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FCC Criteria for Evaluating Competing Applicants

This Article examines the comparative criteria used by the Federal Communications Commission to determine whether an applicant has met the standard of public interest, convenience and necessity, and whether he has successfully proved himself better qualified for a broadcast license than an opposing applicant. The author concludes that an ideal application of the criteria requires weighing the relative merits of the qualifications of each applicant; he therefore sets forth suggestions for determining the proper weight to be given each criterion.

H. Gifford Irion*

Under the Communications Act of 1934, 48 Stat. 1083, 47 U.S.C. § 307(a) (1952), the Federal Communications Commission is required to find that an applicant will satisfy the three-fold test of public interest, convenience and necessity before it can grant a broadcast license. When two or more applications seek the same channel or frequency, the Commission is required to afford the applicants a comparative hearing. In such a hearing, the applicants have a large margin of choice as to what evidence to present reflecting favorably upon themselves and the Commission may also rely upon the applicants to detect and prove any adverse factors about an opponent. Thus, in a sense, the parties themselves determine the issues before the Commission. During the years, however, the Commission has evolved a number of criteria for making its decisions.

† The material contained herein is not intended in any way to reflect the views of the Federal Communications Commission.

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2. The techniques by which comparative cases are decided have been developed over a period of many years and are not the work of any single person. The writer has been intimately associated with such hearings during the past decade, but would like to make clear that the observations and suggestions in this Article are presented with humility and with the hope that they will be of service in stimulating further discussion. Radio regulation has grown up — perhaps we should say that it has grown old — and like any other branch of the law it requires occasional reexamination.

Most of the substantive law on comparative hearings is contained in the Commission’s decisions, which are published both in the FCC reports and in Pierce & Fisman, Radio Regulation. Very little of the law is found in court decisions. As a consequence the following remarks are primarily concerned with law as developed within the Commission.


choice among applicants, and the evidence thus normally relates to these criteria in all cases. It is fundamental, of course, that the ultimate objective is the selection of a licensee who will best serve the public interest. As a consequence, each criterion was originally designed to promote this broad purpose.

The Commission and the courts alike have recognized that selection of the best qualified applicant necessarily requires a wide area of judgment and discretion. For this reason the courts have shown a decided reluctance to overthrow a Commission decision in a comparative case unless there has been some procedural flaw. A striking illustration of the court's recognition that reasonable men can differ on the application of criteria is shown in McClatchy Broadcasting Co. v. FCC, where the hearing examiner did not give sufficient weight to the factor of diversification of ownership of mass communication media, and the Commission reversed, concluding that this factor was controlling. Judge Miller said:

There is much to be said of the examiner's position concerning diversification of control, but we cannot say the Commission went beyond its province in disagreeing with him. It has the duty, in choosing between competing applicants, to decide which would better serve the public interest. Where that interest lies is always a matter of judgment and must be determined on an ad hoc basis.

The standard of "public interest" given by Congress is necessarily broad and has never been precisely defined, but it is clear that in every case the Commission and its hearing examiners must act upon some basic concept of what the term means. It is not a monolithic concept, because conditions may vary from area to area or may change with time. For the purpose of this Article I am going to assume that the term involves at least two distinct principles, both of which have been implied by scores of decisions. First, there must be consideration of what the public wants to hear or see. In this sense the public interest actually means majority taste. Satisfaction of that taste by broadcasters is more than a commercially expedient move; it is, with rare exceptions, an effort to satisfy a public need. The second principle, however, is a necessary corollary to the first. When we think of "the public" we necessarily include minorities whose needs, interests and tastes may be both reasonable and laudable. Obviously there is less temptation for the broadcaster to expend time and money on providing programs for minority tastes, but any sound evaluation of the public interest must take them into account. Thus the Commission itself has emphasized the need for a certain amount of free time in order to publicize admittedly worthwhile

5. Sacramento Broadcasters Inc. v. FCC, 236 F.2d 689 (D.C. Cir. 1956); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir. 1956).
6. 239 F.2d 15 (D.C. Cir. 1956).
community organizations and activities.7 These include well-known nonprofit groups, such as the Red Cross, and also such causes as the promotion of traffic safety, fire prevention, registration for voting, etc. Implicit in all of this is the belief that a broadcaster must not merely cater to existing tastes and interests but must make at least a modest effort toward improving and widening them. Gilbert Seldes, a noted critic of radio and television art forms has urged that the audience must be created; it is not a ready-made component of the population but is rather an incipient body of tastes awaiting to be quickened by the broadcaster’s initiative.8

Bearing these things in mind we may turn now to the so-called criteria. The ones most often found in decisions are listed as follows:

- Local ownership
- Participation in civic activity
- Integration of ownership and management
- Diversification of background of stockholders
- Broadcast experience
- Record of past broadcasting performance (including a sense of public service responsibility)
- Proposed program policies
- Proposed programming (including preparation for operation)
- Proposed staff and technical facilities
- Diversification of ownership of mass media of communications

In addition to strictly comparative matters, however, the hearings also consider special questions regarding a single applicant. For example, the past conduct of an applicant (or one of its principal stockholders) may be considered, in a negative sense, to reflect upon his character qualifications.9

In characterizing these as the “so-called” criteria, I do not intend a slur but suggest rather that “criteria” is the wrong word. Actually they are simply specific areas of comparison, and I think it would

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7. The most emphatic, and certainly the most controversial, statement of this policy appeared in a bulletin which the Commission issued in 1946. Federal Communications Commission, Public Service Responsibility of Broadcast Licenses (1946) (known otherwise as the Blue Book).

