

1976

## FCC Broadcast Standards for Ascertaining Community Needs

Arthur P. DeLuca

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Communications Law Commons](#)

---

### Recommended Citation

Arthur P. DeLuca, *FCC Broadcast Standards for Ascertaining Community Needs*, 5 Fordham Urb. L.J. 55 (1976).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol5/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# COMMENT

## FCC BROADCAST STANDARDS FOR ASCERTAINING COMMUNITY NEEDS

### I. Introduction: The Ascertainment Issue

In March 1971 the Federal Communications Commission (FCC) issued a Primer on Ascertainment of Community Problems by Broadcast Applicants (*Primer*),<sup>1</sup> a set of regulatory guidelines in question and answer form, requiring both prospective and current broadcast licensees to determine the "problems, needs and interests" of the area they propose to serve.<sup>2</sup>

The *Primer's* purpose was to increase the responsiveness of a broadcast applicant to the needs of its proposed service area.<sup>3</sup> Recent changes in FCC policy indicate that current broadcast licensing standards may decrease this responsiveness by ignoring needs of "significant groups"<sup>4</sup> within the community.

In an effort to enlarge the role of community input in programming decisions, the *Primer* requires the license applicant to: (1) draw up a detailed demographic outline of the community;<sup>5</sup> (2) determine significant community groups from the outline;<sup>6</sup> (3) conduct interviews with leaders of each "significant group" to discuss community needs;<sup>7</sup> (4) undertake a survey of the general public to discuss community needs;<sup>8</sup> and (5) propose programming to meet the needs and problems of the community as ascertained from the

---

1. 27 F.C.C.2d 650 (1971) (hereinafter cited as *Primer*). The *Primer* was adopted in response to feedback received by the FCC to a Notice of Inquiry, 22 F.C.C.2d 880 (1969), whose purpose was to clarify "commonly raised questions" about the Commission's policies on the ascertainment of community problems and the broadcaster's response to those problems. 27 F.C.C.2d at 650-51.

2. *Id.* at 682-83.

3. *Id.* Question and Answer 3 of the *Primer* defined this purpose: "To show what the applicant has done to ascertain the problems, needs and interests . . . of his community of license." *Id.*

4. See notes 60-66 *infra*.

5. *Primer* at 660-62.

6. *Id.* at 663.

7. *Id.* at 661.

8. *Id.* at 664-65.

prescribed studies<sup>9</sup> (hereinafter collectively referred to as "ascertainment procedures").<sup>10</sup>

The FCC issued the *Primer* as part of its continuing attempts to bring order to the bitter controversy over broadcast license renewal. During the five years following its issuance, citizens' groups have become increasingly critical of the broadcast media and increasingly active in their efforts to make the media more responsive to its basic commitment to function "in the public interest, convenience and necessity."<sup>11</sup> By use of petitions to deny licenses and by challenges to incumbent licensees, citizens' groups have attempted to combat the media's seeming insensitivity to community needs.<sup>12</sup>

Before the issuance of the *Primer*, the broadcast media<sup>13</sup> appeared to have slighted minorities and other "significant groups" by failing to provide programming designed to meet their interests.<sup>14</sup> The

9. *Id.* at 672.

10. The term "ascertainment" as used here and elsewhere in this Comment refers to the determination of community needs through a set of special procedures. See notes 6-10 *infra*.

11. 47 U.S.C. § 309(a) (1970); *id.* § 310(d) (Supp. IV, 1974).

12. The use of the petitions to deny and formation of competing groups to challenge the incumbent licensee resulted in many pieces of proposed legislation to clarify the burdens of license renewal for the licensee and to give the licensee security it allegedly does not possess. See generally, *Hearings on S. 16, S. 247, S. 272, S. 613, S. 646, S. 822, S. 844, S. 849, S. 851, S. 1311, S. 1589, S. 1870, S. 3637, and H.R. 12993 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 2d Sess., ser. 93 (1974); and Hearings on H.R. 5546, H.R. 3854, H.R. 370, H.R. 565, H.R. 1066, H.R. 1864, H.R. 2001, H.R. 2349, H.R. 2355, H.R. 3551, H.R. 6319, H.R. 6320 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., ser. 35-36 (1973) [hereinafter collectively cited as *Hearings on H.R. 5546*]. These hearings were noteworthy not only for the many pieces of proposed legislation being considered, but also for the large range of opinions on license renewal which indicated the depth of the controversy.*

13. See D. McQUAIL, *TOWARDS A SOCIOLOGY OF MASS COMMUNICATIONS* 9 (1969). McQuail's opinion stemmed from the lack of immediate feedback from the broadcaster's audience concerning the message it received from the media. *Id.*

This lack of interconnection between the broadcaster and its audience has consequences for communication in an urban culture. Since contacts are often made by representation rather than person-to-person confrontation, "the voice of the representative" is sought as an indicator of group thought. See L. WIRTH, *Urbanism as a way of life*, in *CLASSIC ESSAYS ON THE CULTURE OF CITIES* 143, 154 (1969). Wirth expressed this method of representation in a concept strikingly similar to the *Primer's* community leader consultations:

In a community composed of a larger number of individuals than can know one another intimately . . . it becomes necessary to communicate through indirect media and to articulate individual interests by a process of delegation . . . The individual counts for little, but the voice of the representative is heard with a deference roughly proportional to the numbers for whom he speaks.

*Id.*

14. The leading evidence for this argument appeared in the REPORT OF THE NATIONAL

*Report of the National Advisory Commission on Civil Disorders*,<sup>15</sup> echoing the claims of various minorities, stated that the media's insensitivity was not founded on racism as much as indifference and lack of intimate contact with minority groups.<sup>16</sup> To remedy the situation, the report called for continual news assignments among minority groups and continual dialogue through the ascertainment procedures between community residents and the media.<sup>17</sup>

The *Primer* has improved the situation for the more organized minorities by emphasizing the broadcaster's responsibility to initiate and facilitate a genuine exchange of ideas between leaders of significant community groups and broadcast management.<sup>18</sup>

While the *Primer* clearly specifies that leaders of badly-organized groups (*i.e.*, groups which are difficult to discern) should be consulted if any such group is significant,<sup>19</sup> the *Primer's* deliberate vagueness curtails the document's effectiveness with these groups.<sup>20</sup> Blacks, Mexican-Americans and other ethnic minorities are easily recognizable community elements, but the poor, a potentially "significant group" are not so easily identified. Less well-organized and

ADVISORY COMMISSION ON CIVIL DISORDERS 374 (Bantam ed. 1968) [hereinafter cited as *Report*]. The Commission devoted an entire chapter of its report to the problems disclosed by their study of the news media's coverage of racial violence.

15. See *Report* at 383. The Commission judged that news coverage of blacks was deficient in its failure to communicate several ideas: (1) a sense of what it means to be "living in the ghetto"; (2) a sense of the difficulties in being a Negro; and (3) a "sense of Negro culture." *Id.*

16. *Id.* at 384.

17. *Id.* See also *Primer* at 664. The *Primer* stressed that one of the main objectives in the response to community needs was the establishment and maintenance of a dialogue between representatives of significant elements within the community and broadcast personnel. *Id.*

18. *Primer* at 664.

19. *Id.* at 666. In the report accompanying the publication of the *Primer*, the Commission specified that "an applicant may not arbitrarily avoid personal consultations with significant groups because the group lacks a highly developed formal structure . . . . The Commission also indicated the possible need for "additional efforts . . . to identify leaders of less organized groups . . . ." *Id.*

20. This vagueness was part of a built-in flexibility of the *Primer* by which the Commission dealt with the problem of the *Primer's* application "to a group of operations that vary widely" in several respects. *Id.* at 651. The Commission stated this clearly in the introduction to the *Primer*:

[W]e recognize that there are several areas covered in the *Primer* where more specificity might be viewed by some as desirable. But the diversity is too great, and attempts to establish more precise criteria raise more questions than are answered . . . . [W]e believe we must retain a degree of flexibility.

