


3-2012

Survival of the Standard: Today's Public Interest Requirement in Television Broadcasting and the Return to Regulation

Drew Simshaw
Indiana University Maurer School of Law

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Recommended Citation

Simshaw, Drew (2012) "Survival of the Standard: Today's Public Interest Requirement in Television Broadcasting and the Return to Regulation," *Federal Communications Law Journal*: Vol. 64 : Iss. 2 , Article 6.

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Survival of the Standard: Today’s Public Interest Requirement in Television Broadcasting and the Return to Regulation

Drew Simshaw*

[Despite the fact that] [t]he conscience and judgment of a station’s management are necessarily personal . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: ‘Manage this station in our interest’ The standing of every station is determined by that conception.

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* J.D. Candidate, Indiana University Maurer School of Law, May 2012; B.A. in Political Science, *cum laude*, University of Washington, 2007. The Author thanks Professor Michael McGregor for inspiring this Note and the *Federal Communications Law Journal* staff for their hard work on its publication. He also thanks his family and friends for their continued support.

1. John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B.J. 5, 14 (1950).

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I. INTRODUCTION

There are few legal tasks more difficult than determining how best to treat a concept that lacks definition. The history of the public interest requirement is one of these constant struggles. That broadcasters must broadcast in the public interest has always been a requirement; exactly how this requirement is met has taken many forms. This Note will examine the history of the requirement—from vagueness, to regulation, to good faith and presumptions of compliance—and consider the appropriate direction for the public interest’s future.

This Note will begin by examining the early days of broadcast regulation itself. It will then describe the creation of the public interest concept and the various standards by which the FCC has considered it satisfied. This Note will then describe the deregulation of the 1980s, during which the public interest standard was arguably eviscerated, and focus primarily on programming and ascertainment requirements for television broadcasters. Consideration will be given to the various justifications offered by the FCC for its cutbacks, which will be scrutinized in light of the industry’s current state.

Next, the FCC’s Enhanced Disclosure Order and its Report on Broadcast Localism and Notice of Proposed Rulemaking will signify the reemergence of proposed specific regulation regarding the public interest standard. The current state of broadcast guidelines and regulation, or lack thereof, will reveal today’s challenges. Broadcast licensees are out of touch with their communities. Technology is being underutilized, squandering opportunities that could increase the ease of reporting and accessing programming content, as well as opportunities for direct communication between licensees and community members. Only recently have licensees and the FCC undertaken a post-Internet burden and benefit analysis that should reveal new sensible ways in which the public interest could be served. Many of these possible solutions can be found, which this Note will examine, by looking to today’s broadcasting practices and the innovative ascertainment methods that have resulted from a regulation-free industry.

The FCC's recent Order on Reconsideration and Further Notice of Proposed Rulemaking regarding enhanced disclosure requirements, as well as its Notice of Inquiry regarding standardized program reporting, indicate that the FCC is prepared to consider enacting significant regulatory reform.

Finally, this Note will conclude that it is necessary to implement certain sensible regulation at this time in order to ensure the preservation of the public interest standard. These possible regulations include, but are not limited to, required community advisory boards, town halls, and technological means of communicating with the public. First, it is critical to understand where the notion of the "public interest" has been in order to comprehend where it stands today so that we may best decide its future.

II. HISTORY: REGULATION AND THE PUBLIC INTEREST

The public interest standard in broadcasting is a concept as old as federal oversight of broadcasting itself. The justification of federal oversight is rooted in two main goals.² The first is to allow regulation to foster the commercial development of the broadcasting industry.³ The second goal, from which the public interest standard derives, is to regulate in a manner that meets the informational needs of the public.⁴ It is the marketplace's ability or failure to meet these public needs that has controlled the degree of government regulation over time. The idea of serving the public interest subsequently created an array of new goals, from ensuring candidate access to the airwaves, to providing educational children's programming. This Note will focus on the goals of ensuring diversity in programming and promoting a concept known as "localism," especially with ascertainment of community needs. Examining the history of specific public interest regulations is essential to understanding where we find ourselves today. Its journey has led us to our current point in history where it is necessary to return to some of the early forms of regulation, as well as develop new forms.

A. *The Early Days: Creation of the Concept*

The need for regulation was first recognized during the chaotic 1920s, a time in which radio interference made mass media communication unreliable, and consequently made commercial development impossible. As a result, Congress passed the Radio Act of 1927, in which broadcasters

2. Archive of The Benton Found., *Section II: The Public Interest Standard in Television Broadcasting*, BENTON FOUNDATION, <http://www.benton.org/archive/publibrary/piac/sec2.html> (last updated Jan. 21, 1999).

3. *Id.*

4. *Id.*

were required to operate in the “public convenience, interest, or necessity.”⁵ Notably, the phrase was not defined in the Act. It was noted at the time that, “‘Public interest, convenience or necessity’ means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”⁶ A larger move toward regulation was apparent in the subsequent Communications Act of 1934.⁷ Rather than take the opportunity to define the phrase, Congress gave the FCC intentionally broad discretion to change the particular meaning of obligations as circumstances changed over time. This new requirement was notably different from the absence of regulation in print media. Instead, broadcasters were charged with a positive, albeit broad, statutory obligation to serve the public in specific ways.

The question of what this new obligation of broadcasters should look like has been a constant struggle that continues to this day. Indeed, the historical account that follows will reveal that no particular definition, standard, or requirement has remained constant. However, the Federal Radio Commission (“FRC”) eloquently captured the sentiment that drives the need for a public interest standard in a statement that should be considered by anyone seeking to define appropriate regulation at any given point in time. Although some aspects of the statement seem less applicable today, its philosophy can be considered a mantra for the essence of what it should mean to broadcast in the public’s interest. The FRC explained that, even though certain aspects of a station’s management are personal,

[T]he station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: “Manage this station in our interest” The standing of every station is determined by that conception.⁸

There are several historical developments that may seem to diminish the applicability of this statement today. On the one hand, the FRC likely could not have comprehended the degree to which broadcasting would become commercialized. In addition, the varying methods of licensing that have been adopted over time suggest that we are not singularly focused on “the best man in sight” when considering to whom licenses should be granted. On the other hand, the broad public interest policy behind the

5. Radio Act of 1927, ch. 169, 44 Stat. 1162, 1166 (repealed 1934).

6. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 Air L. Rev. 295, 296 (1930).

7. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

8. Willis, *supra* note 1, at 14.

FRC's statement is still used in commentary today to advocate for political and social issues related to broadcasting.⁹ Above all, and for the purposes of this Note, the notion that the public should be served through addressing the needs of the community should remain prominently considered while addressing the history of public interest requirements, deregulation, recent proposals, and where the standard should go from here. Upon such considerations, it will be evident that the current state of public interest regulation for broadcasting has lost sight of this mantra. Further, the longer we go without implementing additional, sensible broadcast licensing regulation, the further away the mantra could slip.

B. Particularizing the Concept

In 1943, *NBC v. United States* affirmed the FCC's broad regulating power over the broadcasting industry.¹⁰ More specifically, the Supreme Court held that the public interest standard is the touchstone of this authority.¹¹ It also held that the standard is justified by the scarcity rationale and that it is not unconstitutionally vague.¹² The ruling paved the way for guidelines and regulations to more specifically determine what broadcasting in the public interest would look like in action.

In 1946, the FCC issued a general statement regarding programming¹³ and what would be known as the "Blue Book" guidelines.¹⁴ Although the Blue Book guidelines only served symbolic importance, having never been ratified or rejected, they would still have an effect on the emerging priorities of the public interest standard. The statement recognized that, at renewal time, in determining whether a station was serving the public interest, the FCC would require four components: live local programs, public affairs programming, limits on excessive advertising, and what were known as "sustaining programs."¹⁵ Of special importance to this Note is

9. See, e.g., David Morris, *Once We Insisted on Civility: Reflections on Tucson*, ON THE COMMONS (Jan. 10, 2011), <http://onthecommons.org/once-we-insisted-civility-reflections-tucson> ("As the Federal Radio Commission (FRC), forerunner of the Federal Communications Commission (FCC), explained, 'It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest.' The Commission made clear there was no room for 'propaganda stations.'").

10. 319 U.S. 190, 216 (1943).

11. *Id.*

12. *Id.* at 225.

13. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946), available at http://reboot.fcc.gov/c/document_library/get_file?uuid=9f04f8f3-0ef9-485e-bbdb-544e29bc70a6&groupId=101236.

14. Archive of THE BENTON FOUND., *supra* note 2.

15. *Id.* at 12.

the FCC's recognition of live local programs at the top of its priority list. Further historical analysis will indicate a pattern of emphasis on the importance of localism and program diversity. The consequences of the subsequent abandonment of such priorities will reveal that, in moving forward, we must reemphasize these aspects in order to ensure the preservation of the public interest standard itself.

The 1950s were a time of weakened confidence in an unregulated broadcasting system, leading to the 1960 Programming Policy Statement, which identified fourteen elements that, while not originally serving as strict requirements, would be indicative of what a station does to serve the public interest.¹⁶ The elements were opportunity for local self-expression, the development and use of local talent, programs for children, religious programs, educational programs, public affairs programs, editorialization by licensees, political broadcasts, agricultural programs, news programs, weather and market reports, sports programs, service to minority groups, and entertainment programming.¹⁷ Once again, the FCC recognized the importance of localism by placing "opportunity for local self-expression" and "development and use of local talent" at the top of the list.¹⁸ The inclusion of editorialization by licensees also highlights the FCC's intention to promote the licensee's involvement in, and interaction with, its local community. The fostering of the relationship between a licensee and its community will continue to be an essential element of the success of serving in the public interest. The strengthening of the current discord in the relationship will prove to be just as essential.

In addition to identifying certain priorities, the 1960 Programming Policy Statement also introduced the concept of "ascertainment." The Statement acknowledged that the public interest standard's "principal ingredient . . . [consists of a] diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area."¹⁹ This process of ascertaining and fulfilling the needs of the community would become known as "ascertainment." To an extent, this process is simply good business practice. After all, if it is an audience that the station seeks, it is only prudent to provide programming that the particular service area desires. In this light, the FCC issued a formal ascertainment primer in 1971.²⁰ The primer was issued not as a burden but

16. Rpt. and Statement of Policy Res: Comm'n En Banc Programming Inquiry, *Public Notice*, 44 F.C.C. 2303, 2314 (1960).

17. *Id.*

18. *Id.*

19. *Id.* at 2312.

20. Primer on Ascertainment of Cmty. Problems by Brdst. Applicants, Part I, Sections IV-A and IV-B of FCC Forms, *Report and Order*, 27 F.C.C.2d 650 (1971) [hereinafter

in order to aid local ascertainment efforts and to give more certainty to licensees that they were in fact meeting the public interest standard.²¹ The primer gave advice to stations on how they should go about consulting with the general public as well as community leaders within the service area.²² It then advised how to take the information learned and develop appropriate programming that responds to the areas in need.²³ While formal ascertainment requirements may not have proven to be the most efficient method of ensuring that a licensee stays in touch with the needs of its community, some formal requirements should be implemented as we move forward to ensure that licensees do not lose sight of the public interest mantra.

III. DEREGULATION

The 1980s marked the beginning of extensive deregulation of the broadcasting industry, in which standards and guidelines gave way to the “trust the market” sentiment of new FCC commissioners. The abandonment of regulation was not necessarily an abandonment of the ideals of serving the public interest; rather, the critics of regulation believed that trusting the market was the best way in which to serve the public’s interests.²⁴ There was a belief that federally mandated obligations were too vague and that proper enforcement would require too great of a threat to the First Amendment rights of broadcasters.²⁵

The result of broadcast deregulation was cutbacks on requirements designed to promote certain programming and localism. It could be said that such cutbacks essentially served to abandon the public interest mandate. As will be seen, stations were no longer required to perform ascertainment of community needs,²⁶ nor were they required to maintain

Primer on Ascertainment].

