01.

62 *See, e.g., id.* at 199. The Mutual Broadcasting System, Inc. had the exclusive right to broadcast the 1939 World Series. NBC and CBS invoked a provision of their agreements with affiliated stations preventing the affiliates from broadcasting this "program of outstanding national interest." *Id.* Thus, residents of communities having only NBC or CBS affiliates were unable to hear the games.

63 *See id.* Programming restraints were condemned by the FCC as contrary to the public interest. Denying stations the freedom to choose programming defeats the duty of licensees to operate in the public interest.

64 *Id.* at 196.

65 *See id.* at 224.

66 *Id.* at 215.

67 *Id.* at 216.

68 *Id.* at 216-17 (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138, n.2 (1939)).

69 395 U.S. 367 (1969).

70 *Id.* at 369-71.

71 *Id.* at 386. The broadcasters contended that use of "their allotted frequencies con-

ever, asserted that it is the first amendment right of viewers and listeners, and not of the broadcasters, which is paramount.[72] The public has the right to receive suitable access to the airwaves to express "social, political, esthetic, moral, and other ideas. . . ."[73] Broadcasters, who hold the limited number of licenses available, have no right to drown out conflicting viewpoints by refusing to provide reply time.[74] As proxies or fiduciaries for the entire community,[75] they are obligated to "present those views and voices which are representative of [the] community and which would otherwise, by necessity, be barred from the airwaves."[76]

In essence, fulfillment of the Communications Act's public interest mandate, as interpreted by the FCC and the courts, is twofold. First, broadcasters must account to the public by providing programming responsive to issues of importance to the public. Second, they must provide a balanced presentation of any controversial issues addressed on the air.

Under the Communications Act, the FCC must grant and renew licenses on the basis of service in the "public interest, convenience and necessity."[77] The FCC cannot regulate program content *per se*, but it must determine whether a licensee has provided a balanced presentation of controversial issues. Thus, the FCC's evaluation of a broadcaster's fulfillment of its public interest obligation is necessarily based upon a consideration of the broadcaster's program content.

IV. FCC Rulemaking Procedure and Judicial Review

The FCC's rulemaking process begins with the FCC sending a notice of its proposals to a cross-section of broadcasters, industry organizations, religious and charitable groups, citizens organizations, and government agencies.[78] On September 6, 1979, the FCC adopted a Notice of Inquiry and Proposed Rulemaking,[79] in which it identified its goal of reducing or eliminating

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tinuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency" was protected by the first amendment.

72 *Id.* at 390. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361-62 (1955).

73 395 U.S. at 390.

74 *Id.* at 389.

75 *Id.* at 389.

76 *Id.*

77 47 U.S.C. § 307(a), (c) (1982).

78 Jacobs, *supra* note 20, at 41.

79 73 F.C.C.2d 457. This procedure is prescribed in 5 U.S.C. § 553 (1976), which states that a "general notice of proposed rule making shall be published in the Federal Register." *Id.* § 553(b).

"regulations no longer appropriate to certain marketplace conditions and whose elimination would be consistent with the Commission's public interest obligations."[80] In the FCC's view, the large number of radio stations now in existence,[81] the tendency toward specialized program formats,[82] and the public's perception of radio as a secondary source of entertainment and information[83] necessitated a reevaluation of the FCC's entire regulatory approach.[84] The FCC considered various regulatory options[85] in the Notice and solicited comments and empirical

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80 73 F.C.C.2d at 458.

81 The FCC's statistics showed that the number of AM and FM radio stations on the air had increased from 583 in 1934 to 8,654 in 1979. 73 F.C.C.2d at 547 (citing *FCC Annual Report for Fiscal Year 1976* (1949-1976 data); FCC Broadcast Bureau [sic], License Division, AM-FM Branch (1977-1979 data); C.H. STERLING & T.R. HAIGHT, THE MASS MEDIA: ASPEN INSTITUTE GUIDE TO COMMUNICATION INDUSTRY TRENDS 43 (1978) (1934-1948 data)).

82 In making its decision to deregulate, the FCC relied upon the following statistics regarding commercial radio stations with specialized program formats:

Radio Stations Providing Ethnic or Foreign Language Programming, SRDS vs. Broadcasting Yearbook Data

Type of Programming	Number of stations providing programming according to SRDS	Number of stations providing programming according to Broadcasting Yearbook
American Indian	12	55
Black	416	793
French	27	105
German	43	121
Greek	27	58
Italian	55	120
Japanese	5	11
Polish	63	183
Portuguese	29	33
Spanish	270	570
Ukranian	7	14

73 F.C.C.2d at 558 (citations omitted).

83 The Notice of Proposed Rulemaking cited a recent poll showing that television had become the primary sources of news and information. 67% of those interviewed indicated that they got their news from television; 49% cited the newspaper as their primary news source, and only 20% identified radio. 73 F.C.C.2d at 486 (citing Changing Public Attitudes toward Television and Other Mass Media, 1959-1978: A Report by the Roper Organization, Inc. 2-3 (1979)).

84 707 F.2d at 1419-20.

85 In the Notice of Proposed Rulemaking, the FCC offered alternative proposals in four major areas of radio which were to be deregulated.

In the area of nonentertainment programming, the proposals were:

(1) The Commission could remove itself from all consideration of the amount of nonentertainment programming furnished by commercial broadcast radio licensees. Under this alternative, the marketplace would generally determine what levels of such programming would be presented.

(2) The Commission could relieve individual licensees of any obligation to present nonentertainment programming but would, instead, analyze the amounts of such programming on a marketwide basis. If the amount of

nonentertainment programming presented in a particular market fell below a certain amount, the Commission would then take action to redress the deficiency.

(3) The Commission could free licensees of any specific responsibilities with respect to nonentertainment programming (and ascertainment and commercial minutes), but would require licensees to show, if challenged upon renewal, that they were serving the public interest. Marketwide criteria would be used for such evaluation.

(4) The Commission could impose quantitative programming standards for each nonentertainment programming category. Such quantitative standards could take the form of either a minimum number of hours per week that would have to be presented for each category of programming or a specified percentage of programming time that each station would have to devote to such category.

(5) The Commission could impose quantitative standards, as above, but instead of setting such standards in terms of hours or percentage of time devoted to each category, could measure the adequacy of the programming on the basis of each station's expenditures thereon. This could take the form of the Commission's mandating a certain proportion of revenues or profits that each station would have to reinvest in nonentertainment programming.

(6) The Commission could establish a minimum fixed percentage of local public service programming that would have to be presented. This percentage could be met by the broadcast of any of the following alone or in combination: local news, local public affairs, local public service announcements, community bulletin boards, or any other locally produced nonentertainment programming demonstrably related to serving local community needs. The meeting of this minimum percentage would be a *sine qua non* of license renewal.

73 F.C.C.2d at 526-27.

In the area of ascertainment, the FCC made the following proposals:

(1) to eliminate both the ascertainment procedures and the general ascertainment obligation and to leave it to marketplace forces to ensure that programming designed to meet the needs and problems of each station's listernership is supplied;

(2) to require ascertainment to be conducted by licensees but to permit them to decide in good faith how best to conduct that ascertainment without formalized Commission requirements;

(3) to retain our ascertainment requirements, but in a simplified form; or

(4) to retain our ascertainment requirements as they currently exist.

Id. at 527-28.

With respect to commercial time guidelines, the FCC proposed the following:

(1) We could eliminate all rules and policies dealing with the amount of commercial time and leave it to the marketplace to determine what levels of commercialization would be tolerated;

(2) We could set quantitative standards that, if exceeded, would result in some sanction being imposed against the licensee;

(3) We could eliminate all rules specific to individual licensees, but intercede if heavy levels of commercialization occurred marketwide; or

(4) We could retain quantitative guidelines but only with regard to the Broadcast Bureau's delegation of authority.

