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Public Service Announcements: *Out with Monotony and in with Diversity*

By DON LIVELY*

News and public affairs programming is the primary vehicle broadcasters use to carry out their obligation to provide fair and adequate coverage of public issues.¹ Such programming, however, is subject to restrictive time and resource constraints and to the broadcasters' definition of newsworthiness. Subject matter which falls short of the newsworthiness standard, or which escapes a licensee's attention, still may be important to the community and essential for serving the public right of "suitable access to social, political, esthetic, moral and other ideas and experiences."²

Public service announcements (PSA's) are well-tailored to fill that information gap. The Federal Communications Commission (FCC) defines a PSA as:

[a]n announcement for which no charge is made and which promotes programs, activities, or services of Federal, State or local governments (e.g., recruiting, sales of bonds, etc.) or the programs, activities or services of nonprofit organizations (e.g., UGF, Red Cross Blood Donations, etc.) and other announcements regarded as serving community interests, excluding time signals, routine weather announcements, and promotional announcements.³

The spot format nature of a PSA offers an attractive and effective medium for a message. Because of their brevity and scheduling adaptability, PSA's tax neither the concentration of the audience nor the profit objectives of the broadcaster. Information that is conveyed in a PSA, therefore, can be served up readily by a broadcaster and digested easily by a view or listener.

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1. Broadcasters are required to provide adequate and fair coverage of public issues. 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

2. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

3. 47 C.F.R. §§ 73.112 n.4; 73.282 n.4; 73.582 n.3; 73.670 n.4.

Despite the rich promise for addressing public issues, including controversial ones, PSA programming has fallen short of its potential, at least partially because of an FCC policy that neither requires nor strongly encourages PSA's for such purposes.⁴ Licensees are vested with broad discretion in determining the quantity and quality of the PSA's they choose to air.⁵ As a result, PSA's have become defined by both policy and practice as messages that represent a limited range of interests and that address, for the most part, non-controversial matters. This disappointing performance has failed to comport with the First Amendment values of "uninhibited, robust and wide open debate"⁶ and diversity in the electronic forum.⁷ Nevertheless, a basic premise of modern broadcasting is still that "[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount."⁸ That general principle, enunciated in *Red Lion Broadcasting Co. v. FCC*,⁹ furnishes a springboard for fashioning a policy to broaden the nature and enhance the use of PSA's.

I

The Problem with PSA's

Although PSA's have the potential of contributing significantly to broadcast diversity, they are now mostly effective in communicating a limited range of messages from a limited

4. The FCC's only inducement for PSA programming is to give ascertainment programming credit to any PSA addressing a licensee's ascertained problems, needs, and interests. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 445, 35 Rad. Reg. 2d (P&F) 1555 (1975).

Licensees are required to list annually 10 problems they have ascertained in their communities. At license renewal time, the FCC measures the extent of programming toward those ascertained needs. *Id.* at 419, 35 Rad. Reg. 2d (P&F) at 1555.

5. The Commission has concluded that because of the licensee's knowledge of the community, and because of the risk of "an inappropriate intrusion into the sensitive area of programming," a broadcaster must have broad discretion in "the scheduling and selection of PSA's." *In re* Petition to Institute a Notice of Inquiry and Proposed Rulemaking on the Airing of Public Service Announcements by Broadcast Licensees, 67 F.C.C.2d 907, 910 (1977) [hereinafter cited as PSA Petition].

The FCC has since decided to proceed with a general inquiry into PSA programming and practices that could lead to a change in the agency's position. Airing Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37,725 (Aug. 24, 1978).

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

7. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389.

8. *Id.* at 390.

9. *Id.* at 395.

range of sources. The present condition of PSA programming is largely a product of limited access and fairness obstacles.