21. *Id.* This role of the primer would be diminished when, through deregulation, stations became free to “determine the issues in their community that warrant consideration by whatever means they consider appropriate.” Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1076, para. 47 (1984) [hereinafter Revision of Commercial TV Policies].

22. Primer on Ascertainment, *supra* note 20, at paras. 20–22.

23. *Id.* at paras. 63–64.

24. Revision of Commercial TV Policies, *supra* note 21, at para. 2.

25. See Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 627 (1998) (“Complicating this controversy is the conflict between First Amendment provisions guaranteeing the right of broadcasters, like other media owners and operators, to be free of government control over the content of programming . . .”).

26. Revision of Commercial TV Policies, *supra* note 21, at para. 2.

program logs.²⁷ Further, limits on advertising time were abandoned and stations no longer were required to air minimum amounts of public affairs programming. The renewal process—the time when performance of meeting the public interest was reviewed—was now all but automatic.

Despite some criticism, the FCC justified deregulation by concluding that “market incentives will ensure the presentation of programming that responds to community needs . . . [and] that these forces will continue to hold levels of commercialization below [the FCC’s] existing guidelines.”²⁸ A closer look at the FCC’s justifications for abandoning programming guidelines and ascertainment is important in deciding to what extent “trusting the market” will ensure that broadcasters manage stations “in our interest.” Analysis of these cutbacks will reveal the consequences as well as the benefits that result from deregulation and how each should affect decisions moving forward.

A. Justifying Programming Requirement Cutbacks

Beginning with programming guidelines, the FCC performed several studies looking at station performance and concluded that “the current programming guidelines and the routine review of program performance in uncontested renewal proceedings that they facilitate are not necessary”²⁹ The result was total elimination of programming guidelines requiring that broadcasters provide some issue-responsive programming.³⁰ The first justification was that the programming levels at the time exceeded the corresponding existing guidelines across the board.³¹ This is to say that stations, on average, did not appear to be merely meeting the requirements for the sake of doing so but rather were exceeding them. Also citing averages, the FCC proclaimed that there had been “a trend toward increasing amounts of total non-entertainment programming on television” and that there had been “a stable market demand over time for both news and public affairs programming and that commercial television stations have consistently met that demand.”³²

Despite the apparent overall acceptability of programming content, the FCC conceded that locally produced programming was on the decline in terms of percentage.³³ The significance of such a decline should be

27. *Id.* at paras. 7, 74.

28. *Id.* at para. 2.

29. *Id.* at para. 7.

30. *Id.*

31. *Id.* at para. 10.

32. *Id.* at paras. 11–12.

33. *Id.* at para. 14.

apparent when recalling the historical priority that the FCC has placed on policies promoting localism. Nevertheless, the FCC dismissed such concerns by concluding that overall broadcast time devoted to locally produced programming still remained above the guidelines of the time.

Despite the fact that overall data suggested that stations, on average, were performing above the existing programming guidelines, the FCC admitted that there may be individual stations not meeting programming category guidelines.³⁴ Again citing averages, the FCC claimed that this did not conflict with serving the public interest because “the failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations.”³⁵ The FCC further concluded that market demand will result in the shifting of programming mixes in such a way that “overall performance will exceed the guidelines even though individual stations are not presenting required amounts in all program categories.”³⁶ It will become clear that this reliance on the performance of other stations discourages communication within the community of an underperforming station’s service area, since they are no longer required to comprehend the needs of their community.³⁷ Further, this justification raises concerns when considering the mantra of “manage this station in our interest,” and while it may have been satisfactory to justify cutbacks at the time, such rationale should be rejected today in considering what sensible regulations are necessary to more effectively serve the public interest.

The acceptance of individual stations not meeting programming guidelines designed to serve the public interest raises considerations of exactly who the parties are in the public interest mantra. We must decide who is asking whom to broadcast in their interest. Is it the public as a whole asking the entire broadcast industry to broadcast in their interest? Or, is it, as the FRC stated, “as if people of a community should own a station and turn it over to the best man in sight?”³⁸ If we consider the former, the parties as wholes, it seems more likely that the aggregate of the market may be able to provide adequate programming for the public as a whole. However, if serving the public interest is being asked of each individual station, then relying on the performance of other stations seems less likely to satisfy the mantra. While there may not be an obviously appropriate

34. *Id.* at para. 22.

35. *Id.*

36. *Id.*

37. *See infra* Part III.B.

38. Willis, *supra* note 1, at 14.

interpretation at this point, these perspectives become important when considering the role of the public interest standard in moving forward.

It is important to note that abandonment of programming guidelines does not necessarily mean an abandonment of all programming responsibilities or the licensee's overall public interest obligations. Deregulation is not a dismissal of the public interest itself but rather a redefinition of what constitutes meeting the public interest requirement. In clarifying this distinction and introducing the new standard, the FCC declared that a "commercial television broadcaster will remain subject to an obligation to provide programming that is responsive to the issues confronting its community," but, instead of strict guidelines, "in the exercise of its good faith judgment, it will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community."³⁹ The practical result of this redefinition, though not obvious, is certainly significant. The resulting lax standard for broadcasters could be credited for recent innovation in new programming;⁴⁰ current challenges will reveal why today's decision-makers should be skeptical of its continued use in moving forward.

The "good faith" standard adopted by the FCC created a licensing renewal process requiring that "[a] licensee need only have addressed community issues with whatever types of programming, that in its reasonably exercised discretion, it determined was appropriate to those issues."⁴¹ For uncontested renewal applications, this resulted in a "presumption of compliance" with the public interest standard and an end to the routine reviewing of programming.⁴² In the case of a petition to deny a renewal application, programming would serve as a consideration, but with the abandonment of specific quantity requirements, "arguments based solely on the failure to present amounts of non-entertainment programming . . ." would no longer be relevant.⁴³ The FCC further concluded that, when faced with a petition to deny based on lack of specific issue programming, a station "should be able to respond by pointing . . . to other television stations available in the community that could reasonably have been relied upon to address such issues."⁴⁴ This conclusion essentially redefined a broadcaster's obligation as one in which it is only required to "contribute to

39. Revision of Commercial TV Policies, *supra* note 21, at paras. 32–33.

40. See Krasnow & Goodman, *supra* note 25, at 635 ("[T]he FCC and broadcasters have worked together to provide the most diverse system of broadcasting in the world.").