8. Seldes, Is the Common Man Too Common? passim (1954). There have been times, however, when the Commission appeared to veer away from this philosophy and to accept the rather indifferent view of “giving the public what it wants” with no standards for serving cultural needs or minority tastes. It once said: “But the most important factor is public demand. The public knows what it wants and is both quick and eager to make its desires known. That the public has this power to influence the programming directed toward it we deem appropriate, the public being, after all, the beneficiaries of the trusts we create.” Enterprise Co., 9 P & F Radio Reg. 816, 818f (FCC Aug. 6, 1954).

9. Throughout this Article the word “applicant” will often be used as though each applicant were an individual. This, of course, is not always or even normally the case, especially in television where most applicants are corporations. Nevertheless, the personalities involved are of primary concern to the Commission and the background of principal stockholders, officers and directors is always carefully scrutinized.
be better if we referred to them as such. However, the old name will probably stick, and for convenience I shall continue to use it. The real problem is how to give value to the several items of comparison after preferences in each one have been found. In other words we are faced with the need for higher "criteria" by which a number of distinct preferences can be assessed in relation to one another. In order to make this perfectly clear let us consider a greatly simplified case. Let us say that A and B go through a comparative hearing on nine areas of comparison. They are placed side by side on each point, and a preference is found for one or the other. It may be noted, parenthetically, that in some areas the applicants may be so equally matched that no preference, or only a small preference, can be found. But in our simple case we will say that A is preferred in five categories, while B is preferred in only four. Is the examiner or the Commission simply to add up the number of preferences and give the award to the one with the highest score? This method is so transparently inept that it must be dismissed. Ignoring such un-lawyer-like methods, though, let us consider what alternatives exist. Should there be some one point of comparison which ought to outweigh all others in every case? If so, what should it be? If, on the contrary, there should be a weighing of the criteria in the light of the record in each case, how should this be done?

My first premise, right or wrong, is that there absolutely must be a weighing of the comparative areas in every case. The ensuing remarks will reveal the difficulties which this imposes, but they are designed to show that weighing criteria can be accomplished without being capricious or arbitrary. It may be conceded at the beginning that the rule of stare decisis does not apply to administrative cases of the kind we are discussing, but far too often this is taken to excuse a course of action which appears to an ordinary observer as simply quixotic. One case is decided by stressing a certain criterion, and the following week a decision comes down in which the same criterion is passed off lightly. Actually there can be justification for such shifts of emphasis, but unfortunately the reasons are seldom

10. When this happens, the Commission has the power to award the grant on a very narrow margin of superiority. As the Court of Appeals for the District of Columbia has said: "A slight difference may be decisive when greater differences do not exist." Sacramento Broadcasters, Inc. v. FCC, 236 F.2d 689 (D.C. Cir. 1956).

11. The use of preferences as simple numerical units was, in fact, condemned by the court in Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir. 1951).

12. There is no one established criterion by which a choice between applicants must be made. The various criteria are not to be construed as absolutes, but are merely guideposts pointing toward the ultimate objective of finding the applicant who will best serve the needs of the area proposed to be served. Our determination is based on an over-all relative estimation and evaluation of all significant and material factors.

clarified. I think this results from a failure to apply the criteria in such a way that they are interrelated, in such a way that they assume proportion from their position in the entire context of the case. This is certainly not easy to do, but an examination of the conventional areas of comparison will illustrate the techniques which should be attempted.

One must keep in mind that the ultimate facts in comparative cases relate to the future. The process is therefore quite unlike a suit in tort or contract. The Commission must find which applicant will best serve the public interest in the years to come. Consequently, there has to be something more than a mere comparison of promises. Anyone with a little ingenuity can devise programs and formats which positively glow with civic responsibility. But what if his past record shows him to be a person who never keeps his promises? There must be some sort of showing, therefore, of the likelihood of "translating" promises into actual operation. Six of the criteria discussed below are presumed to relate directly to this objective.

**Local Ownership**

The first of these is local ownership. This is a norm which has a venerable history dating back at least to 1935. Stated simply, it is based on the supposition that a broadcast operator who resides in the community where his station is to be located will be more familiar with the needs and interests of the community than someone living elsewhere. It has sometimes been assumed that local ownership would also generate a continuing desire for serving community needs and interests, although this does not logically follow from the first premise, and it may be seriously questioned whether the assumption has any empirical support.

