BROADCAST BUREAU PLANNING WHITE PAPER

I. Introduction

The purpose of this paper is to delineate the policy goals and objectives of the Broadcast Bureau, as well as steps for their implementation. It is intended to provide a general plan or framework for action rather than a specific strategy. Underlying the discussion is the assumption that the Bureau will continue to operate with a relatively fixed level of resources; that any substantial increase will be in terms of computer support rather than personnel.

The planning and operating functions of the Bureau are outlined in Section II. In Section III, the public interest policy objectives of broadcast regulation are explicitly stated and discussed, with recognition made of possible conflicts among the various objectives. The relative merits of structural vs. conduct regulation are discussed in Section IV, and the conclusion reached that in general structural regulation is better suited for the attainment of the Commission's public interest objectives. In Section V, specific actions and recommendations that the Commission should consider within the next two to three years to implement a structural regulatory framework for broadcasting are discussed.

II. Broadcast Bureau Functions

Put simply, the purpose or goal of the Broadcast Bureau is to provide a regulatory framework conducive to the development of an efficient broadcast system within a broader telecommunications system responsive to the wants and needs of the American public. Such a framework is most likely to yield a telecommunications system operating in the public interest.

Telecommunications in the U.S. is subject to government regulation or oversight, but not the level of government control imposed in most other nations. Regulation is prescribed through a licensing process. Licensees must meet certain eligibility requirements and operate within a framework of Commission rules, regulations, requirements, policies, procedures, and guidelines. 1/

The Commission has the responsibility to: (1) devise rules and regulations consistent with the public interest; (2) authorize licenses subject to these rules and regulations; (3) enforce the rules and regulations; and, (4) review the rules and regulations to insure they continue to be

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1/ For simplicity, in the remainder of this paper we shall use the term "rules and regulations" to refer to the entire panoply of Commission rules, regulations, requirements, policies, procedures, and guidelines.

consistent with the public interest, modifying or eliminating rules and regulations where appropriate in response to changes in technology or market conditions. Most of these duties are performed under delegated authority by the Broadcast Bureau, although policy issues are decided by the Commission.

Day-to-day operations, particularly applications processing, demand the bulk of the Bureau's resources. 2/ The significance of these functions extends into policy considerations. For example, a policy objective to increase broadcast outlets cannot be fully implemented if backlogs in applications processing delay authorizations and thereby retard potential service to the public. Such a goal is also frustrated by protracted rulemaking proceedings that effectively maintain the regulatory status quo even though identifiable changes in technological or market conditions indicate the need for regulatory change.

The Broadcast Bureau therefore has two major planning functions: policy planning and management or resource planning. The former requires the Bureau, following the instructions of the Commission, to identify and articulate overall public interest goals and objectives, to analyze the current broadcast environment, 3/ to make projections about future technological developments, and, based on all of these, to plan appropriate policies (constituting a regulatory framework) most likely to attain Commission objectives. Management planning involves setting priorities for the allocation of the Bureau's limited resources and developing procedures and processes to implement Commission policy.

Policy planning changes--whether due to changed objectives or changed circumstances--will effect the other Bureau functions. However, the causality can be two-way. Constraints on resources might not allow for the implementation of preferred policy options, necessitating "second best" solutions. In addition, actual experience in implementing particular policy objectives might necessitate "in course" corrections.

III. Broadcast Policy Objectives

A. Statutory Guidance

In order to develop and implement an appropriate regulatory framework for broadcasting, the Commission must enunciate clearly its policy objectives. The Communications Act allows the Commission great flexibility in defining these objectives, providing the following general guidance:

2/ For example these operations require 84% of the Bureau's personnel resources.

3/ Including competing non-broadcast technologies. A more detailed discussion of this is found in Section V.

> Sec. 302(a): The Commission may, consistent with the public interest, convenience, and necessity make reasonable regulations....
>
> Sec. 303(g): ... [The Commission shall] generally encourage the larger and more effective use of radio in the public interest.
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> Sec. 307(b): ... the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

These general instructions provide the Commission with broad authority to develop broadcast policy but give little specific direction. Since some of these general goals--for example, efficiency and equity--may sometimes not be simultaneously realizable, it is clear that the legislative intent was for the Commission to use its acquired expertise to choose among them.

B. Major Public Interest Objectives

The Act provides one basic principle: that regulation must be consistent with the public interest. Since the term "public interest" is nowhere defined in the Act, it is left to the Commission to determine what that implies. The public interest is of necessity a complex concept, as it must take into account the great diversity of wants and needs of the American public, and requires that the Commission take a long view of issues, rather than just addressing immediate concerns.