41. Revision of Commercial TV Policies, *supra* note 21, at para. 36.

42. *Id.*

43. *Id.* at para. 37.

44. *Id.* at para. 38.

the overall information flow in its market.”⁴⁵ As today’s challenges are considered, it will become evident that this mindset, in which a station’s performance is judged in relation to the performances of other stations, discourages interaction with the community in all areas of that community’s needs and interests. Similar deregulation in ascertainment requirements highlights these implications more directly.

B. Ascertainment Deregulation

Formal ascertainment requirements shared the same fate as programming guidelines during the FCC’s deregulation of broadcasting. The requirements at the time consisted of “standards . . . for determining the composition of the area to be served, consultation with community leaders and members of the general public, enumerating of community problems and needs, evaluation of the problems and needs, and relating proposed programming to the evaluated problems and needs.”⁴⁶ In practice, this meant that a station must keep a checklist of community leaders, maintain a public file with information relating to the composition of the community, and file an annual list of service area problems and corresponding programs.⁴⁷ After deregulation, stations were free to “determine the issues in their community that warrant consideration by whatever means they consider appropriate . . . [without] standardized documentation and submission of these efforts.”⁴⁸

In justifying these cutbacks, the FCC concluded that “licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements”⁴⁹ For these reasons, it concluded that existing procedures were “neither necessary nor, in view of their significant costs, appropriate.”⁵⁰ These costs, the FCC said, included broadcast industry work hours, FCC work hours, litigation expenses, resources devoted to ascertainment hearings, and resources devoted to avoiding formal challenges.⁵¹ The FCC acknowledged that there were benefits of ascertainment requirements, such as providing licensees with knowledge of their community. However, it

45. *Id.* at para. 37; *see also* Krasnow & Goodman, *supra* note 25, at 635 (“[T]he FCC has recognized that as the number of competing electronic ‘voices’ has gone up, there is less need for the government to ensure that individual broadcast stations serve particular functions.”).

46. Revision of Commercial TV Policies, *supra* note 21, at para. 45.

47. *Id.*

48. *Id.* at para. 47.

49. *Id.* at para. 48.

50. *Id.*

51. *Id.* at paras. 51–52.

concluded that the benefits did not justify the costs, and that formal ascertainment was not the most efficient means of acquiring knowledge.⁵² This cost and benefit, or burden and benefit, analysis may have been legitimate at the time it was conducted. However, conclusions resulting from a weighing of factors should be coveted only as long as those factors remain constant. One cannot properly analyze the state of the modern broadcast industry without acknowledging that technology and other elements have transformed the factors that should be playing a role in broadcast's burden and benefit analysis.

Broadcast deregulation would continue in the 1990s, notably in the 1996 Telecommunications Act.⁵³ Specifically, stations only had to apply for license renewal every eight years, instead of every five years.⁵⁴ This meant that not only was the public interest standard significantly relaxed, but now it would be examined less frequently.

It should come as no surprise that programming has expanded since the broadcast deregulation of the 1980s. However, it must be considered whether new programming is of the quality that was considered at the invention of the public interest standard, and what quality is desired today. In certain programming areas, Congress has remained active in regulating. One example is children's educational programming.⁵⁵ The consideration is naturally raised of whether Congress and the FCC should have remained active in regulating more areas of programming that might constitute "market failure[s]"⁵⁶ and, as will next be considered, to what extent such regulation is appropriate now or in the future.

IV. TODAY: THE REEMERGENCE OF REGULATION

In 2008, at the end of a conservative Bush administration and under a Republican-appointed FCC chairman, the FCC produced two interesting documents that indicated that new regulation may be imminent. In addition to highlighting the effects of deregulation and the recent state of the public interest standard, the documents also provided some compelling examples of ways in which the FCC could more effectively demand that licensees broadcast in the public interest. Perhaps more importantly, the documents forced a reevaluation of past justifications for "trusting the market," and

52. *Id.* at para. 54.

53. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

54. 47 U.S.C. § 203 (2006).

55. See Children's Television Act of 1990, 47 U.S.C. §§ 303(a)–(b) (2006).

56. See Krasnow & Goodman, *supra* note 25, at 632 ("Only in the case of a perceived market failure—such as children's television—have Congress and the FCC felt the need to return to particularized content regulation.").

now, in conjunction with the FCC's 2011 proceedings, compel a new examination of current day burdens and benefits of licensee obligations. In light of these factors and analyses, it will be evident that minimal requirements in the areas of ascertainment and programming guidelines are once again necessary in order to stay true to the public interest standard.

A. Enhanced Disclosure Order: The Return of Programming Considerations

First, the FCC adopted an Enhanced Disclosure Order which addressed new ways that television broadcast licensees would be required to report their local programming.⁵⁷ Although the Report and Order would later be vacated, its significance cannot be overlooked. Not only did the Report and Order symbolize the reemergence of considerations stressed by this Note, but the general sentiments and specific ideas expressed remain as relevant as ever in today's discussion. At the time, the new standardization required the tracking of certain items which would be required to be made available online. The items which needed to be tracked included local civic affairs programming, local electoral affairs programming, public service announcements, paid public service announcements, and independently produced programming. Once again, the emphasis on local entities at the top of the list should be noted. In their tracking, broadcasters would be required to file a standardized form quarterly and make it available online.⁵⁸

There are several features of the Report and Order that are indicative of what the future may hold for the public interest requirement, and help frame the decisions that lie ahead. The FCC stated that it "propose[d] to enhance the public's ability to access information by requiring television licensees to make the contents of the public inspection files, including the standardized form, available on their stations' Internet websites"⁵⁹ In their justification for such a requirement the FCC engaged in another burden versus benefit analysis, similar to how it justified much of its deregulation. A closer look at what has changed in the broadcast world since deregulation will demonstrate how our views of burdens and benefits have changed and what this should mean for the future.

