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## Linguistic Diversity on the Airwaves: Spanish-Language Broadcasting and the FCC

Bill Piatt\*

Hispanics constitute an increasingly substantial segment of the population of this country.<sup>1</sup> The Spanish language is an important part of the Hispanic culture<sup>2</sup> and is spoken in a large number of American homes.<sup>3</sup> However, while the Federal Communications Commission (FCC) and the courts have required broadcasters to present program-

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1. In March, 1979, the U.S. Department of Commerce reported a total of 12,100,000 persons of Spanish origin in this country. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, PERSONS OF SPANISH ORIGIN IN THE U.S. (March 1979), Series P-20, no. 354, at 1. The 1980 census counted 14,608,673 persons of Spanish origin, or 6.4% of the total U.S. population. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, GENERAL POPULATION CHARACTERISTICS: UNITED STATES SUMMARY, 1980 CENSUS OF POPULATION, at 14, 21. An estimate by the Bureau of Census' Strategy Research Corporation places the total at 16,887,100 in 1984. These figures may be low. The census routinely has difficulty in densely-settled areas. The language barrier has restricted the response to census inquiries, and undocumented persons may not have been willing to be counted for obvious reasons. HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS, at 698 (1980).

2. Despite the continuing impact of Mexican culture and the inevitable reflection of mainstream American influences, Chicano culture has developed its own internal dynamism, creativity, and forces of change. Intrinsic to that culture is the Spanish language. Even though English is the primary language of Mexican-Americans, the use of Spanish has persisted strongly. . . . Even for those who no longer live in barrios or whose families do not speak Spanish, the language has attained a symbolic importance that encourages language maintenance.

HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS, *supra* note 1, at 714-15.

3. In November, 1979, it was estimated that 18,000,000 persons aged five and over were speaking a language other than English at home. Just under one-half of this number, approximately 8,768,000, spoke Spanish. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, ANCESTRY AND LANGUAGE IN THE UNITED STATES (November 1979), Special Studies Series P-23, no. 116, at 5, 14 [hereinafter cited as ANCESTRY AND LANGUAGE]. Approximately three-fourths of this country's Hispanic population in 1979 spoke Spanish within the household. See *supra* note 1.

ming to meet the needs of various minority groups, including the Hispanic community, there are no clear guidelines as to when this community has a right to programming in Spanish. Conversely, broadcasters have no guidelines for determining when their obligation, if any, to present Spanish programming arises.

This article will first briefly examine the FCC's general authority to regulate programming content to insure that broadcasters are adequately serving minority groups in their respective broadcast areas. Second, it will examine the confusing postures the FCC has taken when it tried to determine when service to the minority community required Spanish-language broadcasting. Third, the article will suggest that the FCC could begin to resolve the dilemma by articulating the reasons why Spanish-language broadcasting should be made available. Some of the possible reasons will be presented. Fourth, before concluding, the article will suggest a scheme for determining when, and to what extent broadcasters would be required to present Spanish-language programming.<sup>4</sup>

## I.

### THE FCC'S AUTHORITY TO REGULATE PROGRAM CONTENT TO INSURE SERVICE TO MINORITY COMMUNITIES

The Communications Act of 1934 created the FCC<sup>5</sup> and directed it to grant broadcast station licenses to applicants "if public convenience, interest, or necessity will be served thereby."<sup>6</sup> The Supreme Court determined that the FCC's regulatory role would not be limited to the engineering and technical aspects of radio communication. Rather, given that broadcast frequencies are limited, the FCC was determined to have the burden of insuring that the composition of broadcast traffic would be in the public interest.<sup>7</sup> This "public interest" was defined as the interest of the listening public in the "larger and more effective use of radio."<sup>8</sup>

In order to determine whether an applicant for a broadcast license will serve the public interest if licensed, the FCC requires the applicant to ascertain the problems, needs, and interests of his or her community

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4. The size of the Hispanic population in this country and the author's particular interest in the Spanish language are the reasons this article focuses on Spanish-language broadcasting. However, the analysis and suggestions contained in this article should be applicable to the presentation of broadcasting in this country in other languages as well. For a detailed statistical summary of other languages spoken in this country, see ANCESTRY AND LANGUAGE, *supra* note 3.

5. 47 U.S.C. § 151 (1976).

6. 47 U.S.C. § 307(a) (1976).

7. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

8. *Id.* at 216 (citing 47 U.S.C. § 303(g) (1976)).

and propose programming which would meet those needs.<sup>9</sup> The FCC's authority to determine whether the broadcaster's program content serves the public interest is not limited to a review of the initial application. Broadcast licensees are held to be public trustees with a burden of demonstrating every three years that renewal of their licenses will serve the public interest.<sup>10</sup> A new "ascertainment" survey must be conducted and submitted with the renewal application.<sup>11</sup> A significant element of the "public interest" as defined by the FCC is the broadcaster's service to the community with programming being the essence of that service.<sup>12</sup> Broadcasters have a wide discretion in selecting community needs to be addressed by their programming.<sup>13</sup> The FCC refuses to substitute its judgment for that of a licensee, absent a showing of abuse of the broadcaster's discretion in dealing with the problems of its community.<sup>14</sup>

However, the FCC and the courts have clearly taken the position that in exercising programming discretion, a broadcaster must take into consideration the problems of minorities in the communities in which he or she is licensed to serve<sup>15</sup> or suffer the loss or restriction of the broadcast license.<sup>16</sup>

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9. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

10. 47 U.S.C. § 307(d) (1976); 47 U.S.C. § 309(e) (1976); Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), reh'g, 425 F.2d 543 (D.C. Cir. 1969).

11. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976).