It must be stressed that it is not the Commission itself, but rather individual licensees, who provide broadcast services to the American public and that, therefore, the role of the Commission simply is to provide the regulatory framework that will most likely result in the provision of telecommunications services in the public interest. The Commission cannot guarantee that result. It can, however, attempt to create a regulatory environment that allows all parties--existing licensees, potential licensees, and other interested parties such as equipment manufacturers and program suppliers--maximum flexibility to respond to the varied and changing demands of the public. Because the American public is diverse in its wants and needs, it is impossible in the normal course of business for the Commission, acting

as a centralized decision maker, to have sufficient information to be able to reach knowledgeable and meaningful judgments about individual markets. 4/

It is clear that one major public interest objective that the Commission's regulatory framework should seek to foster is service responsive to consumer wants and needs. As indicated above, the Commission lacks the wherewithal to gather the information necessary to ascertain consumer preferences precisely. At best, centralized regulators can construct an aggregate picture that reflects overall tastes but probably fails to recognize local differences. Competitive markets, on the other hand, are particularly effective at identifying and responding to varied wants. It must be recognized that currently not all broadcast markets are competitive and that, in any event, there are certain peculiarities to broadcast markets--particularly advertiser-supported markets that cannot measure the intensity of consumer demand--that render broadcasters less than fully responsive to consumers. However, a substantial economic literature, as well as casual observation, indicate that as the number of competing stations increase, these markets do become increasingly responsive to very diverse consumer wants. This suggests that as the level of competition increases in broadcast markets, the Commission should rely more on market forces and less on Commission regulation to foster service responsive to consumer wants.

In general, consumer wants include consumer needs and therefore the same regulatory framework that will foster service responsive to consumer wants will also foster service responsive to consumer needs. There may be situations, however, where there are identifiable needs that consumers, either through preference or ignorance, do not demand. Generally, these needs involve goods or services that provide a "positive externality," that is, provide a social benefit from which the individual consumer does not directly gain and therefore may not demand, but from which society as a whole does gain. Public health, public education, and--more relevant here--nonentertainment broadcast programming are possible examples. 5/ Great care must be taken by a government agency, however, before it fosters--or requires--the production of a good or service that the public does not indicate it wants, for it is likely that such an action will forestall or displace the provision of goods or services preferred by consumers. Thus, the burden of proof must be on the Commission, for example, to show that it is in

4/ This statement is generally true, though in some specific situations, such as hearings, where considerable Commission resources are expended to gain relevant information, the Commission may be able to make reasoned judgments about a specific market. Even in hearing situations, however, the Commission often may not be able to distinguish between two alternative applicants, or, if it can, it may not be better able to do so, in terms of the tradeoff between benefits and costs, than some other administrative or market process, such as a lottery or auction. See Section V below.

5/ These have sometimes been called "merit" goods.

the public interest to have policies requiring programming that few consumers choose to view or listen to. Simply alleging the existence of an unmet consumer need is insufficient justification. The existence, nature and size of the unmet consumer need must be demonstrated. This is not easy to do if the public is not demanding the service. It is necessary for the Commission to show how large or otherwise compelling that need is and--particularly in light of a lack of consumer demand for the service--to assure that the Commission does not foster more service responsive to that non-demanded need that can be justified.

As a corollary to provision of service responsive to consumer wants service should be provided whenever consumers are willing to support such service. 6/ That is, subject to appropriate technological (interference) constraints, it should be a public interest objective to have a regulatory framework that fosters the maximum provision of services that consumers will support This can be described as a demand-driven regulatory framework and has the obvious advantage of being directly responsive to consumer wants.

There may be other public interest objectives, however, that cannot be attained within a strict demand-driven system. Predictions of future demand can be made with varying degrees of confidence, but in general a demand-driven system will be most responsive to immediate concerns. Although the spectrum is a non-depletable resource that can be utilized today and still be available tomorrow, in reality that spectrum must be committed to a particular use for a reasonable period of time if licensees are to have an incentive to invest in equipment and provide quality service. The allocation and assignment of spectrum today at least partially precludes its availability in the future. Hence, if there is some expectation of need for spectrum for future use, it may be necessary to preserve spectrum rather than to allocate it now in response to current demand. As in the situation of unarticulated consumer needs, however, the burden of proof for justifying such spectrum reservation must fall on the Commission and must be great since it runs counter to current consumer wants. So long as the spectrum remains unutilizezd or underutilized when demand for it exists, consumers are losing potential service and benefits.

There are three general situations that might prompt Commission decisions to reserve spectrum:

> (1) In order to assure that spectrum will be available to developing technologies that offer the promise of new services, experimental and reserve bands might be set aside. The public interest justification for this action is in some ways akin to that of an infant industry protective tariff argument.

6/ Or in an advertiser supported system, where advertisers will finance the service.

(2) Demand for most existing services is greater in urban than in rural areas. Depending on one's definition of an equitable distribution of services, one might choose to reserve spectrum to assure first or second service in some areas that currently lack sufficient consumer demand for even that level of service rather than allocating that spectrum to meet existing unmet demand for additional service in nearby urban areas.

(3) The first applicant to provide a particular service might already have a broadcast voice in the market, but because of cost or experience advantages might be, for some period of time, the only potential provider of the additional service. In this situation, the Commission might decide that it is preferable to forego service immediately in order to assure greater diversity of voices in the long run.