Id. at 528.

Following are the proposals considered by the FCC regarding program logs:

(1) eliminate the need for AM and commercial FM stations to keep program logs;

(2) eliminate our program log requirements but require any AM or commercial FM licensee keeping records of its programming or commercial schedules for its own purposes to make these available to the public in accordance with the procedures currently outlined in Section 73.1850

information.[86]

Public response to the September 6th Notice was "swift and vociferous."[87] The majority of the comments expressed opposition to the deregulation proposals.[88] The FCC staff reviewed the comments and, following standard procedure, made a recommendation to the FCC.[89] On January 14, 1981, the FCC adopted its proposed rules and issued its Report and Order.[90]

The rules adopted by the FCC are reviewable under the Ad-

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of the Commission's Rules and discussed in the Public and Broadcasting Procedural Manual, Revised Edition; or,

(3) continue our program log requirements as they currently exist.

Id. at 528-29.

The FCC noted its own preference to rely on "the discretion of its broadcast licensees in the areas of ascertainment, nonentertainment programming, and commercial matter[,]" *id.* at 529, and to eliminate program logs altogether, *id.* at 534.

86 *Id.* at 457. The FCC is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c) (1982).

87 Over 20,000 comments were received by the FCC. 707 F.2d at 1419 (citing 84 F.C.C.2d at 972).

88 707 F.2d at 1419 (citing 84 F.C.C.2d at 972). The FCC analyzed the comments as follows:

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

46 Fed. Reg. 13,909 (1981).

89 Note, *The FCC's Proposal to Deregulate Radio: Is it Permissible Under the Communications Act of 1934?*, 32 FED. COM. L.J. 233, 238-39 (1980).

90 46 Fed. Reg. 13,888 (1981). The FCC is required to consider relevant matter presented and publish its ruling. *See* 5 U.S.C. § 553(c), (d) (1982).

ministrative Procedure Act.[91] A court of appeals is required "to hold unlawful and set aside any agency action, findings, and conclusions [that are] found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law."[92]

The court of appeals is obligated to make two separate inquiries.[93] First it is to determine whether the FCC has acted within its delegated authority under the Communications Act, to wit, whether the FCC's actions are in furtherance of the public interest.[94] The court will defer to the FCC's judgment "as to what the public interest entails and how it may best be served. . . ."[95] However, it is the court's role to "give content and meaning to the [Communications] Act's public interest standard so that it serves, not to shield Commission [decisions] from judicial scrutiny, . . ."[96] but to guide the FCC in its exercise of authority.[97] In sum, the court conducts an independent analysis to determine whether the FCC has acted within its authority under the Communications Act.

Beyond this threshold issue, the court's review of the FCC's decisionmaking process is limited to determining whether the FCC's adopted rules and policies are the product of a rational decision-making process.[98] The FCC's burden of proof, therefore, is relatively low. The FCC must merely satisfy the court that the facts and policy concerns that it relied upon in making its decision have "some basis in the record."[99]

This standard ordinarily entails minimal scrutiny by the reviewing court. In *UCC v. FCC*, however, the court used heightened scrutiny because the FCC's deregulatory measures overruled long-standing policies[100] and thus constituted "a danger signal that the Commission may be acting inconsistently with its statutory mandate."[101] The court required the FCC to justify

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91 5 U.S.C. § 706(1982).
92 *Id.* § 706(2)(A).
93 *See* 707 F.2d at 1422.
94 *Id.*
95 *Id.* at 1424.
96 *Id.*
97 *See id.*
98 707 F.2d at 1422.
99 *Id.* at 1424.
100 *Id.* at 1425.
101 *Id.* One commentator has criticized the "intrusiveness" of the court's review in UCC v. FCC. *See* Boudreau, *supra* note 11, at 306-08. The commentator asserts that an independent analysis by the court of appeals in *UCC v. FCC* is contrary to a recent Supreme Court mandate that reviewing courts are to defer to the FCC's judgment and prediction. *Id.* (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978)).

each of the challenged deregulatory measures by showing that each change was supported by the relevant law and facts.[102]

V. *OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST V. FEDERAL COMMUNICATIONS COMMISSION*

The FCC's Report and Order of January 14, 1981,[103] adopted the following measures deregulating the commercial radio industry.

> 1. Elimination of guidelines requiring licensees to present certain amounts of nonentertainment programming to meet the needs and problems of their communities;
> 2. Elimination of the ascertainment procedures by which the licensees must identify community needs and problems;
> 3. Elimination of guidelines limiting the amount of radio broadcast time devoted to commercials; and
> 4. Elimination of the requirement that radio stations maintain and make available program logs that record information about each program or commercial aired during the broadcast day.[104]

A number of public interest groups petitioned the FCC for reconsideration of the Report and Order, and those petitions were denied.[105] Subsequently, the United Church of Christ and other public interest groups filed petitions with the Court of Appeals for the District of Columbia Circuit for review of the FCC's deregulatory order.[106]

The petitioners argued that the FCC's deregulatory measures violated the substantive mandate of the Communications Act.[107] They claimed that the FCC had abandoned its duty to regulate broadcasting in the public interest. Alternatively, the challengers alleged that the deregulation was "arbitrary, capricious or an abuse of discretion" and thus unlawful under the Administrative Procedure Act.[108]

The court upheld three of the four deregulatory measures.[109] It was satisfied that in the areas of nonentertainment programming,[110] ascertainment,[111] and commercial practices,[112] the FCC

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102 707 F.2d at 1426.
103 46 Fed. Reg. 13,888 (1981).
104 *See id.* at 13,889.
105 707 F.2d at 1419.
106 *Id.* at 1419-20.
107 *Id.* at 1422.
108 *Id.* (citing 5 U.S.C. § 706(2)(A) (1982)).
109 *See* 707 F.2d at 1427-42; *see infra* text accompanying notes 128-250.
110 *See* 707 F.2d at 1427-35; *see infra* text accompanying notes 120-57.
111 *See* 707 F.2d at 1435-37, *see infra* text accompanying notes 158-77.
112 *See* 707 F.2d at 1437-38; *see infra* notes 189-200 and text accompanying notes 178-89.

had justified its departure from prior policy. The court found that the FCC had relied upon a reasonable factual basis,[113] considered issues raised during the rulemaking process,[114] and evaluated alternative proposals[115] in each area. Moreover, the court was satisfied that the FCC had not abandoned its obligation to regulate broadcasting in the public interest.[116] The petitioners prevailed in only one area.[117] The court would not permit the FCC to completely eliminate its longstanding requirement that broadcasters keep minute-by-minute program logs[118] and remanded this issue to the FCC for reconsideration. On remand, the FCC modified the logging policy to require that licensees keep records, available to the public on a quarterly basis, listing programming aired in response to issues of importance to the community.[119]

Throughout its decision in *UCC v. FCC*, the court noted its belief that the FCC's policy changes would not affect the vitality of the public interest standard. However, upholding the elimination of all quantitative guidelines in fact creates a void in assessing a licensee's public interest performance. This quandary will be discussed in Part XI.

VI. Changes in FCC Nonentertainment Programming Policy

A. *Specific Content Requirements v. Issue-Responsive Programming*

In the area of nonentertainment programming, the FCC made three changes. First, it departed from its categorical approach, which designated the major elements of program content necessary to meet the public interest standard.[120] These included religious, educational, public affairs, political, agricul-

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113 *See* 707 F.2d at 1425-26, 1430, 1436.