Television stations in a five-state area informed the FCC that they planned to carry an average of 113 PSA's per week for the 1977-1980 license period.¹⁰ Only about 40 percent of those messages, however, were to be on behalf of organizations in the stations' service areas.¹¹

A major criticism of PSA programming is that it is dominated by two information sources: government agencies and non-profit organizations.¹² The FCC's present definition of PSA's may work in favor of such institutions, since they are the only interests specifically singled out as appropriate PSA sources.¹³ In the recent past, however, the Commission rejected any modification of the formulation. The agency concluded that the definition only explained the nature of PSA's and afforded no special treatment for any particular group.¹⁴ Nonetheless, the FCC has since launched an inquiry into PSA programming and practices to consider, among other matters, the possible need for a revised PSA definition that would eliminate any built-in preferences.¹⁵

Aside from the possible favoritism government agencies and non-profit organizations enjoy, such institutions are catered to by a placement service with the know-how, experience and connections to place messages effectively. The Advertising Council has achieved recognition from its clients and critics as the dominant broker between the government agencies and nonprofit groups that have something to say, and the broadcasters who can give the time and place to say it.¹⁶

The Council is composed of 85 representatives from major corporations and media concerns.¹⁷ Tax-exempt groups and government agencies are invited to submit proposals for PSA campaigns to the Council. If a proposal is accepted, the Council formulates the content of the message and handles the pro-

10. PSA Petition, *supra* note 5, at 913.

11. *Id.*

12. *See* PSA Petition, *supra* note 5, at 909 n.6.

13. *See* 47 C.F.R. §§ 73.112 n.4; 73.282 n.4; 73.582 n.3; 73.670 n.4.

14. PSA Petition, *supra* note 5, at 910.

15. Airing of Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37,725 (Aug. 24, 1978).

16. *See id.* at 37,726, para. 8, n.10; PSA Petition, *supra* note 5, at 908 n.3.

17. Baldwin, *Ad Council Prescription: Public Service Pabulum*, WASH. JOURNALISM REV. 37 (Oct. 1977).

ject from conception to distribution.¹⁸

Production quality of Council spots is of the highest order, since the nation's elite advertising agencies perform most of the work. However, production cost is also of the highest order.¹⁹ Many citizens and public service groups contend that, as a result, they are simply priced out of the PSA market.²⁰

The Council, in addition, has been criticized for an "establishmentarian" composition and for a narrow political and economic philosophy that produces self-serving and non-controversial PSA's. Charges have also been leveled that the Council disdains efforts by citizens' groups to secure its endorsement.²¹ Allegations that the Council exercises inordinate influence over the content and selection of PSA's have prompted the FCC in its inquiry into PSA programming and practices to investigate the Council's particular role.²²

Any dominance or parochialism on the Council's part, however, is reinforced by the insistence of broadcasters that PSA's "should deal affirmatively with the causes they advertise, as opposed to those that attack or demean."²³ Despite criticism of the Council for its dominance in the PSA marketplace, the Council seems to have reached its preeminent status simply by supplying what broadcasters demand. By tailoring its efforts to meet standards of blandness, the Council has achieved its success as an influential PSA broker.

The perpetuation of standards catering to the safe, common denominator impairs entry into the PSA marketplace by interests, such as consumers, environmentalists and civil rights groups who could air potentially controversial messages. The net result for viewers and listeners is a plethora of PSA's from relatively non-diverse sources addressing non-controversial subjects.

Even if a broadcaster wants to diversify his PSA sources, though, he retains a compelling interest in avoiding divisive issues. Non-controversial PSA's entail a minimal risk of fairness obligations. Controversial PSA's, on the other hand, inevitably

18. *Id.*

19. Critics claim that an Advertising Council PSA campaign may cost from \$50,000 to \$300,000. PSA Petition, *supra* note 5, at 908.

20. *Id.*

21. *Id.*; Baldwin, *supra* note 17, at 37-38.

22. Airing of Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37,725 (Aug. 24, 1978).

23. Baldwin, *supra* note 17, at 36.

invite time requests to air balancing viewpoints.²⁴ To avert the possibility of having to give away additional time for discussion of a subject, and thus sacrifice profits, a broadcaster may select those PSA's presenting the least threat to commercial time and business fortunes.

This is the essence of the fairness doctrine barrier. Ironically, the doctrine may be the most potent restraint upon the breadth and diversity of PSA's. When it was devised, the fairness doctrine was supposed to provide for the interplay of "representative community views and voices" in the electronic forum.²⁵ Although the FCC has considered strict adherence to the fairness doctrine to be a broadcaster's most important duty,²⁶ the doctrine has not in fact helped broaden the spectrum of ideas in the electronic forum.