In all three situations, short term gains in service to the public would be sacrificed for other, longer term, objectives. Because of the certainty of immediate consumer loss and the uncertainty of long term gain, however, the burden of proof should be on the Commission to show the public interest benefits from departing from a demand-driven system.

It is most consistent with the public interest to develop mechanisms that allow the spectrum to be put to immediate use while guaranteeing its availability in the future for a "higher value" use. 7/ For example, assignments could be made on a secondary basis, or renewal rights could be limited to a specific time period, at which point the licensee would be required to sell to any "higher valued" applicant. These mechanisms, however, might also reduce the incentive for entrepreneurs to commit resources to the new service, due to the risk of the project being terminated before adequate returns could be realized.

The spectrum is finite and is a key input to the provision of many services that consumers want and need. As such, it is a valuable resource that must be used efficiently to gain maximum benefit for the public. Thus, another public interest objective that should be fostered by our regulatory framework is efficient use of the spectrum. Efficient spectrum use would allow for the provision of additional services to consumers, both today and in the future, from a given amount of spectrum. A regulatory framework devised to meet the already discussed objectives--responsiveness to consumer wants and needs and maximum provision of services that consumers will support--is likely to be consistent with spectrum efficiency, but providing explicit incentives for efficiency will increase the intensity of spectrum use and therefore the

7/ Here "value" represents the Commission's impression of what the public most desires or needs, not necessarily what the public would choose if given a choice.

availability of service. 8/ In the long run, this translates into service at the lowest possible cost to the public.

Regulation can encourage spectrum efficiency if it allows licensees, equipment manufacturers, and other interested parties maximum flexibility to respond to consumer wants, subject of course to technological (interference) considerations. This might entail fostering of time sharing and similar measures that allow for greater use of the spectrum over the broadcast day and, where appropriate, sharing the band among different type users, including non-broadcast users. To assure that such flexibility is possible, the Commission must continually review its rules and regulations, including its basic definitions, to make certain that they do not unduly restrict potential spectrum use.

Many of the constraints on flexible spectrum use have been imposed to protect the quality of service to consumers. Those constraints should be reviewed at two levels: (1) to determine whether recent technological developments render old protections unnecessary, in that service quality can be assured in their absence; and, (2) to determine the net gain or loss to consumers of a reduction in quality of some existing services in order to gain additional services.

The second level of review, itself, presents a policy issue. How does one determine the appropriate tradeoff between providing additional services and more intensively utilizing the spectrum, on the one hand, and maintaining the quality of existing services, on the other hand. Dimunition of existing service, absent compensating benefits, is not in the public interest. Maintaining the status quo, however, can have long term implications for spectrum efficiency. Guaranteed protection from interference retards research and development that might provide technology capable of coping with a more congested spectrum. That is, the imposition of protective Commission rules eliminates demand for more selective transmitting and receiving equipment that might allow for the introduction of additional stations, and hence more service, over time.

In markets for most goods and services, a lack of diversity may have minimal social consequences. It is common to employ standardization in order to exploit scale economies of production and distribution and consumers make implicit tradeoffs between lower prices and greater diversity. Broadcasting, however, is a major means of distributing opinions and ideas as well as entertainment, and the marketplace of ideas is not exactly analogous to other markets. Ideas have special impact on society. Hence, there may be social benefits from a diversity of voices, opinions, or ideas that cannot be taken

8/ Government imposed incentives for efficient use of the spectrum may be necessary because licensees currently do not pay for the spectrum and therefore do not face natural marketplace pressures to use it most efficiently.

into account in a normal market context. Another public interest objective is, then, to devise a regulatory framework that fosters a diversity of voices. This is an especially difficult task because requiring rather than fostering diversity can infringe on licensees' First Amendment rights.

For the Commission to foster a diversity of voices without compromising licensees' First Amendment rights requires the maintenance of a certain distance from licensee programming decisions. Thus, where ownership or employment patterns can be expected to have some impact on programming, regulations to foster diversity of voices through these mechanisms--EEO, multiple ownership, and minority ownership rules and policies--should be employed. The impact of such policies on diversity of voices is necessarily indirect. The most direct way to increase diversity is to increase the number of voices; to assure a maximum number of independent voices, add multiple ownership rules.

No matter how responsive a broadcast system is to the diverse wants and needs of the public, not all wants can be met. We have already suggested that one criterion for determining which wants should be met is consumers' willingness to support the service. If too few people demand a service to support it directly--or to entice advertisers to finance it--then that service should not be provided unless its provision satisfies other public interest objectives as well. In fact, however, because of limits on the number of available channels in some markets, there continues to be considerable unsatisfied demand for broadcast services where consumers (or their advertiser proxies) are willing and able to cover the cost of program production and transmission, but cannot meet the high rents demanded by the stations (which represent the opportunity cost of not using the station for alternative programming that is more highly valued by consumers). When this situation occurs, it is most likely that mass appeal programming will be provided. Specialized tastes, even if held by enough individuals to provide the financing to cover out-of-pocket production and distribution costs, probably will remain unsatisfied. The most effective long term regulatory response to this situation is the construction of a regulatory framework that fosters as much new and additional service as possible. Among other consequences, such a policy is likely to reduce the expected market share of individual broadcast stations and thus encourage them to provide specialized programming to specialized audiences.

