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The FCC and Minorities: an Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs

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I. INTRODUCTION

The Communications Act of 1934 empowers the Federal Communications Commission (FCC) to regulate the airwaves as "public convenience, interest, or necessity requires." The "public interest" standard has been interpreted by the Commission and the courts as requiring the FCC to encourage both wide diversity and responsiveness to local needs in the programming of its licensees.

A major step toward the achievement of the dual goals of diversity and responsiveness has been the FCC's demand that special attention be paid to the needs and interests of minority groups within the licensee's community. Especially when such minority groups constitute substantial elements of a broadcaster's community, failure to program to serve the minority's interests raises severe doubt as to the responsiveness of the programming to the community as a whole.

The FCC's concern that programming be representative of and

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2. Id. § 303.
5. In this article the word "minority" includes those segments of society whose history is characterized by discrimination. It thus encompasses women, homosexuals, and the handicapped as well as those groups which have traditionally been considered suspect classifications for equal protection purposes. If at points in this article women and minorities appear to be treated as distinct groups, it is because some courts and the FCC have set up such a distinction.
responsive to the needs of all community members is not new. In a 1946 report,⁸ the Commission noted that it had consistently followed the policy “that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.”⁹ Since then, the FCC has instituted numerous programs and regulations designed to increase the effectiveness of radio and television programming in serving ethnic, racial, and social minorities within the broadcast community. Among these are the Ascertainment program, the Fairness Doctrine,¹⁰ equal employment requirements, and efforts to increase minority ownership of broadcast facilities. Recently, the effectiveness of these programs has been challenged. The pending Communications Act of 1978,¹¹ for example, would eliminate all of the programs and regulations alluded to above except minority ownership incentives.¹²

This article examines the various attempts by the FCC to promote representation of minority interests and evaluates the extent to which these efforts actually affect programming and advance the needs and interests of minority groups.

II. THE NEEDS OF MINORITIES: WHAT ARE THEY?

In the FCC’s usage, programming meets the needs of the local community if it addresses local issues and is of informational and practical use to area residents. When it talks of addressing the needs of minority elements within that community, the FCC recognizes that minorities have needs frequently distinct from those of the community as a whole. In some ways, these are merely special-

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⁸. FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946).
⁹. Id. at 15. Although the 1946 Report dealt with minorities primarily in terms of programming tastes and preferences, it laid the groundwork for the later Ascertainment programs, parts of which are aimed specifically at responsiveness to racial and ethnic minorities.
¹⁰. Although not specifically designed to meet minority needs, the Fairness Doctrine, by encouraging presentation of diverse viewpoints on controversial issues, is a useful tool for minorities seeking a forum for issues important to them. Inquiry and Proposed Rulemaking: Deregulation of Radio, 44 Fed. Reg. 57,636, at 57,659 (1979). See notes 65-77, 136-41 and accompanying text infra.
¹². The FCC has recently decided to deregulate radio and has discontinued some of the programs discussed below insofar as they apply to radio stations. Deregulation of Radio, 46 Fed. Reg. 13,888 (1981). See notes 144-53 and accompanying text infra for a discussion of the FCC’s new policies.
ized versions of informational needs, satisfied by programming such as black news or Spanish-speaking broadcasts. But minorities, who are by definition victims of discrimination, have greater needs which radio and television, because of their pervasive influence on societal attitudes, are ideally suited to confront. To program in the interests of racial, ethnic, and social minorities, the media must be concerned not only with the information imparted to the particular group towards whom the programming is aimed, but also with the impact such programming will have on the non-minority segment of the population. This, at least, has been the theory of many of the minority groups who have sought to challenge the licenses of broadcasters before the FCC. The FCC itself has stated:

Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

The media's role in shaping the community's perceptions of the minority elements within it justifies a degree of substantive regulation of the content of material broadcast over the airwaves.

The author divides the objectives sought to be achieved through minority­geared programming into two classes—representational objectives and political objectives. Representational objectives are aimed at insuring that minority viewpoints are presented, that programming does respond to problems which are unique to the particular minority, and, especially in the case of less recognized or readily ascertainable minorities, that viewers are aware of the minority's existence. Most of the FCC's minority-oriented policies are designed to achieve representational objectives, which have traditionally been regarded as within the ambit of FCC regulation.

Political objectives, on the other hand, have less often been regarded as an area of legitimate FCC concern. Political objectives are designed to combat discrimination which typically characterizes treatment of minorities by promoting media portrayals which

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are positive and challenging those which are negative. Minorities have charged that programming which presumes to meet their needs cannot do so if it in fact deals insensitively with such needs.\textsuperscript{16} The FCC, however, has responded that so closely supervising the manner in which broadcasters present minority issues would "run the risk of turning the FCC into a censorship board,"\textsuperscript{16} and might violate the first amendment. Nevertheless, several FCC policies are appropriate for use by minorities in furthering political objectives. These will be discussed below in further detail.\textsuperscript{17}

III. THE ACHIEVEMENT OF REPRESENTATIONAL OBJECTIVES THROUGH FCC PROGRAMS AND POLICIES

Encouragement of adequate presentation of minority viewpoints in media programming is evidenced primarily in four FCC programs or policies: Ascertainment, the Fairness Doctrine, equal employment, and increased minority ownership.

A. THE ASCERTAINMENT PROGRAM

The Ascertainment program\textsuperscript{18} is the FCC's most direct attempt to insure adequate presentation of minority viewpoints in media programming by requiring applicants for construction permits and license renewals to program in response to the needs and interests of significant community groups, particularly minority groups. The program, first established in 1971\textsuperscript{19} and revised in 1976,\textsuperscript{20} details five procedures that must be followed by all commercial\textsuperscript{21} broadcast applicants in order to satisfy the Commission

\textsuperscript{15} Stone v. FCC, 466 F.2d 316, 328 n.44 (D.C. Cir. 1972).
\textsuperscript{16} Id. at 329. See Georgetown Univ., 66 F.C.C.2d 944, 946-47 (1977).
\textsuperscript{17} See notes 114-41 and accompanying text infra.
\textsuperscript{18} The Ascertainment program, while still fully applicable to television stations, has been significantly modified as it relates to radio stations. See note 12 supra. Licensees of radio stations no longer need to fulfill any of the procedural requirements of the Ascertainment process except to file the annual list of ten significant community problems and illustrative programming addressing these problems. Furthermore, although broadcasters must honor a general obligation to address community issues, the FCC has chosen to rely upon competitive forces in the marketplace to insure that the needs of particular community groups are met. See notes 144-53 and accompanying text infra for a more extended discussion of the effects of this deregulation.
\textsuperscript{19} Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).
\textsuperscript{20} Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976) [hereinafter cited as 1976 Ascertainment Report].
\textsuperscript{21} Although discussion in this section is limited to guidelines for commercial appli-
that the licensee has achieved and programmed in accordance with a thorough knowledge of the community he is licensed to serve. The five procedures are:

1. Listing the demographic aspects of the licensee's city of license, "including total population figures, numbers and proportions of males, females, minorities, youth and the elderly."22

2. Conducting interviews with community leaders. To aid the licensee in determining which community leaders to interview, the FCC has compiled a checklist of community elements common to most cities.23 If interviews are conducted in all checklist categories that apply in a particular community, the licensee's coverage of all significant elements will not be subject to question.24 The Commission has also indicated the number of interviews it considers necessary for a finding that the licensee's survey is sufficiently representative. This number varies from 60 to 220 depending upon the size of the community.25 Since one of the primary purposes of these consultations is "to bring the officials and principals of a station into contact with a variety of leaders—particularly those who speak for the interests of racial and ethnic minorities and women,"26 the FCC recommends that at least fifty percent of the community leader interviews be conducted by higher level employees.

cants, the FCC has set ascertainment guidelines for noncommercial licensees as well. See Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 54 F.C.C.2d 766 (1975).

22. 1976 Ascertainment Report, supra note 20, at 418-19. These data can be obtained from U.S. Census publications. Id. at 442.

23. The listed elements are: Agriculture, Business, Charities, Civic Neighborhood and Fraternal Organizations, Consumer Services, Culture, Education, Environment, Government, Labor, Military, Minority and Ethnic Groups, Organizations of and for the Elderly, Organizations of and for Women, Organizations of and for Youth and Students, Professions, Public Safety, Health and Welfare, Recreation, Religion, and Other. Id. at 447. In addition, licensees are asked to indicate the number of leaders interviewed in all the listed elements who are: blacks; hispanic, Spanish-speaking, or Spanish-surnamed Americans; American Indians; orientals; or women. Id.

24. Id. at 424. The "Other" category was initially conceived as optional, allowing the licensee flexibility to interview unlisted, but otherwise significant community elements. The FCC subsequently amended this interpretation to require ascertainment of unlisted groups who alert the broadcaster to their existence and are determined by the broadcaster to be significant elements within the service community. Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Non-commercial Educational Broadcast Applicants, Permittees and Licensees, 47 RAD. REG. 2D (P&F) 189, 196 (1980) [hereinafter cited as Amendment to Ascertainment Report]. See note 52 and accompanying text infra.


26. Id. at 419.
The Commission has determined that persons conducting interviews should have an "'effective voice' in communicating with the licensee's decision makers" and thus ultimately be able to influence programming.

(3) Conducting a general public survey. This may be done either by station employees or an outside organization professionally competent in the field of polling. The purpose of the survey is to supplement the community leader interviews and aid the licensee in determining the area's needs, problems, and interests. The survey must be random and may be conducted any time during the license term.

(4) Compiling an annual list of no more than ten "significant problems and needs existing in [the licensees'] service areas during the preceding 12 months." The FCC report specifically rejects the contention that all significant problems will all be "majority" problems, and notes that problem lists that neglect minorities—especially racial minorities—will be scrutinized.

(5) Programming to respond to those "significant" community problems discerned by the licensee through its interviews and public survey. The FCC stresses that actual programs rather than public service announcements or news inserts should appear on the problems-programs list. The licensee has broad discretion in terms of manner, timing, and degree in choosing programs to satisfy community needs, so long as its overall programming evidences a good faith effort to determine which problems merit treatment and is responsive to such problems.

In theory, then, the Ascertainment program is a logical process designed to insure both that the broadcaster is aware of the diverse community groups within the area it serves and the needs and problems of each community group, and that its programming addresses those particular needs and problems. By emphasizing that

27. Id. at 427. This percentage will probably be higher in the case of interviews with racial and ethnic minorities and women. Id.
30. Id.
31. Id. at 431.
32. Id. at 433.
33. Id.
34. Id. at 445.
special attention must be given to minority needs, the program
seems to be aptly designed to effect the representational objectives
of minorities—that is, to assure the presentation of minority view-
points and programming geared to their particular needs. Although
the Ascertainment process is partially successful in achieving rep-
resentational objectives, its performance fails to measure up to its
potential in several ways:

Community problems list. The community problems lists sub-
mitted annually by all licensees suffer from a generality that viti-
ates attempts to address seriously the problems enumerated. For
example, WABC-TV in New York City lists the following ten “sig-
ificant problems” for 1978: Health Care and Safety, Government
Administration, Women’s Issues, Education/Youth, Problems of
Minority Groups, Crime/Law Enforcement, Foreign Affairs,
Mental Health and Social Adjustment, Energy/Environment, and
Problems of the Economy.\(^6\) The problem list for 1976 was identi-
cal, and that for 1977 differed only in the substitution of “Urban
Problems” for “Foreign Affairs.” These categories, derived from
the community leader and general public surveys, are of questiona-
ble utility. Any person who regularly reads a newspaper could
quickly compile a similar list of problems. Although the list is ordi-
narily communicated to those who produce public affairs pro-
gramming, it is unlikely that any specialized programming results from
this process; it is difficult to imagine a program of public, educa-
tional interest that could not be slotted into one of these
categories.

Since the requirement of individual interviews mandates con-
tact with minority leaders,\(^7\) it is not surprising to find categories
in the community problems list devoted to issues relevant to wo-
men and minorities. In this sense, the process of compiling a com-
munity problems list is a positive step in achieving representa-

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\(^6\) WABC-TV Public File, New York City. ABC conducts about 300 community
leader interviews per year in its program entitled “Let Us Ascertain You.” Community lead-
ners are asked three questions in ABC’s ascertainment surveys:

1) What in your judgment are the major problems, needs and interests of your
community? 2) As a leader of an organization in the field of ___, what specific
problems relating to that area do you believe are of most concern? 3) What
problems, needs and interests—of a statewide or national nature—do you believe
are of most concern?

\(^7\) While it would be difficult to document any direct correlation between individual
interviews and more responsive programming, it is logical to expect an increased sensitiza-
tion of station personnel as a result of the process. Face-to-face contacts help prevent the
stereotyping that is the basis of minority discrimination.
tional goals. But because of the breadth of categories such as "Problems of Minority Groups," there is no guarantee of coverage for less significant minorities. Furthermore, because only a few "illustrative" programs need be listed in each category, there is no guarantee that minority needs (and objectives) will be met to any significant degree.