Local ownership has another aspect which is sometimes ignored. Besides raising the presumption that a person living in a community knows its needs, local ownership can be used to resist monopoly. People have always feared that broadcasting might fall into the hands of a few powerful interests who could then proceed to throttle expression of opinion. This fear is reflected in the diversification-of-ownership criterion, the multiple ownership rules and even in the network regulations.

community, at least not for the purpose of winning a comparative hearing. But even conceding the merit of such a proposition, certain offsetting values must be recognized. The local man will not necessarily run the best station. Many stations are owned by outsiders but are nevertheless very well operated. The outsider may actually be far more attentive to local needs because he must do a better job to win public approval. These possibilities are suggested merely to caution against a hastily considered conclusion that one comparative field is unmistakably superior to another.

Participation in Civic Activities

This is a somewhat more recent standard, but, like local ownership, it is an area of comparison from which the Commission hopes to derive assurance of continued attention to community needs. Again, the precise application of the criterion is not always easy. As the Commission itself has said: “The choice here is a difficult one since the various considerations do not resolve themselves into a clear black and white pattern but remain stubbornly gray.”

An individual who makes a practice of joining everything may or may not be contributing to civic life. He may in fact be a fraud, whereas an individual who devotes his time and energy to a single activity—such as a church, a welfare agency or an art gallery—may be a far more worthwhile citizen. There is also the situation where applicant A, a local resident, has shown little interest in community affairs while applicant B, coming from another city, has been very civic minded in his own community. In that case A could hardly be found superior to B.

Integration of Ownership and Management

It is implicit in the Communications Act, and in the whole theory of broadcast regulation, that a licensee must be responsible for what his station puts on the air. Use of space on the radio spectrum is a valuable privilege which carries concurrent obligations. The spectrum is part of the public domain, and for this reason the federal government is empowered to license use of any portion of it. Responsibilities of those using the broadcast segments include the duty to see that technical equipment functions properly, to operate within the terms of the license and to program in the public interest. In fulfilling these duties the broadcaster is clearly expected to exercise close supervision over his station. From this proposition came the criterion of integration between ownership and management. In brief, it means that an applicant whose owners are closely identified

with management is to be preferred over one whose owners will delegate authority. This, of course, does not mean that there is any legal requirement for the licensee or any of its stockholders to hold jobs on the station's staff. Many stations in the United States are operated by hired managers. Nevertheless, in comparative hearings, the integration factor has been given great respect. The Commission has sometimes shown concern where the alleged integration appeared to be "window dressing" carefully designed by skilled legal counsel. It is obvious that merely giving a stockholder some title such as "supervisor of public service" would be meaningless unless he actively participated in public service programming. And this is a matter that is generally gone into very carefully by opposing counsel during a hearing. The integration factor is also occasionally associated with the factor of experience which will be dealt with later. Presumably this comes from the natural question of whether an inexperienced licensee in a managerial position is preferable to one who employs the best talent available.

**Diversification of Background**

This criterion apparently came into being about 1947, but it has not often been controlling. It seems to rest on the theory that an applicant whose stockholders come from varied business and professional fields will somehow be more civic minded than one whose stockholders are engaged in only a single business. So far as I am aware there is no empirical data to support this belief and there is very little logic to recommend it. Consider the case of applicant A whose stockholders represent every profession and trade in the community, as opposed to applicant B whose sole business is and has always been broadcasting. Is there not a reasonable question whether the very diversity of interests in A will, so to speak, cause its policies to fly apart and lose any coherent purpose?

**Broadcast Experience**

The foregoing areas of comparison are presumed to give an assurance that an applicant is aware of community needs and will effectu-

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16. "The significance of the integration factor is based on our belief that there is more assurance that a proposal will be effectuated if the day-to-day operation is in the hands of an owner of the station than if the station is run by employees...." Hi-Line Broadcasting Co., 13 P & F Radio Reg. 1017, 1042 (FCC 1957). "This factor is best exemplified where stockholders are at the helm of the station." Biscayne Bay Corp., 11 P & F Radio Reg. 1113, 1156 (FCC 1956).


18. "The integration takes on clearer meaning and force when those at the helm or participating in an active manner have the experience necessary to conduct or tangibly assist the station's operations." Biscayne Bay Corp., 11 P & F Radio Reg. 1113, 1156 (FCC 1956).
ate his proposals in terms of programs actually broadcast. The previous experience of principal stockholders in broadcasting is presumed to indicate their capacity for future service. Usually the evidence on this point is brief and consists simply in showing the number of years spent in the broadcasting industry and the types of employment held.

