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"It is the right of the viewers and listeners, not the right of broadcasters, which is paramount."[1]

I
Introduction

Simon Geller is a sixty-three year old radio and electrical engineer from Lowell, Massachusetts. For eighteen years, he has been the sole owner and operator of radio station WVCA-FM in Gloucester, Massachusetts.[2] He is one of a few remaining sole owners and operators in the United States.[3] He is also the only radio station operator in the history of the Federal Communications Commission (FCC) to have his license revoked pursuant to the comparative renewal process.[4] In 1982, absent any

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

2. WVCA's service area includes surrounding communities which together with Gloucester are known as the Cape Ann area.

3. Out of the 35 Boston area radio stations listed in *Spot Radio Rates and Data*, not a single station is run by a sole owner and operator. In fact, only seven of the 35 are independent stations (not affiliated with other stations or networks). All of these seven are owned by corporations and some by very large corporations, such as Westinghouse Broadcasting and Cable, Inc. and another by General Electric Broadcasting Co., Inc. SPOT RADIO RATES AND DATA, Dec., 1982, at 342. In fact, nine corporations own the radio stations which serve well over half the audience of AM and FM commercial radio. These nine are American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), Westinghouse Metromedia, R.K.O., National Broadcasting Company (NBC), Capital Cities, Bonneville, Cox, and Gannett. B. BAGDIKIAN, THE MEDIA MONOPOLY 15 (1983).

4. *See* Staff of House Subcommittee in Communications, 95th Cong., 1st Sess., Option Papers 225 (1977); *In re* Applications of Simon Geller and Grandbanke Corp., 90 F.C.C.2d 250, 283 n.32 (1982) (Washburn & Quello, Comm'rs, dissenting) [hereinafter cited as *Commission Decision*]. The case of WHDH-TV, sometimes referred to as involving the revocation of an incumbent broadcaster's license pursuant to a comparative hearing, was actually treated as a comparison of two new applicants because WHDH was operating on a temporary license. *See infra* note 91.

suggestion of dishonesty or other wrongdoing, the FCC voted to revoke Geller's license and award it to a competing applicant, the Grandbanke Corporation.[5]

WVCA-FM has a classical music format; it broadcasts no news and a negligible amount of public affairs programming. A significant segment of the Gloucester community seems to like it that way.[6] In fact, the station is partially supported by unsolicited contributions from the community.[7] Geller described his format honestly and in detail to the FCC every three years when applying for renewal of his broadcast license,[8] and the FCC never gave any indication of displeasure with any aspect of Geller's operation.[9]

By filing a mutually exclusive application in 1975, Grandbanke imposed on the FCC the awesome task of comparing Geller's operation and Grandbanke's proposal to determine which would better serve the interests of the Cape Ann area.[10] This task was complicated by the "comparative renewal process" that the FCC uses to determine which of two or more competing applicants will be granted a license.[11]

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5. *Commission Decision*, 90 F.C.C.2d 250 (1982). At the time of filing its application, Grandbanke's stockholders were Edward Mattar, Josiah Spaulding and Spaulding's wife and son. Spaulding was a prominent Massachusetts attorney and politician. Mattar, who owns 66% of Grandbanke, owned a consulting firm. Both lived in the Boston suburbs and owned other media interests in the Northeast. Spaulding died in 1982.

6. Although it is unclear exactly what percentage of the community actually supports Geller and WVCA, the record in the case includes the testimony of 35 witnesses who appeared at the public hearing, as well as over a hundred letters and petitions in support of Geller. In addition, two citizens groups are attempting to intervene on Geller's behalf: Save Our Station (SOS) and Committee for Community Access. SOS has gone so far as to pledge $2,500 a year for the next five years and as much volunteer assistance as Geller needs in order to produce local non-entertainment programming and maintain his station. *See* Geller's Petition for Reconsideration, Docket No. 21104, File No. BRH-1610 (dated July 15, 1982).

7. Initial Decision of Administrative Law Judge John H. Conlin, 90 F.C.C.2d 284, 287 (1982) [hereinafter cited as *Initial Decision*].

8. Recent changes have extended the license term to seven years. 47 U.S.C.A. § 307(d) (West Supp. 1982).

9. *See Commission Decision*, 90 F.C.C.2d at 279 n.8 (Washburn & Quello, Comm'rs, dissenting); *Initial Decision*, 90 F.C.C.2d at 298.

10. Grandbanke proposed a varied format, including 16.9% news, and of that total 55% would be devoted to local and regional news, and 5.9% each devoted to public affairs and non-entertainment programming. *Commission Decision*, 90 F.C.C.2d at 274 n.120.

11. The comparative renewal process has been called the most convoluted area of communications law. The criticism has been particularly harsh in proceedings where a new applicant challenges an incumbent. The process has been described as:

a riddle within an enigma within a conundrum. The riddle: by what standards

In voting to revoke Geller's license and award it to Grandbanke, the FCC overturned the decision of an Administrative Law Judge (ALJ) and ignored the support for Geller voiced by a significant segment of his community.[12] Moreover, the FCC employed a process considered by many to be little more than a method of insuring that incumbent licensees would not have their licenses revoked. The FCC's history of favoring incumbent licensees has led many commentators and even some FCC commissioners to suggest that licensees have a de facto property right in their stations.[13]

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is a renewal applicant to be measured. The enigma: by what standards is a renewal challenger to be measured. The ultimate conundrum of course is, even assuming the measurement of such respective standards, how can there be constructed a matrix which can be used to rationally measure and compare two largely unrelatable properties: an empirical property (an existing record) and an a priori property (a set of applicant pledges)?

Broadcast Renewal Applicant, 66 F.C.C.2d 419, 433 (1977) (separate statement of Hooks & Fogarty, Comm'rs). *See generally* Comment, *The Policy Paralysis in WESH: A Conflict Between Structure and Operations in the FCC Comparative Renewal Process*, 32 FED. COM. L.J. 55 (1980); Comment, *Comparative License Renewal Hearings and the Protection of the "Public Interest": Central Florida Enterprises v. FCC*, 92 HARV. L. REV. 1801 (1979). In a 1973 speech to the International Radio and Television Society, Dean Burch, Chairman of the FCC at that time, said:

> [i]f I were to pose the question, what are the FCC's renewal policies and what are the controlling guidelines, everyone in this room would be on equal footing. You couldn't tell me, I couldn't tell you—and no one else at the Commission could do any better (least of all the long-suffering renewals staff).

B. COLE AND M. OETTINGER, RELUCTANT REGULATORS 133 (1978). For a detailed description of FCC renewal proceedings, *see* Anthony, *Toward Simplicity and Rationality in Comparative Renewal Proceedings*, 24 STAN. L. REV. 1 (1971).

12. *See supra* note 6.

13. *See* Central Florida Enters., Inc. v. FCC, 598 F.2d 31, 41 (D.D.C. 1978), where the court refers to the FCC's history revealing "an ordinarily tacit presumption that the incumbent licensee is to be preferred over competing applicants." FCC Commissioner Robinson went so far as to describe the renewal process as follows:

> [t]o the perceptive observer of the history of renewal contests, it will doubtless be apparent by now that there is less to such 'contests' than meets the eye, that in fact it is not a real contest between two applicants but a pretend game played between the Commission and the public. The outcome of the game is predetermined; the art (and the sport) is to maintain interest until the inevitable outcome is registered. The Commission's role is to look judicious in pursuing a process that yields only one result; from the public the fun is watching the show and trying to anticipate how the Commission will finesse the result in the particular case. It rather resembles a professional wrestling match in which the contestants' grappling, throwing, thumping—with attendant grunts and groans—are mere dramatic conventions having little impact on the final result. Of course, wrestling fans know the result is fixed and generally in whose favor; still they fill the bleachers to see how it is done . . . the process has nothing whatsoever to do with the outcome.

Cowles Fla. Broadcasting, Inc., 60 F.C.C.2d 372, 439 (Robinson, Comm'r, dissenting). "A property right does in fact exist as a consequence of the historic practice of re-

If the comparative renewal process is traditionally manipulated in order to insure the renewal of an incumbent's license, why wasn't Simon Geller's license renewed? The dissent in *Geller* suggested that the process was indeed manipulated, but to achieve a different end:

> [f]or seventeen years, the Commission has struggled to interpret its *Policy Statement* in a fair and just manner, and not once has it determined that a licensee was so deficient in serving its community that denying renewal on comparative grounds was warranted. In its eagerness to reach that result today, the majority distorts our comparative renewal policy beyond recognition and, in the process, disserves the people of Gloucester, who have enjoyed Simon Geller's service for eighteen years.[14]

The dissent did not suggest why the majority was so eager to revoke Geller's license and award it to Grandbanke.

Certainly, Geller's status as one of the few, if not the only, remaining sole owners and operators in broadcasting,[15] coupled with his poor financial condition,[16] must be related in some way to the FCC's manipulation of the process to reach the unlikely end of revocation of an incumbent's license. But questions remain as to the nature of that relationship and whether the FCC's treatment of Geller was justified.