Programming to meet the ascertained problems. The FCC has failed to clearly articulate what constitutes programming "responsive to" problems and needs of the community. Although news inserts and public service announcements are considered insufficiently responsive, the following excerpt is typical of the FCC and judicial response to challenges that particular programs do not present minority viewpoints and generally fail to satisfy minority needs. "How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion . . . the scope of FCC review remains whether or not the licensee has reasonably exercised its discretion." The Commission has noted that programs of general interest also serve the minority community, and has specifically rejected claims that minority needs can only be served by programming "specifically devised for and presented by minorities or

38. The FCC has on numerous occasions rejected the contention that minorities should be represented by percentages of programming time equivalent to their percentage of the community population. E.g., Stone v. FCC, 466 F.2d 316, 328 (D.C. Cir. 1972); CBS, Inc., 56 F.C.C.2d 296, 301 (1975). In the absence of a total neglect of a substantial and strongly expressed need or group, the licensee has broad discretion in how to respond in each category. See WTWV, Inc., 51 F.C.C.2d 1247 (1975).

39. The FCC's failure to require any particular number of illustrative programs in the problems-programs list has caused confusion for courts trying to rule on the quality of licensee response to community problems. See Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 737 (D.C. Cir. 1976): "Since there are no standards about how much programming is enough to meet those problems . . . both licensees and those groups seeking to make them more responsive to the public are understandably uncertain about the Commission's rather amorphous expectations." WABC-TV listed seven programs in each category; WNBC radio listed three.

It should be noted that categories may, and do, overlap. For example, WNBC's "Street Crime" category listed a program on discrimination against blacks and Puerto Ricans in New York City's criminal justice system.


42. Flower City Television Corp., 57 F.C.C.2d 112, 116 (1975). But see Leflore Broadcasting Co., Inc., 65 F.C.C.2d 556 (1977) (castigating a licensee for taking the position that the needs and interests of the black and white communities in its license area were the same).
women."

This hands-off attitude invites two methods by which the purposes of the ascertainment-programming process may be contravened, and thereby threatens representational objectives. First, scheduling responsive programs at inconvenient hours may defeat representational objectives. For example, although WNBC radio listed programs that were admittedly responsive to minority concerns, several were aired from 12-12:30 a.m. Many television shows dealing exclusively with minority issues are shown on the major television network affiliates on Sundays at morning and early afternoon hours, a time period which is inconvenient for a large number of viewers. While licensees have been "put on notice" as to the FCC's "anticipat[ion] that their non-entertainment programming will be presented at times when they 'reasonably could be expected to be effective,'" no action has been taken by the Commission to require that minority-oriented programming be aired during peak or near-peak hours. Plainly, inconvenient scheduling creates a substantive barrier to the achievement of minority needs and objectives.

The FCC's deferential attitude toward responsive programming also defeats representational objectives by failing to differentiate between programs which confront minority problems and those which only deal with them tangentially. For example, WNBC's programs addressing women's issues included both a program exploring the effect of the women's movement on today's family life and an interview with the first woman to work "a corner" in a championship prize fight. While failure to confront minority problems more seriously affects attainment of political goals than representational goals, it may be questioned whether the

44. The programs were half-hour discussions of the relationship between the police and the black community and the present state of black-Jewish relations in New York City.
45. In the New York broadcast area, for instance, programs devoted to black issues are broadcast Sundays at 11:00 a.m. and 1:00 p.m. In Mississippi Auth. for Educ. Television, 47 RAD. REG. 2d (P&F) 1359, 1363 (1980), the FCC rejected petitioner's argument that 12:30 p.m. on Sunday is "dead time," and held that the scheduling of a black-oriented program at that time period was a matter of licensee discretion.
46. Sonderling Broadcast Co., 68 F.C.C.2d 752, 756 n.9 (1978). Sonderling's minority-oriented programs were all presented early Sunday mornings.
47. In American Broadcasting Co., Inc., 52 F.C.C.2d 98 (1975), aff'd sub nom. National Org. for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977), the Commission refused to grant a hearing on this issue, stating that this was a matter of licensee discretion.
48. See notes 124-35 and accompanying text infra.
above-mentioned interview even furthers representational goals.

Despite these criticisms, however, the Ascertainment process, because of the emphasis the Commission places on contact with and service to the minority community, does insure that some problems particularly relevant to minority groups are at least addressed.

Requirements for successful license challenges. Minority groups challenging grants of construction permits or renewals of broadcast licenses on the basis of Ascertainment and programming deficiencies encounter virtually insurmountable barriers. Nevertheless, such challenges are the primary means by which the Ascertainment guidelines become an effective policing mechanism.

Frequent challenges have been made on the basis that the licensee's community leader survey failed to survey a particular minority. However, since the advent of the checklist of community elements, broadcasters who have merely surveyed in all listed categories are presumed to have an adequate familiarity with the community they service. To rebut this presumption a challenger must show that the licensee failed to ascertain a minority element of the community so significant as to evidence a real defect in the licensee's knowledge of his community. Challenges are rendered

49. For a thorough discussion of the difficulties encountered see Note, Use of Petitions by Minority Groups to Deny Broadcast License Renewals, 1978 DUKL J. 271.

50. According to the chairman of the National Black Media Coalition (NBMC), Pluria Marshall, NBMC's affiliates are responsible for almost 80% of all the petitions to deny license renewals ever filed before the FCC. A vast majority of the remaining petitions are filed by affiliates of the National Latino Media Coalition and the National Organization for Women. 3 Hearings Before the Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce, House of Representatives, on H.R. 13015, 95th Cong., 2d Sess. 394 (1978) [hereinafter cited as Hearings] (statement of Pluria W. Marshall).

51. See notes 23-24 and accompanying text supra.

52. See Bamford v. FCC, 535 F.2d 78 (D.C. Cir. 1976) (denial of a construction permit upheld for failure to consult with leaders of the poor, who comprised 20% of the broadcast area). Cf. National Org. for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977) and RKO General, Inc., 69 F.C.C.2d 461 (1978) (failure to ascertain women's groups plainly a defect but no action taken because of amendment to checklist to include "women" as a significant community element).

Under new regulations, the unlisted minority element is responsible for initially contacting the broadcaster. Once contacted, the broadcaster is responsible for determining whether the group is significant. If the group is judged significant, it must be ascertained. "However, if no other significant element initiates contact a licensee's coverage of all significant elements will not be open to question if it interviews a representative sample from among the elements in [the Checklist] that apply to its community." Amendment to Ascertainment Report, supra note 24, at 199 (petition by gay and handicapped organizations to be included in the community element checklist).
more difficult by such policies as refusing to require proportional representation of minority leaders in Ascertainment surveys. Additionally, a successfully challenged community leader ascertainment will result only in a requirement that the licensee contact more (at least one) leaders of that community segment and amend and resubmit its Ascertainment survey.

As noted above, the licensee has significant discretion in programming to meet the needs ascertained. To successfully challenge on the basis of unresponsive programming, the minority group must "make specific allegations of fact, which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of substantial groups within the community." This burden is made even weightier by policies eschewing both 1) percentage comparisons between representation in the community and representation in programming and 2) consideration of programming responsiveness to a particular minority group in isolation from the licensee's general responsiveness to all minority elements of the community, unless that minority segment is unusually significant.