In actuality, the fairness doctrine has discouraged the airing of many views and voices that might precipitate fairness obligations. Broadcasters, in their general programming practices, have always been motivated to avoid raising controversial issues.²⁷ Even paid advertisements face the prospect of rejec-

24. If a broadcaster airs a "controversial matter of public importance," the fairness doctrine obligates him to provide an opportunity for presentation of an opposing viewpoint. Fairness Report, 48 F.C.C.2d 1, 7, 30 Rad. Reg. 2d (P&F) 1261 (1974); reconsidered, 58 F.C.C.2d 691, 36 Rad. Reg. 2d (P&F) 1021 (1976); *rev'd on other grounds sub nom.* National Citizens' Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

25. Red Lion Broadcasting Co. v. FCC, 195 U.S. at 389.

26. Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292, 19 Rad. Reg. 2d (P&F) 1103 (1970), *rev'd on other grounds sub nom.* CBS v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).

27. As a practical matter, the Court's reliance on the Fairness Doctrine . . . seriously overestimates the ability—or willingness—of broadcasters to expose the public to the 'widest possible dissemination of information from diverse and antagonistic sources.' . . . [I]n light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply 'bad business' to espouse . . . the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's 'marketplace of ideas.'

CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 187-88 (1973) (Brennan, J., dissenting) (footnotes omitted).

Advertisers also may be reluctant to purchase time during controversial programs, for fear that their products may be identified with an unpopular subject or cause. Broadcasters, in turn, may tend to seek blander programming that will not frighten away revenue sources. See Comment, *Enforcing the Obligation to Present Controver-*

tion if considered too controversial.²⁸ Furthermore, the FCC has been reluctant to brandish its regulatory sword on behalf of fairness, because of the First-Amendment-sensitive area into which it would slice.²⁹

Licensee fears that controversy may alienate viewers and advertisers, and a general FCC policy of deference to licensee discretion on fairness matters, create an atmosphere that is by no means conducive to extensive programming diversity. Any effort to create a healthy PSA policy, therefore, must address the fairness problems that afflict broadcasters and the Commission. Such a policy either must require broadcasters to air PSA's that run the risk of fairness obligations, or must encourage licensees to diversify their PSA's by exempting them from fairness requirements.

II

A New PSA Policy

The FCC, in establishing a more effective PSA policy, might best proceed with a combination of requirements and incentives for PSA programming. A requirement that licensees air a minimum number of PSA's each broadcast day probably would be greeted with compliance.³⁰ A layer of incentives, atop the basic obligation to devote at least a certain amount of programming time to PSA's, should be sufficient to generate PSA's that serve the constitutional and public interest in diversity.

sial Issues: The Forgotten Half of the Fairness Doctrine, 10 HARV. C.R.-C.L. L. REV. 137, 149 (1975); Bazelon, *FCC Regulation of the Television Press*, 1975 DUKE L.J. 213, 231-32.

28. Kaiser Aluminum and Chemical Company and Mobil Oil Company have attempted to buy time for editorial advertisements but have encountered resistance from broadcasters wary of potential fairness obligations. NEWSWEEK, July 2, 1979, at 57.

29. The FCC, in making a fairness evaluation, considers whether a licensee acted reasonably and in good faith. Fairness Report, *supra* note 24, at 17. That approach reflects the Commission's conviction that it is not "appropriate for a governmental agency to make" content-oriented decisions. *Id.* at 16. And it indicates "a desire to avoid even the appearance of censorship." Comment, *supra* note 27, at 151-55.

30. The FCC has observed that if it created a minimum requirement for local news and public affairs programming, most licensees would adopt that level as their minimum standard. *In re* Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Competitive Hearing Process, 66 F.C.C.2d 419, 427, 40 Rad. Reg. 2d (P&F) 763 (1977), [hereinafter cited as Comparative Renewal Standards], *aff'd sub nom.* National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).

A New Definition

The foundation for a new PSA policy should rest upon a new PSA definition. The present definition of PSA's, by specifically naming government agencies and nonprofit organizations as proper PSA sources,³¹ conveys at least the appearance of an implied preference for those institutions. Citizens' groups have complained that they too are worthy PSA sources, but that the prevailing definition of PSA's does not specifically mention them and thus diminishes their acceptability to broadcasters. Quite possibly, licensees who are hypersensitive to regulatory expectations, and are inclined toward the safest road to compliance, tend to rely upon government agencies and nonprofit organizations for their PSA programming. Substantial dependence upon government and nonprofit organizations, however, seriously undermines the capacity of PSA's to supply a broad spectrum of information needs.