12. Network Programming Inquiry: Report & Statement of Policy, 25 Fed. Reg. 7291 (1960).

13. Committee to Elect Jess Unruh Our Next Governor, 25 F.C.C.2d 726 (1970).

14. Mahoning Valley Broadcasting, 39 F.C.C.2d 52, 61 (1972); WTWV, Inc., 62 F.C.C.2d 633, 639 (1977). The licensee's "good faith" may be an adequate defense to a charge that a licensee failed to present another perspective on a controversial issue of public importance. Screen Gems Stations, 51 F.C.C.2d 557 (1975). *But see* Alabama Educational Television Comm'n cited *infra* note 16.

15. Time-Life Broadcast, 33 F.C.C.2d 1081, 1093 (1972).

16. *See* Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), reh'g, 425 F.2d 543 (D.C. Cir. 1969) (failure of broadcaster to give fair and balanced presentation of issues concerning blacks precludes the FCC from finding renewal of a license to be in the "public interest"); Alabama Educational Television Comm'n, 50 F.C.C.2d 461, 472 (1975) (failure of educational stations to serve the special needs of Alabama's black community constitutes a failure of license responsibility irrespective of any intent to discriminate; the obligation to broadcast in the "public interest" includes not "merely service to the general public, but also service to significant distinct minority interests"); New Mexico Broadcasting Co., 87 F.C.C.2d 213, 243-44 (1981) (deficient programming service to the Mexican-American community was a factor in limiting license renewal to one year, even though the overall performance of the broadcaster was minimally acceptable). *See also* NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976) (FCC's equal employment regulations concerning licenses upheld as necessary to insure that programming fairly reflects the tastes and viewpoints of minority groups); Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment

At this point in time, then, despite some serious criticism<sup>17</sup> and limitations,<sup>18</sup> it is well settled that the FCC has the power to regulate programming content to insure that the needs of minority communities are met.<sup>19</sup>

## II. WHEN DOES THE FCC REQUIRE SPANISH-LANGUAGE BROADCASTING?

At the present time there is no statute or regulation specifically requiring broadcasters to present any portion of programming in a "foreign" language.<sup>20</sup> FCC decisions, on the other hand, do generally

Practices, 18 F.C.C.2d 240 (1969); Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 23 F.C.C.2d 430 (1970); Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342; Adding the Equal Employment Program Filing Requirement to Comm'n Rules 73.125, 73.301, 73.599, 73.680 and 73.793; materials cited *infra* note 19; see generally 47 C.F.R. § 73.2080 (1983) (setting forth the FCC's equal employment policies).

17. See Powe, "Or of the Broadcast Press," 55 TEX. L. REV. 39 (1976); Canby, *Programming in Response to the Community, the Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67 (1976). Professor Powe considers the history and rationale of broadcasting regulations, particularly the fairness doctrine, and concludes the First Amendment should protect broadcasting to exactly the same extent as the print media. Professor Canby examines constitutional problems underlying the FCC's content regulation and argues, contrary to the U.S. Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), that the audiences' interests should not be labelled a constitutional "right to hear."

18. For a discussion of the difficulties encountered in challenges to license renewals by minority groups alleging unfair programming, see Note, *Use of Petitions by Minority Groups to Deny Broadcast License Renewals*, 1978 DUKE L.J. 271.

19. Other commentators, studies, and a legislative proposal urge that the FCC take an even more active role in eradicating racial bias from the broadcast airwaves. See McNeil, *The Right to Cultural Pluralism in Broadcasting*, 6 BLACK L.J. 232, (1978-79) (the author concludes, in part, that the FCC should utilize the fairness doctrine to control news bias against minorities); see also U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: AN UPDATE (1979). The Commission concluded that racial and sexual stereotyping in television drama continues; that news bias against minorities and women continues; and that minorities and women are underemployed in the broadcast industry. The Commission urged the FCC to conduct an inquiry and proposed rulemaking investigating the network programming process, the resulting portrayals of minorities and women, and the impact of these portrayals on viewers. The Commission urged the FCC to seek authorization to regulate equal employment opportunities at the network and to enforce more effectively affirmative action programs for every broadcast licensee. See also Bowie & Whitehead, *The Federal Communications Commission's Equal Employment Opportunity Regulation — An Agency in Search of a Standard*, 5 BLACK L.J. 313 (1977). On February 2, 1983 a bill was introduced in the House of Representatives entitled "Minority Telecommunications Development Act of 1983" H.R. 1155, 98th Cong., 1st Sess. (1983). The bill would have provided for greater diversity of ownership and control of domestic and international telecommunications by requiring persons regulated under the Telecommunications Act of 1934 to implement equal employment opportunity programs. The bill would also have established an advisory committee on minority telecommunications development. However, the bill, after having passed in the House, failed in the Senate.

20. For the purpose of clarity, "foreign language" herein is any language other than English. Any language in use in this country, however, can certainly not be "foreign" to its native speakers.

recognize the desirability of such programming. Later decisions apparently create some obligation on the part of broadcasters to provide it. However, the cases contain varying discussions and analyses of the "need" for such broadcasting, its "suitability," the "obligation" to provide it, and the level of "control" that should be exercised over it. Some cases place importance on the number of ethnic persons in the broadcast audience who speak *only* the foreign language. Others ignore the "linguistic exclusivity" requirement. Later cases confuse minority ownership of broadcast facilities with the language issue. The result is an absence of an adequate standard for measuring the parameters of the foreign-language broadcasting requirement. An examination of cases dealing with the foreign-language issue in several different contexts would be useful at this point.

In early cases, the FCC and its predecessor, the Federal Radio Commission, approved foreign-language programs designed to educate and instruct the audience regarding loyalty to the community and nation, promote racial origin pride, stress citizenship, and instruct on work safety,<sup>21</sup> but did not approve foreign-language broadcasts which were primarily advertising programs stressing the sale of merchandise.<sup>22</sup> No mention was made in these cases of the percentage of the various ethnic groups in the respective broadcast area nor of the percentage of such individuals who spoke only a particular language. No attempt was made to delineate any obligation on the part of broadcasters to provide this programming.

