

before a station must operate a full schedule, as defined by the rules, of programming. A similar standard must be applied here, given the short license term and the limited time and ability available to TBN to begin local program production.

33. It is also important to point out that even during its short license term WHSG-TV did broadcast programming produced within the Station's service area which was responsive to issues in the service area. TBN PFCL ¶ 72-74.

(3) Glendale Argues that Network Programming Can Not Be Credited As Responsive to the Needs of the Service Area Because the Programming Doesn't Mention the Service Area or Feature a Guest From the Service Area. The Commission, However, Commits to a Licensee's Good Faith Discretion the Choice of Programming Responsive to Ascertained Needs, and There Has Been No Showing TBN Abused its Discretion

34. Glendale's contention that WHSG-TV programming is not issue responsive because the program doesn't mention the service area or feature a guest from the service area is a favorite theme, repeated endlessly in Glendale's findings and conclusions (*see, e.g.*, Glendale PFCL ¶¶ 70, 71, 89, 154). The argument rests, however, on a faulty and wholly unsupported premise--that a program to be "responsive" to a local need, must either mention the service area specifically or include a guest from the service area. This position is neither supported by Commission precedent or by common sense. The Commission, in fact, commits to the licensee's good faith discretion the choice of programming responsive to the service area's needs, *Seattle Public Schools, supra*, 65 Rad. Reg. 2d (P&F) at 1629, and is largely immune from Commission review absent bad faith or egregious error. The rigid standard proposed by Glendale would intrude on the licensee discretion that is the heart of the Communications Act. "It seems clear that Congress intended that private broadcasting

develop with the widest journalistic freedom consistent with the public interest obligations." Columbia Broadcasting Systems, Inc., 412 U.S. 94, 110 (1973). Here, there is no evidence that TBN abused its discretion.

35. Citing just a few of the purported examples noted by Glendale, Glendale criticizes a Joy program as "unresponsive" to the issue of crime when the program included an interview of the California Commissioner of Human Relations about hate crimes (Glendale PFCL ¶ 86). It seems obvious that such an interview would include substantive comments and information about the growth in and prevention of hate crimes, comments which clearly are responsive to the same issue in the service area. Or, more accurately, it is clearly a good faith exercise of a licensee's discretion to believe that such a discussion of hate crimes and the prevention of hate crimes is responsive to the issue of crime in the service area.

36. In like vein, Glendale accuses TBN of not providing programming responsive to the issue of "transportation" because the program at issue discusses transportation problems in Southern California, as opposed to specifically mentioning the service area's problems (Glendale PFCL ¶ 74). Again, without being overly repetitive, a discussion of Orange County's transportation problems and its response may provide ideas and insights for other communities to deal with similar problems in their community. See, for example, the Joy broadcast on May 17, 1991 (TBN Ex. 32, Tab B, p. 27). Information about the mistakes and successes of a community dealing with transportation problems in Southern California may inform service area viewers of alternatives that do and don't work. Again, deciding a priori, as Glendale does, that a program is not responsive to a problem because it

discusses the problem in the context of a different locale, would rob viewers of some of the most informative issue responsive programming about issues as well as gut the licensee's discretion to determine what programming is responsive to the service area's needs.

37. Glendale even argues that programming about "Health" and "Healthcare" is not responsive to the service area's needs if the program doesn't mention the service area or include a person from a service area who appeared (Glendale PFCL ¶ 89). Glendale's argument is particularly strained here. Discussions of health issues like fat intake and heart disease (The Doctor and the Word, broadcast October 4, 1991, TBN Ex. 32, Tab B, p. 70) or eating low fat (The Doctor and the Word, broadcast October 14, 1991, TBN Ex. 32, Tab B, p. 70), or about hardening of the arteries (Joy, broadcast November 28, 1991, TBN Ex. 32, Tab B, p. 72) may provide vital information to viewers without being specifically tied to a particular locale or personality in the service area. The same observation may be made about discussions of different educational philosophies or proposed curriculums as responsive to the problem of "Education/Schools" or whether interviews with reformed alcoholics and drug addicts about successful strategies and their programs to implement those strategies may be responsive to the issue of "Alcohol/Drugs." In these instances, as in others, the location of the speaker or the program is largely irrelevant to whether the programming is providing relevant and useful information about the subject under discussion and is, therefore, "responsive" to a community need. Indeed, Glendale's view would essentially eliminate the value of the Sunday morning public affairs programs of the major three networks (CBS, NBC, and ABC) to a local affiliate, and render meaningless the Commission's judgment to rely on a licensee's good faith discretion that such programming serves its local community.

- (4) Glendale claims WHSG-TV shouldn't receive any credit for its children's programming because the record doesn't show a "need" for children's programming. This argument, however, proceeds from either a faulty factual premise or a profound misconception of a licensee's obligation to provide programming to the often neglected children of the area**

38. Glendale seeks to minimize the credit to which TBN might otherwise be entitled for its outstanding record of children's programming by arguing that: there was no showing of a "need" for children's programming in the service area; the programming broadcast by WHSG-TV wasn't tied to any "need" of children in the service area; the evidence concerning its children's programming shouldn't be credited because it doesn't provide information concerning specific program episodes; and, finally, that TBN seeks credit for programming that is primarily entertainment in nature (Glendale PFCL ¶ 165). Each of Glendale's arguments proceeds either from faulty factual premises or a profound misconception of a licensee's obligation to provide programming for the often neglected children in its audience.