Summary. In the final evaluation, the requirement of interviews with community leaders is potentially the most effective part
of the ascertainment process. Presently, many of these interviews are conducted by phone or at "ascertainment luncheons." This circumvention of face-to-face contact eviscerates the central purpose of direct communication to management personnel of the problems and needs of minorities. At hearings conducted prior to revision of the ascertainment guidelines in 1976 the FCC rejected recommendations from minority groups that the interview process be strictly formalized.60 However, the FCC recommended face-to-face interviews as a "staple" and requires at least fifty percent of all interviews to be conducted by management-level personnel.61

The FCC's approach to licensee-community agreements further evidences the Commission's unwillingness to adopt a formal interview process despite its apparent endorsement of the premises underlying such formality.62 While committed to "constru[ing] the provisions of citizen agreements in a manner favorable to their implementation,"63 the FCC also feels that "licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation."64 The FCC's luke-warm endorsement of community-licensee agreements and formalized interviewing processes is unfortunate, because a more active role in promoting these procedures could remedy some of the problems which now make programming responsive to minority needs less than a reality.

B. THE FAIRNESS DOCTRINE

A second means by which the FCC has sought to increase diversity and responsiveness in programming is through the Fairness Doctrine. This doctrine entails two requirements: first, a station

60. 1976 Ascertainment Report, supra note 20, at 428. The minority groups wanted the FCC to require that all interviews be conducted on a face-to-face basis with management-level personnel. The National Black Media Caucus suggested that citizen advisory panels would be a better approach to community ascertainment, while the United Church of Christ wanted the FCC to institute a methodology that would "impress the importance of the event on all parties concerned." Id.

61. Id. at 443.

62. See Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d 42 (1975). The FCC announced a general policy in this area because of assertions by minorities that licensees who had made agreements after being approached and consulted by minorities were failing to enforce such agreements. Id.

63. Id. at 49.

64. Id. at 47. The FCC adds that "the Commission will not prescribe or prohibit any particular agreement terms, so long as they are not unlawful or violative of particular Commission rules." Id. at 54.
must provide some coverage of all controversial issues of public importance within the license community; second, when a station does cover controversial issues of public importance, it must present contrasting views on the issue.\textsuperscript{68} Although the Fairness Doctrine seems to afford opportunity for minority groups to air their viewpoints, its requirements have been construed in a manner that hinders successful challenges to a station's failure to address minority issues.\textsuperscript{66}

As with its approach in the Ascertainment area, the FCC affords the licensee wide discretion. The licensee has primary responsibility to determine both which issues are controversial and of importance, and the manner in which it presents contrasting views.\textsuperscript{67} Because the Commission will not order a hearing unless the licensees' efforts are unreasonable or such as to evidence bad faith, challengers under the Fairness Doctrine face a heavy burden.\textsuperscript{68}

Proving an allegation that a controversial issue of public importance has been raised requires a showing first, that the issue at hand is a controversial one of public importance, and second, that the issue has actually been raised. Gay groups have experienced difficulty satisfying the first requirement. The FCC has only quite recently overcome its reluctance and decided to consider gay rights legislation a controversial issue of public importance, that requires a balanced presentation.\textsuperscript{69} Furthermore, since gay organizations are

\textsuperscript{65.} Fairness Report, 48 F.C.C.2d 1, 7 (1974).

\textsuperscript{66.} Stations are not required to report examples of compliance with the Fairness Doctrine unless the FCC receives serious complaints from interested viewers. \textit{Id.} at 8. Thus, it is difficult to determine how successfully the Fairness Doctrine does in fact work to present minority viewpoints.

\textsuperscript{67.} \textit{Id.} at 9; Newhouse Broadcast Corp., 61 F.C.C.2d 528, 541 (1976). For example, just because the controversial issue was first raised in a 60 minute in-depth inquiry, does not mean that the opposing view must be presented with equal breadth.

\textsuperscript{68.} See National Org. for Women v. FCC, 555 F.2d 1002, 1011-12 (D.C. Cir. 1977). The Commission has determined that the first part of the Doctrine has been violated only once. Representative Patsy Mink, 59 F.C.C.2d 987 (1976) (failure to present any programming relating to the issue of strip mining).

\textsuperscript{69.} Council on Religion and the Homosexual, Inc. v. The Faith Center (KVOF-TV), 68 F.C.C.2d 1500, 1506 (1978). 5 \textit{Hearings, supra} note 50, pt. 2 at 378 (Field Hearings: Trenton, N.J.) (statement of Ron Gold, staff assistant, National Gay Task Force). Gay groups face an additional tactical dilemma caused by their desire to educate the public not to view gay rights as a controversial issue in itself. See note 140 infra. But see James Robison Evangelistic Ass'n, 46 RAD. REG. 2d (P&F) 1606 (1980) (the Commission noting that a preacher's sermon on Biblical views of homosexuality could raise a controversial issue of public importance, requiring balancing, even though based on religious doctrine).
frequently not regarded as significant community groups,\textsuperscript{70} their problems are unlikely to be considered issues of public importance, and consequently broadcasters are free under the Fairness Doctrine to ignore them.\textsuperscript{71}

In \textit{National Organization for Women v. FCC (NOW)}\textsuperscript{72} the court faced the question of when an issue is raised for purposes of Fairness Doctrine. Plaintiffs in that case alleged that the stereotypical presentation of women in ABC-TV's commercial programming raised only one side of an issue, thus requiring balancing. While not deciding the point, the circuit court indicated that there was a serious question as to whether such stereotypical portrayals raised the admittedly controversial issue of women's place in society.\textsuperscript{73}

The Fairness Doctrine \textit{has} provided a basis for at least two successful challenges of broadcast licenses for failure to broadcast minority viewpoints. In \textit{Office of Communications of the United Church of Christ v. FCC},\textsuperscript{74} the court required the FCC to refuse license renewal\textsuperscript{75} to a broadcaster serving a community in Mississippi with a forty-five percent black population after continual failure of the licensee to address all aspects of racial issues, in particular the issue of desegregation of schools. Similarly, in \textit{Radio Station WSNT, Inc.},\textsuperscript{76} the FCC ordered a full hearing when a broadcaster in Georgia covered Governor Maddox's speech oppos-

\textsuperscript{70} But see Amendment of Ascertainment Report, supra note 24 (FCC ruling requiring broadcasters to ascertain gay organizations brought to the attention of the licensee) (discussion of this ruling is at notes 24, 52 supra).