114 *Id.* at 1424. The FCC is required, under the Administrative Procedure Act, to consider relevant matter presented in the course of its rule making proceeding. *See* 5 U.S.C. § 553(c) (1982).

115 707 F.2d at 1426.

116 *See, e.g., id.* at 1430. In the Report and Order, the FCC stated that the "bedrock obligation contemplated by the 'public interest' will be fulfilled with the least government intrusion and with the most licensee flexibility." (footnote omitted) 46 Fed. Reg. 13,893 (1981).

117 707 F.2d at 1438-42.

118 *Id. See infra* notes 190-232 and accompanying text.

119 96 F.C.C.2d 941-45 (1981).

120 707 F.2d at 1421. The FCC had, since 1946, indicated to licensees what types of programming it considered desirable. *See supra* notes 45-55 and accompanying text (discussing the public interest standard and the FCC's program content policy). *See also* 46 Fed. Reg. 13,892 (1981).

tural, locally-originated, and childrens' programs.[121] Under the deregulation plan, the FCC requires only that radio stations provide programming "responsive to community issues."[122] Broadcasters need no longer provide any specific types of programming.[123]

The challengers in *UCC v. FCC* claimed that the FCC's elimination of specific categories of required programming violated its statutory mandate to regulate broadcasting in the public interest.[124] They also argued that the FCC acted arbitrarily and in contravention of the Administrative Procedure Act by limiting its concern to issue-responsive programming.[125] The challengers asserted that the FCC had failed to explain why other types of programming, specifically those formerly recognized as "necessary" to meet the public interest standard,[126] had now "ceased to serve the public interest."[127]

The court, however, held that the FCC's requirement that licensees provide broadly-defined issue-responsive programming constitutes a "reasonable interpretation of the public interest standard."[128] Further, the court observed that the new standard of issue-responsive programming does, in fact, include programming described under the FCC's former guidelines[129] as necessary to satisfy the public interest obligation.[130] In its Report and Order, the FCC had explicitly stated that broadcasters could continue to provide programming that fell within one of the previously prescribed categories.[131] A licensee could, for example, indicate its responsiveness to community issues through educational or religious programming.[132]

The court noted that the FCC had included, in its deregulation order, a clarification of its use of the term "issue" to guide

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121 707 F.2d at 1421. *See also* 44 F.C.C. 2303, 2314 (1960).

122 707 F.2d at 1421 (citing *In re* Deregulation of Radio, Reconsideration Order, 87 F.C.C.2d 797, 804 (1981). The FCC maintained that removing the nonentertainment programming guideline would give broadcasters maximum flexibility to be responsive to important issues. 46 Fed. Reg. 13,891 (1981).

123 707 F.2d at 1421. *See also* 46 Fed. Reg. 13,889 (1981).

124 707 F.2d at 1422.

125 *Id.*

126 *See supra* notes 57-58 and accompanying text (discussing the public interest standard and the FCC's program content policy).

127 707 F.2d at 1427.

128 *Id.*

129 *See id.* at 1430; *see supra* notes 57-58 and accompanying text (discussing the public interest standard and the FCC's program content policy).

130 707 F.2d at 1430-31.

131 *Id.* (citing 84 F.C.C.2d at 982-83).

132 707 F.2d at 1431.

licensees.[133] An " 'issue' " was defined as a " 'point of discussion, debate, or dispute, . . . [or a] matter of wide public concern.[134]' " The court stated that the new issue-responsive approach would maximize the journalistic discretion of radio licensees to choose the types of programs they broadcast.[135]

The Communications Act does not require that a radio station offer a particular type of programming,[136] and mandatory program categories imposed by the FCC have raised first amendment questions.[137] However, "the chief concern has always been that issues of importance to the community will be discovered by broadcasters and will be addressed in programming so that the informed public opinion, necessary to the functioning of a democracy, will be possible."[138] Therefore, the court held that the FCC's imposition of only a "bedrock obligation to cover public issues"[139] was consistent with the FCC's past practices, as well as congressional and judicial interpretation of the Communications Act.

B. *Quantity of Nonentertainment Programming*

The second change in the area of nonentertainment programming was the elimination of specific quantitative guidelines.[140] While licensees were never barred from offering less than the recommended amount of nonentertainment program-

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133 *Id.*

134 *Id.* (citing Reconsideration Order, 87 F.C.C.2d at 818).

135 707 F.2d at 1432. The goal of providing maximum flexibility for licensees was a major factor in the FCC's elimination of nonentertainment programming guidelines. 46 Fed. Reg. 13,893 (1981).

136 707 F.2d at 1430. *See* 47 U.S.C. § 307(a).

137 707 F.2d at 1430 (citing National Ass'n of Indep. Television Producers and Distribs. v. FCC, 516 F.2d 526, 536 (2d Cir. 1975) (upholding prime time access rules as not violative of broadcasters' first amendment rights). In 1960, the FCC considered the possible constitutional implications of its interference in the area of program content. 44 F.C.C. at 2303. It concluded that because of the unique relationship between broadcasting and the first amendment, the FCC could impose an obligation to offer programming relevant to the "tastes, needs and desires of the public [the broadcasters are] licensed to serve. . . ." *Id.* at 2314. *See supra* notes 69-76 and accompanying text (discussing the Supreme Court's decision in *Red Lion* upholding the FCC's interpretation of the first amendment in relation to broadcast regulation).

138 707 F.2d at 1431 (citing 84 F.C.C.2d at 978, 982). *See Red Lion*, 395 U.S. at 390 (1969) (citing Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co., v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) Holmes, J., dissenting)). *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). *See generally* R.E. LABUNSKI, THE FIRST AMENDMENT UNDER SIEGE: THE POLITICS OF BROADCAST REGULATION (1981) (discussing first amendment implications of government control of electronic versus print media).

139 707 F.2d at 1430. *See* supra notes 61-81 and accompanying text.

140 707 F.2d at 1420. *See* 46 Fed. Reg. 13,890-91 (1981).

ming, if a station did offer less, its renewal application would not be routinely processed. The application would be "flagged" and, in some cases, a hearing would be held to determine whether the public interest mandate was being fulfilled.[141] Under the deregulation plan, the FCC no longer requires that licensees provide a minimum amount of nonentertainment programming.[142]

The petitioners in *UCC v. FCC* alleged that, for purposes of the license renewal procedure, the FCC had " 'arbitrarily determined that the amount of time devoted to public service programming is never relevant to the public interest determination. . . .' "[143] They maintained that abolishing quantitative guidelines meant that the FCC would "never look at the quantity of [a station's] public interest programming in assessing the [proposals of a license applicant or] the performance of a renewal applicant."[144]

The court determined that the FCC's decision in this area only emphasized that a licensee's response to issues of importance to its listening audience could not be measured by quantity alone.[145] "Quantity of programming remains but one factor in assessing the overall responsiveness of a licensee—a factor that the Commission may choose to deemphasize, but may not ignore altogether."[146]

The Communications Act provides no quantitative measure of the public interest standard. Interpretation of the Act by Congress, the courts, and the FCC, however, "ha[s] left no doubt that the regulatory scheme envisioned by the drafters of the Act imposes upon licensees *some* affirmative obligation to present informational programming."[147] The court noted that the FCC's elimination of quantitative guidelines will enable licensees to exercise greater discretion within their statutory obligation to operate in the public interest.[148] In essence, the court found that the FCC's policy in this area was "basically unchanged."[149]

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141 46 Fed. Reg. 13,890 (1981).
142 707 F.2d at 1419-21.
143 *Id.* at 1432 (quoting petitioner's brief at 14).
144 *Id.* at 1433.
145 *Id.* at 1433-34.
146 *Id.*
147 *Id.* at 1429 (emphasis in original). *See, e.g.*, 47 U.S.C. § 315(a) (1982) (stations must afford reasonable opportunity for the discussion of conflicting issues of public importance); Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (as public trustees, broadcasters have the duty of fairly and impartially informing the public audience); *Red Lion*, 395 U.S. at 380 (Congressional public interest mandate imposes duty on broadcasters to discuss both sides of controversial issues).
148 707 F.2d at 1429. *See* 46 Fed. Reg. 13,889 (1981).
149 707 F.2d at 1433.