First, it is necessary to reconsider what may have made prior record-keeping requirements seem so burdensome, and consequently, not worth the benefits that may have resulted. Part of this sentiment may have been

57. See Standardized & Enhanced Disclosure Requirements for TV Brdcast. Licensee Pub. Interest Obligations, *Report and Order*, 23 F.C.C.R. 1274 (2008).

58. *Id.* at para. 1.

59. *Id.*

due to the unlikelihood of persons actually visiting stations to view information kept in any required physical public files.⁶⁰ If the information was not going to be viewed, then any burden undertaken in order to produce the file would seem to be not worth it. In short, the burdens simply outweighed the benefits. However, this framework must be reconsidered in light of the proliferation of the Internet, which has made it more convenient for the public to access information, and as a result, made it more likely that they will do so. As will become clear, the benefits of an informed and involved public go beyond simple licensee accountability.

The FCC concluded in the Report and Order that “the benefits of licensees placing their public inspection files on the Internet outweigh the cost”⁶¹ The main burden cited by opponents in comments was “the cost of converting and maintaining the public file electronically.”⁶² While the FCC acknowledged that “the cost of this initial conversion may be appreciable,” it concluded that “it is a one-time expense and, in nearly all cases, should not be overly burdensome.”⁶³ At the time, the FCC further reasoned that “[t]he ongoing additional costs of putting their public files on the Internet should be relatively modest.”⁶⁴ However, as will be seen, in 2011, the FCC would rectify concerns regarding the burden of licensees maintaining the online files, by proposing that the FCC host them.

In the Report and Order, the FCC cited several benefits that it believed outweighed the mentioned costs of placing public inspection files online. Generally, it concluded that it is “beneficial for the community to have Internet access to information it may not otherwise be able to obtain.”⁶⁵ The information available in the file “assist[s] consumers in educating themselves as to the licensee and its programming.”⁶⁶ Further, the FCC stated that “[b]y making the file more available through the Internet, we hope to facilitate access to the file information and foster increased public participation in the licensing process.”⁶⁷ This final point regarding public participation is significant not only in the issue of public documents but also in considering whether the FCC should revise its current passive role and return to more formal ascertainment requirements.

60. *Id.* at para. 45 (discussing the “unnecessary inconvenience on the public . . . [by requiring] that interested individuals travel to the station during business hours to review the material.”).

61. *Id.* at para. 10.

62. *Id.* at para. 8.

63. *Id.* at para. 10.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at para. 12.

This question of ascertainment was touched on in the Report and Order and even more directly addressed in the subsequent Notice of Proposed Rulemaking.

B. A Preview of Ascertainment's Comeback

The reemergence of the ascertainment issue was first apparent in the Report and Order's new standardized form. Because the Report and Order was vacated in 2011 in order to, among other reasons, update the analysis of a possible standardized form, it is important to understand what was originally included in the Report and Order, to put today's discussion in proper context. The Report and Order's quarterly form, which was required to be made available on the Internet, was intended "to provide the public with easily accessible information in a standardized format on each television station's efforts to serve its community."⁶⁸ Of particular note, the form required "information about efforts that have been made to ascertain the programming needs of various segments of the community."⁶⁹ In response to concerns from broadcasters over infringement of licensee discretion, the FCC made clear that requiring such information "does not adopt quantitative programming requirements or guidelines" and "does not require broadcasters to air any particular category of programming or mix of programming types."⁷⁰ Rather, the FCC justified such requirements in order to respond to what it viewed, and still does view, as a "communications breakdown between licensees and their communities concerning the breadth of their local licensees' efforts to air programming that serves communities' local needs and interests."⁷¹ The Report and Order's form would have accomplished this by simply asking the licensee to answer, yes or no, "whether the licensee has undertaken efforts to assess the programming needs of its community" and "whether the licensee has designed its programming to address those needs."⁷² It also provided "space to describe efforts taken in this regard."⁷³

The FCC also made clear that traditional criticism of public file regulation is no longer applicable today. Indeed, requirements at the time of the Report and Order "impose[d] unnecessary inconvenience on the public because it essentially require[d] that interested individuals travel to the

68. *Id.* at para. 34.

69. *Id.*

70. *Id.* at para. 36.

71. *Id.* at para. 39.

72. *Id.* at para. 45.

73. *Id.*

station during business hours to review the material.”⁷⁴ However, the FCC clarified that “[a]lthough such inconvenience was unavoidable generations ago . . . it is not so today, given the development of the Internet over the past decade.”⁷⁵ This serves as another example of how recent technological changes in the broadcast world are redefining the way we evaluate burdens and benefits of regulation.

The FCC also clarified that the Report and Order did not reimpose the detailed ascertainment requirements that were eliminated in the 1980s because the form did “not mandate the nature, frequency, or methodology to be used by licensees” in their ascertainment, but rather was “only asking the licensee whether and how it assessed and addressed the community’s programming needs.”⁷⁶ Although the Report and Order did not impose any new substantive requirements on licensees, the emphasis on the importance of ascertainment is significant, and it paved the way for another 2008 report that would address the issue more thoroughly, which will be discussed next.

C. Report on Broadcast Localism and NPRM: Solving the Communication Breakdown with Ascertainment

The Report on Broadcast Localism and Notice of Proposed Rulemaking (“NPRM”) elaborated on the FCC’s concerns, which were also highlighted in the Report and Order, over ineffective communication between broadcasters and the communities they serve. The FCC explains that “many stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired.”⁷⁷ To begin to remedy this deficiency, the Report and NPRM looks at “ways to encourage broadcasters to improve programming targeted to local needs and interests, and to provide more accessible information about those on-air efforts to the people in their communities.”⁷⁸

The primary concept stressed in both the problems and possible solutions is communication. The FCC explains that “the centerpiece of localism is the communication between broadcasters and the members of the public that they are licensed to serve”⁷⁹ In light of this importance,

74. *Id.* at para. 39.