Record of Past Broadcasting Performance

This criterion differs from broadcast experience in that its purpose is to reflect the nature of the operations which an applicant previously conducted as a licensee. It differs from experience in that the party may not actually have participated in running a station, but since he was a licensee it is expected that the quality of the station's programs will reflect his sense of public service responsibility. Accordingly, it is customary for any applicant which has already owned a station, whether AM or TV, to present evidence regarding its recent operation.

In this area the Commission is mainly concerned with local live programming. It is to the applicant's advantage to show as many high quality shows as possible and also to demonstrate his public service responsibility by showing an appreciable number of announcements on behalf of worthy causes. Naturally his opponents at the hearing will try to uncover a neglect of the public interest through excessive commercialism or some similar sin. The Commission has repeatedly said that it regards evidence of past programming as a more certain reflection of the broadcaster's capability and likelihood to effectuate his promises than such things as local residence or civic activity. Nevertheless it still continues to give some weight to those matters, although it is not clear why. Assuming that an applicant demonstrated an exceptionally good record at another station, it is difficult to see how the fact of his residence or participation in charity drives could be a determining factor at a comparative hearing. By the same token, if the past record was bad or even merely average, there is little that the other criteria could do to give more assurance that he would translate promise into performance.

22. Apparently these other criteria come into play only when the past records offer no grounds for a preference. Sangamon Valley Television Corp., 22 F.C.C. 1167 (1957); KFAB Broadcasting Co., 12 P & F RADIO REG. 317, 393 (FCC 1956).
Proposed Program Policies

If there is one aspect of a comparative case where evidence of a purely subjective and self-serving character is permitted, it is here. In framing a policy statement for future operations the applicant is of course free to make promises of the most idealistic kind. It is noteworthy, however, that a danger exists in making them too extravagant, because they will seem unrealistic and will be likely to suffer when matched against evidence of actual operations.

Proposed Programming

Evidence of proposed programming has assumed a form which by now is conventional in all hearings. The applicant presents a "typical" program schedule for one week and lists in addition any other occasional and special events he proposes to carry. This showing in TV proceedings generally includes something more than the names and brief abstracts of the various programs. Where the format and techniques of production would tend to make an applicant superior, these details are fully described in the testimony.

Operating Plans

It is elementary that the value of a program consists in something more than a clever title or idea. It requires competent personnel and adequate physical facilities for its production. While these factors have rarely appeared to hold much weight in the Commission's final decisions, they have always been stressed by applicants with highly competent staffs. For example a party with an outstanding program director will always try to show how his skill and experience has been put to use in designing specific shows. An applicant will also endeavor to stress the superior design of its studios and equipment. Admittedly these things have sometimes been carried to excess, as in the case where applicants insisted on being compared with respect to the toilet and parking facilities of the proposed studios. The reaction to this sort of thing can also unfortunately go to excess by ruling out any comparison of studios. There have been instances where the party is given no preference for admitted superiority in planning of storage space on the ground that this was immaterial. Yet anyone with the slightest knowledge of TV operations is aware that storage is a primary factor in efficient production.

Diversification of Ownership of Mass Media of Communications

For a good many years the Commission has adhered with a rather high degree of consistency to the doctrine that an application which will tend to spread ownership of media of communication should be
preferred over one which will concentrate such ownership. The most striking consequence of this criterion has been to place newspapers in a disadvantageous position against competing applicants, but it also applies to parties with other broadcasting holdings. It is, of course, contrary to the Commission's rules for one person or company to hold interests in two stations of the same category within a single community, although they may simultaneously own an AM, FM or TV station in the same community. The theory behind the diversification-of-ownership doctrine is that it tends to keep the channels of communication open to as large a number of owners as possible and thus prevent restriction of news and information. Whether this is actually accomplished in an age when so much news emanates from network sources is questionable, but, so far as local affairs are concerned (disputes over bond issues, civic problems, etc.), there is genuine ground for concern about allowing all organs of communication to be vested in the same hands.

Weighing the Criteria

An analysis of the weight given to any one criterion, or an evaluation of all in the aggregate, is somewhat difficult because the language of decisions has not always been as explicit as might be desired. In some cases it would appear that each area of comparison has been treated as a distinct mathematical unit, and that the final result has been reached by tallying up points of preference. In its more reflective decisions, however, the Commission has expressly deplored this practice and has referred to the criteria as "guideposts." It should be clear to anyone seriously interested in judicial reasoning that an isolated area of preference, such as local ownership, is virtually meaningless unless it is considered in connection with a number of other factors. For example, the fact of residence must be tempered by the record of stockholders in civic participation and by the degree to which the owners will participate in management. Otherwise it would have no significance as an indication that knowledge of the community would result in better programming for its needs.