C. *Reliance on the Programming of Other Stations*

The third change in the area of nonentertainment programming was the elimination of the requirement that broadcasters provide programming responsive to the needs of the entire community. Broadcasters can now tailor their issue-responsive programming directly to their own listening audiences[150] if they determine that other stations provide adequate services for other specific groups in the community.[151] The broadcaster may, therefore, ignore issues of importance to those community members who the broadcaster determines are not part of its listening audience or who are adequately served by other stations. Thus, if its public interest performance is challenged, a station may argue that programming services provided by other radio stations in the community, together with its own programming, fulfill the overall public interest mandate.[152]

The petitioners in *UCC v. FCC* argued that the new policy permitting specialization of programming would result in a "loss of diverse sources of information in any given community and the removal of incentives for each licensee to communicate minority group concerns to majority audiences."[153] The court, however, rejected the contention that broadcasters must provide "something for everyone" in order to meet the public interest standard.[154] The court relied on the FCC's finding that, whereas in the early days of radio it was essential that the few stations in existence provide a broad general service, the thousand of licensees currently operating can offer diverse programming to segmented audiences.[155]

The court was satisfied that the policy shift was "adequately explained and sufficiently supported by economic analysis and logical argument."[156] Finding no reason to overturn the FCC's decision,[157] the court deferred to the Commission's expert prediction of licensee behavior.

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150 46 Fed. Reg. 13,892 (1981).

151 707 F.2d at 1421. *See* 46 Fed. Reg. 13,892 (1981).

152 This policy change requires the FCC to make an evaluation of public interest performance within a particular market rather than on an individual station-by-station basis. It directly contravenes the FCC's statutory mandate to determine whether *each* license it grants will serve the public interest. *See* 47 U.S.C. § 309(a) (1982).

153 707 F.2d at 1434.

154 *Id.* at 1435.

155 *Id.* at 1434 (quoting 84 F.C.C.2d at 969).

156 707 F.2d at 1435.

157 *Id.*

VII. Elimination of Ascertainment Procedures

Ascertainment is the process by which a radio licensee discovers the programming needs of its community.[158] The FCC's first formal policy guideline regarding ascertainment, published in 1960, required broadcasters to "provide a statement describing the measures taken and efforts made 'to discover and fulfill the tastes, needs, and desires of [their] community or service area.' "[159]

After more than a decade of analyzing its ascertainment guideline, the FCC established mandatory formal ascertainment procedures.[160] In 1971, the FCC issued a detailed Ascertainment Primer, requiring that broadcasters consult with community leaders and members of the general public who received the station's signal.[161] The Primer designated demographic categories of community members to be contacted by a station in order to ascertain which issues were important to the community.[162] Further, it required the station to conduct general opinion surveys and list community problems and needs to be served with responsive programming and to place this information in the station's public file.[163]

The petitioners in *UCC v. FCC* argued that the FCC eliminated these procedures without adequate explanation or supporting evidence.[164] The FCC countered that elimination of the procedure was a rational result based on a cost-benefit analysis.[165] The FCC argued that its focus had shifted away from scrutiny of the broadcasters' method of ascertainment, and thus, detailed formal procedures were no longer necessary.[166] Under the deregulation plan, licensees were directed to " 'utilize their good faith discretion in determining the type of programming that they will offer and the issues to which they will be

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158 *Id.*
159 *Id.* at 1435-36 (quoting 84 F.C.C.2d at 1073).
160 707 F.2d at 1436.
161 Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).
162 707 F.2d at 1436 (construing 84 F.C.C.2d at 1073 (referring to 27 F.C.C.2d 650)). The FCC's Report and Order regarding Ascertainment of Community Problems by Broadcast Applicants required that community leaders and members of the general public be contacted. 27 F.C.C.2d at 660. Applicants were advised to rely on statistically accurate sampling reports compiled, for example, by the Census Bureau to determine the composition of their listening audiences and to contact representatives of major demographic groups. 27 F.C.C.2d at 660-61.
163 707 F.2d at 1436 (citing 84 F.C.C.2d at 1074).
164 707 F.2d at 1435-37.
165 *Id.* at 1436.
166 *See id.*

responsive.' "[167]

The court held that the FCC's cost-benefit analysis was neither arbitrary nor capricious.[168] It stated that since this was uninformal procedure, the FCC did not have to cite to findings of fact to justify its policy judgment.[169] Nevertheless, the court noted evidence in the Report and Order that indicated the high costs for ascertainment and noted that there were numerous legal challenges brought against the FCC exposing the burdensome nature of the ascertainment procedure.[170]

The court of appeals upheld the FCC's determination that the detailed methodology of ascertainment formerly prescribed was not as important as good faith responsiveness to the community.[171] As a result of the deregulation plan, broadcasters were required to prepare only an issues/programs list consisting of a brief statement of five to ten issues facing the community, a description of how the licensee selected each issue, and examples of programming aired in response to the issue.[172] On remand, the FCC modified this policy; it no longer requires any documentation of the licensees' ascertainment procedure.[173]

Just as the Communications Act provides no specific guidelines regarding nonentertainment programming content,[174] the Act provides no procedural guidelines for ascertainment. It is, therefore, within the FCC's general discretionary power to establish an ascertainment method. The court endorsed the FCC's "continuing efforts to readjust these policies in light of past experiences."[175] In the court's view, any reasonable method of as-

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167 *Id.* (citing 84 F.C.C.2d at 998). Under the deregulation plan, licensees were instructed to determine, by any reasonable means, which issues in their community warrant consideration. 46 Fed. Reg. 13,897 (1981). On remand, the FCC maintained its requirement that licensees need not document their ascertainment procedure. 96 F.C.C.2d at 941. Arguably, the licensee must still utilize good faith discretion in the area of ascertainment even though it need not prove how that discretion was exercised.

168 707 F.2d at 1436.

169 *Id.* at 1437.

170 *Id.* at 1436-37. In its Report and Order, the FCC noted that it had been called upon to decide numerous cases involving the ascertainment procedures. 46 Fed. Reg. 13,897 (1981). The issues involved were generally the mechanics of the procedure, such as how the ascertainment was conducted, whether it was sufficient, whether the correct community leaders were contacted, and whether the appropriate station employee conducted the procedure. *Id.* at 13,897-98. *See also infra* note 254 and accompanying text.

171 707 F.2d at 1436.

172 *Id.* (citing 84 F.C.C.2d at 998-99). In the FCC's deregulation plan, that same issues/programs list was to replace the program logs. *See* 46 Fed. Reg. 13, 903-04 (1981). *See also infra* notes 210-12 and accompanying text.

173 96 F.C.C.2d at 941.

174 *See supra* notes 45-77 and accompanying text (discussing the public interest standard and the FCC's program content policy).

175 707 F.2d at 1436.

certainment[176] that apprised a licensee of the issues important to its listening audience was entitled to judicial deference.[177]

VIII. Elimination of Commercial Time Guidelines

In 1970, the FCC determined that it was reasonable for radio stations to air a maximum of eighteen minutes of advertising per broadcast hour.[178] Any initial application or renewal application exceeding this guideline would not be routinely processed and would be referred to the full Commission for review.[179] The removal of this restriction was challenged by an *amicus* as "irrational".[180]

In support of this deregulatory measure, the FCC argued that it had found current levels of advertising time far below those permitted by the guidelines.[181] The FCC concluded that

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176 *Id.* at 1421 (construing 84 F.C.C.2d at 993). *See* 46 Fed. Reg. 13,889 (1981).