There may be other public interest objectives tied to equity that the Commission seeks to foster with its regulatory framework. Some of these may be inconsistent with the public interest objectives already enumerated. Where this is so, it is the responsibility of the Commission to show how the public interest gains from fostering the particular equity objective will exceed the public interest costs to the other objectives.

As an example, consider the oft-cited public interest objective of fostering "localism." Certain policies imposed to attain this objective may be consistent with other public interest objectives. For example, if local ownership is in fact more responsive than absentee ownership to the broadcast

wants and needs of the local community, then a nexus exists between a regulation that favors local ownership and the public interest. But that nexus should be demonstrated. 9/ Similarly, a requirement that broadcasters air a certain amount of local programming is consistent with the public interest--though perhaps superfluous--if, as in the case of local television news, it is demanded by the public. If, on the other hand, audiences do not prefer local programming, the burden should be on the Commission to show why airing that programming contributes to public interest objectives that should be fostered. Because information dissemination is subject to substantial economies of scale, it is much costlier to provide local programming than national. Unless consumer demand is sufficient to cover the costs of such programming--or there exist other public interest justifications for it--it is not clear how regulations that foster localism are, in fact, beneficial to the public.

IV. Conduct Regulation vs. Structural Regulation

The Commission's ability to achieve directly its public interest objectives, expecially insofar as they pertain to programming, is severely limited. It can only devise a regulatory framework that fosters attainment of these objectives. The licensees are the actual providers of services to the public. Also, the Commission has only a limited budget with which to construct and operate a regulatory framework. Given these constraints, it is clear that, where possible, it will be best for the Commission to attempt to provide natural incentives for the licensees to pursue public interest objectives. To the extent that such activity is in the licensees' self-interest, it will be less necessary for the Commission to commit scarce resourses to monitoring and enforcement activities, thus freeing resources to help speed the implementation of additional services.

There are two generic classes of regulation: conduct regulation, which is intended to promote public interest objectives by directly constraining licensees' activities, and structural regulation, which is intended to promote public interest objectives more indirectly by setting up competitive market forces that will provide licensees with the appropriate incentives. For a variety of reasons, we feel that the structural approach is the preferable one to follow in broadcast regulation.

Conduct regulation, especially in the context of broadcasting, has several distinct disadvantages. Inherent to conduct regulation is the tendency for the licensee to respond to the wishes of the regulator rather than to the wants of the consuming public. Where the public has homogeneous

9/ For example, absentee owners might be more isolated from particular local pressure groups, especially in the business community, and therefore more responsive to the overal needs of the community. In this case the requisite nexus would not be shown to exist.

tastes and needs that do not change rapidly, a centralized regulator might be able to ascertain these tastes and needs and act as a representative of all consumers. In a geographically and demographically diverse society with volatile tastes, however, this is an impossible task. In any case, conduct regulation will frequently have one of two results, neither of which furthers the public interest. Often regulations will require service that the public wants anyway, or prohibit service that the public rejects anyway. 10/ Absent these regulations, virtually all licensees would act no differently, and thus these regulations are redundant, adding only to the administrative costs of both the Commission and the licensees.

On the other hand, if there are Commission-imposed rules that consumers do not favor, then although licensees might try to exhibit minimum compliance with these rules, they will have incentives to evade them. For example, radio broadcasters tend to air public affairs programming during graveyard hours because it is not highly demanded by the public. As a result, licensees meet Commission guidelines, but the public interest objective sought by the Commission is not met. Further, to the extent that Commission resources are allocated to the enforcement of these regulations, other more socially beneficial activities must be ignored.

In addition, conduct regulation of broadcasting inherently involves programming decisions and therefore raises First Amendment issues. Because of constitutional protections, it is necessary for the Commission to tread lightly in this area; conduct regulation often must be indirect, and its impact therefore uncertain. If there are other means to achieve public interest objectives without jeopardizing First Amendment rights, they should be employed.

The obvious alternative to conduct regulation is structural regulation. Wherever feasible--that is, wherever it is technically possible to have a market structure that will provide incentives for licensees to be responsive to consumer wants and needs--the Commission should concern itself with maintaining free and open competitive entry rather than relying upon restrictive rules or requirements to help attain its public interest objectives. Basically, the structural approach entails following a pro-competitive broadcast policy. All Commission rules and regulations--including basic definitions and technical rules--should be reviewed, and where appropriate modified, to remove unnecessary barriers to the provision of new service or additional existing service. Such a regulatory framework would have as its basic tenets:

10/ For an example of the former, consider news programming on radio, which is aired during drive-time in response to consumer demand, and would continue to be aired absent Commission guidelines. For an example of the latter, consider commercial messages on radio, which are almost always at a significantly lower level than Commission guidelines allow.