At this point it is fitting to state emphatically that no application of the criteria can ever be successful when it loses sight of the basic philosophy which accounts for their existence. Using the phrase "public service" as an approximate expression of this philosophy, it becomes evident that no one of the criteria should be determinative unless it tends to form a pattern with other evidence concerning an applicant's knowledge of the community, his ability and sincere efforts to perform promises and his general imagination and resource-

fulness. The assessment which must thus be made of the areas of comparison is admittedly difficult. It should not be done in any mechanical fashion but requires a most conscientious use of judicial discretion. There can be no question that value judgments are called for. They are sometimes attacked as being "subjective judgments," and this is perhaps true if we regard a judgment that is not made by slide-rule as being subjective. Yet any other type of judgment would be wholly unrealistic.

Possibly the best area of comparison for observing the way in which value or qualitative judgments must be made is in the comparison of programming plans. Leaving aside the question of programs whose content is deemed specifically not to be in the public interest—and such programs are rarely contained in proposals—there is still a great deal of confusion about what weight should be given program plans. For the most part, the Commission has stressed that its interest is in obtaining a balanced schedule. Local live programming is obviously more important than network or film presentations. The Commission has stressed that proposals cannot be evaluated purely on the basis of statistical analyses of schedules and that the content and nature of proposed programs must be evaluated.

The word "content" with reference to programs must mean quality, and this appears to be the Commission's view. On one occasion it said: "We note in passing that no preference in any event would be accorded on mere percentage figures, without relation to the content or quality of programs involved."

Notwithstanding these announced principles, the Commission has several times seemed to water down the importance of programs by adopting a negative, rather than positive, view. By this I mean that greater reliance has been placed on the fact that the proposed schedule is "balanced" or merely "adequate" rather than on recognizing a clear superiority in quality which frequently exists. The following language reveals this hesitation and reluctance to do the job thoroughly:

25. We therefore, attach great importance to the local live programming. Thus confining our attention primarily to this area we find that Tribune proposes substantially more local live programming than either of the other applicants, the percentages being Tribune—43.82%; Pinellas—33%, as revised, and Tampa Bay—35.03%. We are not impressed by quantity alone. This greater percentage is not considered to be determinative of relative superiority. It is the content and the promise for implementation of the proposal and the assurance of the effectuation which we must consider.
Of necessity program details are unlikely to remain constant and unmodified from year to year during a station's operating history; this is particularly true in the case of new stations. For this and other reasons, the Commission has followed the policy of placing primary reliance upon a balanced format containing suitable amounts of the several categories and types of programs. A program by program comparison has been considered of less importance in the decisional process because of the likelihood of change already described and because the Commission, in its administration of the Communications Act believes that attempted detailed comparison of individual programs would necessarily have the ultimate effect of substituting the Commission's administrative for management's operating judgment. The long range effect which such a policy is likely to have upon the advantages which otherwise flow from the interplay of ideas in a freely competitive system is likely to be adverse. In those cases where comparisons are possible and necessary, the emphasis is normally placed upon local live program proposals. . . .

Let us examine what happened in the Wichita case, Radio Station KFH Co. The Commission first found that the applicants were equal "on the primary preference consideration" of a diversified, well-rounded program service and repeated its principle of not awarding a preference on percentage figures alone. It then said:

We must look to the content of the over-all programming proposed. If an applicant's numerical superiority in the category in question is found to consist of programming of a worthwhile nature, a preference may then be accorded on the basis noted—that such an applicant can appropriately claim that it is more completely fulfilling its vital role as an outlet for local expression. We stress again that the differences between applicants must be significant, that they must not be a mere matter (appropriately left to the judgment and discretion of the individual broadcaster) of emphasis of one category at the expense of some other, with no showing that the public interest is better promoted by such emphasis, and that the amounts of time allocated to these categories must not appear to be, or be shown to be, unreasonable with regard to implementation.

In that case there were three applicants so that a three-way comparison was necessary. No preference was accorded on religious, news, talks, or sports programs. On the agricultural proposals no difference was found between applicants A and B, but applicant B was given a preference over applicant C. The same held true with respect to discussion programs. It appears that the educational category was regarded as particularly significant. Again applicants A and B were found superior to C. A proposed three and one-half hours of educational programming a week, whereas B proposed seven and one-half hours. After listing the specific programs the Commission said: "In view of this showing, Wichita TV [applicant B] was found to be more completely meeting the educational needs

30. Id. at 97.
of the area.” In summing up the program proposals, the decision stated:

In summary, we have found that the percentage differences as to local live programming noted in par. 4 have been translated by Wichita TV into worthwhile, meritorious programs, and into superiority in several categories. Wichita TV’s margin of superiority over KFH in this area is a slight one, stemming from the fact that its proposal has been found more completely to meet the educational needs of the area. Its superiority over KANS is clearer and more marked, and is found not only in the educational but in the discussion and agricultural categories. While Wichita TV is thus seen to be better proposing to fulfill its important role as an outlet for local expression, it should be kept in mind that its preference here—even over KANS—is not a major one, since all three programming schedules have been found to be essentially well-rounded, meritorious ones.