*Id.*

less well-defined, they exist as a largely heterogeneous group with incomes below the poverty level.<sup>21</sup> They are scattered among many different ethnic groups and encompass all age levels. In short, the poor are often a fragmented group, prone to being unrecognized or ignored.<sup>22</sup>

Although the poor as a group are difficult to identify, their needs are often greater than those of other community groups. Mass media studies indicate that the poor rely more on the broadcast media than on print outlets.<sup>23</sup> While the general population is more inclined to read newspapers for world or local news, the poor, regardless of ethnic group, place a heavy emphasis on audio-visual news sources.<sup>24</sup> Thus, broadcasters may have a greater responsibility to the poor, while experiencing a greater degree of difficulty in carrying out that responsibility because of an inability to identify the poor as a group.

Two recent events concerning ascertainment procedures raise serious questions about the effectiveness of such procedures for badly-organized groups. In January 1976 the FCC issued its *Renewal Primer*,<sup>25</sup> which contained the ascertainment procedures for incumbent broadcast licensees. These regulations relaxed the ascertainment burden for the renewal licensee, relieving it of certain obligations required of new applicants.<sup>26</sup> Given the difficulties encountered with the ascertainment procedure under the original *Primer*, renewal applicants may become less responsive to groups such as the poor and may eliminate them from the ascertainment process.

In March 1976 the Court of Appeals for the District of Columbia in *Bamford v. FCC*<sup>27</sup> upheld the FCC's denial of a broadcast construction permit because the applicant (A.V. Bamford) had not consulted with leaders of the poor who comprised almost 20 percent

---

21. *Id.* at 661. The Census Bureau's COUNTY AND CITY DATA BOOK provides these figures for all communities. *Id.* at n.9.

22. See N. JOHNSON, TEST PATTERN FOR LIVING 45 (1972). Johnson represented the poor as being victimized by the "predatory habits" of the media. *Id.*

23. Greenberg & Dervin, *Mass Communication Among the Urban Poor*, 36 PUB. OPIN. Q. 224, 233 (1972).

24. *Id.* at 233.

25. See Ascertainment of Community Problems by Commercial Broadcast Applicants (*Renewal Primer*), 41 Fed. Reg. 1372 (1976).

26. *Id.*

27. 535 F.2d 78 (1976).

of the population of the proposed broadcast area.<sup>28</sup> The court held that the *Primer* and FCC precedent made the broadcaster responsible to the poor in the community if they should happen to constitute a "significant group."<sup>29</sup> This decision and issuance of the *Renewal Primer* appear to enlarge the differences in licensing standards between the current and prospective broadcast licensee.

This Comment will examine: (1) the history of the ascertainment procedures, including the function of the original *Primer*; (2) the effect of the *Renewal Primer* amendments on the ascertainment procedures; and (3) the significance of the *Bamford* cases in light of the treatment of badly-organized groups under prior ascertainment procedures, and in light of the issuance of the *Renewal Primer*.

## II. The Primer: Background and Policies

### A. Pre-Primer Policies

Even before the Supreme Court affirmed the FCC's power to determine the fitness of broadcast applicants,<sup>30</sup> broadcasters have protested the imposition of government controls over radio and television outlets.<sup>31</sup> From a constitutional viewpoint, some broadcasters regarded Commission regulations as infringements on the discretion granted by the first amendment to the press.<sup>32</sup> More practically, small private station owners view the FCC with a distaste based on economic pressure since Commission policies and licensing proce-

---

28. *Id.* at 85-86.

29. See text accompanying note 17 *supra*. Also, see generally Volner, *Broadcast Regulation: Is There Too Much 'Public' In the 'Public Interest'?*, 43 U. CINN. L. REV. 267, 272-77 (1974) for a review of case history prior to the issuance of the *Primer*.

30. *NBC v. United States*, 319 U.S. 190 (1943), gave the FCC the right to determine and apply fitness standards for broadcast licensees. Included in this generalized function of the FCC was the specific right to revoke licenses or deny applications of prospective licensees who failed to meet Commission standards. See also notes 37, 85 *infra*.

31. See BROADCASTING AND THE BILL OF RIGHTS (NAB, 1947), an early collection of statements by members of the broadcast industry opposing the exercise of government control over broadcasting.

32. See *Editorial: The unresolved battle*, COLUM. JOURNALISM REV. 2 (Sept.-Oct., 1971). Typical of this group is Frank Stanton who has stated that "broadcasting must be freed from government interference" before it can "serve its democratic function in our nation." See BROADCASTING AND THE BILL OF RIGHTS 150 (NAB, 1947). Stanton feared the continuous expansion of FCC power over the media, intimating that such expansion was contrary to the "free expression of ideas." *Id.* Also, Stanton believed the FCC's power should be limited to the granting and denial of broadcast licenses on a technical basis only, by judging engineering performance and allocating frequencies on this standard. *Id.* at 150-51.

dures required time and manpower beyond the reach of the smaller operator.<sup>33</sup> The broadcasters were opposed by media critics who argue that broadcasters have done little to serve their communities<sup>34</sup> and less to ensure that the community leaders they selected represented the interests of the broadcast area.<sup>35</sup>

Over the years the FCC has attempted to promote greater community interest in broadcasting by setting out rules for the media to determine these community needs. The FCC issued its first policies dealing with broadcast license renewal in 1946.<sup>36</sup> While the Commission listed the goals it considered essential to good program-

---

33. See Letter from Louis H. Pells, President, WEOK Broadcasting Corp., to Richard Wiley, Commissioner, F.C.C., Nov. 15, 1972 [hereinafter cited as *Pells Letter*]. Mr. Pells stated the following in his letter:

First, I agree entirely that licensees should act in the public interest, convenience and necessity. I only regret some of the means employed by the Commission to satisfy these goals are most oppressive, especially to the smaller station already committed to such service.

*Id.*

The need for profit in broadcasting should not be disparaged since the necessity for public service must be balanced by the necessity of competition between broadcasters. The fact that the airwaves are legally public property should not remove the business basis from privately owned broadcast facilities. See generally, N. JOHNSON, *HOW TO TALK BACK TO YOUR TELEVISION SET* (1969). However, in view of the rapid rise of broadcast media popularity in the last twenty years, it is logical to assume that media responsibility to the public should also rise. As of 1974, over 96 percent of American households had a television set while adults averaged over four hours of viewing time each day. This almost complete saturation of the public might indeed indicate the need for higher broadcast standards. See *America's News Industry: Responsible or Reckless?*, U.S. NEWS & WORLD REP., April 29, 1974, at 35.

34. The positions in this controversy are delineated by Volner, *supra* note 29, at 267-68, which advocated a middle approach, balancing the public interest with a substantial amount of discretion on the part of the licensee. *Id.* A similar call for a balancing of the interests of the public and of broadcasters was presented before a House subcommittee by Rev. H. Carl McCall, President of Inner City Broadcasting Corp., and Chairman of the Association of Minority Broadcasters. Rev. McCall stated that broadcasting must be an accommodation between two basic interests: (1) there should be "some protection for the broadcaster who has adequately fulfilled his public obligations"; and (2) there should be "some assurance to the public that its needs will remain the cornerstone of good broadcasting." See *Hearings on H.R. 5546*, at 722.

35. S. Surlin, L. Bradley, *Ascertainment Through Community Leaders*, 18 J. BROADCASTING 97, 107 (Winter 1973-74). A real difference was discovered in the needs of the community as perceived by broadcasters versus community leaders. Such a situation was described in the *Primer* where broadcast applicants continually interpreted the needs of the community in terms of needs for more entertainment programming rather than in terms of public affairs. See *Primer* at 656.

36. FCC, *PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES*, (1946) [hereinafter cited as *Blue Book*].

ming, primary responsibility for serving public interest needs lay squarely with the broadcaster. It alone determined program balance, presumably after some consideration of minority tastes, public issues, and the broad needs of the area served.<sup>37</sup>

Secondary responsibility was given to critics of the media. The public, which was to act through listener councils as advisor to, and critic of programming, had even less input.<sup>38</sup> In short, although public interest was to be served, the licensee decided how much public interest was enough, what members of the public were to be consulted, and how such contact would occur.