Later, the FCC discussed foreign-language broadcasting in the context of cases wherein one applicant for a broadcast license sought preference over another on the basis that it had more of a commitment to serve the foreign-language audience. In *Tampa Times Co. v. FCC*,<sup>23</sup> the FCC, with judicial approval, granted a television permit to an applicant which also operated a radio station. The FCC noted that there were some problems with the radio station's programming. However,

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This is particularly true in the case of the Spanish language which was in use in what is now the southwest United States long before English was spoken there. For an historical summary, see HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS, *supra* note 1, at 700-19.

New Mexico officially recognizes the continuing importance of the Spanish language in that state. See N.M. CONST. art. XX, § 12 (publication of laws in English and Spanish); art. XII, § 8 (teachers to learn English and Spanish); art. XIX, § 1 (publication of proposed constitutional amendments). See also N.M. STAT. ANN. ch. 1-2-3 (1978) (election notices and instructions to be printed in English and Spanish); ch. 76-4-4 (1978) (pesticide labels to be printed in Spanish).

21. Johnson-Kennedy Radio Corp., *aff'd sub nom.* Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 270-71 (1933) (programs included broadcasts for "Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch and Irish people" in the Gary, Indiana area).

22. U.S. Broadcasting Corp., 2 F.C.C. 208, 223 (1935) (foreign-language programs were transmitted in the Brooklyn area in "Jewish, Italian and Polish").

23. 19 F.C.C. 257 (1954), *aff'd*, 230 F.2d 224 (D.C. Cir. 1956).

it found that the favorable aspects of its broadcasting included Spanish-language programming in the Tampa, Florida area. It made no mention of the percentage of the population who spoke only Spanish in the broadcast area. Shortly thereafter, in *In re Great Lakes Television, Inc.*,<sup>24</sup> the FCC appeared to vacillate on the desirability of foreign-language programming. There, an applicant proposed to present 5.8% of its total programming in foreign languages. The FCC found that the "detriment" to those who would not be able to comprehend the programming would outweigh the benefit to those who needed and wanted such programming. Therefore, the Commission found no basis for giving the applicant "preference" in its application over another applicant which proposed less foreign-language broadcasting.<sup>25</sup> The Commission found that a need for foreign-language broadcasting had been shown to exist in the area.<sup>26</sup> Yet, far from enunciating how best to meet this need, the Commission appeared ready to limit foreign-language broadcasting by announcing a number of factors for determining its "suitability." These factors were: 1) the percentage of the population to be served which could be expected to comprehend the foreign tongue; 2) the percentage of the station's total programming to be devoted to foreign languages; 3) the control the licensee could exert over the content of the foreign-language programs;<sup>27</sup> and 4) the number of other radio or television services available in the area.<sup>28</sup>

In a third preference case, *In re La Fiesta Broadcasting Co.*,<sup>29</sup> an applicant proposing to present an all-Spanish format in Lubbock, Texas was given preference by the FCC over another which only sought to broadcast part-time in Spanish. The FCC rejected its hearing examiner's determination that all-Spanish programming would be inconsistent with state and national policy.<sup>30</sup> It then applied a two-pronged analysis: 1) does a substantial number of persons residing within the proposed service area lack the ability to comprehend English, or is their working knowledge of English so poor that for purposes of public service announcements they can be reached effectively only by an all-Spanish language station? 2) to what extent would the proposed programming meet such need?<sup>31</sup> The FCC relied upon testimony of a growing "Latin American" population in the Lubbock, Texas area, 60% to 80% of which could not properly understand Eng-

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24. 25 F.C.C. 470 (1958).

25. *Id.* at 526.

26. *Id.*

27. For a discussion on the issue of "control," see text accompanying notes 38-43.

28. See *supra* note 24, at 526.

29. 6 F.C.C.2d 65 (1966).

30. *Id.* at 66.

31. *Id.* at 68-73.

lish, in finding a "need" for full-time Spanish programming,<sup>32</sup> and awarded the license to the full-time Spanish station.

In the context of license renewal challenges, the FCC had the opportunity to clarify the parameters of an "obligation" to provide foreign-language programming, but failed to do so. In *In re New Mexico Broadcasting Co.*,<sup>33</sup> deficiencies in service to the Mexican-American community was a factor in the FCC's decision to limit license renewal to one year. There was no specific finding regarding failure to provide broadcasting in the Spanish language, even though petitioners had raised the issue. In another license renewal challenge, *In re Marsh Media*,<sup>34</sup> the FCC granted a license renewal in the face of an assertion by the challengers that the station's weekly thirty-minute bilingual programming was insufficient. The FCC found a failure to raise any substantial and material questions of fact.<sup>35</sup> Again, there was no attempt by the FCC to develop any guidelines for bilingual service.<sup>36</sup>

The FCC also declined to announce any such guidelines in the ironic cases where one Spanish-language broadcaster sought to limit access to the airwaves by a potential competitor who also sought to broadcast in Spanish.<sup>37</sup> A public pronouncement<sup>38</sup> by the FCC warning broadcasters to maintain control over foreign-language program-

32. *Id.* at 69-73. The Commission also noted with apparent approval the "suitability" guidelines of Great Lakes Television, Inc., 25 F.C.C. 470 (1958). *La Fiesta Broadcasting Co.*, 6 F.C.C.2d at 68.

33. 87 F.C.C.2d 213 (1981).

34. 67 F.C.C.2d 284 (1977).

35. *Id.* at 290.

36. *But see id.* at 290-94 (Ferris, Chairman, concurring).

37. *See Spanish Int'l Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967); *Big Valley Cablevision, Inc. v. FCC*, 529 F.2d 353 (D.C. Cir. 1976).