177 *See* 707 F.2d at 1436-37. On remand, the FCC re-evaluated the revised ascertainment requirement. 96 F.C.C.2d at 941-42. It decided that licensees need not describe how they discovered that a particular issue was important to their community. This policy shift may undermine the public interest requirement that licensees be responsive to their community, for now the licensee need not indicate that it contacted anyone in the community to ascertain which important issues face the community. *See infra* notes 244-47, 258-60 and accompanying text.

178 In *In re* WDIX, Inc., 14 F.C.C.2d 265 (1968), the FCC refused to renew a broadcast license finding, *inter alia*, an excessive commercialization level. In another licensing case, the FCC stated that it would consider commercial content of eighteen minutes per hour, or approximately 10% of total operating time, to be a reasonable level. *See* 73 F.C.C.2d at 477. This policy was incorporated into the rules delegating authority to the Chief of the Broadcast Bureau of the FCC. *Id.* (citing Delegation of Authority, 43 F.C.C.2d 638 (1973)). Prior to implementation of the deregulation plan at issue in *UCC v. FCC*, the FCC Broadcast Bureau Chief could not grant applications exceeding the following criteria:

> (i) Commercial AM and FM proposals in non-seasonal markets exceeding 18 minutes of commercial matter per hour, or providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the stations' total weekly hours of operation.
> (ii) Commercial AM and FM proposals in seasonal markets (e.g., resort markets) exceeding 20 minutes of commercial matter per hour during 10 percent or more of the stations' total weekly hours of operation.
> (iii) During periods of high demand for political advertising proposals exceeding either (a) an additional 4 minutes per hour of purely political advertising or (b) exceeding 10 percent of the station's total hours of operation in the applicable lowest-unit-charge period.

73 F.C.C.2d at 477-78 n.92 (citing 47 C.F.R. § 0.281(a)(7)(n.d.)). The FCC decided it would conduct an *en banc* review of any applications proposing commercial levels in excess of the guidelines. 73 F.C.C.2d at 478.

179 *See* 46 Fed. Reg. 13,900 (1981). *See, e.g.*, Marion Broadcasting Co., 44 Rad. Reg. 2d 1045, 1046-47 (P & F) (1978). *See also* Chattahoochie Broadcasting Co., 69 F.C.C.2d 1460 (1978) (licensee admonished for excessive advertising time); CBS, Inc. 41 Rad. Reg. 2d 1350 (P & F) (1977) (licensee admonished for excessive advertising time); Enid Radiophone Co., 67 F.C.C.2d 19 (1977) (licensee with excessive advertising time granted short-term renewal).

180 *See* 707 F.2d at 1438; 46 Fed. Reg. 13,901-02 (1981).

181 *Id.* at 1438; 46 Fed. Reg. 13,901 (1981).

market forces were more effective in reducing advertising excess than its own burdensome record-keeping and monitoring.[182] The FCC reasoned that audiences avoid radio stations with excessive advertising.[183] Those stations are less attractive to advertisers and do not survive in a competitive marketplace.[184] The FCC concluded that self-regulation would prevent over-commercialization.[185]

Although the Communications Act does not obligate the FCC to maintain maximum commercial guidelines, the FCC has stated that " 'a limitation on the amount and character of advertising [is] one element of [performance in] the 'public interest'.' "[186] Noting its own "concern about excessive commercialization"[187] the court endorsed the FCC's "long-standing polic[y] against domination of scarce broadcast time by private advertiser interests."[188] Nevertheless, the court upheld the FCC's elimination of the commercial time guideline.

The court indicated that it was confident the FCC would reconsider this deregulatory measure if marketplace forces did not sufficiently limit over-commercialization.[189]

IX. The FCC's Attempt to Eliminate Program Logs

The FCC is authorized "to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable."[190] For over fifty years the FCC exercised this discretion by requiring stations to keep comprehensive program

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182 707 F.2d at 1438; 46 Fed. Reg. 13,901-02 (1981).

183 707 F.2d at 1438.

184 *Id.*

185 *Id.*

186 W. Jones, Cases and Materials on Electronic Mass Media: Radio, Television and Cable 366 (2d ed. 1979) (quoting Public Service Responsibility of Broadcast Licensees (1946)).

187 707 F.2d at 1438.

188 *Id.* In *Florida Renewals* 9 Rad. Reg. 2d 639, the FCC granted renewal applications to stations having records of excessive commercial time but requested follow-up reports regarding the number of complaints received, the number of times the licensee aired more than eighteen minutes of commercial time per broadcast hour, and a statement explaining why the stations' commercial policy was consistent with the public interest. *Id.* at 639-40. The FCC has considered commercial practices when reviewing license applications, *In re* Sheffield Broadcasting Co., 30 F.C.C. 579 (1961), *In re* Fisher Broadcasting Co., 30 F.C.C. 177 (1961). *In re* The Walmac Co., 12 F.C.C. 91 (1947), *In re* The Community Broadcasting Co., 12 F.C.C. 85 (1947). The FCC has denied a license application on the basis of commercial practices. *See, e.g., In re* Travelers Broadcasting Service Corp., 6 F.C.C. 456 (1938).

189 707 F.2d at 1438.

190 47 U.S.C. § 303(j) (1982).

logs.[191] Program logs are records describing the type, time, and duration of all programming broadcast.[192] Under the FCC's rules, the logs were made available to members of the public seeking concrete information demonstrating a radio station's performance.[193]

Program logs have been used by the FCC in two types of proceedings to determine whether licensees are fulfilling their public interest obligation. In comparative renewal hearings,[194] an incumbent broadcaster whose license is due to expire is challenged by one or more parties seeking to replace the current licensee. The challenger(s) propose(s) to serve the community better than the current licensee does through differences in ownership,[195] management,[196] and programming.[197] The FCC compares the quantity and quality of the incumbent's past performance[198] with the sometimes grandiose proposals of the challenger(s). The program log is arguably the best evidence of the incumbent's attention to the public's needs and interests through its programming.

An incumbent may also be challenged by a private party not seeking to replace the existing broadcaster but claiming that the broadcaster has not fulfilled the public interest mandate. A "party in interest,"[199] which may include representatives of the station's audience,[200] may seek to have a broadcaster removed by filing a petition to deny[201] the incumbent's renewal application. This party must allege specific facts sufficient to show that the renewal will be *prima facie* inconsistent with the public interest, convenience and necessity.[202] The FCC has rejected petitions to deny renewal applications for lack of specificity, noting that "gen-

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191 46 Fed. Reg. 13,947 (1981).

192 *See id.*

193 *See* 707 F.2d at 1441.

194 *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

195 *See, e.g., In re* Geller, 90 F.C.C.2d 250, 267-68 (1982).

196 1 F.C.C.2d at 395-96. Participation of station owners in day-to-day management was considered an important factor in securing the best possible broadcast service.

197 1 F.C.C.2d at 397-98. *See, e.g., Geller*, 90 F.C.C.2d at 261-67 (licensees must provide programming responsive to community needs and this obligation is not excused by financial troubles of licensee); Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C. Cir. 1949) (differences in programming are the major element to be considered in comparing service offered to the listening public by competing applicants).

198 *See, e.g., Geller*, 90 F.C.C.2d at 260-61 (citing quantitative information about the incumbent's programming performance). Presumably the source of this information was the incumbent's program log.