The Commission *en banc* Programming Inquiry in 1960 (1960 *Policy Statement*)<sup>39</sup> enlarged the public's advisory role. It required a license applicant to present "(1) the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires."<sup>40</sup> The broadcaster was to follow this policy for all substantial groups among listening groups.<sup>41</sup> In effect, the 1960 *Policy Statement* promoted the public from casual advisor to required consultant, a status it has not lost. This mandate exceeded the limits of prior policy.<sup>42</sup>

---

37. *Id.* at 59. This was consistent with the original premises under which the government first imposed control on broadcasting. The FCC and its predecessor, the Federal Radio Commission, were formed primarily as agencies to regulate the distribution of frequencies and maintain standards of technical performance. Decisions on programming policy were left entirely to the licensee. Broadcasters such as Frank Stanton believe the FCC should have remained primarily an engineering agency. See note 32 *supra*. However, it was clear from the early history of the FCC that so simple a regulatory base was not sufficient to cope with the problems of broadcast license allocation. The Communications Act of 1934, which chartered the FCC, was interpreted by the Supreme Court in *NBC v. United States*, 319 U.S. 190 (1950), to give the FCC the further function of determining who among many applicants was fit to broadcast. However, the origination and promulgation of applicant guidelines was left solely to the Commission. See E.J. EPSTEIN, *NEWS FROM NOWHERE* 47 (1973). With this judicial affirmance of the FCC's power, it became easy for the Commission to set community responsibility standards for broadcasters.

38. *Blue Book*, *supra* note 36, at 55.

39. Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303 (1960) [hereinafter cited as 1960 *Policy Statement*].

40. *Id.* at 2316.

41. *Id.* This development, which mandated the discovery of substantial groups in the community was a predecessor to the "significant groups" concept adopted by the FCC in the *Primer*. See *Primer* at 683.

42. One commentator defends the *Blue Book* concept saying that it "had the virtue of encouraging experimental, innovative and controversial programming because the role as-



Unfortunately for community groups, the *1960 Policy Statement* listed the major elements necessary to meet the "tastes, needs and desires of the community."<sup>43</sup> This checklist of "good programming" had two consequences: (1) it allowed the licensee to follow the letter of the regulations rather than their intent; and (2) it allowed the licensee to limit program alternatives.<sup>44</sup>

The *1960 Policy Statement* clearly required the broadcaster to consult the "substantial groups" within the community in order to determine their problems. In addition, the *1960 Policy Statement* obligated the broadcaster to meet those problems with programming but, it did not recommend specific procedures to effectively delineate community needs.

## B. Thrust of the Primer

For community groups, the *Primer* was the end result of a gradual change in status from a mere advisory role in broadcasting to one which allowed substantial input toward broadcast programming. This policy statement adopted certain proposals of broadcast organizations as well as theory of some FCC case precedent in setting out rules with respect to the community ascertainment procedure.

The *Primer* utilized the basic premises of the *1960 Policy Statement*. Under the *Primer*, the applicant for a construction permit (new facility) or license renewal must state what he "has done to ascertain the problems, needs and interests of the residents of his community of license . . . and what broadcast matter he proposes to meet . . . [them] as evaluated."<sup>45</sup> The *Primer* was a more care-

---

signed to the public and public opinion left the broadcaster relatively free of the fear of public reprisal." Volner, *supra* note 29, at 287. This fear of public reprisal, says Volner, has the capability of stifling experimentation by the licensee and deterring the exercise of licensee discretion. *Id.* at 286-87.

43. *1960 Policy Statement*, *supra* note 39, at 2314.

44. Further amendments to policy were made on a case by case basis. See *Sioux Empire Broadcasting Co.*, 16 F.C.C.2d 995 (1969); *Minshall Broadcasting Co.*, 11 F.C.C.2d 796 (1968). Pre-*Primer* Commission decisions show how the license applicant responsibilities expanded under the FCC policy of constantly refined standards. In *Sioux Empire Broadcasting Co.*, the licensee's ascertainment burden increased significantly. As part of its application, the potential licensee was to make a showing of three efforts to determine community needs: (1) a consultation "with community leaders to become informed of the real needs and interests of the area to be served"; (2) the suggestions "received in those consultations as to community needs"; and (3) programs "proposed to meet particular community needs" as evaluated. *Id.* at 998. It is clear from this format that the outlines of *Primer* regulations were beginning to emerge.

45. *Primer* at 682.

fully thought out document than the 1960 *Policy Statement* since it possesses a flexibility that permits some licensee discretion while aiming toward two very specific goals. First, the *Primer* attempts to counteract the unfortunate tendency of broadcasters to interpret the needs of the community in terms of entertainment broadcasting (e.g. need for more music) rather than "needs for improved schools, roads, or welfare programs."<sup>46</sup> Additionally, the *Primer* contemplates a continuing dialogue between management level employees of the local broadcaster and the leaders of significant community groups in order to prevent any slighting of the public's interest in broadcasting.<sup>47</sup> To implement this dialogue, the FCC wrote several ascertainment procedures into the *Primer* which have the capability of bringing the intended parties together to discuss community needs.

### C. Primer Procedures

The *Primer* holds the broadcast applicant responsible for conducting several community studies, the results of which are submitted with its license application.<sup>48</sup> Originally, the Commission required such studies during the six months prior to a license application.<sup>49</sup> Current licensees are now responsible for ascertaining community needs throughout the entire license period.<sup>50</sup>

#### 1. Demographic Breakdown

As a starting point, the applicant must determine the demographic composition of the proposed license area. Any method short of guesswork is acceptable in the compilation of these figures.<sup>51</sup> Applicants conventionally use statistics from reliable sources such as

---

46. *Id.* at 656.

47. *Id.* at 664.

48. The *Primer* applies to several types of commercial broadcast applications. These are listed in Question and Answer 1 of the *Primer* and include applications for (1) a construction permit for "new broadcast stations"; (2) a construction permit for "a change in authorized facilities"; (3) a construction permit or license modification to change station locations; (4) a construction permit for a "satellite television station"; and (5) an application for "assignment of a broadcast license." *Primer* at 682.

49. *Id.* at 684.

50. Ascertainment of Community Problems By Broadcast Applicants (*Further Notice of Inquiry*), 53 F.C.C.2d 3, 7 (1975).

51. See *Primer* at 660-62.

the United States Census Bureau and the local Chamber of Commerce.<sup>52</sup> The *Primer* requires that the demographic breakdown include information on the "minority, racial, or ethnic breakdown of the community, its economic activities, governmental activities, public service organizations, and any other factors which make the particular community distinctive with respect to its composition."<sup>53</sup>

The FCC does not demand the most detailed analysis possible, but only a delineation of the social factors which distinguish the proposed broadcast area from others.<sup>54</sup>

In *Rust Communications Group, Inc.*<sup>55</sup> a broadcast licensee presented a community description which included "the physical location of the city; a population breakdown of the city by age, race and sex; a list of five corporations as major industries; a list of five cultural facilities; and a list of five educational institutions."<sup>56</sup> The Commission labeled *Rust's* showing inadequate. It stated that such information did not indicate what made the community distinctive from other areas:<sup>57</sup>

[T]he licensee's initial compositional study included no information on minorities other than black, and it failed to discuss such matters as local government, religion, labor, agriculture, politics . . . professions, eleemosynary or ethnic elements of the community.

The Commission also required these demographic details so that an applicant would not rely on familiarity with the area to determine the "significant groups" present.<sup>58</sup> Long time residency in the community was not to be a substitute for the actual ascertainment procedures.<sup>59</sup>

---

52. *Id.* at 660. These statistics are not to be treated as exclusive sources. Rather, "other reliable reports or studies may also be used to assist in determining the composition of the community." *Id.*

53. *Id.* at 662.

54. *Id.* at 683. See also George E. Cameron Jr. Communications, 56 F.C.C.2d 752, 758 (1975); Maranatha, Inc., 56 F.C.C.2d 473, 474 (1975).

55. 53 F.C.C.2d 355 (1975).

56. *Id.* at 357.

57. *Id.* The Commission also stated that assuming *Rust Communications'* compositional outline reflected significant community elements, its community surveys showed virtually no contacts with these groups. *Id.* at 358.

58. The *Primer* made it clear that while area familiarity was a plus for the applicant, it was no substitute for familiarity with the entire range of problems facing a community. *Primer* at 682. See also *Folkways Broadcasting Co.*, 48 F.C.C.2d 723 (1974).

59. *Primer* at 682.