75. *Id.*

76. *Id.* at para. 45.

77. Broadcast Localism, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324, para. 1 (2008) [hereinafter *Report and NPRM*].

78. *Id.*

79. *Id.* at para. 2.

it is unsettling that “many listeners and viewers know little about Commission processes, such as the agency’s review of license renewal applications and its complaint procedures, which allow the public to effectively raise concerns about broadcasters’ performance.”⁸⁰ To the extent that some stations do maintain effective communication with the public, “the Report also addresses current efforts undertaken by both broadcasters and the Commission itself to make relevant information concerning broadcasters’ efforts to serve their communities readily available to the public.”⁸¹

One obvious solution to the failure of many stations to effectively communicate with their audience, which has been called for by some in the industry, is the reinstatement of formal ascertainment requirements.⁸² Without any new justification in the Report and NPRM, the FCC has rejected this option.⁸³ However, it does look to several possible solutions, in addition to the previously mentioned Enhanced Disclosure requirements, that it believes may begin to rectify current communication problems. In examining these possible solutions, it should be considered to what extent these methods should be recommended or required by the FCC.

One possible solution the FCC stresses is the creation of community advisory boards. In this recommendation, the FCC notes that it is:

[N]ot persuaded that the appropriate measure should be reinstatement of the former ascertainment mandates . . . [but] that the same fundamental objectives can be achieved through other means, including regular, quarterly licensee meetings with a board of community advisors and improved access by the public to station decision makers.⁸⁴

In addition to the question of whether such boards should be required, many aspects of the boards will need to be clarified, such as their makeup, whom should be represented, and how often they should meet.

In addition to formal community advisory boards, the FCC recognizes several informal efforts currently being undertaken by some stations to gather information from their communities. These methods include ad hoc telephone or Internet surveys, “town hall” meetings, having station managers sit on community boards and councils, and fostering community dialogue through publicized telephone numbers, email

80. *Id.*

81. *Id.*

82. *Id.* at para. 14.

83. *See id.* at para. 16 (“[W]e do not agree that all . . . suggestions are feasible or necessary, such as reinstating formal ascertainment process . . .”).

84. *Id.* at para. 25.

addresses, and websites.⁸⁵ Surveys have the potential to gather valuable information from the public with minimal time commitment. “Town hall” meetings are a convenient way for the stations to simply allow citizens to come to them; all the stations have to do is advertise a time and place. Many station managers probably already serve on community boards and councils; keeping in mind their duty to ascertain the needs of their community would require minimal additional effort with large informational reward. These ascertainment methods all serve as examples of what a station would have been able to list in order to satisfy the standardized disclosure form required in the Report and Order. In considering the possible requirements of the more recently proposed standardized form, we should not lose sight of the benefits of providing a format through which stations can conveniently share their efforts with their communities. A separate consideration, which this Note will examine later, is whether any of these outreach efforts should actually be required of all licensees.

Two additional proposals addressed in the Report and NPRM involved possible renewal application changes. First, as another way to increase community awareness and participation regarding the renewal process, the FCC believes it “should change the existing rules governing the so-called ‘pre-filing and post-filing announcements’ that licensees must air in connection with their renewal applications”⁸⁶ Similar to the manner in which the Report and Order sought to utilize the accessibility of the Internet with its standardized disclosure form, the Report and NPRM considers the possibility of requiring that pre-filing and post-filing announcements be posted on the Internet, as opposed to the current requirement that they merely be announced on-air.⁸⁷ This would expand the possible audience of the announcement from whomever happened to be tuned in when it was made on television to anyone with Internet access.

Currently, announcements are required to provide the mailing address of the FCC from which information regarding the broadcast license renewal process can be accessed.⁸⁸ The Report and NPRM considers whether to “broaden the required language for these announcements . . . to include the agency’s website address.”⁸⁹ Similarly, “a licensee’s on-line provision of the Commission’s web address could be linked directly to

85. *Id.* at para. 27.

86. *Id.* at para. 24.

87. *Id.*

88. FCC Radio Broadcast Services Rule, 47 C.F.R. § 73.3580(d)(4)(i) (2011).

89. *Report and NPRM*, *supra* note 77, at para. 24.

these places on the agency's website."⁹⁰ The FCC believes that "such online posting is likely to be more accessible and understandable to the public than are the relatively few on-air announcements currently required" ⁹¹ The benefits of these user-friendly solutions should be considered in a broader context than that in which they are presented. Making it more convenient for a member of the public to become involved in one aspect of checking a station's performance, may make it more likely that they will become involved in other areas.

The Report and NPRM also more specifically addresses another deregulated aspect of the renewal application process that was re-raised in the Report and Order. While the Report and Order required the tracking of certain types of local programming and public service announcements, the Report and NPRM considers whether the FCC should require "public interest minimums" for public affairs and political programming, as well as locally produced public service announcements" ⁹² The FCC tentatively concluded that it "should reintroduce renewal application processing guidelines that will ensure that all broadcasters . . . provide some locally-oriented programming."⁹³

The notion of imposing new minimum local programming requirements may appear to be a heavy burden on local broadcasters, especially if some of the other communication breakdown solutions are implemented simultaneously. However, such programming may yield benefits not only to the public but also to the stations themselves by creating a better informed audience. A better informed audience would be more likely to participate in a station's community advisory board, which would increase the ease with which a station could fulfill any reporting requirements that the FCC may implement. An uninformed audience that is unwilling to provide input on community issues would make reporting a station's efforts on ascertainment much more difficult. In this light, and in order for the public interest to remain intact, possible solutions should not be viewed in isolation of each other and should not be viewed as pitting the licensee against the public. The public interest requirement's survival depends on both the compounding benefits of programming and ascertainment requirements, and the cooperative collaboration of stations and the audience they serve.