The fact that the FCC singled out Geller for unusual treatment has not been the focus of the considerable press which Geller has received.[17] The press has focused instead on the contrasting qualities of the Grandbanke Corporation and Geller,[18] and on the criticism the decision has received from within the community which Geller has served and been a part of for

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newing licenses except for misbehavior. To pretend otherwise is to blink at reality." *Id.* at 446.

14. *Commission Decision*, 90 F.C.C.2d at 283 (Washburn & Quello, Comm'rs, dissenting).

15. *See supra* note 3.

16. WVCA's total revenues for the three years preceding the filing of its 1975 application for renewal were less than $19,500. *Commission Decision*, 90 F.C.C.2d at 255.

17. Several articles on the *Geller* case have appeared in BROADCASTING, The New York Times, The Washington Post, and even the Wall Street Journal. *See, e.g.*, *One Man's Radio Station, But F.C.C. Doesn't Like It*, N.Y. Times, May 11, 1982, at A12; *One-Man Band to be Silenced*, BROADCASTING, May 24, 1982, at 36; *The TV Column*, Wash. Post, May 20, 1982, at C14.

18. One article, which described Geller as a "57-year old Lowell native, who some say has the physical resemblance of a bit player from 'Murder by Death,' " described the scene at the hearing in Gloucester as follows:

> Geller came to court armed with statistics and figures. He carried them in a cardboard box and plunked them down at the counsel table. Non-lawyer Si-

nearly two decades.[19]

The FCC decision to revoke Geller's license seems in stark contrast to precedent and current political trends.[20] Furthermore, the Geller decision seems to conflict with the FCC's mandate to operate in the public interest, at least insofar as a number of Cape Ann citizens express that interest.

This note examines the FCC's procedure for determining which of two competing applicants will best serve the public interest and how the FCC's applied this procedure in *Geller*.[21]

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mon Geller was his own attorney, having little faith in attorneys that might come free. Into the same chambers marched the first team from Grandbanke:

Attorney, politician, civil leader, hospital owner, Yale and Columbia Law School graduate Josiah A. 'Si' Spaulding, a friendly gentleman with enough gumption to challenge Teddy Kennedy for the U.S. Senate in 1970 . . . .

Edward Mattar of Brookline, meticulous in a three-piece suit . . . . John Bankson of Washington, D.C., associated with the Washington law firm of Hamel, Park, McCabe and Saunders who have handled many cases before the FCC. Bankson is a graduate of Yale and Harvard Law School. Louise Sunderland of Washington, D.C. via Brookline, Mass. . . . by way of Vassar and Stanford Law School.

Unlike Geller's cardboard box, the Grandbanke team had attache cases.

Cahill, *Can Simon's Symphonies Survive the Fight for Air?*, N. SHORE MAG., July 16, 1977, at 8.

19. Gloucester, Massachusetts is a small fishing town located approximately 25 miles northeast of Boston. Out of a population of about 28,000, fisheries and fish processing plants employ 6,324 wage earners. Secondary industries in the service trades are geared toward tourists and summer residents. The service trades employ approximately 5,000 wage earners. *Initial Decision*, 90 F.C.C.2d at 285. There is a significant artistic community. *Id.*

20. In 1981, the FCC did away with ascertainment and logging requirements, removed the limits on the number of commercials allowed and did away with guidelines for the amount of non-entertainment programming. Report and Order on Deregulation of Radio, 84 F.C.C.2d 968, *reconsideration denied*, 87 F.C.C.2d 797 (1981). In addition, recent legislation has proposed doing away with the comparative renewal process altogether. For a detailed discussion of such legislation, *see* Kuklin, *Continuing Confusion: Renewal of Broadcast Licenses*, 27 ST. LOUIS L.J. 95, 129 (1983). The past two chairmen of the FCC have favored doing away with the comparative renewal process. *See Hearings on S. 601 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transp.*, 97th Cong., 1st Sess. 7-8 (1981) (statement of Robert E. Lee, Acting Chairman of the FCC); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Mark S. Fowler, current Chairman of the FCC, supports replacing the renewals process with a user fee. *See generally* Stengel, *Evangelist of the Marketplace*, TIME, Nov. 21, 1983, at 58; Harris, *Fowler Proposes Total Deregulation In Return for Modest Spectrum Fee*, VARIETY, Oct. 26, 1982, at 1; *see also infra* note 182. There is significant disagreement, however, as to whether these "marketplace" approaches to regulation are consistent with the FCC mandate to license in the public interest. *See* Campbell, *The FCC's Proposal to Deregulate Radio: Is it Permissible Under the Communications Act of 1934?* 32 FED. COM. L.J. 233 (1981); *see generally* Comment, *The FCC's New Equation for Radio Programming: Consumer Wants = Public Interest*, 19 DUQ. L. REV. 507 (1981).

21. This note will not discuss the constitutional issues raised in this case. How-

The examination underscores the contradictions between various FCC policies and procedures established and applied over the years as determinative of the "public interest."[22] Especially curious is the contradiction caused by the FCC's long-established policies favoring diversity in ownership and programming[23] and the FCC's rejection of the ultimate result of such diversity—a radio station which is unique in format, programming and ownership.[24] The FCC seems to favor diversity, to a point. That point ends where the FCC's assumptions regarding the public interest begin.

Is it not possible that classical music played by a neighbor might be more in a community's interests than yet another top forty format chock-full of commercials and news programming? Who says that playing Beethoven is inconsistent with the public interest? When information abounds in every form,[25] why is the lack of "non-entertainment" programming an unpardonable sin? Taken to its extreme, if a community banded together and declared that it did not want to hear one more syndicated radio news capsule, would the radio station in their community still have to play such "non-entertainment" programming in order to operate in that community's interest? Perhaps an agency in Washington, D.C. is less equipped to determine and protect the "public interests" of a fishing town in Massachusetts, than that town is itself.

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ever, in their Appellate Brief Geller's counsel argued that "[i]n according discriminatory treatment to Geller's programming on the basis of its content, the Commission has violated his First and Fifth Amendment Rights." Brief for Appellant at 22, Simon Geller v. FCC, Case No. 82-2400 (dated Mar. 1, 1983).

22. The only guideline provided for the FCC by the Communications Act of 1934 is that licenses should be granted and renewed only if the "public convenience, interest and necessity will be served thereby." 47 U.S.C. §§ 307(a), (d), 309(a) (1978). The FCC has broad discretion in establishing methods to identify and protect the public interest. *See* National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978). This vague mandate to license in the public interest is the cause of much confusion. Even FCC decisionmakers disagree as to what is meant by the "public interest." *See* Krugman & Reid, *The Public Interest as Defined by FCC Policymakers*, 24 J. BROADCASTING 311 (1980).

23. *See infra* note 144 and accompanying text.

24. *See supra* note 3; *see infra* notes 144-53 and accompanying text.

25. In this case, although WVCA is Gloucester's only radio station, the community is well-served by other radio signals. *Initial Decision*, 90 F.C.C.2d at 252. The ALJ noted that the availability of adequate news and public affairs programming elsewhere was a recurrent theme of the 35 witnesses testifying on behalf of Geller at the hearing in Gloucester. *Id.* at 288.

II
Procedural History

The Communications Act of 1934 requires that the FCC grant licenses only if the "public convenience, interest and necessity will be served thereby."[26] At the time of Geller's 1975 application, the maximum term for broadcast licenses was three years.[27] At the end of each term, an incumbent station must again pass the public interest test to qualify for renewal.[28] Where two or more applications are mutually exclusive,[29] the FCC must conduct a full comparative hearing.[30] Such hearings must be held regardless of whether both applicants are applying for an original license or one is an incumbent licensee.[31]

Before the FCC undertakes a detailed comparison of the applicants, each must be found to qualify as an FCC licensee by meeting certain standards of character, citizenship, financial ability and technical skill.[32] If two or more applicants pass this threshold determination, a comparative analysis is held to decide which applicant would better serve the public interest.

The original hearing of both the qualifying and standard comparative issues is held before an ALJ. The ALJ takes evidence on the issues designated by the FCC to be material to the case.[33] The ALJ makes an initial determination as to the designated issues and renders an Initial Decision.[34] If a party files exceptions to this decision, the full Commission will review it and render a Commission Decision.[35]

The initial hearing in *Geller* was held in Gloucester before an ALJ in June of 1977. At this hearing, both the qualifying[36] and the standard comparative issues[37] were considered. The ALJ concluded that a grant of Geller's application would better

26. *See supra* note 22.
27. *See supra* note 8.
28. U.S.C.A. §§ 307(a), (d), 309(a) (1978).
29. Applications are mutually exclusive when applications, original and/or renewal, request to operate on the same channel or when the distance between the respective proposed transmitter sites does not comply with FCC regulations. 47 C.F.R. §§ 73.3573, 76.610 (1982).
30. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945).
31. *See* Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).
32. *See* 47 U.S.C. §§ 308(b), 319(a) (1976).
33. *See* 47 C.F.R. § 0.341 (1982).
34. *See* 47 C.F.R. § 1.267 (1982).
35. *See* 47 C.F.R. §§ 0.365, 1.276 (1982).
36. *See infra* notes 45-46 and accompanying text.
37. *See infra* note 112 and accompanying text.

serve the public interests of the Cape Ann area.[38] Grandbanke filed exceptions to the decision, causing the full FCC to review the decision and render a Commission Decision.[39]

The FCC reversed the Initial Decision based on the ALJ's application of the standard comparative criteria[40] and agreed with the ALJ's resolution of the qualifying issues.[41] In addition, the FCC held that the ALJ's findings of fact were substantially complete and accurate.[42]

Geller filed a petition for reconsideration of the FCC's decision.[43] The FCC, however, reaffirmed its earlier decision and refused to consider additional facts offered by Geller in support of his petition.[44] Geller has appealed to the Court of Appeals for the District of Columbia.[45] In the meantime, Geller continues to operate WVCA and will do so until the litigation reaches its ultimate disposition.