## 2. Significant Groups and Leader Consultations

Most *Primer* problems do not arise from the demographic figures but from their interpretation. The demographic breakdown of the area is used to determine the community's "significant groups."<sup>60</sup> The *Primer* requires the applicant to interview a representative cross-section of the leaders of these groups.<sup>61</sup>

The problems stem from the equivocal terms the *Primer* uses in discussing "significant groups" and "community leaders." A number of community elements are listed which might contain "significant groups," but these suggestions are not meant to be comprehensive.<sup>62</sup> Rather than using a rigid definition which might limit the number of groups consulted or favor only those indicated, the *Primer* indicates that any definition of a "significant group" is dependent upon particular community characteristics.<sup>63</sup>

Although the licensee is obligated to find "significant groups," the *Primer* does not define the term. It describes a "significant group" with such phrases as a group depends on "its size, influence or lack of influence"<sup>64</sup> or the least organized group may require additional efforts to determine leaders.<sup>65</sup> Yet, the failure to determine a "significant group" or to consult with its leaders is grounds to challenge an applicant's showing.<sup>66</sup>

60. *Id.* at 661. The FCC stated:

[t]he applicant is expected to choose members from each of those broad groups that reflect the composition of the city of license. Obviously, an applicant does not rely on a random sample to choose community leaders. Rather, he is expected to contact leaders of each significant group within the community.

*Id.*

61. *Id.* at 662-63.

62. *Id.* at 683. These elements are listed in Question and Answer 10 of the *Primer*. They include:

economic, social, political, cultural and other elements of the community, such as government, education, religion, agriculture, business, labor, the professions, racial and/or ethnic groups, and eleemosynary organizations . . . .

*Id.*

63. *Id.* at 663. The *Primer* also required that,

[l]eaders of the listed organizations should be consulted, if they represent a significant group within the particular community. Since all these groups or organizations listed . . . will not necessarily appear in all communities, it would be inappropriate to set them forth in a *Primer* that is generally applicable.

*Id.*

64. *Primer* at 663.

65. *Id.* at 666.

66. *Id.* at 663. See also 47 U.S.C. § 309(d) (1970). The *Primer's* Question and Answer 10

The *Primer* does not define "leader" at all. In *Bamford v. FCC* the court indicated that the term would include a person who leads or is active in a "significant group" rather than a member of that group with a responsible job.<sup>67</sup> Neither description, however, has received FCC approval.<sup>68</sup>

One result of this policy is that well-organized ethnic minorities or public interest groups garnered most of the broadcaster's attentions. The majority of cases decided by the Commission concern blacks,<sup>69</sup> Mexican-Americans,<sup>70</sup> Chinese,<sup>71</sup> American Indians,<sup>72</sup> labor leaders,<sup>73</sup> and public interest organizations.<sup>74</sup> Less distinct groups, such as the poor, rarely raise the question of omission from a broadcaster's ascertainment surveys.<sup>75</sup>

The FCC has refused to play what it terms a "numbers game" in determining the correct number of community leaders who must be interviewed from each group. The Commission stated that the test is one of representativeness, not numbers.<sup>76</sup> There is no requirement that the percentage of leader interviews taken from each group be

---

required the challenge include "supporting data that a significant group has been omitted" from the survey. *Id.* See, e.g., *Harvit Broadcasting Corp.*, 55 F.C.C.2d 298, 313 (1975); *Zia Tele-Communications, Inc.*, 50 F.C.C.2d 182, 185 (1974).

67. This position was taken by the *Bamford* majority. 535 F.2d 78, 82-83 (1976). *Bamford* himself argued for the second and broader definition to enhance the quality of his ascertainment showing. *Id.*

68. *Id.* The *Primer* made no judgment as to the preferable definition.

69. See *Independence Broadcasting Co.*, 53 F.C.C.2d 1161, 1162-63 (1975); *New South Radio, Inc.*, 54 F.C.C.2d 337, 340 (1975).

70. See *Mission Central Co.*, 54 F.C.C.2d 581, 588 (1975); *National Broadcasting Co.*, 56 F.C.C.2d 411, 411-13 (1975).

71. See *CBS, Inc.*, 56 F.C.C.2d 296, 296-98 (1975).

72. See *Dakota Broadcasting Co.*, 54 F.C.C.2d 65, 67 (1975).

73. *Id.*

74. *Columbia Broadcasting System, Inc.*, 53 F.C.C.2d 526, 526-27 (1975); *RKO General, Inc.*, 47 F.C.C.2d 824 (1974).

75. *City of Camden*, 18 F.C.C.2d 412 (1969) was one of few FCC cases prior to *Bamford* which dealt with lack of representation for the poor in a broadcaster's ascertainment surveys. There, the FCC refused assignment of a station due to a failure of the prospective owner to consult with leaders of Camden's poor. *Id.* at 422.

Few other cases even indicate that broadcast applicants interviewed the poor and none represent it as a major ascertainment issue. See, e.g., *H.S. Hagan, Jr.*, 56 F.C.C.2d 1026, 1028-29, 1031 (1975); *Post-Newsweek Stations*, 55 F.C.C.2d 172, 175 (1975); *Rust Craft Broadcasting, Inc.*, 54 F.C.C.2d 1222, 1223, 1225 (1975).

76. This concept has been reiterated many times by the Commission. See, e.g., *Mission Central Co.*, 54 F.C.C.2d 581, 589 (1975); *New South Radio, Inc.*, 54 F.C.C.2d 337, 340 (1975); *Independence Broadcasting Co.*, 53 F.C.C.2d 1161, 1163 (1975); *Newhouse Broadcasting Corp.*, 53 F.C.C.2d 966, 967-69 (1975); *WTWV, Inc.*, 51 F.C.C.2d 1247, 1260 (1975).

in "direct proportion to the presence of that group in the community."<sup>77</sup> Merely because a percentage of a community's population is black does not mean that the same percentage of leaders interviewed must also be black. For example, in *New South Radio, Inc.*, the Commission ruled that a black population of 26 percent was well represented although the applicant conducted only 11 percent of its interviews with black leaders.<sup>78</sup>

In *Newhouse Broadcasting Corp.*, the FCC approved an application where 17 percent of the community leaders interviewed were black.<sup>79</sup> The Commission concluded that the leaders represented a sufficiently wide segment of the black population (41 percent of the community) to meet the test of representation.<sup>80</sup>

### 3. General Public Survey and Program Proposals

The *Primer* also requires a survey of the general public by random sample to assist in determining the needs of the community.<sup>81</sup> The broadcaster may hire a professional survey organization or use lower-level employees under management supervision to conduct the study.<sup>82</sup>

---

77. *Columbia Broadcasting System, Inc.*, 53 F.C.C.2d 526, 527 (1975).

78. 54 F.C.C.2d 337, 340 (1975). The Court concluded that, "[m]erely pointing to the fact that the percentage of minority community leaders interviewed does not equal the minority population percentage fails . . . to raise a substantial . . . question of fact regarding the representativeness of a licensee's ascertainment survey." *Id.*

79. 53 F.C.C.2d 966, 967-69 (1975). The Commission stated that "[t]he important question is whether the survey represents a reasonable selection of community leaders from significant groups . . . and not whether a specific number of community leaders were interviewed." *Id.* at 969.

80. *Id.* at 968-69. The Commission pointed out that several of the black community leaders represented more than one local community organization and were thus qualified to represent the black population adequately. *Id.* at 969.

81. See *Primer* at 664-65. Community leader consultations and significant community groups are only slightly involved in the general public survey.

82. *Id.* at 665. With these procedures, the FCC departed from the more complex and stringent standards it imposed for the community leader consultations. The *Primer* seemed to indicate that this followed the relative ascertainment strengths assigned by the Commission to the leader consultations and the general public survey. The major burden of ascertainment as well as the crucial establishment of dialogue rested with the community leader consultations while the public survey seemed to be regarded as supplemental. Thus, the use of lower level employees and the professional research organization to conduct the general public survey was a practical move which reflected the lesser importance of that study.