\textsuperscript{71} See Georgetown Univ., 66 F.C.C.2d 944 (1977). In response to charges that the Georgetown radio station had stopped reporting on gay issues, the FCC responded that failure to discuss gay issues would not result in a ruling that "the licensee ignored any significantly expressed community problems or was remiss with respect to its fairness doctrine responsibilities." \textit{Id.} at 950. See also James Robison Evangelistic Ass'n, 46 RAD. REG. 2D (P&F) 1606 (1980). Responding to an assertion that a television station violated its obligations by failing to broadcast a preacher's sermon on Biblical views of homosexuality, the Commission noted that this was an act within the licensee's discretion, and refused to take any action. But see Council on Religion and the Homosexual, Inc. v. The Faith Center (KVOF-TV), 68 F.C.C.2d 1500, 1506 (1978) (finding that gay rights was a controversial issue of public importance in the San Francisco Bay area).

\textsuperscript{72} 555 F.2d 1002 (D.C. Cir. 1977).

\textsuperscript{73} \textit{Id.} at 1012-15. See Flower City Television Corp., 57 F.C.C.2d 112, 116-17 (1975) (showing of racist movies not a "discussion" of a controversial issue of public importance).

\textsuperscript{74} 425 F.2d 543 (D.C. Cir. 1969).

\textsuperscript{75} The circuit court initially sent the case back to the Commission for a hearing, 359 F.2d 994 (1966), but after the FCC renewed the license, Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968), the circuit court vacated its renewal.

\textsuperscript{76} 27 F.C.C.2d 993 (1971).
ing school integration but failed to devote any time to demonstrations by black groups after a federal order requiring school desegregation in the South.77

Notwithstanding these examples, minority groups have rarely invoked the Fairness Doctrine as a means by which to achieve representational objectives. This may signify that licensees are sufficiently covering controversial issues of importance to minority groups and insuring balanced presentations. Or it may indicate that minorities are employing other avenues of challenge which are easier to document and sustain, for example, on Ascertainment or equal employment grounds. In either case, because of its infrequent use, it is difficult to make generalizations about the utility of the Fairness Doctrine in achieving representational objectives. At a minimum, the Fairness Doctrine insures that some issues of especial significance to minorities will not be ignored. This reason alone justifies vigorous enforcement of the Doctrine by the FCC.

C. EQUAL EMPLOYMENT PROGRAMS

The FCC's implementation of equal employment (affirmative action) programs is a third approach adopted to encourage programming which reflects minority viewpoints.78 This effort, first begun in 1969,79 has been endorsed by the Supreme Court: "These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934, . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."80 The Commission's equal employment efforts, then, are not dedicated to ending discrimination generally, but have as their primary objective programming responsive to minorities.81

77. WSNT was the only station serving Sandersville, Georgia, a community that was approximately 60% black.
78. The FCC requires that licensees both refrain from deliberate discrimination and increase employment of minority individuals through recruitment and other positive programs. See 47 C.F.R. § 73.2080 (1979).
80. NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976) (citation omitted).
81. National Org. for Women v. FCC, 555 F.2d 1002, 1017 (1977); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 229-30 (1976) ("We do not contend that this agency has a sweeping mandate to further the 'national policy' against discrimination, nor have we sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC.").
Although rarely resulting in denial of a broadcaster's license, minority petitions to deny license renewals on the basis of employment discrimination have achieved definite results in terms of increasing in absolute numbers, as well as percentages, the number of minorities and women employed in the broadcast industry. However, whether increasing employment of minorities will result in programming responsive to minorities is unclear. There are both procedural and conceptual obstacles to the attainment of this goal.

The procedural barriers involve the degree and manner of proof required to make out a prima facie case of discrimination. To warrant a hearing the challenger must show a disparity between the percentage of station employees who are minorities and the percentage of minorities in the local workforce that is so substantial as to be outside a "zone of reasonableness." In determining the "zone" the FCC will normally consider only the percentage differentials with respect to all minority groups and not employment practices in regard to any one particular minority. The FCC has also been willing to consider post-term improvements when evaluating whether minority employment is within the "zone of reasonableness," unless the term performance is unusually below this "zone." The unwillingness of the FCC to judge the licensee solely "on his record" has made it more difficult for minority challengers to affect license renewals, since the improvement achieves the desired result of increased integration. The high percentage differentials that must be demonstrated in addition to the FCC prefer-


83. Id. at 228. There is no consistency as to what falls within the "zone of reasonableness." The following percentages have all been held within that "zone": 7% black employment in an area 24% black (Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972)); 20.8% female employment in an area with a 36% female workforce (Capital Cities Communications, Inc., 58 F.C.C.2d 13 (1976)); 27.7% Mexican-Americans where that minority constituted 44.2% of the population of the listening area (Avco Broadcasting Corp., 53 F.C.C.2d 48 (1975)).

84. LIN Tex. Broadcasting Corp., 55 F.C.C.2d 604, 605 (1975). As the statistics in the preceding note indicate, where the challenging minority group is the dominant one in the community, the FCC may consider the underrepresentation of that particular minority in station employment.


ence for mild remedies—such as short-term renewals or grants conditional on submission of regular progress reports—and acceptance of subsequent remediation have made successful license challenges rare. It is unlikely that a license will be revoked and reissued to a more responsive programmer as a result of failure to satisfy the Commission's equal employment requirements.

A second procedural impediment to achieving the desired goal of increased presentation of minority viewpoints in programming is the failure of the Commission to focus on the number of minority employees actually in a position to affect programming decisions. While the FCC does require licensees to file employment profiles differentiating between levels of employee responsibility, the Commission will not order a separate hearing merely because employment of minorities in upper-level jobs is low provided the overall employment profile is within the "zone of reasonableness." The Commission prefers in such circumstances to rely on a

89. See, e.g., Rahall Broadcasting of Ind., Inc., 66 F.C.C.2d 295, 300-01 (1977); Southern Broadcasting Co., 62 F.C.C.2d 146, 152 (1976). If the applicant's recent efforts have failed to increase the number of minorities on its staff, the Commission may also require the applicant to update its affirmative action program by establishing specific goals and setting forth timetables in which to reach them. See James J. Shipley, 45 Rad. Reg. 2d (P&F) 1321 (1979); Cypress Central Communications Corp., 45 Rad. Reg. 2d (P&F) 1316 (1979).
90. See note 105 infra.
91. However, according to a National Black Media Coalition study, the mere filing of a license challenge is directly related to an increase in black employment both at the challenged station and at other stations in the same area. 3 Hearings, supra note 50, at 394 (statement of Pluria W. Marshall).
92. Each licensee must file a Form 395 which requires a profile of the number and percentage of minorities (blacks, Asian-Americans, American Indians, and Hispanics) and women employed by the station in all positions and in the upper four positions (officials and managers, professionals, technicians, and sales). Stations with more than 50 employees are also required to list the job titles held by their minority and female employees. Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976). With respect to Form 395, it is interesting to note that the FCC has recently refused to include "the handicapped" as a minority subject to its equal employment reporting requirements, noting that discrimination against the handicapped requires evaluation on an individualized, case-by-case basis. Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395, 46 Rad. Reg. 2d (P&F) 1621 (1980).
93. See New York Times Broadcasting Serv., Inc., 63 F.C.C.2d 695, 699 (1977) ("[W]here no actual discrimination in filling responsible positions has been established, the placement of employees, including minority group employees, in particular positions is and must remain a part of the licensee's discretion in the operation of its broadcast station."). See also Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 228 (1976) ("[B]oth the Commission and the courts have rejected the underutilization argument where the record shows that minorities and women are employed..."
station's extant affirmative action program to promote minority employees to more responsible positions." This reliance on the promotional system of stations which have been shown to have few minorities in upper level positions is misplaced and seems unlikely to guarantee that minorities will be able to achieve the FCC goal of influencing what appears on the air.