III
Is Simon Geller Qualified to be a Licensee?

The Designation Order in *Geller* stated that prior to a determination of the standard comparative issues, specified issues had to be addressed to determine whether Geller was qualified to remain an FCC licensee. These issues were:

a) To determine whether the efforts were made by Simon Geller to ascertain the community problems of the area to be served and the manner in which the applicant proposes to meet these problems (Ascertainment Issue).
b) To determine whether Simon Geller's non-entertainment programming of Station WVCA was reasonably responsive to the community problems, needs, and interests during the 1972-1975 licensing period (Past Programming Issue).[46]

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38. *Initial Decision*, 90 F.C.C.2d at 306.
39. *Commission Decision*, 90 F.C.C.2d at 251 n.7.
40. *Id.*
41. Although the FCC agreed with the ALJ's resolution of the qualifying issues, it spent 15 pages reinforcing that determination and only seven pages discussing the ALJ's application of the standard comparative criteria.
42. *Commission Decision*, 90 F.C.C.2d at 251.
43. Petition for Reconsideration, Docket No. 21104, File No. BRH-1610 (dated July 15, 1982).
44. Memorandum Opinion and Order Denying Petition for Reconsideration, F.C.C. No. 82-461 (released Oct. 28, 1982).
45. *See* Brief for Appellant, Simon Geller v. FCC, Case No. 82-2400 (dated Mar. 1, 1983).
46. Memorandum Opinion and Order, 65 F.C.C.2d 161 (released Feb. 2, 1977).

If Geller had been disqualified under either issue, his license would have been revoked prior to any comparison with Grandbanke.

A. Ascertainment Issue

Prior to 1979, every applicant for a license was required to make a formal ascertainment of their community's needs and interests and to propose responsive programming. The FCC set out complex guidelines for such ascertainments.[47] Substantial compliance with the guidelines was necessary in order to qualify for renewal.[48]

Geller's 1975 renewal application contained no ascertainment of community needs. In fact, Geller never conducted a formal survey. At the hearing before the ALJ, Geller testified that he was aware of community needs and interests through newspapers, telephone conversations with listeners, and chance encounters with Gloucester residents. Geller defined this process as "continuous ascertainment over the years."[49]

In April of 1977, Geller discovered that his failure to conduct an ascertainment as defined by the FCC was potentially disqualifying. Shortly thereafter, Geller learned that he could conduct a survey and petition to amend his application to reflect its results. Geller did so,[50] and his petition to amend his application was granted and the amendment accepted.[51] At the time of the hearing before the ALJ, however, questions remained as to whether Geller's amendment was properly granted and if so, whether Geller's ascertainment was in substantial compliance with the *1971 Primer*.[52] Whether Geller's amendment was properly granted depended upon his showing

47. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971) [hereinafter cited as *1971 Primer*]; Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976). In 1979, the FCC did away with formal ascertainment requirements. *See supra* note 20. However, Geller's ascertainment efforts were assessed under the rules set out in the *1971 Primer*, since new FCC policies apply from the date of adoption only to those portions of renewal applications which relate to future proposals. *See* 57 F.C.C.2d at 439.

48. Report and Order in Revised Procedures for the Processing of Contested Renewal Applications, 72 F.C.C.2d 80 (1979).

49. *Commission Decision*, 90 F.C.C.2d at 252.

50. Geller contacted 19 leaders of the Gloucester community and conducted interviews over the telephone concerning what they saw as the problems in their community. *Id.* at 253.

51. Petition to Amend Application for Renewal (filed May 25, 1977).

52. *See supra* note 47.

good cause[53] for late filing.[54]

In the Initial Decision, the ALJ concluded that mitigating factors such as the poor financial condition of WVCA,[55] the status of Geller as WVCA's sole employee, and the fact that Geller is a diabetic, justified Geller's late filing of the amendment.[56]

The FCC came to the same conclusion, but for different reasons.[57] The Commission emphasized Geller's efforts to get a waiver of the ascertainment requirement, noting that prior to the designation of the issues, Geller stated his reasons for not conducting an ascertainment survey with "abundant candor."[58] The FCC also noted that as soon as Geller discovered that he could amend his application, he conducted a survey and petitioned for leave to amend.[59]

The ALJ combined his consideration of the issue of acceptance of the amendment with that of the sufficiency of the ascertainment offered in that amendment. He stated that "despite the absence of formal surveys Geller had established a unique rapport with his listeners and that dialogue which the Commission's ascertainment policy seek [sic] to create between a station and the community has been achieved in this instance."[60] The ALJ held that based on the mitigating factors mentioned above, Geller's ascertainment efforts were made in good faith and were not insubstantial.[61] The ALJ evidently equated Geller's "not insubstantial efforts" with substantial compliance with the *1971 Primer*.[62]

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53. "Good cause" is established through a showing of due diligence, good faith, and no undue hindrance to the competing applicant. *See* Erwin O'Conner Broadcasting Co., 22 F.C.C.2d 140, 143 (1970).

54. 47 C.F.R. § 1.522(a)(2) (1978).

55. *See supra* note 18.

56. *Initial Decision*, 90 F.C.C.2d at 303.

57. *Commission Decision*, 90 F.C.C.2d at 252.

58. In a letter to the FCC written April 2, 1975, Geller said that an ascertainment would be pointless since he could not afford to produce the programming a survey might indicate was needed. *Id.* at 253.

59. The FCC mentioned that Geller's misunderstanding of the FCC rules was reasonable considering his status as a layman. *Id.* at 257-58.

60. *Initial Decision*, 90 F.C.C.2d at 304.

61. *Id.*

62. The findings established that Geller did not follow the ascertainment procedures set out in the *1971 Primer*. Geller did not consult any demographic data prior to his survey, did not submit a compositional study of Gloucester or surrounding communities, did not survey members of each group identified in the *1971 Primer*, and did not survey leaders outside Gloucester or submit a general survey. *See Commission Decision*, 90 F.C.C.2d at 253-54. All of the above are necessary components of ascertain-

In agreeing with the ALJ's conclusion that Geller's ascertainment was in substantial compliance with the *1971 Primer*, the FCC seemed to suggest that "substantial compliance" was a subjective test; "substantial" pertained to the effort expended rather than to the compliance affected. The FCC concluded that:

> the evidence amply supports the ALJ's finding that Geller's ascertainment deficiencies were a direct result of his limited resources, lack of staff and physical handicap. While these difficulties did not excuse Geller from fulfilling his broadcast obligations, we believe that disqualification is inappropriate where, as here, the licensee's failure to ascertain was not 'deliberate, continued and egregious', and did not 'show a propensity for operation without regard for the Commission's Rules which cannot be overlooked.'[63]

The FCC's reluctance to disqualify Geller on the ascertainment issue is puzzling in that Geller obviously did not comply with the requirements of ascertainment which were the law at the time of his renewal application.[64] While claiming that Geller's difficulties did not excuse him from his ascertainment obligations, the FCC did not explain what did excuse Geller's blatant disregard for the Commission rules on ascertainment.

B. Past Programming Issue

In order to qualify for license renewal, a licensee must show that during their past license term they presented programming responsive to the needs and interests of their service area. The past programming issue designated by the FCC in *Geller* was limited to a consideration of Geller's non-entertainment programming and whether it was responsive to the com-

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ment as set out in the *1971 Primer*. Under FCC precedent, failure to comply with the rules set out in the *1971 Primer* results in disqualification. *See* A.V. Bamford, 60 F.C.C.2d 749 (1976); Voice of Dixie, Inc., 45 F.C.C.2d 1027 (1974); Centreville Broadcasting Co., 50 F.C.C.2d 261, 263 (1974); Folkways Broadcasting Co., 48 F.C.C.2d 723 (1974). In fact, at least one case has held that failure to conduct a general public survey in and of itself is sufficient grounds for disqualification. *See* Community Broadcasting Co., 60 F.C.C.2d 951 (1976). Failure to propose programming to meet ascertained needs of the community has also been held to be a fatal defect. *See* Bud's Broadcasting Co., 51 F.C.C.2d 238, 240 (1975).

63. *Commission Decision*, 90 F.C.C.2d at 261.