Problems with this procedure as well as with proposals for relevant programming have not been litigated except in conjunction with community leader/"significant group" issues where the applicant's whole ascertainment showing (*i.e.*, the results from the applicant's ascertainment procedure) is thrown into question or disapproved.<sup>83</sup>

### III. The FCC and License Renewal

#### A. Is the FCC a "Rubber Stamp"?

One of the main criticisms of the FCC's actions on licensing standards is that the Commission is merely a "rubber stamp" for renewal applicants.<sup>84</sup> Its record on the ascertainment procedure issue, both in policy statements and in decisions, is supportive of this view. Without doubt, many cases point to the Commission's tendency to approve a renewal applicant's ascertainment showing despite certain flaws.<sup>85</sup> For example, the FCC has approved renewal showings where lower level employees conducted the community leader surveys;<sup>86</sup> where two "blacks" listed as community leaders were in fact white;<sup>87</sup> where small aspects of the survey were not

---

83. *See, e.g.*, *Centreville Broadcasting Co.*, 50 F.C.C.2d 261, 263-65 (1974). The Commission ruled in *Centreville* that the broadcaster had failed to make a "good faith effort to comply with even the minimum requirements of the Primer." *Id.* at 263. The FCC ruled the ascertainment showing deficient on all counts: (1) the demographic outline; (2) the selection of community leaders; and (3) the general public interviews. *Id.* at 263-67.

84. Former FCC Commissioner Nicholas Johnson criticized the Commission for exercising a "presumption in favor of the incumbent" in renewal proceedings and accused the Commission of "rubber stamping" license renewals. *See Hearings on H.R. 5546, supra* note 12, at 131.

85. At least one commentator noted the infrequent use of the FCC power of license revocation, stating that the Commission is more powerful by its threats than by any actual use of power. *See E.J. EPSTEIN, NEWS FROM NOWHERE* 49 (1973).

86. *WHEC, Inc.*, 52 F.C.C.2d 1079, 1081-83 (1975). The Commission ruled that *WHEC's* ascertainment efforts complied with the *Primer* despite use of non-management personnel to interview black community leaders. Apparently the *Primer's* guidelines may be stretched where, as here, interviews with thirteen other black community leaders conducted by management personnel was considered sufficiently representative of the community. The non-complying interviews were simply discarded.

87. *Newhouse Broadcasting Corp.*, 53 F.C.C.2d 966, 967-69 (1975). Several community groups as petitioners challenged *Newhouse's* ascertainment showing on various grounds and alleged, among these grounds, that two of seventeen community leaders listed as black were actually white. Licensee entered no rebuttal to the contention. The Commission dismissed the complaint by utilizing petitioner's concession that though the two leaders were white, they were nonetheless "unquestionably diligent in their efforts on behalf of Blacks." *Id.* at 969.

wholly approved but the conclusions were valid;<sup>88</sup> and where applicant had made an extended but unsuccessful effort to uncover community leaders.<sup>89</sup>

While it is difficult to show FCC prejudice in each of these cases, it seems the FCC will disregard what it considers unimportant deficiencies and approve an ascertainment showing where an applicant established a real dialogue with community leaders or where an extended effort resulted in at least a minimal performance.<sup>90</sup> This tendency, however, when added to *Primer* amendments during the past five years permitted a gradual erosion of some of the broadcaster's responsibilities to the public.<sup>91</sup>

Initially, the FCC approved a plan whereby an individual community leader would be interviewed by groups of community broadcasters to ease the strain and repetitiveness of the required interviews on both parties.<sup>92</sup> But every licensee, however, was individu-

---

88. *Capital Cities Broadcasting*, 55 F.C.C.2d 553, 553-55 (1975). The Commission focused here on the conclusions rather than the form of the ascertainment showing. Departure from form must apparently be substantial to disqualify an applicant's showing. For example, on *Capital Cities general public survey*, the Commission stated that ". . . petitioners' allegations centering on Black responses from the general public survey fail to focus on the purpose of the survey; their allegations attack one small aspect of that survey and disregard the main conclusions from the assembled responses." *Id.* at 555.

89. *Doubleday Broadcasting Co.*, 56 F.C.C.2d 333, 333-37 (1975). Licensee had committed itself to achieving "parity" in its community leader surveys; that is, Doubleday was to interview Mexican-American leaders in an equal proportion to that group's presence in the community. If 50 percent of the community were Mexican-American, then 50 percent of the community leaders must be from the same group. The Commission agreed that licensee had fallen short of parity since 36.3 percent of its community leaders were Mexican-American as opposed to 44 percent of the population. However, the *Primer* did not require parity and since the licensee had made extended efforts to achieve it, the FCC approved the showing and discarded the agreement in recognition of the efforts. *Id.* at 336-37.

90. See notes 82-85 *supra*.

91. For Commission rulings affecting ascertainment policy and the *Primer*, see, e.g., *Community Policy Guidelines*, 28 F.C.C.2d 265 (1971); *Fisher's Blend Station, Inc.*, 30 F.C.C.2d 37 (1971); *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 33 F.C.C.2d 394 (1972); *Ascertainment of Community Problems by Broadcast Applicants*, (*Notice of Inquiry*), 40 F.C.C.2d 379 (1973); *Southern California Broadcasters Ass'n*, 47 F.C.C.2d 519 (1974); *Ascertainment of Community Problems by Broadcast Applicants* (*Further Notice of Inquiry*), 53 F.C.C.2d 3 (1975); *Ascertainment of Community Problems by Broadcast Applicants* (*Renewal Primer*), 41 Fed. Reg. 1372 (1976).

92. *Community Policy Guidelines*, 28 F.C.C.2d 265 (1971). *Ves Box of Station KDFW-TV* requested a declaratory ruling from the FCC on joint consultations with community leaders. Box noted that almost all the stations in his community of license, the Dallas-Ft. Worth, Texas area, had essentially the same list of leaders to consult, making the task repetitive and tiring to both leaders and broadcast management. Box proposed a plan similar



ally responsible for its use of the information gathered at the joint consultations.<sup>93</sup> In *Fisher's Blend Station* the FCC refused to extend this approval to groups of leaders being interviewed by groups of broadcasters, stating that the "free flow of communication" between the parties might be inhibited by the presence of other leaders.<sup>94</sup> The Commission felt this would be inconsistent with the *Primer's* intent of fostering a "person-to-person" dialogue between the licensee and the community leader.<sup>95</sup>

The Commission departed from the intent of the *Primer* in 1972 when it approved the use of mail questionnaires for general public surveys.<sup>96</sup> Although the FCC conditioned its approval on whether the applicant could demonstrate a "general distribution" of the questionnaire among the "general public,"<sup>97</sup> Commissioner Johnson dissented from the ruling, anticipating a threatened close to the *Primer's* "open channel for dialogue."<sup>98</sup> Johnson implied that broadcasters would be able to spend less time and money on their community surveys by largely eliminating the face to face contact with

---

to a press conference wherein the community leader would make a statement on his views of community needs and then answer questions. See BROADCASTING, Feb. 15, 1971, at 50. The Commission commented in its approval of Box's plan that the suggestion had been dealt with in the original FCC notice of inquiry on the *Primer*, 20 F.C.C.2d 880 (1969). The FCC there endorsed any ascertainment method which provided for the expression of individual views of community leaders. 28 F.C.C.2d at 265.

93. Community Policy Guidelines, 28 F.C.C.2d 265 (1971).

94. 30 F.C.C.2d 37 (1971). The Commission feared that the presence of community leaders together might prevent a frank presentation of views. The FCC stated that "[t]here may be a tendency on the part of those leaders interviewed to be more influenced in the presentation of their ideas by the presence of other leaders than might be the case in person-to-person contacts." *Id.* at 37-38.

95. *Id.* at 37.

96. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 33 F.C.C.2d 394 (1972). Question and Answer 17 of the *Primer* allowed the use of questionnaires in the general public survey if they were collected by the license applicant. The Commission believed the use of questionnaires requiring voluntary return by the public would "result in an inappropriate distribution" among the general public which would not be considered a random sample. *Id.* at 394.

The Commission modified its position in the declaratory ruling. The use of mail questionnaires was approved if "follow up procedures for improving response rates" brought about a showing that "those members of the general public who are consulted are generally distributed throughout the city of license." *Id.* at 395.

97. *Id.* at 395.