So long as a definition satisfactorily explains to broadcasters the nature of a PSA, it should be unnecessary to include examples of particular groups. A broader and less suggestive definition that would eliminate any possible implied preferences for any groups or individuals might provide that:

A public service announcement is a non-routine, non-billable broadcast message that:

- (1) Informs the audience about a service, program or activity of community interest, or
- (2) Provides a forum for individuals or groups to express their ideas, viewpoints or opinions.

Time signals, routine weather announcements and station promotional announcements are not public service announcements.³²

Such a definition would be more consistent with the spirit of the policy "that no private individual or group has a right of special access to the airways."³³

Essential Ingredients

The FCC presently imposes no obligation upon licensees to air even a minimum amount of PSA programming. It is unlikely, however, that licensees would be burdened excessively if required to devote, for instance, at least 90 seconds of air

31. 47 C.F.R. §§ 73.112 n.4; 73.282 n.4; 73.582 n.3; 73.670 n.4.

32. *Cf. id.*

33. PSA Petition, *supra* note 5, at 911.

time every two hours to PSA's as part of their obligations to serve the public interest.³⁴

Such quantitative requirements would leave licensees with full discretion to determine what types of PSA's would be aired, when they would be aired, and how they would be aired. A broadcaster who adhered to those standards would be considered "in compliance" with the requirement to air PSA's. Moreover, those PSA's addressing a problem, need or interest discovered through a licensee's ascertainment process,³⁵ would be credited with programming responding to to ascertained subjects. Failure to meet the minimum PSA obligation, however, would warrant any of the penalties which the Commission imposes for violating broadcasting regulations.³⁶

In the past, the FCC has been reluctant to set percentage or minimum quantitative standards for public affairs programming. The Commission has refused to adopt regulations designed to promote the frequency of such programming, because of its belief that substantial service to the community would not necessarily result.³⁷

For instance, the agency has suggested that a licensee might fulfill percentage requirements for public affairs programming by focusing upon such matters as canoe safety rather than upon issues of deeper concern to the community.³⁸ Such an analysis presumes that licensees would fulfill their public affairs obligation by ignoring what would be of interest to the community—a programming strategy that would undercut the broadcaster's economic self-interest in maximizing his audience and profits.

The Commission also has rejected quantitative standards as

34. A proposal that licensees be required to set aside 90 seconds of PSA time every two hours was presented to, but rejected by, the FCC. The Commission concluded that selection scheduling of PSA's fall within a licensee's broad discretion, and that it should not intrude "into the sensitive area of programming." PSA Petition, *supra* note 5, at 910.

35. The ascertainment process is described in note 4, *supra*.

36. The FCC may issue cease-and-desist orders, revoke stations' licenses, deny license renewals, issue short-term renewals or impose monetary forfeitures. 47 U.S.C. §§ 307(d), 312(b), 503(b) (1976).

37. Comparative Renewal Standards, *supra* note 30, 66 F.C.C.2d at 427: "[W]e conclude that quantitative standards would not do what we had hoped. They would not simplify the hearing process, and they could not offer a licensee any real assurance of renewal. They are a simplistic, superficial approach to a complex problem, and we will not adopt them."

38. See Brief for Appellee at 8, *National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978).

an encroachment upon licensee discretion "to broadcast the programs they believe best serve their audiences."³⁹ However, the agency has indicated it might implement standards if it could be shown that "clear and substantial benefits" would result.⁴⁰

A minimum PSA standard would only slightly disturb licensee discretion since small amounts of programming time would be involved and important content decisions would be left to the licensee's discretion. On balance, therefore, if more stimulating PSA programming emerged from a relatively insignificant level of government regulation, clear and substantial benefits could be realized.

A requirement to air a minimum number of PSA's would establish only a base level public interest standard. However, licensees would have clear notice of the minimum PSA performance required by the Commission and of their relative standings in serving one aspect of the public interest. No incursions would have to be made into licensee discretion to determine PSA content. Furthermore, any fear broadcasters might have over possible audience loss would be unwarranted, given the brief amount of time PSA's require.