From all of this it would appear that, although the Commission has renounced the mathematical technique of awarding preference on percentages, it has refused to take the next logical step and weigh the qualitative aspects of the programs themselves. The preference given to B on educational programming, was apparently on the basis of a larger number of hours for this category. Yet it is far from clear how B is “more completely meeting the educational needs” of the area. It also seems somewhat curious that the preference granted to B in the programming field should not be a major one in view of the distinct holding that it is superior in fulfilling “its important role as an outlet for local expression.”

It must be admitted that there is some difficulty in reconciling the decisions on programming. In one instance the Commission looks at “the over-all proposal in terms of its balance.” At another time it emphatically stresses the need to examine content. The latter view certainly seems reasonable, because it would be hard to see how mere balance could serve the public if the programs were of a mediocre and pedestrian character.

A long line of cases holds that no preference should be accorded for devoting a greater percentage of time to local live programming. On the other hand an applicant has been preferred for devoting more time to local live programming if the content was also found to be superior.

32. 11 P & F Radio Reg. at 97, 100.
36. Odessa Television Co., 11 P & F Radio Reg. 755 (FCC 1955); Tampa Times Co., 10 P & F Radio Reg. 77, 129 (FCC 1954). In these cases it would appear that both quantity and quality were determining factors.
In the WJR case the Commission said:

While we attach great weight to local live programming because an applicant, through its local live programming, demonstrates its capacity to meet community needs and desires and serves as an outlet for local expression, quantity alone is not sufficient; for it is the content and the promise for implementation of the proposals and assurance of the effectuation which must be considered.37

It is difficult to determine what significance the Commission now attaches to the so-called "prime listening hours" of 6:00 to 11:00. According to the Blue Book there was an obligation by the broadcaster to furnish some of his best programs (in the public service sense) during these hours. On the other hand the Commission held that differences in percentage of time devoted to local live programming during the prime listening hours was not a factor of significance.38 Comparison of commercial time has likewise been rejected as the basis for a preference.39

The Commission has shown at times what sounds like irritation that applicants present programs for comparison at all.

In the area of secondary importance, comparison of specific programs by type, each of the applicants asserts superiority over the other two. To the extent that preference is claimed because more time will be devoted to local live originations, we need only reiterate the point we have made so frequently before, that in the absence of a showing of lack of balance mere quantitative superiority on one type or another, or, mere superiority in the number of local live programs, provide no basis for preference. Quantity may be of importance, but only when it is demonstrated that the divergent interests and needs of the area are better served thereby.40

The difficulty with this statement is that it appears to evade comparing programs in terms of quality, the very thing which has so often been proclaimed as the real matter in issue. Furthermore, it again demonstrates a negative approach by assuming that a comparison cannot be made unless one party or the other shows a lack of balance. Also it raises the question of divergent interests and needs which, as any counsel knows, are extremely difficult to prove and, even when proved, leave considerable doubt whether any preference will result.41 Perhaps we would do well to heed what the Court of Appeals once said:

Moreover, this is a comparative consideration, and the question is not whether the applicant will present a well-rounded program but whether

38. Loyola University, 12 P & F Radio Reg. 1017, 1105 (FCC 1956).
40. Ibid.
41. One is sometimes driven to the uncomfortable impression that all an applicant has to do is furnish a list of the schools, colleges, charities, etc., and promise to do something for them. If this is what is meant by "divergent needs and interest" no one would be more surprised than the listening public itself.
its proposals will better serve the public interest than will those of another applicant. . . . Perhaps a mere finding that an applicant will present a well-rounded program would suffice if the decision related merely to the bare qualification of the applicant for a license. But that is not the inquiry here. The Commission is making a comparison and it says, correctly, that the comparison of the program proposals is an important criterion in that determination.42

The confusion apparently must be explained by the obvious diffidence of the Commission toward an evaluation of quality in programming. There is no doubt that a government agency should not impose its tastes upon broadcasting, but a comparison can be made without being so arbitrary. As a matter of fact the Commission has frequently made value judgments which are subjective and which are not actually supported by any evidence except common sense. For example, the emphasis—which amounts almost to a requirement—on the devotion of at least some time to educational, religious, agricultural and discussion programs is clearly a value judgment. Educational programs are thought to be worthwhile for the public, and broadcasters are therefore expected to present a certain number of them. But it is certainly possible in some instances to demonstrate the superiority of one program over another. A performance by a high school band is technically classified as educational, yet it would be folly to assert that this is on a par with a lecture on history. Similarly, the thoroughness and skill with which a program is prepared or the quality of its production are qualitative elements which can be compared. The WJR case43 cited above appears to go quite far along this line, and it would seem that the winning applicant actually acquired some preference by virtue of its superior studio facilities.44 This is evidently what the Commission meant by “implementation.”