98. *Id.* (Johnson, Comm'r, dissenting). Johnson stated that "[i]n an age of impersonality, we are adding yet another barrage of computerized mailings, primarily designed to eliminate the very personal contact that is so vital to opening channels of dialogue." *Id.*

community leaders required by the *Primer*.<sup>99</sup>

Following these decisions, the FCC issued a notice of inquiry on Ascertainment of Community Problems By Broadcast Applicants (*Notice of Inquiry*)<sup>100</sup> which invited comments from the broadcast industry both as to the current effectiveness of the *Primer's* operation, and possible modifications in its handling of license renewal applications.<sup>101</sup> Commissioner Johnson filed a dissent, stating that

99. On another issue involving this concern with face-to-face contact, the use of telephone interviews in the ascertainment process, the FCC has shown vacillation.

While the *Primer* is silent on the use of telephone interviews for the community leader and general public surveys, in *Lexington County Broadcasters, Inc.*, 40 F.C.C.2d 694 (1973), the Commission ruled in favor of the method. The Commission defended the applicant's use in *Lexington* of the telephone for a large number of its community interviews saying

[a] dialogue with community leaders and with members of the general public has been established, and the mere fact that some, or indeed, that most of the contacts with the community leaders may have been by telephone rather than in face-to-face conversation does not make the showing unacceptable.

*Id.* at 698. In *Southern California Broadcaster's Ass'n*, 47 F.C.C. 2d 519 (1974), the Commission interpreted *Lexington County* to mean that "telephone interviews are not *per se* unacceptable if the applicant makes a *prima facie* showing that it has consulted with a representative cross-section of community leaders." *Id.* The FCC here refused to establish a "rule of thumb" as to the allowable number of telephone interviews since the subject was being considered in a pending notice of inquiry. See 40 F.C.C.2d 379 (1973). It did emphasize here the importance of notes "in formalizing" such interviews, and the importance of showing that the interview had resulted "in a meaningful dialogue." *Id.*

The Commission changed its viewpoint in *Julie P. Miner*, 52 F.C.C.2d 684 (1975), where it found a high percentage of telephone interviews questionable. The FCC stated:

[W]e believe that where . . . an extremely high percentage of the community leader contacts were via telephone, a question is raised as to the meaningfulness of the dialogue between the interviewees and the proposed station's decisionmaking personnel.

*Id.* at 687.

The *Further Notice of Inquiry*, which resulted in *Primer* amendments favorable to renewal applicants, found a majority of broadcasters in favor of continued use of telephone interviews. In view of this, the Commission not only endorsed the interviews but said it would consider "other rationales" for their use aside from those proposed up to that time "in the spirit of the new flexibility accorded the renewal applicant . . ." 53 F.C.C.2d 3, 20 (1975). In a single move, the FCC gave the renewal applicant more security by easing the ascertainment process and gave the public more cause for concern by moving it one further step away from close involvement with ascertainment.

100. 40 F.C.C.2d 379 (1973).

101. The initial notice of inquiry on the formation of the *Primer*, 20 F.C.C.2d 880 (1969), proposed specific ascertainment procedures for both renewal and prospective applicants. The *Primer*, 27 F.C.C.2d 650 (1971), deleted all references to renewal applicants pending action on other license notices issued by the FCC. Until renewal regulations were formulated from the notices, the *Primer* applied to all applicants.

The concurring statement to the instant *Notice of Inquiry* by Commissioner H. Rex Lee criticized the Commission for ignoring its former mandate to take action on pending license

the result of the inquiry might be "the erosion of such feeble efforts as still remain to provide some public interest criteria for broadcasting with nothing to substitute in its place."<sup>102</sup> Johnson complained that incumbent licensees' arguments that they be responsible "to neither the FCC nor their local communities," might end the ascertainment procedures, and that the *Notice of Inquiry* did not consider possible alternatives.<sup>103</sup>

## B. The Renewal Primer and Its Effects

Commissioner Johnson's fears about the regulatory intent of the Commission were well-founded. The FCC action on the *Notice of Inquiry* resulted in the easing of renewal applicants' responsibilities under the ascertainment procedures. In a *Further Notice of Inquiry*<sup>104</sup> and the *Renewal Primer*,<sup>105</sup> the Commission enacted *Primer* amendments which gave the renewal applicant several advantages over prospective applicants.

First, although renewal applicants are now responsible for maintaining the ascertainment procedures throughout the license period instead of only six months before license expiration, the Commission endorses a "multiplicity" of techniques to facilitate dialogue with community leaders. These range from the formalities of joint consultations to the informality of community leader luncheons, interviews during business meetings, and on-air discussions. The FCC also allows lower level employees to conduct some of the leader interviews.<sup>106</sup>

---

renewal notices before issuing such a broad inquiry into renewal ascertainment standards. 40 F.C.C.2d at 383.

102. 40 F.C.C.2d at 382-83. Johnson clearly viewed FCC talk of rule modification as a signal for the relaxation of ascertainment standards which would result in a "reducing" of the local ascertainment process. *Id.* at 382.

103. *Id.* at 382.

104. Ascertainment of Community Problems by Broadcast Applicants (*Further Notice of Inquiry*), 53 F.C.C.2d 3 (1975). The Commission presented the more significant responses to its *Notice of Inquiry*, *supra* note 91, which suggested modifications of the *Primer* for renewal applicants, and summarized proposed action to be taken in response to the comments. In turn, the Commission invited further comments on the proposed actions.

105. Ascertainment of Community Problems by Broadcast Applicants (*Renewal Primer*), 41 Fed. Reg. 1372 (1976). The *Renewal Primer* sets forth each proposed action of the *Further Notice*, *supra* note 99, analyzes comments received on them and summarizes final actions taken.

106. *Further Notice of Inquiry*, 53 F.C.C.2d 3, 7 (1975). The Commission allows the renewal applicant the right to have 50 percent of its community leader interviews conducted by lower level employees under the supervision of management. *Id.* at 7, 15-16.

Secondly, although renewal applicants must file a "relatively uncomplicated identification of typical community institutions and elements, including simple demographic characteristics," they need no longer submit the detailed demographic study of the community required of the new applicant.<sup>107</sup>

Thirdly, although the FCC held to the *Primer* rule requiring consultations with leaders of "significant groups," it has eliminated the problem of "significant group" determination by providing a list of nineteen typical community elements. Absent a showing to the contrary, interviews with leaders of each of these elements creates a presumption of the adequacy of the ascertainment procedure.<sup>108</sup>

Finally, although the FCC would not specify an adequate number of community leaders from each population element, it has presented guidelines for the number of total community leader interviews by prescribing a set number of consultations based on population size of the community.<sup>109</sup> A licensee who follows the table in Question and Answer 9 of the *Renewal Primer* and conducts the number of interviews required will be free of "any question as to the gross quantitative sufficiency of its community leader survey."<sup>110</sup>

These four changes in requirements for renewal applicants have two main effects: (1) By giving the current licensee an easier job of ascertainment than a prospective applicant, the Commission has

107. *Id.* at 12. The demographic characteristics include the "population of the community of license and station service area, broken down as to: male and female, youth . . . minorities and elderly . . ." *Id.*

108. *Id.* at 7. These institutions and elements are listed in Question and Answer 7 of the *Renewal Primer*, 41 Fed. Reg. 1372, 1381 (1976):

- 1) Agriculture; 2) Business; 3) Charities; 4) Civic, Neighborhood and Fraternal Organizations; 5) Consumer Services; 6) Culture; 7) Education; 8) Environment; 9) Government (local, county, state & federal); 10) Labor; 11) Military; 12) Minority and ethnic groups; 13) Organizations of and for the Elderly; 14) Organizations of and for Women; 15) Organizations of and for Youth (including children) and Students; 16) Professions; 17) Public Safety, Health and Welfare; 18) Recreation; 19) Religion.

*Id.* The list is not intended to be comprehensive and could be modified to reflect the particular community in which it is used. 53 F.C.C.2d at 12.

109. *Renewal Primer* at 1375. The Commission attempted to add "a modicum of certainty to community leader ascertainment . . . by stating explicitly what we consider to be reasonable numbers of consultations." *Id.* Briefly, the FCC guidelines call for a total of sixty consultations for a population of over 10,000; one hundred consultations for a population over 25,000; 140 consultations for a population over 50,000; 180 for a population over 200,000; and 220 consultations for a population over 500,000. *Id.* at 1375.