199 47 U.S.C. § 309(d)(1) (1982).

200 Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

201 *See* 47 U.S.C. § 309(d)(1) and (2) (1982).

202 47 U.S.C. § 309(d)(1) (1982).

eral allegation[s] of inadequate news and public affairs programming . . . raise[s] no substantial or material question of fact regarding prospective service in the public interest."[203] It has required petitioners to submit specific evidence establishing that the licensee's programming "could not reasonably have met the needs and interests of the people within his service area. . . ."[204]

The incumbent's proof that it has served the public interest, or the challenger's proof to the contrary, is often largely based on the incumbent's program logs. Since 1946, the FCC has made license renewal decisions by considering the adequacy of time allotted by the licensee to discussion of news and public issues.[205] Elimination of the logs would mean that the public and the FCC would not have access to the quantitative information necessary to determine whether a broadcaster has fulfilled the public interest obligation.

Nevertheless, the FCC decided that the record-keeping burden imposed on licensees outweighed the value of the logs to both the FCC and the public.[206] Its decision to eliminate the logs was based on a cost-benefit analysis.[207] Evidence was presented showing the "tremendous" amount of paperwork associated with keeping these records.[208] In addition, the FCC contended that since minimum nonentertainment programming requirements and maximum commercial time guidelines had been eliminated, the logs would no longer be useful.[209] The logs had been used to assess compliance with those requirements, but now there are no guidelines to comply with.

Therefore, the FCC changed its policy to require that in lieu of program logs, licensees must place the issues/programs list in their public files.[210] This list, which would have also satisfied the ascertainment requirement,[211] would enumerate five to ten issues

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203 *In re* Radio Station WPFB, Inc., 66 F.C.C.2d 459, 462 (1977) (citing *In re* California La Raza Media Coalition, 38 F.C.C.2d 22 (1972)).

204 *In re* RadiOhio, Inc. and WBNS-TV, Inc., 38 F.C.C.2d 721, 738 (1973).

205 *See* Comment, *supra* note 23, at 519-20.

206 707 F.2d at 1438-39 (citing 84 F.C.C.2d at 1008-10, 87 F.C.C.2d at 809). *See also* 46 Fed. Reg. 13,903-04 (1981).

207 707 F.2d at 1439.

208 *Id.* A General Accounting Office study on federal paperwork concluded that "radio stations' compliance with the logging rules involves 18,233,940 hours per year." *Id.* (citing 84 F.C.C.2d at 1009). *See also* 46 Fed. Reg. 13,903-04 (1981).

209 707 F.2d at 1439. *See* 46 Fed. Reg. at 13,904; *see supra* notes 120-89 and accompanying text discussing elimination of nonentertainment, ascertainment and commercial time guidelines. *See also* 87 F.C.C.2d at 809.

210 46 Fed. Reg. 13,904 (1981).

211 Licensees must no longer document any ascertainment method. *See* 96 F.C.C.2d at 741. *See also infra* notes 243-47 and accompanying text.

of concern to the community, and would provide examples of the programs aired to address those issues.[212] Since its focus has shifted to an evaluation of "issue-oriented programming," the FCC maintained that a general issues/programs list would "enable it and the public to oversee the general public interest responsibilities of licensees."[213]

The petitioners in *UCC v. FCC* asserted that citizens, as well as the FCC, would find the issues/programs list an inadequate substitute for program logs.[214] The court agreed. It found that the lists required by the FCC under the deregulation plan would provide only illustrative examples of issue-oriented programming, selectively noted by the stations. There would be no way to "gauge a station's overall public service performance."[215]

The court was careful to note that it did not question the validity of the FCC's cost-benefit analysis.[216] However, the court was not satisfied that the FCC had considered the relevant factors or adequately explained its reasoning in adopting this deregulatory measure.[217] "The fundamental problem is the Commission's complete failure to examine in an orderly fashion the informational needs created by its revised scheme and the possible ways in which those needs may be met."[218] More specifically, the court indicated that the FCc had failed to consider the possibility of requiring stations to keep logs in a form compatible with the new issue-responsive focus.[219]

In rejecting this FCC deregulatory measure, the Court relied in part on its determination in a previous case involving both the United Church of Christ and the FCC[220] that citizens have a "crucial right . . . to participate in the review of a station's public interest performance at renewal time . . . . The public . . . possesses an unassailable right to participate in the disposition of valuable public licenses, free of charge, to 'public trustees.' "[221] In the past, citizens bringing petitions to deny had relied heavily on the logs to demonstrate a radio station's inadequate perform-

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212 707 F.2d at 1439 (construing 84 F.C.C.2d at 1009).
213 707 F.2d at 1439 (construing 84 F.C.C.2d at 1010).
214 707 F.2d at 1441.
215 *Id.*
216 *Id.* at 1440.
217 *Id.*
218 *Id.*
219 *Id.* For a critique of the court's scope of review regarding the elimination of program logs, see Boudreau, *supra* note 11, at 306-09.
220 707 F.2d at 1441 (citing 359 F.2d 994, 1003-05).
221 707 F.2d at 1441.

ance.[222] Elimination of the program logs would result in "a dearth of information . . . hardly conducive to encouraging the public participation envisioned by the Congress and by this court as essential to the formulation of an informed regulatory policy."[223]

Further, the court was uneasy about the elimination of program logs in light of the FCC's simplification of the license renewal process.[224] Under the simplified renewal procedure, petitions to deny would remain one means of challenging a licen-

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222 *Id. See also*, J. GRUNDFEST, CITIZEN PARTICIPATION IN BROADCAST LICENSING BEFORE THE FCC (1976); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. CIVIL RIGHTS—CIVIL LIB. L. REV. 137, 168-70 (1975).

223 707 F.2d at 1441.

224 Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Non-Commercial AM, FM and Television Licensees, 46 Fed. Reg. 26,236 (1981). The FCC had previously developed an elaborate procedure requiring extensive documentation by radio licensees. *Id.* at 26,237. Licensees were asked about their legal, technical, engineering, programming, and equal employment opportunities. The FCC hired a large staff to review and assess the applications. The simplified procedure required that commercial radio licensees answer only the following five questions:

1. What is the applicant's name, address, and call letters;
2. Whether the following reports are on file at the FCC:
   (a) The three most recent Annual Employment Reports (FCC Form 395)
   ☐ Yes ☐ No
   If no, [licensee is to attach] an explanation
   (b) The applicant's Ownership report (FCC Form 323 or 323-E)
   ☐ Yes ☐ No
   If no, licensee is to provide the following information:
   Date last ownership report was filed:
   Call letters of the renewal application with which it was filed;
3. [Whether] the applicant is in compliance with the provisions of Section 310 of the Communications Act, . . . relating to interests of aliens and foreign governments[.] [If not, applicant is to attach an explanation];
4. [Whether] [s]ince the filing of the applicant's last renewal application for this station or other major application has an adverse finding been made, a consent decree been entered, or final action been approved by any court or administrative body with respect to the applicant or parties to the application concerning any civil or criminal suit, action, or proceeding, brought under the provisions of any federal, state, territorial or local law relating to the following: any felony, lotteries, unlawful restraints or monopolies, unlawful combinations, contracts or agreements in restraint of trade; in the use of unfair methods of competition; fraud, unfair labor practices, or discrimination?
   [if so, applicant is to attach an explanation; and]
5. [Whether applicant has placed] the documentation required by Sections 73,3526 and 73,3527 of the Commission's Rules [in its public files at the appropriate times].