(1) provide the opportunity to have as many competitive providers of service as possible;

(2) allow new services to compete with existing services;

(3) allow new technologies to compete among themselves and with existing technologies in the provision of both new and existing services;

(4) foster technological changes that will allow for the provision of additional services (and additional competitive providers) from a given amount of spectrum; and,

(5) require all competing services or technologies to pay the full cost for the scarce inputs they use so that the public, in choosing among competitive providers of services, takes into account the full cost to society of each competitive service.

A structural regulatory framework can provide the opportunity for the maximum number of competitors, subject to technological constraints. The greater the constraints, the less potential competition there is. The relevant technological constraints in broadcasting, however, involve interference, which is a relative rather than an absolute phenomenon, and for which consumers have differing levels of tolerance. Since responsiveness to consumer wants is a major public interest objective, the Commission should, where possible, allow the public to determine through the marketplace the appropriate tradeoff between the quantity of service offered (the number of stations) and the quality of service (the level of interference). Similarly, a structural regulatory framework provides the opportunity for additional providers of service. Whether or not such service will actually be provided will depend on whether there is sufficient consumer demand to support that service. Consumers make the final choice. By eliminating barriers to the provision of service, the Commission will foster competition in exactly those areas where the public wants service.

A structural regulatory framework would be consistent with the four major public interest objectives in the following ways:

-- Increased competition provides additional market pressures for licensees to be responsive to consumer wants or face the risk of lost audience and hence lost revenues. This pressure is greatest when competition has already eroded away most or

all of the monopoly profits leaving the licensee with little room for slack.

-- Additional competitors reduce the expected market share for each station, thus making more attractive the competitive strategy of seeking a specialized audience rather than a mass audience. As a result, specialized audiences with high-intensity demands are more likely to be served.

-- More competitors translates into more providers of final services to the public and, therefore, more total service. A pro-competitive policy would make available currently unutilized or underutilized spectrum for services for which there is consumer demand.

-- If competition erodes monopoly profits, incentives become greater for licensees to increase their revenues by utilizing the entire band available to them. The simultaneous implementation of pro-competitive regulations allowing for wider use of the broadcast spectrum--for example, permitting teletext and non-broadcast use of the SCA's on the FM band--would yield a wider array of services to the public.

-- A structural regulatory framework will increase channel authorization and usage, thus increasing the intensity and efficiency of spectrum use.

-- A pro-competitive policy will foster specialized programming and therefore format diversity.

-- A pro-competitive policy in conjunction with multiple ownership rules and minority ownership rules will foster diversity of voices and viewpoints.

In addition, a structural regulatory framework is compatible with the First Amendment. As the number of competitors in a market increases, the diversity of formats and the diversity of voices are both likely to increase. Most content-related Commission rules are intended to foster diversity, and if pro-competitive structural rules can substitute for these program restrictions, potential First Amendment problems can be avoided.

A structural regulatory framework is also likely to be far less costly to administer--both for the Commission and for licensees.

There are two general arguments made against a structural, pro-competitive broadcast policy. Both rely on an assumption of reduced service quality. The first is a technical argument--that as the number of competitors in a market increases, the resultant interference and congestion will reduce the quality of service provided to the public.

There are several responses to that concern: (1) in many cases, more competition can be allowed while maintaining the same level of protection as now accorded in the rules (e.g., the "equivalent protection" concept used for VHF Drop-Ins); (2) where possible, it should be the public, not the Commission, that chooses the trade-off between additional service and quality of service; and (3) so long as strict interference protection levels are maintained, there will be no incentive for manufacturers to undertake the research and development necessary to improve equipment and thereby increase the intensity of spectrum use. Easing the protection levels will create incentives for such technological advances, so that any reductions in service quality resulting from increased total service will probably only be temporary. Over the long run, the quantity of service increases without any loss in quantity.

The second argument against increased competition is that broadcasters can provide "merit" programming only if they earn monopoly profits. Merit programming is non-entertainment programming that perhaps the public "needs," but doesn't demand. With lower profits, due to increased competition, the argument continues, both the quality and the quantity of merit programming will fall. Assuming that the Commission has made the showing that a public interest jusification exists for requiring programming that the public does not want, the argument still contains logical gaps.

The argument is based on the assumption that the quality of merit programming is directly related to its costs. but that since audiences do not demand such programming in any case, there is no profit incentive to increase quality and cost. The licensee's only motivation is to retain his license. The more profitable is possession of a license, the greater the motivation to retain it. If producing and airing merit programming is necessary to retain the license, then the motivation to do so will depend on the profitability of the license. Added competition will reduce profitability and hence the incentive to provide merit programming.