110. *Id.* at 1375, 1381.

given the incumbent a greater feeling of license security;<sup>111</sup> and (2) By increasing the difficulty in challenging a renewal applicant's ascertainment showing, the new requirements have the capability of limiting public input to the broadcaster over a long period of time.<sup>112</sup> Additionally, by introducing non-management level employees into the leader interviews, the Commission eased the neces-

---

111. The FCC policy in other areas of license renewal reflected this same emphasis on license security for the incumbent broadcaster. In recent years, broadcasters have complained of poor treatment by the FCC of the incumbent both in non-comparative and comparative renewal processes. Broadcasters claimed they need protection both against "blue sky" applicants, challenging parties who make extravagant promises to gain a license, and against unwarranted petitions to deny by public interest groups. See *Hearings on H.R. 5546*, at 725. Former FCC Chairman Dean Burch, speaking before a House hearing on broadcast legislation delineated Commission rationale in both renewal contexts.

Where a citizen's group has filed a petition with the FCC to deny a broadcaster's license, the licensee's burden of proof for renewal is minimal when measured against that of petitioner. The latter party must show "through specific allegations of fact supported by affidavit, that there exist substantial and material questions of fact raising the question that a grant of the renewal would be prima facie inconsistent with the public interest." See *Hearings on H.R. 5546*, at 59. The licensee, conversely, need not prove that its operational record is "praiseworthy"; instead, it must only show that it "has served the public in a manner that is sufficient—but no more—to get a renewal . . ." See *Hearings on H.R. 5546*, at 58. Burch believes the only problem with non-comparative license renewal is the tendency of petitioners to wait until just before license expiration to discuss the broadcaster's service to the community resulting in a "triennial explosion" of petitions. See *Hearings on H.R. 5546*, at 59.

The comparative process has been more controversial. While the Commission has a commitment to "an appropriate balance between maintaining the competitive spur and insuring stability in broadcast operations," the "competitive spur" which must be initiated by possible license removal in favor of a challenger, may be lost under the heavy emphasis on broadcaster stability. Burch stressed the "substantial financial investment" in broadcasting and the need for its protection. See *Hearings on H.R. 5546*, at 61. Burch pointed out four principles which govern comparative proceedings: (1) the applicant "should be judged on his record"; (2) the applicant's record "should not have to be outstanding"; (3) the applicant's record should "not be judged against some industry average"; and (4) the applicant's "past record must be controlling." *Hearings on H.R. 5546*, at 61-62. Licensee security is the basis for each of these principles.

112. Some parties, such as former Commissioner Johnson, do not feel that public input should be sacrificed in the name of broadcaster security, and that, in fact, this security is overly protected by the FCC. Johnson depicted the citizens' group fighting vainly with the FCC over petitions to deny: "A detailed petition to deny must be filed with the FCC with the full knowledge that if a 't' is not crossed or an 'i' is left undotted, the community group will be thrown out by the Commission." See *Hearings on H.R. 5546*, at 132.

Johnson believed this Commission attitude also prevails with the comparative process. He accused the FCC of "rubber stamping" license renewals. Johnson presented figures to show that of the 12,000 license renewals handled by the FCC between 1968-73, there were only forty competing applications filed, or "one third of 1 percent." The clear implication was that the incumbent is so amply protected already that further lightening of renewal requirements would be superfluous. *Hearings on H.R. 5546*, at 131.

sity of station managers' close involvement with the ascertainment procedures, and moved the managers one more step away from the face to face dialogues contemplated by the *Primer*.<sup>113</sup>

#### IV. The *Primer* and the Poor

One major problem brought about by the FCC's easing of the *Primer's* requirements is that badly organized groups, such as the poor, might go unidentified as "significant groups." An extended effort is needed to reach the unorganized—an effort quite possibly beyond current renewal requirements.<sup>114</sup> The three *Bamford* cases highlight the difficulty of such an ascertainment procedure even under the more stringent showing asked of new applicants.

In January 1970 A.V. Bamford submitted a construction permit application for a new FM radio station serving the Corpus Christi, Texas area. The court postponed hearings on the issues involved in the application pending the publication of the *Primer* which appeared in March 1971.<sup>115</sup> In May of that year, petitioner attempted to comply with *Primer* procedure through surveys and interviews of community members. After hearings in September, Bamford conducted additional surveys and filed the results as an amendment to his application.<sup>116</sup> Bamford's figures showed contact with forty-eight community leaders and seventy-three members of the general public, fifty of the latter by mail questionnaire.<sup>117</sup>

---

113. The Commission's rationale for the use of staff members to conduct community leader interviews was a desire to expand the range of community contacts by allowing "the utilization of such wide-ranging and conversationally-skilled individuals as salesmen, news reporters and on-air program hosts." *Further Notice of Inquiry* at 16. While this is a practical suggestion for smaller broadcasters, who must make "effective use of their limited resources," the use of staff members, combined with the approved use of telephone interviews, and mail questionnaires for renewal applicants indicates that the overall quality of the ascertainment process is now informal, with less emphasis on dialogue than was mandated in the *Primer*. See *Renewal Primer* at 1372.

114. The original *Primer* stated that "an applicant may not arbitrarily avoid personal consultations with significant groups because the group lacks a highly developed formal structure." 27 F.C.C.2d 650, 666. The *Primer* also called for added efforts on the applicant's part to discover such groups and ascertain their needs. *Id.* The recent amendments to the *Primer* for renewal applicants which resulted in the *Renewal Primer*, 41 Fed. Reg. 1372 (1976) contain no such stress. Instead, they speak of numerical sufficiency and of community checklists designed to lighten the licensee's burden of ascertainment.

115. A.V. Bamford, 48 F.C.C.2d 1161 (1974).

116. A.V. Bamford, 48 F.C.C.2d 1155, 1156 at n.6 (1974).

117. 48 F.C.C.2d at 1163-65.

The initial case on the resolution of Bamford's ascertainment issue reached the FCC's administrative law judge (ALJ) in February 1974. The FCC Broadcast Bureau, which challenged Bamford's application, criticized the ascertainment showing on several counts: (1) petitioner had failed to distinguish clearly between his surveys of the community leaders and the general public; (2) petitioner had failed to contact adequate numbers of females, Mexican-Americans, students and other groups; and (3) petitioner had failed to conduct ascertainment surveys outside the primary service area.<sup>118</sup>

The ALJ found Bamford's ascertainment showing "haphazard in the extreme."<sup>119</sup> Nevertheless, he found the showing sufficient because all other groups, except youth and students were at least "minimally represented,"<sup>120</sup> and these excepted groups were subsumed within other categories.<sup>121</sup> This ruling was at variance with the *Primer* which requires the applicant to seek out members of any group if such group comprises a significant portion of the community.<sup>122</sup>

The ALJ also ruled that the *Primer* does not specifically require that the community leader and general public surveys be conducted separately. Thus, the ALJ found Bamford's application minimally acceptable; consultations with only four Mexican-Americans, a group comprising almost 40 percent of the population, was not considered a deficiency.<sup>123</sup> Despite the apparent inadequacies of Bam-

---

118. *Id.* at 1167-68. The ascertainment for the additional area need not be as extensive as that for the primary area since the broadcaster's "principal obligation" is to the city of license. The applicant's ascertainment was limited to major problems and it enjoyed a wide discretion as to method. Consultation with community leaders was usually considered sufficient to ascertain the major problems. *Primer* at 656.

119. 48 F.C.C.2d at 1166. Bamford was found financially qualified for the construction permit the previous year in *A.V. Bamford*, 41 F.C.C.2d 836 (1973).

120. 48 F.C.C.2d at 1168.

121. *Id.* Bamford had not expended much effort toward satisfying *Primer* requirements. The ALJ stated that Bamford's showing was "aimed at achieving an absolute minimum of adherence to requirements." *Id.* at 1169. This in itself would not disqualify Bamford's application, but it was sufficiently indicative of his attitude toward ascertainment to justify a later commission denial based on additional grounds. Specifically those grounds were noted in the omission of the poor as a "significant group" and the subsequent failure to contact representative leaders of the community's poor. 48 F.C.C.2d at 1159.

122. *Primer* at 666.