90. *Id.*

91. *Id.*

92. *Id.* at para. 39.

93. *Id.* at para. 40.

D. *The 2011 Order on Reconsideration and FNPRM and Notice of Inquiry*

Following its release, the Report and Order was challenged on three fronts. First, the FCC received petitions for reconsideration from not only the broadcasting industry, who believed that the standardized form and online posting requirements were “overly complex and burdensome” but also from public interest advocates, who argued that the online public file was underinclusive and not research-friendly.⁹⁴ Second, several parties appealed the Report and Order to the D.C. Circuit, which agreed to hold the proceeding in abeyance while the FCC reviewed the petitions for reconsideration.⁹⁵ Finally, the Report and Order’s information collection was opposed under the Paperwork Reduction Act at the Office of Management and Budget (“OMB”).⁹⁶

The FCC explains that, “[b]ecause of the multiple petitions for reconsideration,” it “has not transmitted the information collection to OMB for its approval, and therefore the rules adopted in the *Report and Order* have never gone into effect.”⁹⁷ In light of these circumstances, the FCC concluded that “the best course of action is to vacate the rules adopted in the *Report and Order* and develop a new record upon which we can evaluate our public file and standardized form requirements.”⁹⁸ Because it was never approved of by OMB, “vacating the *Report and Order* will have no practical effect on any party.”⁹⁹ To adequately address each issue, the FCC would discuss the public file requirements and the standardized form in separate proceedings.

First, the FCC addressed requiring stations’ public files to be placed online in its Order on Reconsideration and Further Notice of Proposed Rulemaking. Whereas the requirement set forth in the Report and Order would have required a station to place their public file on the station’s own website, this new proposal would establish “a requirement to submit documents for inclusion in an online public file to be hosted by the Commission.”¹⁰⁰ The FCC explains that largely replacing the in-studio paper file with an FCC-hosted online public file “will meet the longstanding goals of this proceeding, to improve public access to

94. Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 26 F.C.C.R. 15788, para. 4 (2011).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at para. 6.

99. *Id.* at para. 8.

100. *Id.* at para. 2.

information about how broadcasters are serving their communities, while at the same time significantly reducing compliance burdens on the stations.”¹⁰¹ As the FCC further explains, hosting the online public file on the FCC’s website “will be more efficient for the public and less burdensome for broadcasters to have all or most of their public files available in a centralized location.”¹⁰² In applying the proposed online posting rule to specific public file components, the FCC notably proposed that a station’s political file should be included in the online public file requirement,¹⁰³ while letters and e-mails from the public should not.¹⁰⁴ Because it vacated the standardized form set forth in the Report and Order, the FCC resumed the discussion of including a new standardized form as part of the online requirement in a separate proceeding.

In its 2011 Notice of Inquiry, the FCC released “a proposal to replace the issue/program list that television stations have been required to place in their public files for decades with a streamlined, standardized disclosure form that will be available to the public online.”¹⁰⁵ Despite vacating the prior Report and Order, the FCC “continue[s] to believe that the creation and implementation of a standardized form is beneficial and worthy of pursuing” and proposed “to require broadcasters to report on their programming using a sample-based methodology.”¹⁰⁶ The FCC believes that a sample approach to reporting information that must be included on the form would “substantially reduce the burden it imposes on broadcasters,”¹⁰⁷ agreeing with those “who argue that requiring reporting on all programming in those categories [listed in the form] would be unduly burdensome.”¹⁰⁸ This new proposal would require that stations draw information “from only a sample or composite week of programming on a quarterly basis, rather than requiring a comprehensive listing of all relevant programs throughout the year.”¹⁰⁹ This proposed “constructed or composite week” would be “a sampling method in which individual days are selected at random by the FCC to construct a week that contains different days of the week from different weeks of the quarter.”¹¹⁰

101. *Id.*

102. *Id.* at para. 16.

103. *Id.* at para. 23.

104. *Id.* at para. 26.

105. Standardizing Program Reporting Requirements for Broadcast Licensees, *Notice of Inquiry*, 26 F.C.C.R. 16525, para. 1 (2011) [hereinafter *Notice of Inquiry*].

106. *Id.*

107. *Id.* at para. 13.

108. *Id.* at para. 14.

109. *Id.* at para. 15.

110. *Id.*

Although the FCC believes that “a sample approach to reporting would provide sufficient information to the public, without unduly burdening broadcasters,”¹¹¹ the FCC must be very careful if it ultimately decides to implement this system. If the FCC decides to notify stations of which days’ programming will be required to be reported ahead of time, broadcasters could alter their programming lineups for those days in order to distort the amount of public interest programming they air.¹¹²

Out of all the features of the form previously set forth in the now vacated Report and Order, perhaps the most significant was its required tracking of local civic affairs programming, local electoral affairs programming, public service announcements, paid public service announcements, and independently produced programming. However, the FCC is sympathetic to those who argued that these reporting categories were “confusing, burdensome, and unworkable,” and “agree[s] that it would be useful to take a fresh look at the categories and definitions that should be included on the form.”¹¹³ Although the FCC addresses local news, local civic and governmental affairs, and local electoral affairs in its current Notice of Inquiry, it is important that we not lose sight of the other possible categories that have been mentioned along the way.

Perhaps the best ideas mentioned in the Notice of Inquiry are “an optional reporting opportunity that would allow broadcasters to showcase community reporting that does not fall into the specified categories,”¹¹⁴ and the possible inclusion of a “comments” category, “which would allow a licensee to highlight information that it believes is important but is not included in the reporting categories” and “could also provide licensees with space to discuss any additional efforts they have made to serve their communities.”¹¹⁵ Inclusion of these ideas on the standardized form would allow licensees to be creative with their programming and innovate ways to serve their communities. Allowing them to display their efforts would not only keep the public better informed but could also inspire other stations to employ similar methods. If certain programming or methods prove to be especially beneficial, the FCC could consider making either mandatory on a revised form in the future.