The assumption underlying the equal employment program is that the presence of minority individuals in the personnel ranks of the station will result in greater expression of minority viewpoints in that station's programming. This assumption gives rise to a conceptual—as distinct from procedural—dilemma. The leap from personnel to programming involves assumptions about the proclivities of any one individual for programs catering either to the particular minority of which he is a member of to minority needs in general. As the FCC has itself commented, "the effectiveness of this policy in achieving the Commission's public interest objective of diversity will depend in part on the ability and willingness of minority . . . employees . . . to provide minority programming." Notwithstanding these drawbacks, affirmative action programs may still, at the least, effectively sensitize the programming mechanism, and, at best, increase the number of programs directed at diverse minority groups.

D. MINORITY OWNERSHIP

The FCC's adoption of a policy designed to increase minority ownership of broadcast facilities is a fourth strategy developed as
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"another significant way [to foster] the inclusion of minority views in the area of programming."98

According to recent figures, only about 1.5 percent of the stations licensed in the United States are owned or controlled by minorities.99 On the theory that "black [minority] ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black [minority] citizenry,"100 the FCC has initiated several practices in an effort to change the status quo in this area.

The FCC, with judicial approval, gives stations whose applications are characterized by minority ownership and participation an initial advantage in comparative proceedings. The court in TV9, Inc. v. FCC101 noted that

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith, as broadening community representation, gives a local minority group media entrepreneurship . . . .102

While not guaranteeing that the minority applicant will receive the license, the FCC does, therefore, give an initial advantage to minority applicants on the faith that they will program responsively to at least their own minority group.103

102. Id. at 937. The court continued:
When minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.
103. The vast majority of black-owned stations do in fact have black-oriented formats.
It is questionable whether this preference is effective in increasing the number of minority-owned stations. This ineffectiveness is due to at least two factors: 1) the very small number of frequencies that have become available on the market either for the first time or as a result of license revocation or denial of renewal and 2) the necessity that the station be in a large market, where there is a sufficiently large minority population to make ownership economically feasible. Stations in large population centers are very expensive and new frequencies are rarely available.

The great majority of minority-owned stations result from purchase of extant stations, rather than from assignments of newly created frequencies or unrenewed licenses. For this reason, the FCC has recently adopted policies aimed at making such purchases easier for minorities. The policies include: 1) the issuance of tax certificates entitling sellers of broadcasting facilities to minorities to defer payment of capital gains tax if they reinvest in broadcasting; and 2) allowance of "distress sales" to minorities of licenses designated for hearings on revocation or renewal. Other govern-


104. The FCC has proposed a policy that would create thousands of new low-power community television stations in both cities and rural areas. One reason underlying the policy is to increase the availability of television stations for ownership by minority groups. N.Y. Times, Sept. 10, 1980, § D, at 1, col. 1.

105. From 1959-1969 only 10 radio licenses in the 100 largest markets were revoked or denied renewal. Abel, Clift, & Weiss, Station License Revocations and Denials of Renewal, 1934-1969, 14 J. Broadcasting 411, 415-21 (1970). Since 1934, 78 radio and television stations have had licenses revoked or been denied renewal. Id. at 411-21.

106. Soley & Hough, supra note 103, at 462-63. This statement assumes that the minority owner intends to institute a minority-oriented format in his station's programming.

107. Id. at 458-59. But see note 104 supra.

108. Fewer than 30% of minority-owned stations have been acquired by means other than outright purchase of existing stations. The percentage drops below 15% if only post-1972 years are considered. Soley & Hough, supra note 103, at 459.


110. Id. at 983. Soley and Hough express doubt as to whether such tax credits can work effectively. Soley & Hough, supra note 103, at 465. They argue that for such a transaction to be financially worthwhile, it would be necessary that the tax benefit to the seller compensate both for the (presumably) lower than competitive price he would receive from the minority purchaser and the required reinvestment in broadcasting.

111. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978). The "distress sale" price would be significantly below market value and would be the maximum price at which the station subject to hearings could be
ment agencies have also instituted policies encouraging minority ownership.\textsuperscript{112}

It is, at this stage, too early to predict whether these programs will be successful in increasing minority ownership. Yet it is apparent that minority ownership results in stations with minority-oriented formats,\textsuperscript{113} a fact which indicates that success in minority ownership promotion policies will indeed yield programming consistent with FCC minority representational objectives.

IV. THE ACHIEVEMENT OF POLITICAL OBJECTIVES THROUGH FCC PROGRAMS AND POLICIES

The second objective of minorities seeking to influence media programming can be termed political because its aim is to influence social consciousness. The achievement of this objective involves a degree of control over program content that exceeds the control necessary to achieve representational goals. While many representational goals can be achieved through promulgation of general procedural guidelines (as in Ascertainment surveys) and through indirect subsidization (as in minority ownership and equal employment policies), it is less clear that these programs will be sufficient to insure programming that not only includes minority viewpoints, but also provides solutions for minority problems. As one circuit court has noted, there has been a constant tension in this area “between the maintenance of a free competitive broadcast system and reasonable restrictions on such freedom in the public interest.”\textsuperscript{114}

A. ASCERTAINMENT

In the Ascertainment area, minorities have sought political objectives by challenging two facets of the program: the community leaders chosen by the licensees to represent the minority groups, and the programming chosen to meet the problems and

\textsuperscript{112} For example, the Small Business Administration makes available to minorities loans for the purchase of radio and television properties. Soley & Hough, supra note 103, at 464.

\textsuperscript{113} Id. at 461. “All but two of the stations acquired between 1972 and 1977 [41 stations] have had black-oriented formats . . . .” Id.

\textsuperscript{114} Stone v. FCC, 466 F.2d 316, 329 (D.C. Cir. 1972).
needs of minorities as perceived by licensees.