The Commission’s reluctance to use proposed programming as a primary area of comparison has had one unfortunate result. It has tended to make decisions rest entirely on factors alleged to give assurance of reliability without paying much heed to the quality of service to be rendered. In other words, an applicant with a thoroughly unimaginative and mediocre proposal is likely to triumph if he can prevail on the assurance criteria. Just what value there is in having assurance that mediocre promises will be performed is hard to fathom, but that is, in essence, the result. This points up a problem which has vexed both the Commission and the Bar for many years. It is no secret that many thoughtful observers feel dissatisfaction with the criteria, but so far no one has come up with any that make

43. Cited note 36 supra.
44. See WJR, The Goodwill Station, Inc., 25 F.C.C. 159 (1958), where the latest grant is affirmed.
a genuine improvement. I think the secret to the impasse lies in a general dread of basing the judgment on any area which is not susceptible of mathematical measurement. In other words, one can make some sort of slide rule comparison of civic activity, but any comparison of operational proposals must necessarily be a value judgment. But, while the reason for this fear is easily understandable, it tends to destroy one of the two fundamental elements which ought to support every decision: the element of future service with all that it implies. As things stand, the public interest is being deprived of an adjudication on this very important point.

While speaking of programs, a word should be mentioned about the subject of balance. Balance is a concept which was formed in the days when far fewer stations were on the air than now, and it seeks to promote the laudable purpose of serving a wide variety of tastes and interests. Its purpose, in fact, was to fulfill the second of the two ideals I have already mentioned under public interest, minorities and cultural needs. Conditions change, however, and there has recently been a very marked movement in aural broadcasting toward specialized stations. In a community where a number of services exist, it has become popular for one station to program for news and sports, another to cater to ethnic minorities and so forth. In the classic sense of "balance" none of these stations is meeting its obligations but the question is bound to arise whether circumstances do not warrant some exceptions. The "good music" type of station, for example, seems to serve a genuine need in the larger metropolitan areas. What might happen if a specialized station were competing with a "balanced" type of station can only be left to conjecture, but it would seem that the same methods of reason and common sense evaluation of local conditions might afford an answer.

This, indeed, is a precept which could always be remembered with profit. Common sense is a homely virtue, but one which fits harmoniously with the whole philosophy of administrative law. It suggests that whenever abstract theories are applied—and the criteria are certainly abstract—there should be a sensitive recognition of the actual conditions underlying their application. When the evidence is candidly appraised, it may reveal that what appears to be a high degree of integration between ownership and management is actually nothing more than a facade. Or it may show that the common ownership of several media of mass communication is actually the means by which an exceptionally high grade service is made possible. Our minds should never be closed to possibilities. The unexpected often happens.

It is elementary that the several areas of comparison were designed with two fundamental objectives: First, to ascertain which applicant proposes the best programs for the public, and, second,
how much assurance there is that he will match promise with performance. One without the other would be of dubious value, and their intrinsic relationship should never be forgotten. This is why any attempt to apply the criteria as separate units amounts to an absurdity. A few hypothetical cases will illustrate. Let us suppose that X has run a radio station for ten years and during that time has unfailingly presented a monotonous routine of racing news, commercials and the most deplorable kind of rock-and-roll. Now there may be a defense for X as a licensee, but when he is competing with Y for a new television station his record must be examined closely. If Y is proposing superior programs (both in balance and quality), is there any conceivable reason why the local residence or integration of ownership and management in X’s company should be considered? The record of his past operation is enough to damn him. Or we might consider the opposite case where X has maintained a fine record of past performance. If Y is a newcomer, it is impossible to contrast past records. But does that mean X should get no preference? A very good argument could be made that his record should be the determining factor. Whatever happens, the isolated fact that X or Y have been enthusiastic participants in the Boy Scouts and SPCA should not be put in the scales as something of equal significance.

But a third case will show how civic activity can assume genuine importance. Assume that both X and Y are newcomers to broadcasting. X has lived in the town all his life, but Y has lived there for only a year. In his entire lifetime X was never known to serve on a committee, join a community organization or contribute a nickel to charity. On the other hand Y plunged into the life of the community as soon as he moved there. Can we seriously say that the long local residence of X means anything except, possibly, to show a complete void of civic consciousness?

The key task in any decision would thus seem to be the finding of the comparative area (or areas) which will overshadow all others in revealing the true merits of the applicants. The Commission has come close to naming past performance as this key area, and there would certainly be good reason for doing so. In the Wichita case it said:

If an applicant has a past broadcast record, no more persuasive evidence can be found as to whether it can be relied upon to carry out its promises and remain sensitive to the listening needs of the public. For such a record is a tangible or actual demonstration of the applicant's reliability. This factor—past broadcast record—is, of course, of a presumptive nature: A past record, no matter how superior, does not guarantee that the applicant's present promises will be fulfilled. But, as stated, it represents as persuasive evidence as can be marshalled by an applicant on this score.
We point out again that 'the weight to be attached such a record depends on the showing made in each case.'