38. Foreign Language Programs: Broadcasters Cautioned to Exercise Adequate Control, 32 Fed. Reg. 64 (1967):

The Commission cautions broadcasting stations to maintain adequate controls over their foreign language programming.

Essential to the exercise of proper licensee responsibility in this matter is knowledge of the content of such broadcasts. Commission inquiry reveals that a number of licensees have no familiarity with the foreign languages and, thus, no knowledge of the content of such broadcasts. They explain their practices as follows: (1) they permit only persons of established reputation for judgment and integrity to use their facilities; (2) copies of commercial announcements used on foreign language programs must be submitted in advance in English translation; (3) recordings of all programs are made and retained for future reference. We do not regard such procedures, in and of themselves, as sufficient to insure licensee knowledge of and control over foreign language programming.

Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign languages to know what is being broadcast and whether it conforms to the station's policies and to requirements of the Commission's rules.

Failure of licensees to establish and maintain such control over foreign language programming will raise serious questions as to whether the station's operation serves the public interest, convenience and necessity.

On March 5, 1971, the FCC issued a similar warning regarding song-lyrics believed to be "drug-oriented." *See* 47 C.F.R. § 73.4095 (1983).



ming similarly failed to offer any guidelines for determining when the need to provide such programming arises. A clarifying memorandum<sup>39</sup> discussing broadcaster control acknowledged the desirability of foreign-language programming, noting that "we [FCC] have never held or implied that foreign-language programming should be denied when a demonstrable need for it exists."<sup>40</sup> However, the memo did not address the issue of when or how broadcasters would be required to meet the demonstrated need. A second clarification<sup>41</sup> eliminated the "control" requirement, acknowledged the "need for more foreign language programming," and encouraged "time sharing" to provide such programming,<sup>42</sup> but still failed to discuss any obligation on the part of broadcasters to provide it.

The FCC did discuss an "obligation" to provide foreign-language programming in a series of "waiver" cases. In *In re Tucson Radio, Inc.*,<sup>43</sup> applicants sought permission from the FCC to expand to a night broadcast in Spanish. They asked the Commission to waive its rule<sup>44</sup> which prohibited new "night" licenses unless the applicant could show it would provide a "first primary AM service" to at least 25% of an interference-free area which currently had no existing nighttime service. The FCC denied the application, finding, in part, that the applicant "only" showed that 35% of the audience spoke mostly Spanish, and concluded that "a skill in speaking a second language hardly warrants the conclusion that there exists a need to receive aural broadcast in that language."<sup>45</sup> The petitioners appealed.<sup>46</sup> While the appeal was pending, the regulation was amended to allow for licensing where at least 25% of the population in the area (rather than 25% of the geographical area itself) was not being served. The court remanded, concluding that if 25% of the population receives, in effect, no nighttime AM radio service because it cannot understand English, then a station which proposes to serve the population in Spanish may, depending upon FCC interpretation, provide a "first primary service" within the meaning of the FCC regulation and be entitled to licensing. The court

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39. Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs, 39 F.C.C.2d 1037 (1973).

40. *Id.* at 1039.

41. Elimination of Unnecessary Broadcast Regulations and Subscription Agreements Between Radio Broadcast Stations and Music Format Service Companies, 48 Fed. Reg. 49,852 (1983) [hereinafter cited as Regulations and Agreements].

42. *Id.* at 49,857 (citing Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, 82 F.C.C.2d 107 (1980)).

43. 24 F.C.C.2d 827 (1970).

44. 47 C.F.R. § 73.24 (1983).

45. *Tucson Radio, Inc.*, 24 F.C.C.2d at 829. The FCC also concluded that the petitioner failed to show that none of the existing stations would, if requested, broadcast in Spanish.

46. *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380 (D.C. Cir. 1971).

explicitly acknowledged that there could be a "failure to serve a group which cannot understand the language broadcast."<sup>47</sup> It remanded for an interpretation by the FCC of the "first primary service" language and for a factual determination as to whether exclusively Spanish-speaking persons constituted 25% of the population.<sup>48</sup> On remand<sup>49</sup> the FCC held the application in abeyance for 90 days, requiring the applicant to show what percentage of the population in the service area spoke Spanish *only*. The FCC stated:

Broadcast stations are trustees of the public airwaves and must design their programming to meet the needs and interests of their communities. If a substantial segment of the community thinks and speaks in the Spanish language only, and cannot understand the English language, the broadcast stations in that area must be responsive to this fact. Accordingly, if a petitioner can show i) that a substantial segment of the community speaks exclusively a language other than English; ii) that a need exists for aural broadcast service in that language; iii) that none of the existing stations would serve this need; and iv) that the prospects for obtaining such service by resort to existing Commission remedies are poor, the Commission would then entertain a petition for waiver of its primary service rule.<sup>50</sup>

The FCC adhered to the *Tucson* requirement that there be a showing that a substantial segment of the population understand Spanish *only* before granting a waiver, in its denial of the applicant's petition in *In re Riverside Amusement Park Co.*<sup>51</sup> The FCC stated:

[The applicant] does not state how many citizens of Phoenix understand Spanish only and are therefore unable to comprehend programming on the other radio stations in the community. In the light of the foregoing, and in the absence of a showing to the contrary, we will not assume that Spanish is the only language comprehensible to a substantial segment of the Mexican-American population.<sup>52</sup>

However, in at least two other instances the FCC has waived the nighttime limitation on behalf of applicants seeking to provide Spanish programming in areas of substantial Hispanic population without requiring a showing that any percentage of the population speaks *only* Spanish. In *In re Por Favor, Inc.*<sup>53</sup> and *In re D & E Broadcasting Co.*,<sup>54</sup>

47. *Id.* at 1382, n. 1. The court implied that among the remedies for the failure of broadcast stations to provide foreign-language broadcasting would be for persons desiring such service to: 1) request such service from existing broadcast stations; 2) attempt to bring the need for such programming to the attention of stations and the commission through challenges to license renewals; or 3) file competing applications.