123. 48 F.C.C.2d at 1168. The ALJ concluded that the four, a priest, a county clerk, a judge and a city councilman, were leaders under the requirements of the *Primer* and were sufficient for the ascertainment. *Id.*

ford's application, the ALJ ruled that Bamford's "minuses" would only be significant in a "comparative context" and not in an application for a new facility.<sup>124</sup> Relying on Bamford's cooperative attitude and the uncontested nature of the proceeding, the ALJ approved the ascertainment effort ruling that the only possible disqualifying factor was Bamford's failure to survey outside the primary service area.<sup>125</sup>

Seven months later, the FCC Review Board overturned this decision. The Board found several major deficiencies in Bamford's community surveys.<sup>126</sup> First, in his compositional outline, Bamford noted few "significant groups," and aimed primarily at ascertaining racial group designations.<sup>127</sup> Secondly, in his "significant group" consultations, Bamford made only minimal contacts with those few groups he had delineated.<sup>128</sup> Thirdly, in his general public survey, Bamford made use of mail questionnaires, which is specifically forbidden by the *Primer* for new applicants.<sup>129</sup> Finally, in both his general public and community leader surveys, Bamford failed to consult the 18.4 percent of the Corpus Christi community who were poor, a failure sufficient in itself to deny Bamford's application.<sup>130</sup> The Review Board, however, did not consider Bamford's failure to survey the secondary service area to be disqualifying.<sup>131</sup>

Bamford appealed to the Court of Appeals for the District of Columbia Circuit arguing that the poverty group was "an unwarranted addition to the list of groups 'required' to be contacted by the applicant . . . ."<sup>132</sup> The court, in *Bamford v. FCC*, disagreed with Bamford, noting that there is no list of "required" groups in the *Primer*, merely a suggested grouping of community elements which might aid in determining "significant groups."<sup>133</sup> Also, the FCC Report accompanying the *Primer's* publication, "[c]learly

---

124. *Id.* at 1169. The ALJ stated, "that the public interest would be better served by making the assigned service available to the community of Corpus Christi, a matter that has been pending over four years." *Id.*

125. *Id.* See note 114 *supra*.

126. 48 F.C.C.2d at 1156, 1158-59.

127. *Id.* at 1156.

128. *Id.*

129. *Id.* at 1159-60. See note 93 *supra*.

130. 48 F.C.C.2d at 1159; *Primer* at 684.

131. 48 F.C.C.2d at 1159.

132. 535 F.2d at 83.

133. *Id.* at 83-84.



evinced . . . an intent to require . . . leadership surveys in instances where the poor constitute a significant population grouping."<sup>134</sup>

A major FCC pre-*Primer* decision also evidences this concern for the poor. In *City of Camden*,<sup>135</sup> the Commission denied approval for the voluntary assignment of the station because the assignee had submitted an inadequate compositional showing and had failed to contact leaders or representatives of Camden's poor.<sup>136</sup>

The Commission always intended to insure that the poor received fair representation in community surveys. Moreover, the problem of identifying leaders of such badly-organized groups is dealt with in the *Primer*:<sup>137</sup>

Since we have recognized that there may be community leaders of groups that are not organizations in the sense that they have a formal structure . . . we will require identification by name, position and/or organization . . . John Jones, 123 First Street, spokesman for welfare recipients, would be an appropriate identification for a leader of a group lacking a high degree of formal organization.

The *Primer's* main thrust is toward the discovery of organized community groups and their problems but it does provide some help in identifying less well-defined elements of the community.<sup>138</sup> It is questionable whether the policies of the FCC's *Renewal Primer* will continue this help through renewal applicants.

## V. Conclusions

The *Bamford* cases are not the forerunners of a new trend in public service responsibility in broadcasting. The poor have always been covered by the FCC ascertainment procedures up to and including the *Primer*.<sup>139</sup>

The *Renewal Primer's* general emphasis on lessening the amount of face to face dialogue mandated in the original *Primer* could result in a failure to recognize and contact those "significant groups" with insufficient organization to bring their problems to the broadcaster's attention. In a sense, the FCC formulated some of the

---

134. *Id.* at 83.

135. 18 F.C.C.2d 412 (1969).

136. *Id.* at 422.

137. *Primer* at 670-71.

138. See text accompanying notes 109-29 *supra*.

139. See text accompanying note 17 *supra*.

*Primer's* requirements to thrust the "significant groups" of a broadcaster's community and the needs of those groups into the licensee's programming decision.<sup>140</sup> It is difficult to imagine that the easing of the ascertainment procedures for renewal applicants will make them more responsive or prevent a reversion to pre-*Primer* practices.

While the requirements of the *Primer* are somewhat demanding and somewhat vague, they at least placed both renewal and prospective applicants on an equal footing in terms of the ascertainment procedure duties. Also, while the ascertainment procedure for a prospective licensee is a laborious and sometimes a confusing one, the *Primer's* guidelines provide some help for badly organized "significant groups" within the community. In the *Bamford* cases, the court saved the public from a licensee who failed to ascertain that the poor was a "significant group." Admittedly, the *Primer*, whose guidelines *Bamford* followed, does not define "significant groups" with any certitude but the term seems incapable of general definition. A narrowing of the meaning should be avoided since the *Renewal Primer's* reduction of the term to a collection of statistics may result in the perpetuation of entrenched broadcast licensees who might overlook new or hidden "significant groups" in the community. The *Primer*, even with its problems, seems to give the badly-organized groups a chance to be heard by both new and renewal applicants.

The *Renewal Primer's* amendments to the ascertainment procedure can be viewed as necessary to the security of the broadcast licensee's financial investment but other FCC policies so much favor an incumbent licensee that further efforts to protect the current broadcaster must be seen as superfluous.<sup>141</sup>

As a result, one should consider the following modifications of the Commission's ascertainment procedure. First, the FCC might reinstitute the demographic study of the community for renewal applicants to put them on an even footing with challengers. An unchanged compositional showing which rests in a broadcaster's files is of no service to the public, whose interests are not promoted by static figures.

---

140. See *Further Notice of Inquiry*, 53 F.C.C.2d 3, 12 (1975).

141. See notes 111-12 *supra*.

Secondly, the FCC might create a sliding scale of standards for all broadcasters to satisfy the ascertainment criteria based on several factors: size of the area served, broadcaster's power output, carrying signal, and the number of people served.<sup>142</sup> Small broadcasters in large communities can validly claim that it is indeed burdensome to have three or four management level employees of a five hundred watt station conducting surveys in an area of 100,000 residents.<sup>143</sup>

A useful idea to implement this sliding scale would be to develop a survey similar to the *Standardized Community Newspaper Survey* kit created through the Communications Research Center of the Newhouse School of Public Communications at Syracuse University.<sup>144</sup> A survey kit and provisions for inexpensive computer analysis enables a newspaper to gauge accurately the community's reaction to the news media and to itself. The needs and media habits of the community might thus be ascertained by having a low level employee administer the survey. Managers would thus be free to conduct fewer but more comprehensive dialogues while having the larger burden of problem ascertainment carried out through the survey. Larger stations, however, would be responsible for a proportionately greater amount of personal contact.

While these recommendations are by no means comprehensive, the need for a balanced approach is clear. With the dangers inherent in recent *Primer* legislation, much work is needed to achieve representative broadcasting. At present, conflicts between the broad-

---

142. The "sliding scale" idea comes from an interview with Thomas Durfey, then General Manager of Station WHVW, New Hyde Park, N.Y. (Jan. 24, 1973). The burden on the small operator and the bitterness which it feels toward the ascertainment process is aptly expressed in *Pells Letter*, *supra* note 33:

My theory is to keep a close eye on the marginal operators, but give as much freedom as possible to the licensee who keeps his nose clean and his community well-served—especially the smaller operator who just doesn't have the resources to pay high Washington legal fees or spend days or weeks on the charade of community problem surveys.

*Id.*

143. The FCC has taken one step toward remedying this situation with the enactment of a "small market exemption" to ascertainment requirements. Under this rule, broadcasters in a community of under 10,000 population and outside of any Standard Metropolitan Statistical Area as described by the Census Bureau would be exempt from the *Primer's* regulations. See *Renewal Primer* at 1378-79.

144. See W. Clark, R. Seip, & R. Lindeborg, *THE NEWSPAPER AND THE COMMUNITY: PRELIMINARY FINDINGS FROM THE STANDARDIZED COMMUNITY NEWSPAPER SURVEY* (1972).

caster and public interest groups are almost inevitably decided in favor of the broadcaster. Both the public and the public interest are the losers.

*Arthur P. DeLuca*