There are several problems with this argument. First, the alleged direct relationship between program quality and production costs has never been demonstrated. More broadly, the relationship between station profitability and quality or quantity of merit programming has never been empirically supported. All stations currently face the same rules and guidelines concerning merit programming, whether or not they are earning monopoly profits. A highly profitable station does not face a greater burden at renewal time than a marginally profitable station. Stations facing comparative challenges are given preference so long as a minimum threshold level of merit programming has been broadcast. Thus, the actual expenditures on merit programming needn't be greater for the highly profitable stations. It is not clear, then, that foreclosing competition in order to maintain stations' monopoly profits will foster the production of quality merit programming.

In fact, there is evidence from the radio deregulation proceeding that competition may increase the amount of merit programming offered. A study of the amount of public affairs programming broadcast by radio stations in markets of various sizes showed that, although in general stations aired little such programming, as the number of stations in the market increased, the number and percentage of stations that showed significant amounts of public affairs programming (greater than 6% of their total programming) increased substantially. This suggests that as the number of competitors in a market increases, individual stations seek specialized audience niches, with merit programming representing one such niche. Thus increased competition might yield additional merit programming.

It appears, then, that on balance a structural regulatory framework for broadcasting is advisable wherever the technology will permit sufficient competition for market forces to assure licensee responsiveness to consumer wants.

V. Specific Commission and Bureau Activities that Can Form the Basis of a Structural Regulatory Framework.

There are a number of existing or proposed Commission proceedings that, taken as a whole, represent the inauguration of a structural regulatory framework for broadcasting. In order to undertake a comprehensive pro-competitive thrust, these actions must be augmented by concurrent proceedings that will provide the necessary auxiliary broadcast facilities to support the new services and appropriately modified procedures that will allow timely authorization of the new services.

A. Specific Actions

There are a number of current Commission proceedings that will provide the opportunity for additional broadcast stations to operate if consumer demand warrants the service. These includes:

— 9 KHz AM channel spacing.

-- breaking up the AM clear channels.

-- modifying the FM Table of Allocations (the Laurenberg and NTIA petitions).

-- authorizing low power television service.

--allowing limited facility VHF stations (VHF drop-ins) in the Table of Television Channel Allotments.

These proceedings demonstrate the pervasiveness of existing Commission rules that restrict the opportunity for new service. In general, these rules were based on technical and policy concerns that may no longer be relevant. For example, now that we have achieved the nationwide grid of basic television service sought in the Sixth Report and Order, it is no longer in the public interest to conform strictly to the Table of Allotments and mileage separations. This is especially significant given such technical advances as transmission antenna directivity and precise offset techniques.

Similarly, an awareness that many rural areas cannot support the high costs of full power television should suggest that eased technical requirements might result in service that, though lower in quality than full power service, is preferred by the public to no service at all. Note that if consumers deem otherwise the low power service would simply remain dark. The consumers in rural markets, rather than the Commission, would determine what quality and quantity of service is acceptable.

Not all the restrictive rules are technical, however. Limitations placed on how licensees can finance their station--in particular restrictions on subscription television--have probably kept allotments unclaimed, particularly in the UHF band. An STV presence for low power service is especially significant. When consumers must pay directly for services, they can readily inform the entrepreneur if the quality and mix of service is unsatisfactory.

The VHF drop-in proposal provides a good example of the occasional need, even in a structural regulatory framework, for reliance on specific requirements when it is unlikely that licensees will have an incentive to act in accordance with public interest objectives. As the VHF spectrum becomes more congested, it becomes increasingly in the public interest for licensees to employ spectrum saving techniques—carrier offset, precise carrier offset, synchronous offset--that both incur costs and require coordination between co-channel stations. To the extent that utilization of these techniques will increase station audience, each licensee will have an incentive to use them. If the imposition of these costs in their entirety upon the new VHF station will keep that station off the air, however, the existing co-channel station might gain more than it lost by refusing to pay any part of the cost, thus keeping the co-channel station off the air. In this result, the public interest could be harmed and therefore--due to a lack of market incentives upon licensees--the Commission should consider requiring all stations to bear their share of the costs for spectrum saving techniques.

In addition to proceedings that will provide the opportunity for additional broadcast stations, there are five proceedings or proposals that will provide the opportunity for new services to the public from the broadcast band. These include:

-- AM Stereo.

-- FM Quadraphonic.

-- TV Stereo.

-- Teletext.

-- Non-broadcast use of side bands on FM channels (SCA's).

For each of these services, there is more than one technical system capable of providing the service. It is impossible at this point in time to predict either the systems that will provide the best service in the long run, 11/ or the direction in which the service is likely to move in response to technological changes or shifts in consumer preferences. Hence, the Commission must carefully devise technical rules that are limited to protecting the public from harm. That is, only minimum standards should be set.