48. *Id.* at 1383.

49. *Tucson Radio, Inc.*, 35 F.C.C.2d 584 (1972).

50. *Id.* at 585-86.

51. 69 F.C.C.2d 1040 (1978).

52. *Id.* at 1043-44.

53. 68 F.C.C.2d 73 (1978).

54. 70 F.C.C.2d 646 (1979).

the FCC waived nighttime operation and city grade coverage rules, respectively, to allow for service by Spanish-language stations in the San Antonio, Texas area. In *Por Favor*, the applicants showed that there were 400,000 San Antonio residents of Mexican descent presently being served by their station and that there was only one full-time AM broadcast station in San Antonio whose programming was directed towards the Mexican-American community. They asserted, "the inadequacy of this lone voice is plain on its face."<sup>55</sup> In *D & E*, the applicant proposed 100% Spanish-language programming at night, "to serve the substantial Mexican-American population in San Antonio,"<sup>56</sup> without discussing the size of the population that spoke only Spanish.

In both *Por Favor* and *D & E*, the FCC noted the significant minority ownership of the applicants and found the ownership and the programming proposal to be consistent with the "foremost goal of developing a more diverse selection of programming directed towards minority needs and interests."<sup>57</sup>

After examining these cases, there is wide room to speculate on what the FCC requires, if anything, by way of service to communities with substantial segments of persons speaking a language other than English. Among the conclusions that can be drawn are:

1. The FCC will only find foreign-language programming desirable and necessary (and mandatory?) where a substantial segment of the audience speaks *only* that language.<sup>58</sup>

2. Where there is a large enough ethnic population, the FCC presumes foreign-language programming is desirable without inquiry as to the percentage of people who speak *only* that language, on the apparent assumption that a large number of them do speak that language *only*.<sup>59</sup>

3. Applicants with significant minority ownership need not

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55. *Por Favor, Inc.*, 68 F.C.C.2d at 74.

56. *D & E Broadcasting*, 70 F.C.C.2d at 647 n. 4. The FCC quotes the 1970 U.S. Census as indicating that more than 52% of San Antonio's population is of Spanish heritage, but made no reference to any statistical data as to the amount of people who speak *only* Spanish.

57. *Id.* at 647 (citing *Riverside Amusement Park Co.*, 69 F.C.C.2d 1040 (1978) and *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978)). *See also Garret v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

58. *Tucson Radio, Inc. v. FCC*, 35 F.C.C.2d 584 (1972); *Riverside Amusement Park Co.*, 69 F.C.C.2d 1040 (1978) (both cases adopting language used in *La Fiesta Broadcasting Co.*, 6 F.C.C.2d 65 (1966)).

59. *Por Favor, Inc.*, 68 F.C.C.2d 73 (1978); *D & E Broadcasting, Inc.*, 70 F.C.C.2d 646 (1979). In both cases 400,000 Mexican-Americans in San Antonio resulted in Spanish-language broadcasting. For earlier FCC cases allowing foreign-language broadcasting to apparently large ethnic communities, see cases cited *supra* notes 21 and 22. *Tucson Radio, Inc. v. FCC*, 35 F.C.C.2d 584 (1972); *Riverside Amusement Park Co.*, 69 F.C.C.2d 1040 (1978) (170,000 Hispanics in Tucson and 81,000 in Phoenix were held to require no Spanish-language broadcasting).

demonstrate that a percentage of the population speaks *only* a foreign language in order to obtain waiver of FCC rules and thereby make foreign-language programming available where it would not be otherwise.<sup>60</sup>

Each of these conclusions raises serious questions. The first conclusion, if that is the FCC's intent, assumes that bilingual people have no interest in hearing broadcasting in any language but the English language. It also assumes that English-speaking Anglo-Americans have no interest in learning another language or in being exposed to another culture by receiving such programming. It produces the catch-22 result that in a particular broadcast area where broadcasters have failed to provide foreign-language broadcasting, and as a partial result, the ethnic people have lost their native language ability, the broadcasters then have no obligation to provide broadcasting in that language.

The second conclusion offers little guidance as to when foreign-language broadcasting is desirable or required or as to how large the ethnic population must be before foreign-language broadcasting should or must be provided.

The third conclusion assumes, perhaps erroneously, that minority ownership would automatically call for foreign-language programming or programming directed to minority needs. It creates obvious equal protection problems. And, if the goal of minority ownership of broadcast stations is to increase service to ethnic communities,<sup>61</sup> why should the FCC discourage such service by non-minority broadcasters by imposing the higher standards of *Tucson* and *Riverside* before granting rule waivers, particularly where there are no competing applications for service by minority applicants?

The various postures the FCC has taken, then, are confusing and perhaps irreconcilable. They offer little guidance to broadcasters or the public. It is not clear when the FCC requires foreign-language broadcasting in general and Spanish-language broadcasting in particular.

### III.

#### WHY SHOULD THE FCC REQUIRE SPANISH-LANGUAGE BROADCASTING?

The confusion and lack of guidance discussed in Part II of this article may result, at least in part, from the FCC's failure to articulate why Spanish-language programming should be made available. The first step toward resolving the dilemma might be for the FCC to adopt

60. *Por Favor, Inc.*, 68 F.C.C.2d 73 (1978); *D & E Broadcasting, Inc.*, 70 F.C.C.2d 646 (1979).