111. *Id.* at para. 16.

112. *Id.* at para. 19 (citing Letter from Angela Campbell and Andrew Schwartzman, counsel for the Public Interest, Public Airwaves Coalition, to Julius Genachowski, Chairman of the FCC at 3 (Aug. 4, 2011) [hereinafter PIPAC *ex parte*]).

113. *Notice of Inquiry*, *supra* note 105, at para. 24.

114. *Id.* at para. 39 (citing PIPAC *ex parte*, *supra* note 112, at 4).

115. *Notice of Inquiry*, *supra* note 105, at para. 40.

V. INDUSTRIALIZING BENEFICIAL INNOVATIONS

While it can be debated whether more or less broadcast regulation is appropriate at any given point in history, it would be a mistake in moving forward to assume that the only two options are “trust the market” and “return to prior forms of regulation.” To put it simply, too much has changed. As clichéd as it sounds at times, the Internet has changed everything. What once was inconvenient is now easy. What once was difficult to access is now effortless. And, to think in terms used by the FCC, what once represented overwhelming burdens, now simply does not.

Whether or not the deregulation of the 1980s has been beneficial for the industry and public overall, the era has undeniably sparked innovation that could prove quite valuable as the industry moves forward. The unrestrained broadcast market allowed stations to experiment with different ways of ascertaining the needs of their community without needing to follow any strict reporting requirements. Now that it is known that these certain methods exist, decision makers and the public need to examine their success and value in order to determine whether any of these methods are so beneficial that they should be mandated for all stations.

Deregulation also allowed stations the freedom to examine new types of programming without the obligation to provide minimum amounts of various programming categories. In moving forward, it needs to be decided whether such freedom has occurred at the expense of valuable programming categories. However, it is critical to realize that if new requirements are imposed, we must use the past as an example of how to regulate, not as a strict guide. Too much has changed. The FCC’s recommendations, as well as certain methods currently being voluntarily implemented by some stations, have provided many possible solutions to the communication breakdown between licensees and their audience which are worthy of consideration.

Further, it is essential that the compounding benefits of certain combinations of methods be considered. Increasing the amount and accessibility of information about a station’s programming will lead to a more informed community. A community that is better informed will be more likely to participate in whatever ascertainment methods are undertaken. Successful ascertainment will lead to more effective programming, which will continue to educate the public, keeping them informed and engaged in the process. The more engaged a community is during a licensed period, the less likely it is that they will need to challenge a renewal, benefiting the licensee and lessening the administrative burden of contested licensing proceedings on licensees and the FCC. Not only will all parties benefit, but the public interest standard will be strengthened now and into the future.

If there is one thing that broadcast regulation of the public interest has revealed, it should be that regulation has occurred in waves and for good reason. When dealing with a term as amorphous as “the public interest,” it is only prudent to push for its initial recognition, then back off to allow for individual station innovation, before reexamining and redefining the standard in light of what has occurred and been learned. The industry finds itself at such a point in history now and must recognize so by moving back to some regulation sooner rather than later, so as not to lose sight of the fundamental goals of the public interest requirement. It would also be a mistake, however, to assume that the change must be drastic. As the potential compounding benefits from combinations of methods has become apparent, what is important is increasing information accessibility and encouraging public involvement.

The Enhanced Disclosure Order represented a positive step in the right direction, and the new FCC action taken in its place can keep us on the right track, as long as we do not lose sight of the valuable ideas that have been expressed along the way. The required reporting of programming in a form on the Internet would not only increase broadcast stations’ accountability to the public but would also encourage public involvement in the entire licensing process. However, increased licensee accountability to the FCC may be needed. Simply requiring that stations report what they air, without requiring minimum amounts of certain categories, does not necessarily ensure programming of the type that is desired. Currently, if stations are not providing certain categories of programming, they may point to other stations’ programming to prove that the public interest is being met. This system does not tell us who is to be held accountable if no stations in a market air a certain category. The FCC should take a more active approach in ensuring that all critical areas are covered. Further, allowing some stations to rely on the performance of others discourages communication with the community in a station’s service area. Just as benefits can compound from increased communication, the current breakdown can be proliferated by lack of interaction.

The Report and NPRM provides excellent examples of how increased ascertainment requirements could be beneficial to ensure that stations are more aware of the needs of their community. Community advisory boards, town halls, and other forms of communication with the public should be made mandatory to some extent. One way to hold stations more accountable without reemploying the restrictiveness of prior ascertainment requirements could be to list a number of possible ascertainment methods and require that stations perform a minimum number of those options. This approach would ensure that stations are making a greater effort to communicate with the public, while still recognizing that some methods

may make more sense for some stations than others. It is also important to bear in mind that, as history has shown, any requirements would not need to be thought of as permanent. Once they have served their purpose of mending the current communication breakdown, the FCC could consider once again moving into a deregulatory phase to allow for further industry innovation.

The FCC has made it clear that it must incorporate the Internet into current, as well as any new, requirements. Increased accessibility to information for the public is possibly the greatest tool in combating the communication breakdown that currently exists. If the FCC continues to “trust the market,” it is essential that the public have access to necessary information so that it may be an effective check on the actions of stations. The public interest standard, as a theory, seems to have survived the latest wave of deregulation, but there is no guarantee that it will continue to survive. The more theorized the standard becomes—and the more it is viewed as a concept rather than a requirement—the greater the possibility of its extinction.

V. CONCLUSION

Deregulation has served its purpose this time around. Burdens were lifted. Innovation was sparked. It is time to examine those innovative methods and increase the accountability of individual stations. It is currently too easy for stations to underperform on their obligations. It is time to reengage the public, not in opposition to broadcast licensees, but in cooperation with stations. It is time to stop relying on decades-old analysis and out-of-date burden and benefit weighing. It is once again time for the public and the FCC to work with licensees so that they may manage stations “in our interest.”