64. Even the Broadcast Bureau filed a brief maintaining that Geller's noncompliance with ascertainment requirements necessitated his disqualification. *See* Broadcast Bureau's Oppositions to Petitions for Reconsideration, Docket Nos. 21104 & 21105, File Nos. BRH-1610 & BPH-9391 (July 19, 1978).

munity's needs.[65]

In Geller's renewal application for the 1972-1975 license period, he had proposed to broadcast 99.77% symphonic music and .23% non-entertainment programming.[66] Geller testified that after experimenting with various formats, he had turned to symphonic music because there were no exclusively "good music" stations in the Gloucester area.[67]

At the end of each license period, Geller filed an application for renewal clearly outlining his programming proposals; for every three-year period until 1975, Geller's license was renewed without question by the FCC. By renewing Geller's license, the FCC was, in effect, certifying that Geller's operation was in the public interest.[68] In fact, during the 1972-1975 license period, Geller's informational programming conformed substantially to his proposals and in some respects, exceeded them.[69]

The ALJ held that "Geller's programming judgments were made in good faith, and that his decision to forego largely news and public affairs in favor of a highly specialized format was a reasonable exercise of discretion."[70] In coming to this conclusion, the ALJ relied heavily on the unsolicited testimony of residents at the Gloucester hearings. Thirty-five witnesses testified to the same general themes: the unique quality of WVCA's programming, the lack of a satisfactory alternative in the area, the adequacy of other sources of news and public affairs information, and their affection for Geller and his personal style.[71]

The ALJ maintained that "the hearing record established that WVCA was 'uniquely responsive' to the needs and inter-

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65. 65 F.C.C.2d at 164.

66. *Initial Decision*, 90 F.C.C.2d at 286.

67. *Id.*

68. In FCC v. WNCN Listeners Guild, 450 U.S. 582, 600 (1980), the Supreme Court said, "[t]he issue of past or contemplated entertainment format changes arises in the courses of renewal and transfer proceedings; if such an application is approved, the Commission does not merely assume but affirmatively determines that the requested renewal or transfer will serve the public interest."

69. *Commission Decision*, 90 F.C.C.2d at 267.

Although no public affairs programming was proposed, WVCA regularly carried several weekly series which could be so characterized. In addition, WVCA broadcast 18 public service announcements each week. *Id.* at 262.

70. *Id.* at 263.

71. *Initial Decision*, 90 F.C.C.2d at 287-89. Only two witnesses testified in opposition to Geller's renewal; only one of those was a resident. *Id.* at 289 n.4.

ests of the listening public and that a loss of the service it provided would be deeply felt in the community."[72] The ALJ concluded not only that Geller was qualified to remain an FCC licensee, but that Geller's past record was a significant, favorable factor and therefore, entitled to considerable weight in both the proposed programming and renewal expectancy aspects of the standard comparative issues.[73]

While the ALJ determined that Geller's programming was responsive to the needs and interests of the community, the FCC focused not on whether Geller's programming was responsive, but whether his *non-entertainment* programming was reasonably responsive or simply "adequate."[74] The FCC limited its assessment of Geller's programming to less than 1% of that programming.[75] The FCC seems to have addressed not only the question of whether the 1% was responsive to the community needs but also whether it was sufficient under the FCC's own assumptions regarding operation in the public interest.[76]

By framing the issue this way, the FCC was compelled to reach a negative finding. Geller broadcast no news and no locally produced programming; the only non-entertainment programs he presented were produced by government agencies.[77]

The FCC's determination of the past programming issue relied on the fact that Geller's programming was not responsive to ascertained community needs and interests. Since Geller had not conducted an ascertainment survey, technically no

72. *Commission Decision*, 90 F.C.C.2d at 263.

73. *Initial Decision*, 90 F.C.C.2d at 299-301.

74. The FCC said, "the ALJ erroneously relied on the popularity of WVCA's entertainment format in deciding the issue of past programming . . . . We specifically rejected the relevance of Geller's music format to the question of whether his non-entertainment programming was adequate." *Id.* at 266.

75. *Commission Decision*, 90 F.C.C.2d at 261. The FCC designated the issue as whether Geller's non-entertainment programming was reasonably responsive to the Community's needs and interests. *Id.* at 251. Taken in the context of the facts in *Geller*, the FCC was concerned with whether Geller's less than 1% non-entertainment programming was reasonably responsive. Later, and perhaps more accurately, the FCC rephrased their inquiry as to whether Geller's non-entertainment programming was adequate. *Id.* at 265.

76. *Id.*

77. The FCC pointed out that these programs were not presented in response to ascertained needs of the Gloucester community, and rejected Geller's assertion that since they were produced by the government, they were necessarily responsive to the needs and interests of Gloucester. *Id.*

programming could have been presented in response to ascertained needs and interests.

The FCC did not consider whether the very lack of non-entertainment programming may be more responsive to a particular community's needs and interests than any such programming which might be presented. Evidently, the FCC ascertained a per se need for the type of community they assumed Gloucester to be and, in fact, for all communities. It is not surprising that the FCC found Geller's non-entertainment programming to be nonresponsive. What is surprising is that it concluded that Geller's overall service was not in the public interest.

The FCC admitted that "[w]hen it approved [Geller's] application, the Bureau did not question the adequacy of Geller's proposal, or its underlying rationale."[78] The FCC explained that "[r]ecalling the general economic state of FM broadcasting in the recent past, it is apparent that we were less demanding on FM licensees during Geller's renewal period than is presently the case."[79] The FCC did not openly confront the injustice of changing standards without notice to a licensee. It did, however, concede that because Geller fulfilled his non-entertainment proposals to the FCC, "it would be unfair to penalize Geller for having complied with his representations to the Commission in good faith" and concluded that "his inadequate past performance should not be a ground for his disqualification."[80]

Although the FCC claims not to have penalized Geller for complying with his representations to the FCC, the determination of Geller's past performance as inadequate laid the foundation upon which the FCC based its ultimate decision to revoke Geller's license.[81] The FCC's resolution of the standard comparative issues of whether Geller's past broadcast record gave rise to a renewal expectancy[82] and whether Grandbanke's or Geller's programming proposals would better serve the public interest,[83] are both grounded in the initial discussion re-

78. *Id.* at 250, 267.

79. *Id.*

80. *Id.*

81. At the end of its determination of the ascertainment issue, the FCC noted that "[t]he question of what significance should be attached to that record for comparative purposes, however, is a separate matter which will be discussed below." *Id.* at 267.

82. *See infra* note 86 and accompanying text.

83. *See infra* note 131 and accompanying text.

garding Geller's past programming.

IV
Renewal Expectancy

The terms "renewal preference" and "renewal expectancy" have been used interchangeably to refer to a comparative advantage given to an incumbent in a comparative proceeding.[84] The Supreme Court in *FCC v. National Citizens Committee for Broadcasting*[85] held that the use of a renewal expectancy was not only a legitimate component of the overall public interest inquiry, but essential to a public interest determination.[86]

The routine award of renewal preferences has led many commentators to insist that a de facto property right exists in an incumbent licensee.[87] However, the Communications Act has been interpreted to preclude a per se preference based on incumbency.[88] The FCC's position is that it grants a renewal preference where the *quality* of the incumbent's past broadcast service warrants a renewal preference.[89] However, the

84. For a history of the renewal expectancy, *see* Gold, *The Recognition of Legitimate Renewal Expectancies in Broadcast Licensing*, 58 WASH. U.L.Q. 409 (1981); Comment, *FCC Comparative Renewal Hearings: The Role of the Commission and the Role of the Court*, 21 B.C.L. REV. 421 (1980); Comment, *The Policy Paralysis in WESH: A Conflict Between Structure and Operations in the FCC Comparative Renewal Process*, 32 FED. COM. L.J. 55 (1980).

85. 436 U.S. 775 (1978).

86. The Supreme Court stated that:

> preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause.

Id. at 805.

87. *See supra* note 15.

88. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); *see generally* Note, *In a Comparative Renewal Hearing the FCC May Not Create a Bias in Favor of Renewal, But Must Use Criteria that Affords a Challenger A Full Comparison*, 47 GEO. WASH. L. REV. 1205 (1979).

89. *See* Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976), *denied and clarified*, 62 F.C.C.2d 953 (1977), *vacated and remanded sub nom.* Central Florida Enters., Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). In *Cowles Broadcasting*, the FCC said that the justification for a renewal expectancy is threefold:

1) There is no guarantee that a challenger's paper proposals will, in fact,

FCC and the courts have difficulty determining just what that quality must be.[90] The FCC seems caught between the proscribed per se preference and an overwhelming desire to promote industry stability.[91]

The FCC has described past service deserving of a renewal expectancy in a number of ways. In *Hearst Radio, Inc.*,[92] the incumbent was granted a renewal expectancy based on "acceptable" though not "outstanding" past broadcast service.[93] The *1970 Policy Statement*[94] attempted to bifurcate the hearing process so that incumbents providing past service determined to be "substantial" would be granted renewal regardless of the challenger's application.[95] In *Citizens Communications Center v. FCC*,[96] the Court found the *1970 Policy Statement* in conflict with the requirement of a full hearing under the *Ashbacker* doctrine.[97] The Court in *Citizens* did concede, however, that "superior performance should be a plus of major significance in renewal proceedings."[98] Four years later, in *Fidelity Televi-*

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match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one.