The Commission and courts have sustained minority objections to community leaders chosen for survey purposes. In *National Organization for Women v. FCC (NOW)*\(^ {116}\) and *RKO General Inc.*\(^ {116}\) women's groups challenged interviews that purported to ascertain women's needs and interests merely because those interviewed were female. The *NOW* court stressed "that the leaders interviewed should be consulted from the perspective of the groups they represent."\(^ {117}\) For instance, the court rejected the licensees' contention that the Chairman of the Women Strike for Peace Anti-Draft Clearing House, spoke from the perspective of a leader of the women's movement.\(^ {118}\) Similarly, in *RKO*, the Commission found the station's ascertainment "fatally defective"\(^ {119}\) for failing to include women's groups or leaders of the women's movement—as contrasted with women in general—in its interviews with significant community leaders.\(^ {120}\) The FCC's subsequent inclusion of the category "Organizations of and for Women" in the Ascertainment checklist\(^ {121}\) has presumably mooted the issue.\(^ {122}\) These cases, however, evidence the FCC's capability of dealing with charges that a minority's interests are not being addressed in a politically sympathetic manner.\(^ {123}\)

Minorities other than women have had a more difficult time challenging the responsiveneness of programming on political grounds. As discussed above,\(^ {124}\) stations tend to list very general problems in their annual problems list; two common categories are "Problems of Minorities" and "Women's Issues." This generality affords the licensee wide discretion in choosing programming. The FCC regards programs which only tangentially address issues relevant to minorities on a par with programs targeted to solve the

\(^{115}\) 555 F.2d 1002 (D.C. Cir. 1977).


\(^{118}\) *Id.* at 1007.

\(^{119}\) *RKO General, Inc.*, 69 F.C.C.2d 461, 467 (1978).

\(^{120}\) *Id.* at 468-69.


\(^{122}\) Sanctions were not imposed against the stations in either case because of the presumed redressing of the situation by the amendment of the checklist in 1976.

\(^{123}\) The Commission reacted similarly to the claim that a black interviewed in his capacity as a farm agent was capable of adequately representing the interests of blacks in the community. *Cosmos Broadcasting Corp.*, 21 F.C.C.2d 729, 747 (1970).

\(^{124}\) See notes 36-39 and accompanying text *supra*. 
ascertained problems. While the FCC's attitude is not a major drawback in terms of meeting representational goals, it is a formidable barrier to reaching political objectives. Programming which ostensibly meets minority needs may in fact be viewed by minorities themselves as unhelpful and even regressive.

In *NOW*, the National Organization for Women attacked public affairs programming listed by ABC-TV as responsive to women's issues. They claimed that interviews with prominent women were conducted in a demeaning fashion and accused one interviewer of treating women in a stereotypical manner. Similarly, in *Flower City Television Corp.*, a minority group challenging a license renewal application asserted that the "Black Dimensions" program the station had listed really addressed no problems of blacks but was instead "a potpourri of generally incompatible programming needs and styles with only Blackness to unite them." The following excerpt is typical of the Commission's and the courts' responses to such assertions by minority groups: "[A]ny attempt to judge the quality of programming, particularly on the grounds urged [by the challenger] would embroil the Commission in a controversy over what is or is not good programming. This is tantamount to censorship, which is specifically prohibited by Section 326 of the Communications Act." Fear of

125. See note 47 and accompanying text *supra*.
126. Among them were Margaret Mead and Germaine Greer. *National Org. for Women v. FCC*, 555 F.2d 1002, 1009-10 n.39 (D.C. Cir. 1977).
127. *Id.* at 1011.
128. *Id.* NOW alleged that the interviewer devoted more time to discussing the interviewee's age and feelings about growing old than he did to her book about alternatives to child-bearing. *Id.* at 1011 n.48.
129. 57 F.C.C.2d 112 (1975).
130. *Id.* at 115. Similar complaints in *Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972), prompted the court to make the following comment:

The FCC's ascertainment procedures speak largely in terms of ascertaining and dealing with community "problems." Community life, however, does not consist entirely of problems. Rather, it includes a spectrum of events and interests that range from newsworthy to purely aesthetic. It might be desirable for ascertainment proceedings to inquire into more than the problems of newsworthy events in a community. . . . It is not unreasonable for a cultural group to wish these elements of their existence to be treated with seriousness and sensitivity. . . . [But] until there is a redefinition of the scope of the ascertainment process, we are bound to evaluate a programmer's procedures in light of what is currently required.

*Id.* at 328-29 n.44.
131. *Television Wis., Inc.*, 58 F.C.C.2d 1232, 1235-36 (1975). *See Georgetown Univ.*, 66 F.C.C.2d 944, 947 (1977) ("Once it has been determined that a station reasonably and fairly
censorship and first amendment violation has deterred the courts and the FCC from addressing complaints such as those raised in NOW and Flower City Television Corp.

Yet the ability to challenge program content is vital to the achievement of political objectives. Admittedly, determining whether an interviewer is being demeaning is a very subjective determination—and one with first amendment implications. However, if discrimination is occurring in programming which is purportedly responsive some change must be effected. Closer consultation between leaders of minority groups and broadcasters, particularly public affairs production staffs, could be an uncontroversial first step. The Commission could upon the receipt of a complaint attacking responsive programming as unsuitable, require that the station and protesting minority group enter into a dialogue to try and resolve the dilemma. Thus far, the FCC has rejected the promulgation of a regulation requiring such action.  

The FCC's willingness to permit licensees broad discretion in programming to meet ascertained community problems has enabled licensees to avoid addressing controversial problems of minorities. In Georgetown University, the licensee was attacked for ceasing to program on such topics as the labor movement, the gay community, and the Puerto Rican independence movement. The FCC found no indication that the licensee thereby "ignored any significantly expressed community problems." It seems probable that if the licensee can program to "meet" minority needs by broadcasting interviews with black sports figures, it will do so, rather than devote time to discussions of struggles to overcome racism through social change. The FCC's inability or unwillingness to limit this wide discretionary power renders minorities powerless in their efforts to challenge the merely nominal responsiveness of current programming.

responded to significant community problems, we believe that inquiry into the style of such responses trespasses on areas of licensee discretion protected by the First Amendment.

134. Id. at 946.
135. Id. at 950.
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B. FAIRNESS DOCTRINE

The Fairness Doctrine can be invoked to achieve political objectives only if the minority group shows that the disparity between the way programming presently portrays the minority and the way it ought to portray the minority presents a "controversial issue of public importance." In National Organization for Women v. FCC, the women's group argued that "the entire program day of the challenged station is saturated with a distorted and stereotyped portrayal of women." The FCC held that these programs did not amount to advocacy of a position on the woman's role in society and did not, therefore, raise an issue requiring balancing. The circuit court sidestepped this question and ruled that even if the issue had been raised, the licensee "afforded a reasonable opportunity for conflicting viewpoints to be aired," and thereby satisfied the Fairness Doctrine. Gay organizations have experienced similar difficulties in convincing the FCC that stereotyped portrayals of lesbians and gay men raise issues requiring response.