61. *See Riverside Amusement Park Co.*, 69 F.C.C.2d 1040 (1978).

a policy statement<sup>62</sup> articulating some of these reasons. Among the reasons why this author suggests it should be made available are the following:

1. Broadcasters have the obligation to meet the needs and interests of the minority groups in the communities in which they are licensed to serve.<sup>63</sup> Where the minority community speaks *only* Spanish, failure of broadcasters to provide Spanish broadcasting constitutes a complete failure to serve that group.<sup>64</sup>

2. Even if they also understand English, Hispanic-Americans may have an important interest in receiving Spanish broadcasting to maintain contact with and improve upon their Spanish-language ability.<sup>65</sup> Failure of broadcasters to make Spanish-language broadcasting available to bilingual Hispanics creates an insensitive and hostile broadcast climate which has a particularly strong potential negative impact upon Hispanic children.<sup>66</sup>

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62. The FCC utilizes policy statements in an attempt to clarify its position in other areas of regulation. *See e.g.*, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964), *modified*, *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974), *reconsidered*, 58 F.C.C.2d 691 (1976); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, *supra* note 57. *See also* 47 C.F.R. § 73.4000 (1983) (identifying other FCC policies).

63. *See* *Riverside Amusement Park Co.*, 69 F.C.C.2d 1040 (1968).

64. *See* *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 n. 1 (D.C. Cir. 1971).

65. *See* *AMERICAN ETHNIC GROUPS*, *supra* note 1.

66. *See* *New Mexico Broadcasting Co.*, 87 F.C.C.2d 292, 299, 301 (summarizing the testimony of Dr. Rupert Trujillo and Professor Antonio Mondragon), *modified*, 87 F.C.C.2d 213 (1981) (limiting license renewal to one year due to failure of broadcaster to meet the needs of the minority community).

Professor Mondragon teaches in the Department of Psychology and is Director of Chicano Student Services at the University of New Mexico. According to Professor Mondragon:

New Mexico has the greatest proportion of Spanish surnamed persons to total population of any state. It is a multi-cultural state made up of Indians, Mexican-Americans, Anglos and some Blacks. Mondragon stated that the state is officially bilingual with Spanish and English both being official languages. Prof. Mondragon views the Mexican-Americans as a conquered people who are constantly reminded that they are different racially, ethnically and culturally. As a conquered people, the Mexican-Americans are relegated to a subordinate position in society, according to the professor. Mondragon stated that the culture and values of the Mexican-Americans have been misinterpreted by the Anglo culture and a majority of the American people. This lack of understanding on the part of society as a whole has, according to Prof. Mondragon, had an impact on the Mexican-American's self-image. Prof. Mondragon stated that this problem could be alleviated if positive role models were presented. The media . . . could help portray a positive image of the Mexican-American by pronouncing Mexican-American names properly and refraining from negative editorializing on news stories of interest to Mexican-Americans.

Dr. Trujillo, Dean of Continuing Educational Community Services at the University of New Mexico identified problems of Mexican-American children in the educational system including:

(1) lack of responsiveness to the Mexican-American child's cultural background; and (2) language difficulties faced by the Spanish-speaking child and the system's failure to accept the Spanish language and provide Spanish-speaking personnel. Trujillo explained that the insensitivity of the educational system to the Mexican-American child often re-

3. Non-Spanish-speaking individuals, Hispanics and non-Hispanics alike, may have an interest in acquiring language skills and greater cultural diversity by having access to Spanish-language broadcasting.<sup>67</sup>

4. There may be another, more important reason why Spanish-language broadcasting should be made available—Spanish-speaking audiences may have a First Amendment right to it. In upholding the FCC's "fairness doctrine" (requiring broadcasters to give equal time to individuals personally attacked in broadcasts and to political opponents of station-endorsed candidates), the U.S. Supreme Court found a First Amendment free speech right in the listening public:

There is nothing in the First Amendment which prevents the Govern-

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sults in frustration. The child is encouraged at home to get an education. However, according to Trujillo, the child is greeted by teachers who are insensitive to cultural differences and language problems. This cultural and linguistical insensitivity creates a not necessarily deliberate, but nonetheless hostile environment. Trujillo stated that these problems result in a great disparity between Mexican-American children and others on achievement tests. The drop-out rate among Mexican-American children is high and they do not participate as extensively in extra-curricular activities. According to a 1971 study conducted by the Civil Rights Commission, a lower percentage of Mexican-American students entered college (22.2% as opposed to 79.8% for Anglo children) and that by the 12th grade, 71.1% of Hispanics remained in high school as opposed to 79.8% for Anglo children.

As a result of the rejection of the language, Mexican-American students often feel that there is something inferior about their language and culture, and consequently, about themselves and their families.

Presenting Spanish-language programming in a positive manner might alleviate misunderstanding of the Spanish culture by non-Hispanics. It might present Hispanic children with positive role models if, for example, they were able to hear Hispanic professionals and lay people speaking their native tongue on the airwaves. This kind of programming may give these children a better feeling that their Spanish language and cultural background is "all right" — that it is something good and positive. This better understanding on the part of non-Hispanics and a more positive self-image by Hispanic children may begin to alleviate some of the problems identified by Professor Mondragon and Dr. Trujillo.

All groups of children are impressionable. Many use television to inform themselves about "real life." However, low-income minority children show a somewhat greater tendency to accept television as real than do middle-income, majority children. See U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: AN UPDATE, *supra* note 19, at 49-50. The absence of Spanish-language television programming, then, may be particularly harmful to Hispanic children, who might tend to conclude there is something wrong with their language and culture since it is not presented on TV.

The size of the group of Spanish-speaking children in this country makes this an important concern: in 1979, 6% of all elementary school-aged children, 1,800,000 in total, spoke Spanish. See ANCESTRY AND LANGUAGE, *supra* note 3, at 5.

Finally, on this point, it is important to note that the U.S. Supreme Court has implicitly acknowledged that promoting racial or ethnic pride is a valid reason for presenting foreign-language programming. See *FRC v. Nelson Brothers Bond and Mortgage Co.*, 289 U.S. 266, 271 (1933).