2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a 'competitive spur' to licensees if their dedication to the community is not rewarded.

3) Comparing incumbents and challengers as if they were both new applicants could lead to an haphazard restructuring of the broadcast industry especially considering the large number of group owners. We cannot readily conclude that such a restructuring could serve the public interest.

86 F.C.C.2d 993, 1013 (1981).

90. *See infra* notes 92-102 and accompanying text.

91. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), a case denying an incumbent television station its license, is the only case where average performance of an incumbent did not warrant a renewal expectancy and subsequent renewal. *WHDH, Inc.* caused tremendous upheaval in the broadcast community. *See $3 Billion in Stations Down the Drain*, BROADCASTING, Feb. 3, 1969; *see generally* Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Wentz, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?* 118 U. PA. L. REV. 368 (1970). The FCC later tried to distinguish *WHDH, Inc.* by saying that it in actuality "was neither a new applicant nor a renewal applicant" because it had been operating on a temporary license. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 859 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

92. 15 F.C.C. 1149 (1951).

93. *Id.*

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

95. *Id.* at 425.

96. 447 F.2d 1201 (D.C. Cir. 1971).

97. *Id.* at 1204; *see supra* notes 29-30 and accompanying text.

98. *Id.* at 1203.

sion, Inc. v. FCC,[99] the FCC managed to renew an incumbent whose broadcast record was "average" at best.[100] In *FCC v. National Citizens Committee for Broadcasting*,[101] the Supreme Court referred to the type of past service deserving of a preference as "meritorious."[102]

Exactly how a particular past performance is judged to fall within any of these descriptions is unclear. In addition, what weight a preference should be accorded when balanced against the standard comparative criteria is as unclear as the circumstances under which an incumbent earns such a preference. A renewal expectancy does, however, seem to be of extraordinary weight when balanced against other comparative factors. No incumbent awarded a renewal preference has been found inferior to a challenger in the overall comparison.[103]

The standard applied in the *Geller* case is that stated in *Cowles Broadcasting, Inc.*:[104] "[w]here . . . an incumbent has rendered substantial but not superior service, the 'expectancy' takes the form of a comparative preference weighed against other comparative factors . . . . An incumbent performing in a superior manner would receive an even stronger preference. And an incumbent rendering minimal service would receive no preference."[105] Geller's past performance, therefore, need only have been characterized as "meritorious" or "substantial" in order to warrant a renewal expectancy.[106]

Although the FCC is supposed to examine all elements that bear upon the public interest in determining whether a renewal expectancy is warranted,[107] it did not do so in *Geller*. Instead it relied heavily on its analysis of the ascertainment issue in determining whether to grant Geller a renewal preference. It reasoned that since Geller's informational programming was not responsive to his community, Geller's performance on the whole was inconsistent with his public interest obligation and thus, did not warrant a renewal

99. 515 F.2d 684 (D.C. Cir. 1975).

100. *Id.* at 702.

101. 436 U.S. 775 (1978).

102. *Id.* at 805.

103. *Commission Decision*, 90 F.C.C.2d at 283 (Washburn & Quello, Comm'rs, dissenting).

104. 86 F.C.C.2d 993 (1981).

105. *Id.* at 1012.

106. *Commission Decision*, 90 F.C.C.2d at 270.

107. *Id.* at 271.

preference.[108]

The FCC based its conclusions on a number of assumptions, the primary one being that classical music is entertainment programming and, as such, cannot alone be responsive to a community's needs and interests. It discounted the substantial outpouring of community support for Geller. In fact, the FCC seems to be saying that the public interest is defined and circumscribed solely by non-entertainment programming presented in response to a survey.

The dissent in *Geller* suggested other elements bearing upon the public interest. The dissent cited *Citizens Communications Center v. FCC*,[109] where the court of appeals suggested specific criteria for use in determining whether an incumbent has performed in a 'superior' manner, including:

1) elimination of excessive and loud advertising;
2) delivery of quality programs;
3) the extent to which the incumbent had reinvested the profit from his license to the service of the viewing and listening public;
4) diversification of ownership of mass media; and
5) independence from governmental influence in promoting First Amendment objectives.[110]

The dissent suggested that Geller's past performance, when considered in light of these factors, might well be characterized as superior.

V
Comparative Renewal Process

In the *Policy Statement on Comparative Broadcast Hearings*,[111] the FCC set out standards for comparison of applicants. They announced two primary objectives to be sought in comparing competing applicants: (1) "the best practicable service to the public;" and (2) "a maximum diffusion of control

108. Since the licensee's responsiveness to the ascertained problems and needs of its community remains "central," Geller's failure to conduct a formal ascertainment survey and subsequent failure to present programming responsive to ascertained needs and interests justified a denial of his renewal expectancy. *See Fidelity Television*, 515 F.2d at 695-96.

109. 447 F.2d 1201 (D.C. Cir. 1971).

110. *Commission Decision*, 90 F.C.C.2d at 279 n.9 (Washburn & Quello, Comm'rs, dissenting).

111. 1 F.C.C.2d 393 (1965) [hereinafter cited as *1965 Policy Statement*].

of the media of mass communications."[112] The FCC said that it was not attempting to deal with the problems raised where an applicant was in a contest with a licensee seeking renewal of its license.[113] However, in subsequent decisions, it has been held that, since the same statutory standard was evoked, the *1965 Policy Statement* controlled the introduction of evidence in proceedings where two applicants sought initial licenses as well as where one of the applicants was an incumbent.[114]

A. Best Practicable Service to the Public

In the *1965 Policy Statement*, the FCC said that under "best practicable service to the public," they would consider: (1) integration of ownership and management; (2) more efficient use of the spectrum; and (3) proposed programming, where designated as material.[115]

1. *Integration*

Integration is the term the FCC applies in determining the extent to which a station's ownership and management overlap. A station whose management and ownership are identical should be credited with 100% integration. In the *1965 Policy Statement*, the FCC said that it would give preferences of substantial importance to applicants whose ownership and management were integrated and that such preferences would vary according to the extent of such integration.[116] The FCC said that it would also vary the preferences depending on the particular attributes of the owners, reasoning that "[w]hile integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field."[117]

As the sole owner and operator of WVCA, Geller's ownership is 100% integrated with WVCA's management. In addition, Geller is a long-time resident of Gloucester, with almost four decades of radio broadcasting experience. The Grandbanke Corporation, on the other hand, proposed that Edward Mattar, a 66% owner with three years of broadcasting ex-

112. *Id.* at 394.
113. *Id.* at 393 n.1.
114. Seven League Prods., Inc., 1 F.C.C.2d 1597, 1598 (1965).
115. *1965 Policy Statement* at 395-99.
116. *Id.* at 395.
117. *Id.* at 396.

perience, would be manager of the station. Grandbanke proposed that if its application were granted, Mattar would move to Gloucester. Other principals of Grandbanke, however, would not participate in the day-to-day affairs of the station.[118]

The ALJ awarded Geller a clear preference for 100% integration. Grandbanke excepted on the grounds that, although Geller was technically superior, the underlying purpose of the integration criterion is the "likelihood of greater sensitivity to an area's changing needs . . . ."[119] and that Geller's past performance did not accomplish that purpose.[120] The FCC held that Geller's preference in this area should be diminished, stating, "we believe that Geller's technical superiority under the integration standard must be weighed against his poor record of response to community needs . . . ."[121] The FCC in turn awarded Geller only a slight preference for his 100% integration, enhanced by residency and almost forty years of broadcast experience.[122]

The FCC based this determination, once again, on the assumption that Geller's programming could not have been responsive to Gloucester's needs and interests. The FCC did not question whether Geller's format might actually reflect a greater sensitivity to Gloucester's changing needs than that proposed by Grandbanke. Once again, the FCC used its earlier determination of the past programming and ascertainment issues to diminish a clear preference and in so doing greatly enlarged the effect of its resolution of the ascertainment issue.

Even if the FCC's assumptions concerning Geller's past performance were supported by the evidence, the FCC misapplied the integration criterion by using a functional as opposed to a structural approach.[123] As noted by the dissent in *Geller*, the FCC approach to integration as outlined in its *1965 Policy Statement* was clearly structural.[124]

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118. *Commission Decision*, 90 F.C.C.2d at 267-68.

119. *1965 Policy Statement* at 395.

120. *Commission Decision*, 90 F.C.C.2d at 273.

121. *Id.*

122. *Id.*

123. The structural approach entails identifying criteria and awarding the preference based purely on such identification. The functional approach consists of identifying the purpose underlying a criterion, judging whether and to what extent an applicant's service might have accomplished that purpose and awarding a preference correspondingly. *Commission Decision*, 90 F.C.C.2d at 281 (Washburn & Quello, Comm'rs, dissenting).