Teletext and SCA's represent novel uses of the broadcast spectrum and, as such, confront some existing non-technical as well as technical Commission rules and regulations. Both represent the potential for additional service to the public from broadcast channels where the broadcast service currently offered does not require use of the full channel. Thus, unutilized spectrum can be put to use to benefit the public. There are unique issues raised by these services. One concerns past Commission reluctance to allow use of the "broadcast spectrum" for non-broadcast services. It is clear that as technological advances blur the distinctions among the major service categories and as demand for the spectrum increases, the maintenance of arbitrary distinctions can only result in less efficient use of the spectrum. This is most blatant in the current examples where the spectrum available on FM sidebands or TV vertical blanking intervals could not be used to provide additional conventional broadcast service and therefore would go unused if these new services were excluded from that spectrum. Reliance on strict definitions to determine the service made available to the public is not in the public interest. These definitions must be reviewed and Commission spectrum allocation policy modified accordingly.

By restricting "broadcast spectrum" to broadcasting services, the Commission is restricting that band to a narrow group of services

11/ Indeed, because these services have many facets to them that individual consumers attach different weights to, it is generally not possible to rank the alternate systems even at a point in time.

that fit within a complex and convoluted regulatory framework that has developed though case law since 1934. SCA's provide a useful case in point. One of the responsibilities imposed on each broadcast licensee is to maintain total control over the station's operation. If FM side bands could be used to provide services that lend themselves to common carriage type organization, then the FM licensee would find himself in the currently untenable situation of being simultaneously a broadcaster and a common carrier. That method might, however, represent the best use to the public of that sideband spectrum. The appropriate regulatory response is to review the situation to see if there are hybrid services, with some broadcast characteristics and also some common carrier or private radio characteristics, that should be regulated in a framework that does not require categorization into one of three pigeon holes. Whereever possible, the entrepreneur should be allowed maximum flexibility to respond to the diverse wants of the public.

The narrow latitude currently afforded broadcasters not only potentially restricts the introduction of new services, it also hurts diversity of voices in existing services. For example, time sharing and time brokerage of broadcast stations are discouraged to the extent that "loss of control" remains a threat to licensees. Yet time sharing and time brokerage offer two obvious ways to provide programming to audiences with specialized tastes that are too small to support entire stations.

Regulation based on strict definitions is especially tenuous now that there are non-broadcast systems that provide video programming virtually identical to subscription television offerings. If STV is to compete on an equal footing with multipoint distributions systems, private video systems, direct broadcast satellites, and pay cable then it and its competitors should face, to the extent statutorily permissible, the same regulatory environment. Otherwise, it might be regulatory advantage rather than consumer choice that determines the winners in this competitive battle. Indeed, where there are statutory barriers to equal treatment, the Commission should recommend the appropriate legislative changes.

All of these pay video services are hybrids in that they offer broadcast type services but their pay aspects suggest a non-universal element. It is therefore appropriate to undertake a general review of the concept of "broadcasting" to determine whether--as in the case of common carrier regulation--changing circumstances should free some erstwhile "broadcast" services, such as STV, partially or completely from that particular brand of regulation.

Competition of the sort developing for pay video service is beneficial to the public. It is therefore necessary that the regulatory framework imposed on these competitors not give any one group an artificial advantage over the others. Of course one key input into the provision of video services, which is used by all systems except cable,

is the spectrum. At present there is no price charged for the spectrum, even though it is scarce in most markets and as a result has a value. Although the current method of broadcast station assignment does not allow the government to capture the value of the spectrum when a station is first awarded, it does allow the licensee to capture that value upon transfer of the license. The transfer price is based on the revenues that the station--including among its assets the license to broadcast on a particular channel--can expect to earn in the future. A licensee who does not respond to consumer wants will lose audience and revenues; the value of his station will fall. Hence, an incentive does exist for licensees to respond to consumer demand, 12/ and any subsequent purchaser of the license pays as part of the transfer price the capitalized value of the spectrum. However, to the extent that the potential uses to which the spectrum channel can be put is proscribed by Commission rules, regulations, and definitions, spectrum efficiency may be sacrificed. For example, the current absolute constraints on use of television and FM radio channels for teletext and non-broadcast SCA use respectively, limit the public benefits available from the spectrum. 13/

To the extent that VHF and UHF spectrum is limited to broadcast use, the full value to society of that spectrum (i.e., its opportunity cost in terms of other valuable uses foregone) is not incorporated in the transfer price of a broadcast station. Where video broadcasting competes with other video transmission and distribution systems that are paying the full opportunity cost for all their inputs, these non-spectrum using competitors are placed at a competitive disadvantage. The result might be continued use of the spectrum for provision of video services when alternative transmission systems are in fact more efficient. If there are potential alternative uses for the spectrum that must be foregone because the availability of spectrum is limited and non-spectrum using technologies are unavailable, then costs are imposed on society.

Although we do not foresee the introduction of spectrum auctions or fees to ameliorate this problem during the next two to three years, we recognize that removal of the anti-trafficking rules would reduce the potential for distortions resulting from the free use of the spectrum.

12/ To some extent this incentive is reduced by anti-trafficking rules that restrict the ability of a licensee to sell the station to someone who might be more able to put the station to a higher valued use.