67. The FCC has recognized that "minority" programming benefits the non-minority community as well: "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." Statement of Policy on Minority Ownership of Broadcasting Facilities, *supra* note 57.

ment from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326 [of the Communications Act of 1934], which forbids FCC interference with 'the right of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose view should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . (footnotes omitted). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.<sup>68</sup>

Obviously, when the broadcasting is only in English, the exclusively Spanish-speaking listener has no "suitable access" to the ideas, experiences, views and voices which the Court finds to be his or her right. We recognize that other rights cannot be effectively exercised unless some accommodation is made for language differences: bilingual education,<sup>69</sup> the provision of interpreters for litigants and witnesses,<sup>70</sup> and the requirement that Miranda warnings be given in an understandable language<sup>71</sup> are examples. There is no apparent reason why the First Amendment right recognized in *Red Lion* would be any less important.<sup>72</sup>

#### IV.

#### A SIMPLE SOLUTION TO A DIFFICULT PROBLEM: USE OF ASCERTAINMENT SURVEYS TO DETERMINE PUBLIC INTEREST IN FOREIGN-LANGUAGE BROADCASTING AND THE "PERCENTAGE-PROGRAMMING" SOLUTION

Broadcasters are already required to ascertain community

68. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969).

69. *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974); Bilingual Education Act, 20 U.S.C. § 3222 (1978); Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f).

70. Court Interpreters Act, 28 U.S.C. § 1827 (1978).

71. *Sanchez v. LeFevre*, 538 F. Supp. 1104 (S.D.N.Y. 1982).

72. Those people who do understand English and who therefore have access to English-language broadcasting may also have a First Amendment right to a diversified programming schedule which would include Spanish broadcasting. See *supra* note 67.

problems and interests and propose programming to meet those needs, both as part of the initial application for an FCC license and every three years thereafter when the licenses are up for renewal.<sup>73</sup> While recognizing the desirability of Spanish-language broadcasting, the FCC is confused as to when the obligation to provide it exists, as seen above. A relatively simple solution would be for the FCC initially to adopt a policy statement articulating the reasons why such broadcasting is desirable. Then, the FCC could require that the ascertainment surveys be expanded<sup>74</sup> to include a determination of whether Spanish-language broadcasting is desired by the public in the area the broadcaster is to serve, and if so, what percentage of the broadcaster's programming the public would like to see presented in Spanish.<sup>75</sup> The FCC would then require, as a condition of licensing, that the broadcaster provide a portion of its programming in Spanish equal to the survey results.<sup>76</sup> The survey would be redone every three years in conjunction with license renewal and the figure for Spanish-language broadcasting would be adjusted accordingly. Broadcasting *content* would still be left to the broadcaster's discretion subject to existing requirements that broadcasting be in the public interest. The only change would be in the language in which a portion of the programming would be presented.

An example will help illustrate. As part of its initial application, a broadcaster's ascertainment survey reveals that 10% of the prospective audience would like to see Spanish programming. That portion of the audience indicates that on the average it would like to have 10% of its broadcasting in Spanish and 90% in English. Multiplying the results

73. See *supra* notes 9-11.

74. "Ascertainment" presently involves four steps: 1) a compositional study to determine the various groups composing the community; 2) consultation with representatives of the groups to determine community interests and needs; 3) a random survey of the general public to identify community problems and needs; and 4) preparation of a programming plan in response to these problems, interests and needs. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 682-85 app. (1971). Ascertainment of the interest in Spanish-language programming could be incorporated in steps 2 and 3.

75. The Commission should begin to assist licensees in bilingual communities by developing clearer guidelines as to when and to what degree bilingual service is necessary to meet our basic test of serving their communities' needs. Even if less than half of El Paso's Mexican-American citizens use Spanish as a primary or coequal language, that could still amount to one-quarter of KVIA's total audience. We require our licensees to ascertain and address community needs and interests. But how can they be addressed meaningfully if a substantial portion of the audience is not comfortable with the language being used? A trustee of the public surely has a fiduciary obligation to speak to those for whom he holds that trust in a language they can readily understand. Perhaps we should require this issue to be explored by a licensee in its ascertainment surveys, if the existence of a threshold percentage of Hispanic citizens in its service area would make such an inquiry potentially fruitful.

Marsh Media, 67 F.C.C.2d 284, 292 (1977) (Ferris, Chairman, concurring).

76. Preparation of a programming plan in response to community needs and interests is consistent with step 4 of the ascertainment process already in existence. See *supra* note 74.



indicates that the total potential audience has a Spanish-language preference of 1% of the total broadcast time (one-tenth of the audience would like to see one-tenth of the programming in Spanish). Assuming all other qualifications were met, the FCC would issue the license and require the station to present at least 1% of its programming in Spanish. Three years later, a new ascertainment study would be conducted as part of the renewal application. Assume now that because of population increases in the Hispanic community and because of the desire of some non-Spanish-speaking viewers to improve their Spanish language skills and be exposed to more Spanish cultural programming, 12% of the population indicates it would like to see, on the average, 15% of the total broadcasting in Spanish. Assuming that the other requirements for renewal are met, including a determination that the station has complied with the requirement over the past three years that at least 1% of its programming be presented in Spanish, the FCC would relicense the station. This time, the station would be required to present 1.8% of its total broadcast time in Spanish over the next three year period ( $12\% \times 15\% = 1.8\%$ ).

This scheme would eliminate any confusion and unfairness resulting from the FCC's ambiguous decisions as discussed above. It would allow for the possibility that the desire of non-Hispanics to learn Spanish could be accommodated. It would relieve broadcasters from any foreign-language obligation if the audience simply did not wish it. And, it would provide a certain objective standard by which the FCC could measure whether the broadcaster was meeting the diverse language needs of its audience. Finally, it would continue to leave to the broadcaster's discretion the content of its programming, subject only to existing "public interest" standards.