124. *Id.*

2. *Effective Use of the Spectrum*

The FCC agreed with the ALJ that Grandbanke deserved a slight preference for its greater area of coverage. It also held that while Grandbanke's signal would cover a significantly larger area than Geller's,[125] the existence of other signals available in the area caused the preference for such superiority to be diminished.[126]

Additionally, the FCC gave Grandbanke "credit" for its proposal to operate 136 hours per week.[127] Geller testified at the hearing that he was on the air an average of 72 hours per week.[128] In *WHDH, Inc.*, the FCC held that a challenger is not entitled to a preference for longer hours where the incumbent proposes adequate hours of operation.[129] While not suggesting that Geller's proposed hours were inadequate, the FCC said that "where the difference in operating hours is substantial and the applicant proposing lesser hours is also restrictive in his programming," the issue of longer hours "merits consideration in the comparative evaluation."[130] Again, Geller's programming factored into the FCC's determination.

3. *Proposed Programming*

Proposed programming is to be considered "decisionally significant" where "material and substantial differences between applicants' proposed program plans . . . go beyond ordinary differences in judgment and show a superior devotion to public service."[131] The FCC designated the proposed programming issue to be material to the Geller-Grandbanke comparison.[132]

Geller's programming proposal was to broadcast a maximum

125. Grandbanke's contour would cover more than four times the area of Geller's and would provide a signal to over 315,000 more people. *Id.* at 269.

126. *Id.* at 276.

127. *Id.*

128. Although according to his most recent testimony Geller is currently operating an average of 97 hours per week, Grandbanke still proposes 39 more hours per week. *See id.* at 276. Under existing precedent, it is unclear whether such a difference warrants a "credit." It is also unclear exactly what a "credit" is worth and how it factors into either the issue of comparative coverage or the standard comparative issue. *Id.* at 275-76.

129. 16 F.C.C.2d at 16.

130. *Commission Decision*, 90 F.C.C.2d at 275-76 (citing Erway Television Corp., 8 F.C.C.2d 24, 30 (1967)).

131. *1965 Policy Statement* at 397.

132. Memorandum Opinion and Order, FCC 77M-806 81389 at 2 (released Apr. 27, 1977).

of 99.52% classical music and to supplement that format with as much informational programming as money and opportunity permitted. He proposed a minimum of .48% public affairs and other non-entertainment programming and emphasized that he was likely to broadcast such programming in excess of that figure. At the time of the hearing, Geller was well into the license term covered by the renewal application. His actual non-entertainment programming was significantly greater than his proposal.[133]

Grandbanke conducted an extensive and formal ascertainment survey, identified areas of concern to the community and proposed massive non-entertainment programming addressing those concerns. Grandbanke proposed twenty-two hours and fifty-five minutes a week of news; eight hours of public affairs and eight hours of other non-entertainment would be devoted to news, with 55% of it local and regional; 5.9% each would be devoted to public affairs and other non-entertainment programming.[134] Grandbanke proposed an entertainment format consisting of various types of music, including folk, jazz and

133. [T]he record shows the following in the way of non-entertainment programs:
Senator Edward Brooke Report, a five-minute weekly program.
Beacon Hill Report, a weekly 10-minute interview covering activities in the Massachusetts Legislature.
Chapel of the Air, a quarter-hour commercial religious program on 10:00-10:15 a.m., Monday to Friday, June 30, 1975 to March 25, 1977.
Mental Health Matters, a weekly quarter-hour program covering the work of the National Institute of Mental Health.
A 90-minute debate held under the auspices of the League of Women Voters on a newly proposed Gloucester City Charter.
Readings From the Bible, a quarter-hour program broadcast (apparently daily) for one month.
A five-minute weekly program supplied by the Social Security Administration.
Occasional programs proposed by the Jehovah's Witnesses, the Baha'i Church of Gloucester and the Federal Energy Administration.
Initial Decision, 90 F.C.C.2d at 291.

134. The programs Grandbanke proposed to present are entitled: *The Employment Scene*, *Career Opportunities*, *Focus on Careers*, *The Italian Program*, *The Portuguese Program*, *Wonderful Cape Ann*, *Today in History*, *Culturally Speaking*, *What's Happening in Our Schools*, *Today's School Lunch Menu*, *For Fishermen Only*, *The Fishing Industry—Sink or Swim*, *Tourism Forum*, *Today on Cape Ann*, *Local Government Forum*, *From Under the Golden Dome*, *Beacon Hill Reports*, *The Brooke Report*, *Let Justice Prevail*, *Community Profile*, *The Consumer Scene*, *Your Money*, *Our Precious Environment-Monthly*, *Our Precious Environment-Daily*, *Business Briefs*, *The Wall Street Report*, *Cape Ann Business Review*, *On The Road*, *The Traffic Report*, *Cape Ann Recreation Report*, *Focus on Recreation*, *The Boating Report*, *Health Report*, *Focus on Medicine and Health*, *What's Happening in Cape Ann Churches*, *Religion in the News*, *By and About Cape Ann Youth*. In addition, Grandbanke proposed unspecified non-

"dinner music." In addition, Grandbanke planned to broadcast thirty-six hours of classical music per week.[135]

The ALJ concluded that both Geller's and Grandbanke's proposed programming had merit, that each in its own way would provide meritorious service and that a choice between them could not reasonably be made.[136] The FCC disagreed, holding that "Grandbanke has demonstrated a superior devotion to public service, and . . . its proposed programming is entitled to a substantial preference."[137]

Once again, discounting Geller's entertainment programming, the FCC approached the proposed programming issue as if Geller had broadcast nothing *but* fifteen minutes of governmentally produced public interest programs a week. It stated that "in a comparative consideration . . . service to the listening public is the vital element, and programs are the essence of that service."[138] The possibility that classical music might provide a "service to the listening public," once again, was not con-

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entertainment programming dealing with women's activities, gardening and local affairs. *Id.* at 291-93.

135. *Id.*

136. In his consideration of the proposed programming issue, the ALJ stated:

> Gloucester has only one broadcast station, and it is Grandbanke's position that the station could better serve the needs and interests of the community by offering a general service like the one it proposes. Geller, on the other hand, contends that other stations in Essex County and the Boston area provide programming similar to that proposed by Grandbanke and that his own service offers a much needed element of diversity. Both contentions have merit. Grandbanke's is supported by numerous Commission pronouncements stressing the obligation of broadcasters to seek out and be responsive to community problems, an obligation that would seem particularly strong in a one-station locality. Geller's claim, though seemingly at odds with conventional wisdom, found substantial support from the many public witnesses who testified in the case. . . . Grandbanke's well-rounded service with its demonstrated attentiveness to local problems comports fully with the policies enunciated by the Commission. *See, e.g., Report and Statement of Policy Re: Commission en banc Programming Inquiry*, 20 RAD. REG. (P & F) 1901 (1960). Geller's proposal reflects, instead, the judgment of an experienced broadcaster who has experimented unsuccessfully with several other program formats and proposes to continue a service which has won widespread acceptance in the community. Thus, the presumptions normally applied by the Commission in evaluating proposed programming favor Grandbanke while pragmatic considerations support Geller, since he espouses a program concept which stems from his experience in the marketplace and, on the basis of this record, works to the satisfaction of the community.

Initial Decision, 90 F.C.C.2d at 301-02.

137. *Commission Decision*, 90 F.C.C.2d at 274.

138. *Id.* at 273 (citing Johnston Broadcasting Co. v. F.C.C., 175 F.2d 351, 359 (D.C. Cir. 1949)).

sidered.[139] The FCC again expanded its holding in the ascertainment issue by interpreting Geller's lack of non-entertainment programming as indicative of a lack of devotion to public service.

At first glance, Grandbanke's proposed programming seems far superior to Geller's proposal. As the ALJ pointed out, Grandbanke's proposal conformed strictly to the FCC standards to determine the public interest through a complex ascertainment study.[140] However, the members of the Gloucester community who responded to Grandbanke's ascertainment survey were expressing their *concerns*, not their *need* for or interest in radio programming addressing those concerns. There is no assurance that any significant number of people would even want to listen to such programming.[141]

One of the justifications for granting a renewal expectancy is that an incumbent's proven performance is a more reliable indicator of future service than a competitor's "paper promises." This concern is further justified by the fact that a broadcaster can radically alter his format without any notice to or approval

139. In designating "service to the listening public" as the vital element, the FCC raises a number of questions as to how it determines who the "listening public" is. Does the FCC mean to imply that even if a need is ascertained and programming presented to meet it, such programming is irrelevant to the public interest determination unless the faction of the community with the ascertained need listens to the programming?

140. *See supra* note 136.

141. For example, Grandbanke proposed several programs in response to the ascertained concern of unemployment. One program proposed in response to this ascertained concern is *Career Opportunities*, a "weekly half-hour program featuring area specialists in various careers who will discuss the future prospects, entering requirements, salary and other characteristics of various fields of endeavor . . . . *Focus on Careers* will consist of daily five minute excerpts from *Career Opportunities*. *Initial Decision*, 90 F.C.C.2d at 291. The actual social value of these programs is debatable. Both the fishing and service trades (the primary industries in Gloucester) are seasonal to a large extent. Fishermen, carpenters and other tradespersons are generally skilled in their crafts and would not benefit from a discussion of the "future prospects, entering requirements, salary and other characteristics" of their trades. Moreover, the tenor of the program description suggests that these may not be the careers which *Career Opportunities* intends to discuss. These are, however, the careers which exist in Gloucester. The program probably will not create industries which do not already exist, nor will it provide work for laid-off fishermen and carpenters in the dead of winter. On the other hand, it may discuss the wider variety of career choices which exists in Boston. Such discussion, however, will probably be no more helpful than similar Boston programs which are already heard on Cape Ann.