Even if some broadcasters concentrated upon PSA quantity, rather than quality and relevance, FCC policy could encourage them to draw upon more diverse and representative views and voices in their community. An appropriate set of incentives, therefore, could assure that public service form did not triumph over public service substance.

III

Incentives

Broadcasters' First Amendment rights, although subordinate to those of the public,⁴¹ would be unnecessarily hampered if the Commission were to establish content standards for PSA's. Incentives designed to broaden the PSA spectrum, however, would be an equitable alternative that served the interests of diversity without pitting one set of First Amendment values against another.

The FCC is in a position to offer substantial and effective in-

39. Comparative Renewal Standards, *supra* note 30, 66 F.C.C.2d at 427.

40. *Id.*

41. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390.

ducements to encourage PSA's that furnish the community with more representative views and voices.

The Commission could add PSA's to its list of programming categories that help establish "superior" service for renewal purposes in a comparative proceeding.⁴² News, public affairs and local programming are the existing programming categories that provide a basis for a "superior" service finding. Such a rating affords an established licensee one advantage, in a comparative proceeding, over competing applicants for a broadcast frequency.

A licensee also could present evidence of his PSA programming and performance to establish "meritorious programming."⁴³ Such a "meritorious" finding can be helpful in offsetting the consequences of any mistakes or misconduct by a broadcaster during his license term, and conceivably could rescue his license at renewal time.⁴⁴

Broadcasters who implemented a PSA policy providing direct and equal opportunity access for individuals and groups might be exempted from fairness obligations that otherwise would attach to such messages.⁴⁵

42. "'Superior' or above average past performance" has been held to be "highly relevant" in a comparative proceeding "and might be expected to prevail absent some clear and strong showing by the challenger." *Central Fla. Enterprises v. FCC*, 598 F.2d 37, 57 (1978).

A comparative proceeding results when the Commission receives more than one application for the same frequency and must evaluate the qualifications of each applicant to determine who should receive a license to broadcast.

43. A general finding of "meritorious programming" may serve to counterbalance licensee misconduct or rule violations that otherwise jeopardize a broadcast license. *Norjud Broadcasting, Inc.*, 55 F.C.C.2d 808, 35 Rad. Reg. 2d (P&F) 173 (1975); *Rust Communications Group, Inc.*, 544 F.C.C.2d 419 (1975); *Oil Shale Broadcasting Co.*, 52 F.C.C.2d 1167, 33 Rad. Reg. 2d (P&F) 1227 (1975); *Friendly Broadcasting Co.*, 35 F.C.C.2d 611, 24 Rad. Reg. 2d (P&F) 712 (1972).

44. "A significant amount of meritorious programming" has helped a broadcaster retain his license despite a showing that he or his subordinates had falsified news, conducted a lottery, failed to exercise adequate supervision over his employees and lacked due care in corresponding with the Commission. The FCC used "meritorious programming" as a justification for a short-term renewal. *Action Radio, Inc.*, 51 F.C.C.2d 803, 33 Rad. Reg. 2d (P&F) 51 (1975).

45. Special immunity for licensees in special circumstances has been recognized as a valid means of promoting political debate and diversity of expression in broadcasting. The Supreme Court, for instance, has held that a licensee is not liable for defamatory remarks made by a political candidate whose statements were aired under section 315. The Court concluded that the absence of such an exemption would "hamper the congressional plan to develop broadcasting as a political outlet, rather than to foster it." *Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

The Commission could also offer special rewards to licensees who air PSA's responding to ascertained problems, needs and interests. For instance, PSA programming directed toward ascertained issues could receive ascertainment programming credit at a multiple of the actual PSA time devoted to a subject. A 30 or 60 second PSA quite often would reach substantially more viewers or listeners than a 30 or 60 minute public affairs program. Credit based on the actual length of such PSA programming might undervalue the impact of such a PSA and, therefore, extra credit would be justified. Similarly, a multiple credit scheme for PSA's aired during peak audience hours would encourage the use of PSA's at those times.