A difficulty arises, of course, where one competing applicant has operated a broadcast station and his opponent has not. Actually there are three possible situations: (1) Where all applicants have been broadcasters in the community; (2) where one has and the other has not; and (3) where all applicants are new to the industry. Furthermore, there is a question whether the record of prior broadcast operations in some other community should be taken into account and, if so, how much weight should be given to it. As a logical proposition it would appear that if the party has conducted a superior operation in community X, he would be likely to do the same in community Y, but the Commission has generally been inclined to give less weight to performance at an out-of-town station.

Returning to the three categories above, it is clear that the first situation gives the best chance of comparing applicants on an equal basis. Indeed it would seem that, barring some unusual facet in the case, the comparison of past broadcasting records would afford the dominant criterion for adjudging the applicants. In the situation where one applicant has a past record but his opponent lacks one, the rule should be that no preference ought to extend to the experienced broadcaster unless his record has been outstanding. It could reasonably be argued also that a newcomer should be favored solely on the proposition of spreading the licenses around as widely as possible. This principle seems to have been followed in Beachview Broadcasting Corp. In that case a preference was actually given to the licensee, but the Commission added that it was not "of great force in light of the brief period covered by such record." In the situation where none of the parties has a broadcast record there is, of course, no question about making it an area of comparison.

The most significant thing about this criterion is that it requires a qualitative evaluation of programming. It is difficult to see how mere balance could ever be used to demonstrate a superior operation, although significant lack of balance would certainly demonstrate the contrary. What must be taken into account is the quality—or lack of it—in the programs themselves.

45. Radio Station KFH Co., 11 P & F Radio Reg. 1, 103 (FCC 1955). There are additional considerations which would have to be considered in any complete account of past performance. For example, there is size and character of the station. It is very difficult to make a comparative evaluation between AM and TV operations. Even when the stations are both AM, the fundamental difference between a 250 watt local and regional or clear channel operation calls for some weighing of the evidence. Richmond Newspapers, Inc., 11 P & F Radio Reg. 1234 (FCC 1956).
48. There are, of course, other aspects of past operation which may be con-
All of this, of course, is merely suggestive. Dogmatic rules are not well adapted to administrative law, especially in comparative cases. When one reflects on the infinite variety of factual situations—and only a few have been sketched here—one realizes that the solution of a case is more likely than not to be complicated by the unexpected. There is no simple or easy method for deciding between applicants. Nevertheless there are aspects of each case which tend to underscore the criteria which should be emphasized. In a case where an existing licensee has done an outstanding job of programming, the very facts throw a spotlight on past record. In another case the past records of the applicants may be so undistinguished—either for good or ill—that the judgment is forced to turn on a different area of comparison.

Or consider the effect of attempting to diversify ownership of communication media. There are literally dozens of possible situations which come up under this one criterion alone. Applicant A may own daily newspapers and several broadcast stations as well. Clearly he is at a disadvantage unless other merits overwhelmingly support him. But the newspaper owner may be only a fifty or a forty percent stockholder in A, and the opponent may be licensee of a fifty kilowatt clear channel station. Obviously the situation has changed materially. Then again, the market may be one where so many channels of information and expression already exist—as in New York, Los Angeles or Washington—that the significance of diversification is diminished. One can imagine as many sets of facts as he likes, but he is likely to discover that each one presents some novelty or a variation on an old theme.

It is one of the objectives of all branches of law to make the ground rules and basic principles so clear that lawyers, judges and public all will have a reasonable expectation of how decisions will go. Needless to say this ideal is never fully realized. If it were, there would be no law suits or comparative hearings. Nevertheless the situation should not be chaotic.

Precedents are not binding in administrative law, but surely there is good reason for saying that primary principles do not—or should not—change. If public interest requires selecting the party who will provide the best service and who gives the greatest assurance of so doing, then this must hold true in every case. The evidence by which he proves these things will, of course, vary from case to case, and that is why no single criterion should be invariably predomi-

49. This position was recently approved by the Court of Appeals in Massachusetts Bay Telecasters, Inc. v. FCC, 17 P & F Radio Rec. 2083 (D.C. Cir. July 31, 1958).
The task of counsel in a comparative proceeding is to form a theory of his client's case and to present the evidence so that one area of comparison leads logically into another. Ordinarily he will be unable to gain a preference on every point, but he certainly should have some rational theory explaining why the points on which he does prevail are those which should govern. If this standard of advocacy were maintained, not only during the hearing proper, but also on appeal to the full Commission, it may be fairly assumed that the decisions, both initial and final, would likewise take on a desired quality of logic and consistency.

No doubt a great deal more thought is needed on this subject. The writer hopes that his comments—and criticisms—do not reflect a lack of humility, but, instead, that they will be provocative of new and more lucid thinking. If this much is accomplished, the task will not have been in vain.