The simplicity of this scheme is obvious. So too is the responsiveness it would provide to the language interests of the community. However, it is not apparent that the FCC would readily adopt such an approach.<sup>77</sup> The FCC, with judicial approval, has declined to require broadcasters to provide "minority" programming at the same percentage of broadcast time as the percentage of the population of a particular minority group in the community.<sup>78</sup> The FCC has, however, more

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77. In fact, as late as 1981, the FCC was urging Congress to repeal statutory equal time, fairness, and reasonable access provisions. Geller & Yurow, *The Reasonable Access Provision (312(a)(7)) of the Communications Act: Once More Down the Slippery Slope*, 34 FED. COM. L.J. 389, 427.

78. How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public. . . . [T]he scope of FCC review remains whether or not the licensee has reasonably exercised its discretion.

recently acknowledged that foreign-language programming should be encouraged in response to the needs and wants of the "specialized" audience which desires it.<sup>79</sup>

There is a possible distinction between the solution suggested in this article and the concept which the FCC has rejected. That distinction, albeit slim, is that the *content* of a particular broadcaster's schedule would not be altered to require a particular percentage of programming aimed at minority needs; the broadcaster would only need to make some provision for translating a portion of the broadcasting it had already scheduled into another language. For example, the broadcaster required to present 1% of its programming in Spanish could satisfy that requirement by presenting (in the case of a daytime radio station operating approximately twelve hours a day or eighty-four hours a week), a daily eight-minute newscast in Spanish. No alteration of programming content need occur. The broadcaster would

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Stone v. FCC, 466 F.2d 316, 328 (D.C. Cir. 1972). See also Columbia Broadcasting System, 56 F.C.C.2d 296, 301 (1975). However, Chairman Feris, in analyzing previous decisions discussed quantitative tests for measuring a broadcaster's service to the minority communities:

The Court of Appeals has recently warned us that there is a 'zone of reasonableness' by which we should test a station's programming to substantial minority groups as well as its equal employment opportunity efforts directed to them. In *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732 (D.C. Cir. 1976), an Albuquerque, New Mexico, television station had spent, at most, 6% of its total public affairs program time dealing with problems of interest to its 40% Mexican-American community. The Court, while finding the programming issue inadequately presented to the Commission to allow judicial review, noted that had it reached the issue a renewal hearing might have been required. The Commission has itself in the past used a quantitative test to judge a licensee's program service to its minority audience. The Commission held in *Alabama Education Television Commission*, 50 F.C.C.2d 461, 472 (1975), that a licensee's failure to serve the needs and interests of a 30 percent minority community was "fundamentally irreconcilable with the obligations which the Communications Act places upon those who receive authorizations to use the airwaves." In *Radio Marion*, 52 F.C.C.2d 1229, 1243 (1975), the Commission said that a licensee "with a Black population outnumbering the White population" will be "held to an even higher obligation in terms of service to the minority community." And in *New Mexico Broadcasting*, 54 F.C.C.2d 126, 143 (1975), the Commission designated for hearing the issue of whether another Albuquerque licensee had presented sufficient programming "of relevance to the Mexican-American community in its service area." Last year the Supreme Court specifically recognized that the Commission has an "obligation under the Communications Act of 1934 . . . to insure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 664, 670 n. 7 (1976).

But while we have stated this obligation, we have never precisely defined its parameters.

Marsh Media, 67 F.C.C.2d 284, 290-91 (Ferris, Chairman, concurring).

79. There are . . . some specialized audiences whose tastes continue to go unmet because they are too small to support an entire weekly schedule of such programming. This is frequently the case for foreign language audiences, whose preferred programming is unlikely to attract a sizeable cross-over audience. Greater flexibility in time brokerage and time sharing arrangements could encourage more programming responsive to these specialized audiences.

Neither licensees nor minority groups facing difficult economic circumstances should be discouraged from exploring programming alternatives that appear to reflect accurately both consumer wants and competitive incentives.

Regulations and Agreements, *supra* note 41, at 49,857.

only need to translate and present in Spanish a portion of the news it had already prepared and presented in English. Similarly, without altering program content, television broadcasters might utilize Spanish-language close-captioning or "simulcasts" with a local Spanish-language radio station.<sup>80</sup>

Broadcasters might also consider purchasing network radio<sup>81</sup> and television<sup>82</sup> programming in Spanish rather than attempting to produce it locally. Time-brokerage and time-sharing arrangements might also be considered as a means of providing part-time Spanish-language programming.<sup>83</sup>

Perhaps, though, there is no distinction between the solution suggested herein and the concept rejected by the FCC. It may be time for the FCC to recognize the important and perhaps constitutionally mandated reasons for presenting foreign-language broadcasting and to adopt the percentage-programming solution as the most effective means for implementing it.

#### CONCLUSION

Congress has entrusted the FCC with insuring that broadcasting is "in the public interest." So far, the FCC has not made clear the parameters of the obligation to provide Spanish-language broadcasting to a growing segment of that public. It is now time for those parameters to be defined by the FCC, or, if necessary, by Congress and the courts.

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80. Marsh Media, 67 F.C.C.2d 284, 292 (1977) (Ferris, Chairman, concurring).

81. In October, 1983, the United Press International initiated the first nationwide Spanish-language radio network. *El Hispano* (Albuquerque, N.M.), Oct. 21, 1983, at 9.

82. The Spanish International Network currently numbers 251 affiliates serving virtually every area of the country with substantial Hispanic population concentrations. *See* Network Television Facts — All About the SIN Television Network (unpublished document available from Spanish International Network, 250 Park Avenue, NY, NY).

83. *See supra* note 79.