46 Fed. Reg. 26,250 (1981). The FCC asserted that the information necessary to conduct an in-depth review of a licensee's performance would be available in a station's public inspection file. *Id.* at 26,240. Had the court in *UCC v. FCC* not remanded the proposed elimination of program logs to the FCC, then all that would have been available to the public was the answers to the five preceeding questions and an annual issues/programs list.

see's service in the public interest[225] and the information contained in licensees' public inspection files would be extensively relied upon as evidence.[226] However, elimination of the program logs would leave only issues/programs lists in the public files, selectively illustrating the licensees' issue-responsive programming. As a result, a "party in interest" would be deprived of the information needed to establish a *prima facie* case in petitions to deny,[227] and the FCC would not have the data necessary to evaluate such petitions.[228]

Finally, the most critical factor in the court's decision was its determination that the information contained in the logs was crucial to the FCC's ability to monitor its deregulation of the commercial radio industry.[229] Throughout these proceedings, the court upheld numerous policy judgments made by the FCC that were "essentially predictions of future licensee and market behavior."[230] It noted the FCC's promise to monitor the deregulation and, if necessary, to reconsider the validity of the new policies in another rulemaking proceeding.[231] However, elimination of the logs would foreclose the FCC's and the public's ability to assess the accuracy of those predictions.[232] Elimination of the logs would preclude the FCC from determining whether radio stations are complying with their public interest obligation.[233] Therefore, the court remanded this portion of the deregulation plan for reconsideration by the FCC.

X. FCC Action on Remand

In response to the partial remand by the court of appeals in *UCC v. FCC*, the FCC issued a Further Notice of Proposed Rulemaking,[234] seeking comments on revising the program log requirement.[235] In April 1984, the FCC released its Second Re-

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225 *See* 46 Fed. Reg. 26,245 (1981).
226 *Id.* at 26,238, 26,240.
227 707 F.2d at 1441-42.
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id. See* 46 Fed. Reg. 13,905 (1981). The court in UCC v. FCC also noted that much of the information the FCC relied upon in making its decision to deregulate was derived from program logs. 707 F.2d at 1442. Preservation of the logs would afford the FCC continued access to the concrete information it needs to monitor public interest compliance under the deregulation scheme. *See id.*
232 707 F.2d at 1442.
233 *Id.*
234 *In re* Deregulation of Radio, Further Notice of Proposed Rulemaking, 48 Fed. Reg. 33,499 (1983).
235 Specifically, the Further Notice invited comments on the following questions:

port and Order,[236] discussing the comments elicited and modifying the program log requirement.

In evaluating the comments and developing a revised program log requirement, the FCC began with the assumption that the court of appeals did not "express a preference for logging as opposed to some other method of documentation suitable and adequate to [the] new regulatory scheme for radio broadcasting."[237] The FCC presumed that it would be sufficient for stations to keep records of information pertaining only to issue-responsive programming and not to document broadcasts of categories of program content such as public affairs, news, and commercials, since the nature and quantity of such nonentertainment programming was no longer of concern to the FCC. Thus, it decided that the issues/programs list technique would elicit all the information necessary in the context of the deregulatory scheme.[238]

The FCC modified the issues/programs list requirement in several respects. First, the FCC removed the limitation that only five to ten issues be listed on the annual list.[239] Second, licensees must now prepare the issues/programs lists and make them available on a quarterly basis, rather than annually.[240] The lists must describe the issues addressed and the date, time, and duration of the listed programming.[241] The FCC opted for quarterly reports "because such more frequent reports will probably provide more, and will certainly provide fresher, information than annual

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(1) Should the Commission require a complete listing by time, date and duration of all nonentertainment programming or only of issue-responsive programming?
(2) Should the Commission require a brief statement regarding the nature of the issue addressed in each program noted on the "log?"
(3) At what intervals should the "log" have to be placed in the public file—weekly, monthly, quarterly, yearly, etc.?
[footnote omitted]
(4) Should any new types of "log" be in lieu of, or in addition to, the issues/programs list?
(5) What would be the estimated costs of keeping a comprehensive listing of issue-responsive programming?
(6) What benefits would be conferred by our requiring commercial radio licensees to keep such a comprehensive listing?

In re Deregulation of Radio, Second Report and Order, 96 F.C.C.2d at 933 (1984).

236 96 F.C.C.2d 930.

237 *Id.* at 938.

238 *Id.*

239 *Id.* at 941.

240 *Id.* The new regulation requires radio stations to file a list every three months listing five to ten issues addressed by the station during the preceeding three-month period. It is arguable, therefore, that stations must now discuss 20 to 40 issues annually. *Id.* at 945 app. A.

241 96 F.C.C.2d at 945 App. A (citing 47 C.F.R. § 73.3526(a)(14) (1983)).

reports. . . ."[242] Both modifications are in accordance with the court's concern that the public and the FCC have information available on a regular basis to evaluate a licensee's public interest performance.

On the other hand, the FCC's final modification, that licensees need not describe their ascertainment procedure on the issues/programs list,[243] is inconsistent with the rationale underlying the court's decision to uphold the FCC's previous deregulatory measures. The licensee is not required to indicate how it determined that a particular issue was important to the community. In support of this policy change, the FCC stated that it is interested in the result, not the process.[244]

In *UCC v. FCC*, the court of appeals endorsed the FCC's decision to allow licensees to determine the ascertainment method which would apprise them of the issues important to their listening audience.[245] The court relied on the FCC's contention that, despite its elimination of formal ascertainment procedures, broadcasters will still be held to their "bedrock obligation" to operate in the public interest.[246] The court did not consider whether the vitality of the public interest standard would be affected if the FCC were to eliminate all review of a licensee's ascertainment procedure.[247]

XI. Impact of the Deregulation Plan on the Evaluation of a Broadcaster's Performance in the Public Interest

The FCC's mandate to issue and renew licenses on the basis of service in the public interest has not changed. As the *UCC v. FCC* court noted, the FCC is still obligated to monitor the responsiveness of licensees to their communities.[248] However, the FCC's focus in assessing the licensees' compliance with the public interest standard has shifted from an evaluation of compliance with specific programming requirements and ascertainment pro-

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242 96 F.C.C.2d at 941.
243 *Id.*
244 *Id.* at 941-42.
245 *See supra* note 176 and accompanying text.
246 *See* 707 F.2d at 1420.
247 It is notable that in considering the FCC's elimination of nonentertainment programming guidelines, the court warned that the FCC could de-emphasize quantitative measurements but not ignore them entirely. *See supra* text accompanying notes 147-48. Although the FCC has not eliminated the ascertainment requirement *per se*, the court would probably not endorse the FCC's latest policy decision to eliminate all consideration of ascertainment methodology.
248 707 F.2d at 1426 *passim*.

cedures to an appraisal of general good faith responsiveness to the needs of the listening audience.[249] As a result of the FCC's outright elimination of quantitative nonentertainment programming and ascertainment requirements, there is no longer a standard against which to measure a licensee's performance in the public interest. This policy change creates a void in the process of assessing licensee compliance with the public interest standard.

Despite considerable public opposition,[250] the FCC's deregulatory plan was adopted as a means of reducing the paperwork and other burdens on commercial radio stations without adversely affecting the public interest.[251] This laissez-faire regulatory approach is consistent with the FCC's current policy of decreased government intervention[252] and its theory that competitive forces in the broadcast market will compel fulfillment of the public interest mandate by licensees.[253] Yet the public is not well-served by the FCC's deregulatory measures. As a result of the FCC's virtual elimination of its own "flagging" and hearing procedures for initial and renewal applications,[254] the burden of challenging the public interest performance of licensees falls completely onto the public. However, the deregulatory measures adopted by the FCC to make its own job easier leave the public with no means by which to construct such a challenge.

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249 *Id.* at 1436.

250 *See supra* notes 87 and 88 and accompanying text.