As it is now construed the Fairness Doctrine is incapable of dealing with this type of complaint. If the Doctrine were to accommodate political goals, it would be necessary for the FCC to require stations to respond to stereotypical presentations with programming considered by minorities to be politically sensitive. Such a requirement would impose a degree of regulation heretofore regarded as possibly unconstitutional. The listing of problems responsive to minority groups in the problems-programming list would no longer be sufficient evidence—as it was in NOW—that minority viewpoints are being presented with a politically positive emphasis.

137. Id. at 1012 (quoting N.O.W. brief at 25).
139. 555 F.2d at 1014-15. The court upheld a Commission finding that ABC-TV's overall programming included enough programs presenting "anti-stereotypical" views that the issue on the whole had been treated fairly by the station, and the public had not been left uninformed. Id. at 1015.
140. 5 Hearings, supra note 50, pt. 2 at 379 (statement of Ron Gold, National Gay Task Force). Gay organizations have been wary however of advocating that gay rights is a controversial issue. They have instead sought "recognition that human rights and dignities are not controversial issues." Id. It is, in their view, only programming that encourages continued stereotyping and discrimination that is "controversial."
C. EQUAL EMPLOYMENT AND MINORITY OWNERSHIP PROGRAMS

Proposals to invoke equal employment and minority ownership programs to promote political objectives suffer from conceptual infirmities similar to those discussed with respect to using such programs to advance representational goals. Particularly, equal employment and minority ownership programs involve assumptions about the ability and willingness of particular minority employees to provide minority-oriented programming. However, if the underlying assumptions are valid, these programs should be as effective in forwarding political goals as representational ones. Indeed, the primary reason for promoting minority-owned or integrated stations is (or should be) not merely to broadcast minority viewpoints but rather to present such viewpoints in a politically sensitive and culturally sympathetic fashion.

V. CONCLUSION

Since 1934, the FCC has, through various regulatory techniques, sought to encourage programming responsive to minority members of the communities served by its licensees. The effectiveness of these techniques varies, but each has weaknesses which undermine attainment of responsive minority programming. Generally, these techniques are better able to promote the achievement of minority representational goals—a diverse presentation of minority viewpoints—than political goals—presentation of minorities in a socially and politically positive fashion.

Equal employment and minority ownership programs seem best suited to effect both minority representational objectives and political objectives. These, however, provide little assistance to non-recognized or non-organized minorities, and have other deficiencies which are discussed above. The Ascertainment program and the Fairness Doctrine do aid minorities in forcing broadcasters to acknowledge the existence of and respond to minority interests. Yet these policies might be more effective if the FCC were to encourage a more formalized structure for regular meetings and agreements between minorities and licensees.

Neither the Ascertainment program nor the Fairness Doctrine has effectively aided minorities in achieving their political objec-
tives. Although this failure might be attributable to deficiencies within the particular programs, it is more likely a result of the FCC's reluctance to invade broadcaster discretion and risk impinging on first amendment freedoms. The mass media are ideally suited to reduce discrimination in society by informing and educating both minorities and the general public. Because of its mandate to serve the public interest, the FCC can be instrumental in the fulfillment of this potential, but only if it reconsiders its priorities and truly makes its licensees trustees with fiduciary responsibilities to the public.143

VI. ADDENDUM

Since the completion of the main body of this article, the FCC has adopted new rules to deregulate radio which became effective April 3, 1981.144 This development revamped several of the practices described above as they relate to radio, and will, therefore, have repercussions for the continued attempts of minorities to achieve representational and political objectives.

The Ascertainment process and the broadcasting of responsive programming by radio stations are the programs most affected.145 Broadcasters are no longer required to conduct demographic or general public surveys or to interview community leaders.146 They are still required, however, to compile an annual list of five to ten community issues and to include examples of programming treating those issues.147 This list must be placed in the station's public files.

Under previous regulations, each licensee was responsible for serving the diverse elements of its community. While it was not necessary to program to meet the needs of every group within its broadcast area, each licensee was required to address the important issues facing all significant elements of its community.148 The new ruling revises this approach to responsive programming. “In

145. The other changes made by the new ruling are: 1) an elimination of the requirement that 6% of the broadcaster’s programming be devoted to nonentertainment programming, 2) an elimination of the guidelines regarding maximum allowable commercial minutes per hour, and 3) an elimination of the requirement that complete logs of programming be kept for the station’s public files. Id.
146. See notes 22-35 and accompanying text supra.
markets where there are a significant number of radio stations operating, each will be permitted to assess what other radio services are available in . . . choosing which issues to address with programming." Although broadcasters are obligated to act so as to reasonably insure that all issues of particular relevance to significant segments of the community are addressed, if challenged for failure to cover a particular issue, the broadcaster may point to programming of other stations to compensate for a failure to address an issue in its own programming.\textsuperscript{149} Additionally, the licensee may raise as a defense that there were "other radio services available in the community that could reasonably have been relied upon to address such issues."\textsuperscript{150} Thus, the other licensees in a community serviced by a black-oriented station may discontinue coverage of most issues of interest to blacks, relying on that station to cover significant black-related topics.\textsuperscript{151}

These new policies make the achievement of minority objectives more difficult in three ways. First, the discontinuation of required face-to-face interviews between responsible station personnel and leaders of minority groups eradicates an effective method of increasing the sensitivity of operative personnel to minority individuals—a characteristic especially helpful in achieving political goals. Second, increased deregulation is accompanied by an increase in the discretion of individual broadcasters with respect to the manner and degree of coverage dedicated to issues of particular interest to minorities. The broadcaster is permitted discretion to determine whether it might reasonably rely on other stations to cover particular issues, and thereby refrain from programming about them in any way. Because the licensee may now more frequently assert its discretion as a defense, it will be more difficult for minorities to successfully challenge a broadcaster's license. Third, the new rules, by shifting the responsibility for minority-oriented public affairs programming to stations already serving minority audiences, deals a harsh blow to efforts to achieve representational and, particularly, political objectives.

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 13,897. The Commission states: "The focus of our inquiry in the case of a challenge to license renewal will be whether the challenged licensee acted reasonably in choosing which issues to address." Id.
\textsuperscript{152} The Commission notes, however, that "the mere presence of a minority station is not dispositive. If that minority oriented station had, for instance, consistently not presented such programming, the licensee's judgment may not have been reasonable." Id.
As a result of the new policies, stations which serve primarily non-minority audiences may adjust their public interest programming toward issues relevant to that listenership. The resulting shift of the burden of covering minority issues away from stations with a general listenership defeats the representational objective of having the minority's presence acknowledged by the population at large. More significantly, this shift in minority programming strikes at the very heart of the political objective of educating the general listening audience to recognize and understand the needs of minority groups. By encouraging stations to address issues of interest only to its listenership, the FCC has apparently retreated from its previous commitment to "[a]dequate representation of minority viewpoints [which] serves not only the needs and interests of the minority community but also enrich[es] and educate[s] the non-minority audience."