Formulas like these would encourage more extensive and diverse PSA programming without any element of regulatory coercion. Licensees who respond positively to the FCC's incentives could furnish more representative views and voices in two different ways—either by presenting issues and concerns of their own choosing or by opening their studio doors and microphones to community members. Viewpoint diversity would result from either alternative and, therefore, ascertainment or access-based PSA's would be a worthy ingredient in the Commission's recipe for "superior" and "meritorious" programming.

Ascertainment-based PSA's

A broadcaster whose PSA performance served the needs and interests of the community as ascertained by him, should be able to offer such evidence to support a claim of "superior" or "meritorious" programming.

However, the incentives of "superior" and "meritorious" programming credit along might not assure that ascertainment-based PSA's are aired at meaningful times. "Superior" and "meritorious" designations, therefore, could be withheld if a preponderant and unreasonable number of a station's PSA's were aired between the hours of 11 p.m. and 6 a.m.⁴⁶ If PSA

46. A "superior" and "meritorious" determination would require evaluation of the facts and circumstances surrounding the licensee's PSA programming. If, for instance, the broadcaster aired the majority of his PSA's between 11 and 6 but still broadcast a significant number during other hours, a finding of "superior" and "meritorious" programming would not be precluded. Otherwise, a licensee who aired PSA's throughout the day, but also ran a large number of them during graveyard hours, might be unfairly penalized.

policy is supposed to increase the frequency and broaden the content of PSA programming, but the public is asleep when the message is aired, it would be incongruous to attach "superior" and "meritorious" labels to such efforts.

A promise of multiple credit for each PSA aired during peak audience hours, however, might provide sufficient inducement to rescue PSA's from the late-night or early-morning graveyards.

Access-based PSA's

Licensees who allow community groups and individuals to deliver their own PSA's should also be entitled to offer their formats as evidence of "superior" and "meritorious" programming.

A necessary corollary is that those opening their studio doors for public access also should be permitted to exempt their PSA's from the fairness doctrine requirements. This immunity would substantially neutralize one of the greatest obstacles to PSA diversity. Since licensees would be free from concern over obligations to grant time for response to viewpoints expressed in PSA's, they could afford to be less apprehensive about and less restrictive of PSA content.

Any provision for access-based PSA's should assure that speakers and viewpoints are not excluded arbitrarily or accidentally. Administrative sensitivity would be essential in structuring an access system for a forum where the number of speakers would probably always exceed the available number of time slots. Moreover, safeguards would be necessary to protect against efforts to dominate or monopolize the PSA marketplace.

A possible scheme for establishing an access system, with maximum equal opportunity for all views and voices, would be to make air time available either on a basis of random selection or through a system of representative spokespersons. Combining these methods is also a possibility.

Licensees, for instance, could set aside PSA time for groups or individuals selected from a lottery, or on a first-come, first-served basis. Time also could be allocated for representative spokespersons who wished to address community issues or

problems.⁴⁷ A qualification for spokespersons simply might be the ability to collect enough signatures on a petition to be considered a voice for others in the community.

Creation of a PSA access system would offer more representative views by providing more representative voices. Legal and administrative barriers, however, still impede this evolution.

Although the Supreme Court has denied the existence of a public right of paid access to radio or television, it has forged a path for the FCC to "devise some kind of limited right of access that is both practicable and desirable."⁴⁸ Broadcasters have already demonstrated that PSA's are practicable, and the interest in information and viewpoints from the widest array of sources underscores their desirability.

The FCC itself has established a four-part test which any access system must pass before it can be considered acceptable. Access PSA's would measure up well to the Commission's requirements, which include:

- (1) Assurance that important issues do not escape timely discussion;
- (2) Preservation of licensee discretion;
- (3) Protection against any right of access accruing to particular persons and groups;
- (4) Making sure government is not drawn into the role of deciding who receives air time and when.⁴⁹

A pool of speakers from a community should supply enough individuals who are ready and willing to offer their own individual, as well as representative, viewpoints on important contemporary issues.⁵⁰

Although the Commission has expressed reluctance to interfere with licensee discretion in programming, the agency already intrudes into the realm of program content under the fairness doctrine.⁵¹ Moreover, licensee discretion would not be

47. See Comments of Committee for Open Media, BC Docket No. 78-60 (FCC, filed Sept. 6, 1978).

48. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 132 (1973).

49. Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 699, 36 Rad. Reg. 2d (P&F) 1021 (1976), *rev'd in part sub nom.* National Citizens' Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

50. A two and one-half year experiment with "free speech messages" in San Francisco produced an abundance of speakers and an abundance of viewpoints. Access is Fairness: A Petition for Reconsideration and/or Clarification of the Fairness Report (FCC, filed Aug. 12, 1974).

51. An FCC order for a broadcaster to balance his programming in the cause of

eroded by a PSA access option, since a broadcaster could still choose whether to air PSA's that (1) merely met minimum quantitative standards, (2) responded to ascertained problems, needs and interests, or (3) provided access to community groups and individuals. The decision to furnish access in itself, therefore, would be a manifestation and product of licensee discretion.

Access-based PSA's would also be instrumental in expanding PSA sources and in safeguarding against an unreasonably circumscribed content range. A system that relied upon many speakers, drawn from the full spectrum of the community, rather than upon the determinations of a lone licensee, inevitably would invite and produce more diverse viewpoints and information.

Finally, PSA access would reduce and reshape the government's role as an editorial decision-maker. The FCC's content-oriented responsibilities for access spots would consist of determining whether such messages fit the definition of a PSA, rather than whether they create a need for balance. Commission oversight, therefore, would be scaled down from subjective evaluations of fairness to observations of rudimentary fitness.

Special Interests

The programming of ascertainment and access-based PSA's would knock down a major barrier for many voices now seeking entry into the electronic forum. Although such PSA's would create more and better opportunities for a broader range of interests, it is possible that some special interests still would be deprived of a hearing.

Since broadcasting markets vary significantly in their audience composition, it is difficult to generalize about who would constitute one of those "special interests." Possible examples, however, might include persons underrepresented because of handicaps, language or age. Since the handicapped, the elderly and children, at least, are probably present in all markets, the FCC might consider failure to direct a reasonable amount of PSA time to these groups as a possible ground for denying a finding of "superior" or "meritorious" programming.

fairness explicitly lifts content control from the licensee's hands. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 235.

A "reasonable amount," however, might vary with the community and circumstances. Furthermore, it could prove difficult and inadvisable to set uniform standards for the amount of time to be considered reasonable.

A workable formula for setting standards, though, might begin by requiring licensees to seek out and serve those special interests within their particular markets. The "seeking out" part of the mandate could be formalized into a requirement to ascertain those groups which, because of age, language, handicap, or some other disability, would be underrepresented in the electronic forum. The "service" facet of the requirement would consist of providing those interests with a reasonable amount of PSA programming.

The amount of PSA time devoted to this purpose could be subject to challenge as unreasonable. A standard for an unreasonable amount of PSA time eludes definition. But a showing of non-existent or sporadic PSA programming, or other convincing evidence of neglect, should be sufficient to establish a finding of unreasonableness and lead toward a conclusion that the licensee's programming efforts were neither "superior" nor "meritorious."

Absent any challenge to a licensee's performance, however, the Commission could settle for a simple showing by the broadcaster that he made a good-faith endeavor to serve special interests in his community through PSA programming. Even such a seemingly lax standard would still subject to community scrutiny and potential attack the licensee's efforts on behalf of special interests. Compliance thus would depend heavily upon licensee self-interest in procuring favorable programming evaluations from the FCC.

Conclusion

The potential contribution of PSA's to the public dialogue may be overlooked or underestimated because of their fleeting nature. Although PSA's do not offer extensive discussion of issues, they do provide a means for capturing and holding audience attention. Consequently, the value of PSA's may be their unique capacity to stimulate a viewer or listener to reflect upon an idea or an issue that otherwise might not be considered.

PSA programming would not alter a licensee's already existing obligation to cover public issues, but would rather serve

as a valuable complement to other types of public interest programming.

Broadcasting for now exists in a regulated environment that supposedly exalts the rights of the viewing and listening public. So long as this attitude continues to exist, the FCC should be protective and supportive of those rights. The prevailing combination of PSA policy and programming, though, has contributed little to the public's interest in diversity in the media marketplace.

An FCC policy requiring a minimum amount of PSA programming and encouraging community orientation or input should precipitate more PSA programming that represents more views and voices. Such developments should yield more public service programming and, consequently, more programming in the public interest.