251 46 Fed. Reg. 13,888 (1981).

252 *Id.* at 13,906. *See* Fowler, *The Boom Goes Bust, The Bust Goes Boom*, 6 COM. & THE LAW 23 (1984); Fowler, *The Public's Interest*, 4 COM. & THE LAW 51 (1982).

253 *See supra* note 252 and accompanying text; 46 Fed. Reg. 13,906 (1981). For critiques of the FCC's market place theory, see Brennan, *Economic Efficiency and Broadcast Content Regulation*, 35 FED. COM. L.J. 117 (1983); Brosterhous, *United States v. National Association of Broadcasters: The Deregulation of Self-Regulation*, 35 FED. COM. L.J. 313 (1983); KRASHOW, COLE & KENNARD, *FCC Regulation and Other Oxymorons: Seven Axioms to Grind*, 5 COMM/ENT L.J. 759, 763-64 (1983); Schreiber, *Don't Make Waves: AM Stereophonic Broadcasting and the Marketplace Approach*, 5 COMM/ENT L.J. 821 (1983); Note, *A "Better" Marketplace Approach to Broadcast Regulation*, 36 FED. COM. L.J. 27 (July 1984); Comment, *Radio Entertainment Format—Free Market Approach—FCC v. WNCN Listeners Guild*, 28 N.Y. L. SCH. L. REV. 221 (1983).

254 Prior to implementation of the deregulation plan, the FCC, on its own initiative, took note of license applications and renewals proposing less than the recommended amount of nonentertainment programming (707 F.2d at 1420; 46 Fed. Reg. 13,890-92 (1981)) or more than the suggested number of commercial minutes per broadcast hour (707 F.2d at 1421; 46 Fed. Reg. 13,900-03 (1981)). The FCC also reviewed the adequacy of ascertainment procedures employed by licensees (707 F.2d at 1421; 46 Fed. Reg. 13,897-900 (1981)). *See generally In re* Centreville Broadcasting Co., 50 F.C.C.2d 261 (1975); *In re* Axalea Corp., 47 F.C.C.2d 151 (1974); *In re* Frank M. Cowles, 37 F.C.C.2d 405 (1972). Removal of the FCC's guidelines in these areas may eliminate the FCC's consideration of licensee behavior in these areas during the application and renewal processes. There is no need to assess compliance with requirements that no longer exist.

As the FCC stated, its new lack of interest in the nature and quantity of nonentertainment programming rendered the program logs useless.[255] Where there are no programming requirements imposed on licensees, the concept of compliance is irrelevant, and therefore, there is no need for minute-by-minute records of actual performance.

The irrelevance of compliance renders a potential challenger impotent to allege, in his petition to deny, any specific facts sufficient to show that the grant of the application would be *prima facie* inconsistent with the broadcaster's obligation to operate in the public interest. Petitions to deny have, in the past, been dismissed on the basis of insufficient specificity of allegations.[256] With the elimination of specific standards, the specificity of a challenger's petition will have no bearing on its success. The licensee will have as a defense the fact that it is not required to do anything specific.

Moreover, there is now no objective measure of what the FCC will consider to be adequate service in the public interest. Licensees must only demonstrate, through the issues/programs lists, that they have aired nonentertainment programming which they, in their journalistic discretion, determined was responsive to issues of importance to their listening audiences.[257] If journalistic discretion is now the standard, the FCC will deny an initial or renewal application only upon a showing of abuse of journalistic discretion. It will be a matter of trial and error to discover how to prove to the FCC that a licensee has abused this discretion.[258]

Furthermore, following the FCC's decision on remand, there will be no documentation of a licensee's ascertainment procedures. If there is no description of ascertainment, there is no "guarantee that the programming service will be rooted in the people whom the station is obligated to serve. . . ."[259] Absent any indication of the licensee's contact with community members and its ascertainment of community needs, the public will lack the basis for a meaningful challenge to program service which a

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255 *See supra* text accompanying note 209.

256 *See supra* notes 203-04 and accompanying text.

257 *See* 46 Fed. Reg. 13,893 (1981).

258 One FCC Commissioner concurs with the contention that the new system leaves unanswered the question of what basis will be sufficient to challenge the adequacy of a licensee's performance. 96 F.C.C.2d at 946 (separate statement of Commissioner Henry M. Rivera).

259 *In re* City of Camden and the McLendon Corp., 18 F.C.C.2d 412, 419 (1969) (citing Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants, 13 RAD. REG. 2d 1903, 1904 (P & F) (1968)).

broadcaster asserts is responsive to its community's needs and problems.[260]

Although the FCC's burden of proof in a challenge to its rulemaking is merely to satisfy the court that its decision has "some basis in the record,"[261] the court employed heightened scrutiny in *UCC v. FCC*. The court said that the FCC's overruling of longstanding policies[262] signalled the possibility that the FCC was acting inconsistently with its statutory mandate.[263] The promise by the court to carefully scrutinize the FCC's policy changes was, however, not fulfilled by the court's opinion. It accepted the FCC's justifications for its deregulatory plan despite the practical ramifications of eliminating definitive, quantitative programming standards. The public interest has been dealt a severe blow.

XII. CONCLUSION

The broad language of the Communications Act provides no quantitative requirements for nonentertainment programming or maximum allowance for commercial time, prescribes no ascertainment procedures, and makes no demand that broadcasters keep program logs.[264] Yet the FCC imposed each of these conditions upon broadcasters in an effort to give meaning to the public interest standard. The FCC's recent decision to deregulate the commercial radio industry was premised on the belief that direct government interference with licensee behavior could be reduced without violating the FCC's own statutory mandate to regulate broadcasting in the public interest.[265] However, in deregulating the commercial radio industry the FCC is, in effect, abandoning its duty to regulate broadcasting in the public interest. The FCC contends that the public interest responsibility of licensees will be regulated by competition among commercial radio stations.[266]

The Supreme Court recognized long ago that there is a national policy favoring competition in the broadcast industry.[267] However, "encouragement of competition . . . has not been considered the single or controlling reliance for safeguarding the

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260 *In re* Rust Communications Group, Inc., 73 F.C.C.2d 39, 121 (1979).
261 707 F.2d at 1422. *See supra* text accompanying note 99.
262 707 F.2d at 1425. *See supra* text accompanying note 100.
263 707 F.2d at 1425. *See supra* text accompanying note 101.
264 47 U.S.C. §§ 151-606.
265 707 F.2d at 1420.
266 46 Fed. Reg. 13,906 (1981).
267 FCC v. RCA Communications, Inc., 346 U.S. 86, 91-93 (1953).

public interest."[268] Satisfaction of the public interest "necessarily requires . . . a blend of private forces and public intervention."[269]

Public intervention in the regulation of the commercial radio industry requires that citizens be provided with data describing program content and quantity. In the past, citizens have relied on this data in petitions to deny broadcasters' renewal applications. The information has been used by the FCC in comparative proceedings with prospective competitors. The court in *UCC v. FCC* recognized the value of this information and therefore prevented the FCC's attempt to foreclose access to it by eliminating program logs. The FCC's decision on remand may satisfy the court because the public will be provided with information illustrating the type and quantity of programming broadcasters have aired in an effort to fulfill the public interest obligation. However, access to descriptions of issue-responsive programming, in the absence of standards for adequate public interest performance, undermines the public's right to challenge a broadcaster's operation in the public interest. Information about program content has been valuable because it enabled the FCC and the public to compare licensee behavior with a standard. The FCC has eliminated the rules. Now the public must figure out how to play the game.

Cindy Rainbow

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[268] *Id.* at 93 (footnote omitted).
[269] *Id.* at 93-94.