A more curious proposal by Grandbanke is *The Traffic Report*, "a one-minute traffic summary to be aired twice daily during peak tourist seasons, providing information about matters such as traffic congestion, parking regulations and beach parking availability." *Id.* at 293.

by the FCC.[142] There is no assurance that Grandbanke's actual programming will conform to its proposal. This is especially troubling considering the scope of and obvious expense of Grandbanke's proposed programming.

Geller argued that programming and formats like Grandbanke's proposal are prevalent in the broadcasting forum surrounding Gloucester. He maintained that the information Grandbanke would provide was available elsewhere.[143] Geller contended, therefore, that he should receive a preference for proposing a unique or specialized format.

Diversity of programming is a long-established regulatory goal of the FCC.[144] The FCC's goal of promoting program diversity encompasses entertainment as well as informational programming.[145] A Memorandum Opinion and Order[146] quoted Commissioner Robinson's statement that, "[q]uestions of pacing and style, the personalities of the on-the-air talent . . . all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and alas, appellate judges) call format."[147]

In *Citizens Comm. to Save WEFM v. FCC*,[148] the court stated that where:

> [t]he disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio . . . the FCC is obliged to determine whether the format . . . serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment.[149]

In *Cosmopolitan Broadcasting Corp. v. FCC*,[150] the court stated that "where there is a likelihood that a license may not be renewed, determination of the meritoriousness of the programming must include consideration of the uniqueness of that programming to a significant segment of the public."[151]

In the *Geller* decision, the FCC addressed the unique format

142. *See* F.C.C. v. WNCN Listeners Guild, 450 U.S. 582 (1981).
143. *See infra* note 159.
144. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 699 (1979).
145. *See supra* note 142.
146. Entertainment Formats, 60 F.C.C.2d 858 (1976).
147. *Id.* at 862.
148. 506 F.2d 246 (D.C. Cir. 1973).
149. *Id.* at 262.
150. 581 F.2d 917 (D.C. Cir. 1978).
151. *Id.* at 932.

issue only briefly. Under the proposed programming issue, the FCC dismissed Geller's contention on two grounds.[152] First, it pointed out that the record showed that Grandbanke proposed to broadcast a "substantial amount" of classical music per week. Second, it noted that two other stations broadcasting primarily classical music could be heard in the service area. Therefore, it maintained that Geller had not introduced sufficient evidence to indicate that his classical music format was unique when compared to other stations.[153]

B. Maximum Diffusion of Control of the Media of Mass Communications

The *1965 Policy Statement* stressed that "[d]iversification of control of the media of mass communications . . . is a factor of primary significance . . . [and] constitutes a primary objective in the licensing scheme."[154]

Geller owns no interest in any media except WVCA.[155] However, Edward Mattar, 66% owner of Grandbanke, is an officer, director and 100% stockholder in the Northbanke Corporation which operates an FM station in Winchendon, Massachusetts. Grandbanke's three other shareholders together own North Country Communications, Inc., licensee of WNCS-FM, in Montpelier, Vermont.[156]

The ALJ awarded Geller a clear preference under diversification. However, once again, Grandbanke excepted on the grounds that since Geller had not accomplished the underlying purposes of diversification of ownership, his technical superiority should result in a diminished preference.[157] The FCC agreed that the underlying rationale for diversification was "the widest possible dissemination of information from diverse and antagonistic sources . . . ."[158] Stating that Geller provided no information at all, the FCC held that Geller's "preference is diminished by Geller's past failure to provide adequate informational programming."[159]

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152. *Commission Decision*, 90 F.C.C.2d at 275.

153. *Id.* at 275. The FCC also considered the issue of a unique format in a footnote to its discussion of diversification of ownership. *Id.* at 272 n.107.

154. *1965 Policy Statement*, at 394.

155. *Commission Decision*, 90 F.C.C.2d at 272.

156. *Id.* at 267.

157. *Id.* at 271-72.

158. Associated Press v. United States, 326 U.S. 1, 20 (1945).

159. *Commission Decision*, 90 F.C.C.2d at 272. In a footnote to this discussion, the

The FCC seems to have interjected the words "information" and "non-entertainment" into arguments which were intended to embrace all aspects of programming. In *Red Lion Broadcasting Co. v. FCC*,[160] the Supreme Court stated that, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here."[161] While espousing a dedication to such a marketplace of ideas, the FCC in *Geller* interpreted the concept of "ideas" in the narrowest possible sense. It seems to have denied the possibility that aesthetic ideas and experiences, embodied in classical music, may be essential to the "widest possible dissemination of information."

The dissent in *Geller* pointed out that regardless of whether Geller's programming accomplished the underlying goal of diversification, a functional approach to this issue was fallacious.[162] The court in *Central Florida Enters., Inc. v. FCC*[163] held that where the FCC correctly found that an applicant's advantage with respect to diversification was clear, it was unreasonable for the FCC to then accord this diversification advantage little decisional significance because the competing applicant's other media interests were in other states.[164] The dissent in *Geller* stated:

> [i]n *Central Florida*, the Court expressed . . . a concern that a functional approach to diversification might raise serious First Amendment questions by requiring the Commission to inquire into program content . . . . The majority today justifies that concern by making a subjective judgment regarding the value of Geller's entertainment format, on the one hand, and infor-

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FCC acknowledged that programming diversity is a long-established goal of the Commission and that such diversity includes entertainment programming. However, it proceeded to then dismiss the effect of entertainment programming on a determination of programming diversity, saying "it is clear that the underlying purpose of the diversification criterion in comparative cases is to promote the widest possible dissemination of information." The FCC further justified its dismissal by adding, "[m]oreover, licensee choices as to entertainment formats are influenced primarily by marketplace forces without the need for Commission intervention." *Id.* at n.107.

160. 395 U.S. 367 (1969).

161. *Id.* at 390.

162. *Commission Decision*, 90 F.C.C.2d at 281 (Washburn & Quello, Comm'rs, dissenting). *See supra* note 151.

163. 598 F.2d 37 (D.C. Cir. 1978).

164. *Id.* at 50.

mational programming on the other.[165]

C. Weighing the Factors

The FCC concluded its determination of the standard comparative issue by stating that, because Geller's past record entitled him to no renewal expectancy, the case must be decided as an ordinary comparative proceeding.[166] Yet even in such a proceeding, it is unclear how the factors considered in the comparison are weighed against each other.[167]

In the *1965 Policy Statement*, the FCC defined the objectives of diversification and best practicable service to the public as primary,[168] but gave no indication as to how such classifications would affect the balancing of the factors.[169] Absent particular guidelines, it may be reasonable to assume that each of the primary objectives is of equal weight and that the two together comprise 100% of the comparative determination, assuming that no additional aspects are designated as material.

The FCC did not explain the balancing process it used in *Geller*. In fact, it is unclear if the FCC used any balancing process or compared the factors at all. Geller received a slight preference for integration and a moderate preference for diversification while Grandbanke received a substantial preference for proposed programming and a slight preference for more efficient use of the spectrum. If the functional approach to diversification and integration is in fact fallacious, as has been contended, Geller's clear preferences in these areas would lead to the determination that his license should be renewed. Even with the diminished preferences in these areas, the dissent argued that Geller's preferences should have outweighed Grandbanke's.[170]

The FCC factored into every aspect of the standard comparative issue its determination that Geller's non-entertainment programming was not responsive to his community's needs. Not only was this initial and specific determination rephrased

165. *Commission Decision*, 90 F.C.C.2d at 281 (Washburn & Quello, Comm'rs, dissenting).

166. *Id.* at 271.

167. For further discussion on the weight of comparative factors, *see* Anthony, *supra* note 11, at 40.

168. Integration, proposed programming, and more efficient use of the spectrum were considered aspects of the best practicable service to the public.

169. 90 F.C.C.2d at 283 (Washburn & Quello, Comm'rs, dissenting).

170. *Id.*

and enlarged to fit into consideration of the renewal preference and proposed programming issues, but it was also made crucial to the determination of the issues of both integration and diversification of control. It even contributed to Grandbanke's award of a "credit" for longer hours.

VI
Appellate Review

The FCC has broad discretion in establishing methods to identify and protect the public interest.[171] The function of the court of appeals in reviewing an FCC decision is limited, especially when the FCC is acting under its mandate to license in the public interest. The test of an FCC decision on appellate review is whether the FCC's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . ."[172] The court must be satisfied that the FCC:

> has given reasoned consideration to all the material facts and issues, that its findings of fact are supported by substantial evidence; and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation. In general, the agency must engage in reasoned decision-making, articulating with some clarity the reasons for its decisions and the significance of facts particularly relied on.[173]

"It is the judicial function to ensure that [FCC] discretionary choices . . . are rigorously governed by traditional principles of fairness and administrative regularity."[174]

In *Central Florida*,[175] the FCC renewed an incumbent's license, despite the fact that it found favorably for the competitor on issues of diversification, integration, and minority participation, and found that the incumbent licensee was guilty of wrongdoing. The incumbent's license was renewed on the basis of a wholly noncomparative assessment of the incumbent's past performance as "substantial." On appeal, the court vacated the decision and remanded it for further consideration.