13/ Similarly, if these new services are eventually permitted on broadcast spectrum only in severely limited form, public benefits will be reduced.

B. Auxiliary Services

The vast increase in broadcast services contemplated by the proposals in the previous section will place an overwhelming demand upon existing auxiliary broadcast spectrum. Already there are petitions from broadcasters to make available auxiliary spectrum currently reserved for common carriers. This demand stems from the increased use of remote hookups and other recent technological advances. The proposed low power television service alone, if it is to be operative, will require a significant increase in auxiliary band use to provide microwave feeds and other hookups. In urban markets these bands are already heavily congested. The secondary status of low power television itself may not be a problem, but if it has access to auxiliary bands only on a secondary basis, it could be excluded from certain markets by full service broadcasters. It is therefore necessary that, concurrent with the rulemaking stage of these many proceedings, a proceeding be commenced to make available more spectrum for auxiliary broadcast use and to determine priorities for its use. Absent such spectrum, few if any of the services proposed earlier could ever be fully implemented in large cities.

The upper portion of the UHF band represents an obvious region of the spectrum for auxiliary broadcast use. It is largely unutilized and existing auxiliary equipment could be readily modified for use in that band. However, in addition to competing demand for that band from existing broadcasters and potential low power broadcasters, there has been some discussion of reserving part of that band for an experiment in spectrum economics--auctioning spectrum rights to all comers. It is ideal for such an experiment given the compatability of the upper UHF band for so many uses. It is clear from the earlier discussion that this experiment would be beneficial to the public. On the other hand, the benefits from the many new broadcast services (low power, VHF drop-ins, etc.) might be endangered if they, in their infancy, had no auxiliary spectrum available for their use, or had to pay for it while competitors had available free auxiliary spectrum. These competing demands for the upper UHF band must be addressed in an upcoming inquiry.

C. Procedural Matters

Following the guidance of the Communications Act and case law, the Commission has developed highly complex authorization procedures. Unless some of these procedures are relaxed, it will not be possible to process in a timely fashion the large number of applications that the

various pro-competitive proposals will stimulate. 14/ If that were to happen, then the public interest benefits stemming from these proposals would be dissipated. Further these procedures are expensive and time consuming, and may tend to favor large, experienced applicants. Where the final service provided is of a small scale as in the case of low power television, the potential procedural costs might discourage applications entirely.

Streamlined procedures must be developed for both application processing and comparative hearings. Current processing procedures must be reviewed for relevance and efficiency. Commission staff must limit its review to those few factors essential for applicants to be able to operate a station in the public interest. In technical areas this might include placing the burden of proof on the applicant. For example, the staff might no longer verify all engineering findings, but the "plug would be pulled" on the station that causes interference. In such circumstances, the threat of lost investment should encourage applicants to do their homework prior to filing, and the Commission would reduce its allocation of resources to incomplete applications.

Current regulations promote delay by encouraging, or at least not discouraging, multiple application proceedings. For example, ill prepared applications can be filed on top of others with the applicant knowing well that designation for hearing will be far down the road. Such a procedure imposes two levels of delay: (1) Commission staff must seek additional information from the applicant, and (2) lengthy hearings became necessary despite the fact that one of the applicants was ill-prepared to serve the public.

In order to discourage filing on top of other applicants, and to encourage the fastest provision of additional service, preference should be given on a first-come-first-served basis. If this were done, however, the Commission would have to substantially strengthen its requirement for complete applications.

The Commission could also develop procedures that encourage competing applicants to negotiate settlements with one another, rather than going to hearing. To the extent that backlogs are inevitable, they could be used by the Commission to discourage mutually exclusive situations. For example, since such delays impose costs on applicants, expedited treatment could be accorded applications from parties who have reached agreement to avoid hearings.

14/ In fact, constraints on Bureau resources already have forced the Commission to hold off action on the NTIA petition involving FM allocations despite the obvious merits of the petition.

The comparative hearing process itself remains a major cause of authorization delay. Currently, applicants are entitled to a hearing to determine any material questions of fact involving their eligibility. Similarly, hearings must be held to choose among competing applicants. In order to streamline the hearings process, several proposals or strategies should be considered. In some cases, legislative action would be necessary to implement these proposals.

In order to avoid the necessity of many hearings, the qualifications that applicants must meet should be minimal and simple to evaluate. Once the minimum qualifications have been met, further ranking of applicants should be irrelevant. To choose among these equally qualified applicants, a lottery or auction should be implemented. Implementation of the latter would require statutory approval.

These are but a few of a large number of potential modifications to current administrative procedures for assigning licenses. The actions already taken by the Bureau and the Commission toward implementing a structural regulatory framework for broadcasting have been the result of policy planning by the Bureau. In order to bear the fruit of the new regulatory direction--that is, in order to actually authorize new service now that the opportunity exists for such service--the Commission shall have to undertake rulemakings and make suggestions to Congress for new legislation that will permit the necessary streamlined authorization process.