171. "Within these broad confines [of public interest] the Commission is left with the task of particularizing standards to be used in implementing the Act," National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978).

172. 5 U.S.C. § 706(2)(A) (1966).

173. Central Florida Enters., Inc. v. FCC, 598 F.2d 37, 49 (D.C. Cir. 1978).

174. *Id.* at 41.

175. 598 F.2d 37 (D.C. Cir. 1978).

The court's principal reason for its decision was that the FCC's "manner of 'balancing' its findings was wholly unintelligible, based, it was said, on 'administrative "feel." ' "[176] The court felt unable to sustain an action in which the FCC "nowhere even vaguely described how it aggregated its findings into the decisive balance . . . ."[177]

The *Central Florida* court stated that "[w]hat is at issue here is the validity of the process by which the competing applications of Central and Cowles were compared and the adequacy of the Commission's articulated rationale for its choosing to renew Cowles' license."[178] The court held that any method the Commission develops to weigh the incumbent's record against the challenger's characteristics must be specified with sufficient particularity so as to be "susceptible to judicial review."[179] Whether, on appeal, the FCC's rationale in *Geller* will be found to have been stated with sufficient clarity is doubtful.

VII
Conclusion

Recently, the FCC has begun to suggest that in the area of licensing, the broadcasters' and the public's interests are one and the same.[180] Significant factions of the FCC maintain that these interests would be best served by total deregulation.[181] Evidencing his support of deregulation, Mark S. Fowler, Chairman of the FCC, described the current renewal process as follows:

> [t]he landlords [the FCC] may be friendly these days, but they haven't always been. Sometimes, they go about evicting without a lot of notice or even reason . . . . It's the present law that makes these evictions possible—whenever a challenger decides to file against an incumbent. What other business is subject to this system? What other business would put up with such a zoo parade, where a businessman's handiwork and life's labor can be snatched away by administrative fiat, like a monkey grabbing a bag of peanuts from a passerby? Indeed, it

176. *Id.* at 59.
177. *Id.* at 50.
178. *Id.* at 40.
179. *Id.* at 60.
180. Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); *see generally supra* note 20.
181. *See generally supra* note 20.

> would be comical, if it weren't so true, if it didn't happen. But it did happen and it does happen. It's the type of dead-of-the-night seizures that may belong in Moscow, but not on Main Street, U.S.A.[182]

The current administration also seems to be in favor of total deregulation. Shortly after President Reagan's inauguration, he wrote:

> I wanted to take this opportunity to . . . re-affirm my position that over-regulation and regulation by 'raised eyebrow' stifles creativity, ingenuity, diversity of programming, and allows the government to intrude into sensitive First Amendment areas to the detriment of the public and broadcasters alike. De-regulation reduces such intrusion and produces more diverse programming. I believe that the needs, tastes and interests of the community can be served through more reliance on marketplace forces and less on the heavy hand of government regulation and control.
>
> Because many broadcasters are small business persons, they can ill afford unnecessary, burdensome and costly regulation and the all too often accompanying administrative delays and backlogs that exist in certain regulatory quarters. I am confident that de-regulation would neither foster abuses by broadcasters nor create a lack of sensitivity to the need to address the interests and concerns of all segments of their communities.[183]

In a letter to Chairman Fowler, Richard Earle, Senior Vice-President of Compton Advertising in New York City and part-time Gloucester resident, wrote, "I find it particularly astonishing that a commission serving during an administration publicly committed to a return to individualism, would promote the destruction of one lone island of distinction in a sea of blandness."[184] One reasonable interpretation of the *Geller* case is that the FCC and the current administration may be less committed to a return to individualism than to the marketplace approach in radio regulation.

Although Chairman Fowler's description of the comparative renewal process seems to address the injustice inherent in a

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182. Free the Broadcasting 10,000, Address before the North Carolina Ass'n of Broadcasters, in Raleigh, North Carolina, (Oct. 25, 1982).

183. Letter from Ronald Reagan to the Editor of BROADCASTING (Apr. 25, 1980) *reprinted in* BROADCASTING, Nov. 10, 1980, at 27. Certainly, the "small business persons" to whom President Reagan referred are at the very least among the most influential in their communities, and most likely, they are corporations. *See supra* note 17.

184. Letter from Richard Earle to Mark S. Fowler (May 18, 1982).

Geller situation, his deregulation proposal has a catch. He offers deregulation in exchange for a user fee, saying, "[i]f adopted by Congress in connection with deregulation, the fee would replace the old *quid* for *quo* under the trustee regime—content regulation and other 'taxation by regulation. . . .' "[185] In essence what Chairman Fowler seems to be saying is that money will take the place of regulation to protect the public interest. Simon Geller cannot afford to pay a user fee. Under Chairman Fowler's approach, Geller would still be prevented from maintaining his station in the way that he and his audience feel is in their interest. It is curious that a system proposed to prevent the oppression of "small business persons" would do so by imposing a "user fee."

At the crux of the debate over deregulation is the issue of whether a radio station's income reflects the value of its programming to the general public. The belief that a station's income is an accurate indicator of its service in the public interest is the cornerstone of the marketplace approach to broadcast regulation. This belief must be carefully examined, however, in light of our commercial system of broadcasting, which targets, not the general public, but the segment of the public which can best support the commercial sponsor's product.

It is possible, indeed tempting, to interpret the case of Simon Geller as a prime example of the evils of broadcast regulation in the public interest. However, upon close examination such an interpretation does not fit the facts in *Geller*. It was not merely the fact that the FCC regulates in the public interest which led to a finding that Geller's license should be revoked. It was instead the nature of that regulation: unduly burdensome, complex, extremely expensive and only dubiously indicative of an actual community's interest. While compliance with such regulation is virtually impossible for a solely owned and operated station, the marketplace approach to regulation would also tend to preclude the financially marginal station, regardless of the value of its programming. A user fee could put such a station out of business.

Assuming that not all operation in the public interest is necessarily commercially successful, the FCC mandate to grant

185. *See supra* note 182; for a history of fee assessments *see* Hermele, *The Proposed Communications Act Rewrite: Potomac Deregulatory Fever v. The Public Interest*, 48 CIN. L. REV. 476 (1979).

licenses in the public interest must encompass financially marginal stations. Regulatory procedures which operate to preclude such stations contradict the mandate, especially insofar as it has been interpreted to put a premium on diversity of programming and ownership. Moreover, it may be that not all commercially successful stations operate per se in the public interest. Assuming that commercial success is not synonymous with the public interest, the FCC mandate requires some sort of regulation. If some valid public interest lies outside the scope of commercial success, it is necessary for the FCC to adopt simple and inexpensive procedures for determining whether a radio station operates in the best interests of its community. The simplest, most accurate and least expensive method would seem to be to detail procedures which could be carried out by and within a community itself.

In the final analysis, if the airwaves are truly to be operated in the public interest, the community which a station serves must be involved in the assessment of that interest. Moreover, community involvement must not be token. In *Geller*, the ALJ decided after a public hearing in Gloucester that Geller's community felt he operated in its interest. Based primarily on that conclusion, the ALJ granted the renewal of Geller's license. The FCC, relying on a standard set of criteria, irregularly applied, overruled the ALJ's decision. In doing so, the FCC affirmed its position that a set of criteria can better determine the interests of a community than that community itself. What criteria could possibly be better suited to judge the public interests of Gloucester than the citizens of Gloucester themselves? Decentralization of licensing procedures, at least for radio broadcasting, is in order. Public hearings should not only be held, but used to form the basis of the public interest determination.

Thirty-five witnesses gave unsolicited testimony in support of Geller at the Gloucester hearing in 1976. These witnesses, residents of the area, included "teachers, restaurant owners, proprietors of art galleries, painters and craftsmen, an architect, an engineer, an airline pilot, a student, and a volunteer worker."[186] In addition, over 250 letters and petitions in support of Geller were sent to the FCC. Among those who have written letters and otherwise voiced support are the mayor and

186. *Initial Decision*, 90 F.C.C.2d at 288.

the town council of Gloucester. In addition, two citizens groups are seeking to intervene in support of Geller. One of these groups has also committed itself to assisting Geller by donating time and money sufficient to produce five hours of non-entertainment programming per week so that Geller may be allowed to retain his license. Clearly, a significant segment of the community feels that Geller operates in its interests. However, what influence Geller's support from within the community will have on appeal to the federal courts is unclear. Geller, with Capital Legal Foundation as his representative, plans to fight all the way to the Supreme Court if necessary. Perhaps there a determination can be made as to who really owns the airwaves and just what that ownership means. Such findings may well determine the course of future broadcast regulation.