39. The Commission, for literally decades, has made clear a licensee's obligation to provide children's programming as a bedrock licensee obligation. Children's programming was among the categories of programming which the Commission in the En Banc Programming Inquiry, 44 FCC 2310, 2314 (1960) determined characterized a licensee's public interest program service. Similarly, it has been 20 years since the Commission, in the Children's Television Report and Policy Statement, identified the broadcast of children's programming "to educate and inform...not simply to entertain...." as an important aspect of a licensee's program service. Children's Television Report and Policy Statement, *supra*, 31

Rad. Reg. 2d (P&F) at 1236. This mandate was clearly and forcefully stated by the Commission.

Because of their immaturity and special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable resource, to develop and present programs which will serve the public interest. The Children's Television Report and Policy Statement, *supra*, 31 Rad. Reg. 2d (P&F) at 1234.

The Commission's mandate is even stronger in light of the recent passage of the Children's Television Act of 1990, which, among other things, commands the Commission to require licensee's to broadcast educational and informational programming for children and to evaluate that programming in determining if a licensee warrants renewal of its license. 47 U.S.C. § 303b. This mandate has been articulated in any number of Commission policy statements over decades, recently subject to Congressional legislation, and is not tied to any necessity for determining a specific "need", ascertained or not, for such programming. *See, e.g., Pillar of Fire*, 99 F.C.C.2d 1256, 57 Rad. Reg. 2d (P&F) 601, 612 (Rev. Bd. 1984), *rev. denied*, 62 Rad. Reg. 2d (P&F) 276 (children's programming credited without any showing of "need"). The "need" is educational and informational programming is presumptive--the product of Commission policy and positive legislation--and it may be ignored only at risk of non-renewal. To put Glendale's argument in context, if TBN had not broadcast any, or little, children's programming during the License Term because its ascertainment did not show that "Youth" was considered a major problem in its service area (*see* Glendale PFCL ¶ 165), could the Commission, consistent with the Children's Television Act of 1990, have found that WHSG-TV warranted license renewal?

40. Likewise, neither the Commission's policy statements, the Children's Television Act of 1990, nor the Commission pronouncements implementing the Children's Television Act of 1990 require an assessment of children's needs for such programming as a necessary adjunct to a licensee's program service.

41. With respect to Glendale's argument that TBN may not be credited for its children's programming because it did not provide evidence of specific program episodes, TBN notes that the argument is legally unsupported. There is no case cited by Glendale, or of which TBN is aware, that requires a renewal licensee to provide evidence of specific episodes of regularly broadcast programming in order to obtain credit for such programs. It is submitted that such precedent does not exist. The evidence submitted by TBN is sufficiently detailed in terms of the time and date of regular broadcast, the format, the standard characters and program interactions, the age group for which the program was designed, and the segments which contained educational or informational programming for the programming thus described to be credited by the Commission.^{11/}

42. Glendale may also not dismiss TBN's children's programming as "entertainment" and therefore unworthy of credit by the Commission (Glendale PFCL ¶ 165). It is true that TBN children's programming, like all successful children's programming, attempts to be entertaining enough to entice children to watch. In adopting a definition of "children's programming" designed to satisfy the requirements of the Children's Television Act of 1990, the Commission considered and specifically rejected narrowly

^{11/} This is also an instance in which Glendale complains of a lack of evidence when it successfully moved to exclude evidence concerning specific programs and episodes of such programs in the testimony of public witnesses (Tr. 35-40).

defined categories of "nonfiction" or "instructional" programming only, adopting the more expansive "responsive to the educational and informational needs of children" as more consistent with congressional intent and licensee discretion. Report and Order in MM Docket Nos. 90-570 and 83-670 (Children's Programming), 6 F.C.C.2d 2111, 68 Rad. Reg. 2d (P&F) 1615, 1623-24 (1991). In this instance the record clearly shows that the children's programming broadcast on WHSG-TV included specific segments or portions regularly broadcast which were specifically designed to meet the "educational and informational needs of children" (*see, e.g.,* TBN PFCL ¶¶ 47-50). The record also shows that all of TBN's children's programming was designed to meet the needs of particular age children, as well as that all age groups were adequately covered, including the often ignored pre-school children. Children's Television Report and Policy Statement, *supra*, 31 Rad. Reg. 2d (P&F) 1234. Incidentally, Glendale ignores (as does the Mass Media Bureau) the fact that WHSG-TV children's programming has absolutely no commercial content (TBN PFCL ¶ 146), thereby fulfilling the Congressional intent expressed in the Children's Television Act of 1990, 47 U.S.C. § 303a.

43. Accordingly, TBN's outstanding record for broadcasting a large number and variety of commercial free age-specific programs designed to serve the educational and informational needs of children at times when children were likely to be in the audience deserves to count as a major plus in WHSG-TV's broadcast record, and fully supporting its achievement of a renewal expectancy.

(5) Errors in ascertainment do not render WHSG-TV's efforts to ascertain needs and interests in the service area invalid

44. Glendale's findings enumerate a number of errors and omissions in WHSG-TV's ascertainment process and then argues that these flaws invalidate the process that the Station used to determine the problems, needs and interests of the community (Glendale PFCL ¶ 154). Glendale's arguments rely, however, on distorted facts, rely on the hypertechnical application of ascertainment standards which are no longer required by the Commission, and are wholly unsupported by law.

45. The errors to which Glendale points include: the fact that WHSG-TV did not interview any community leaders in its community of license (Glendale PFCL ¶ 154); WHSG-TV's failure to conduct ascertainment during the first quarter of 1991 (*Id.*); the fact that WHSG-TV did not begin interviewing community leaders until September, 1991, and thereby, according to Glendale, providing no information concerning the service area's needs upon which the network could provide responsive programming during this quarter (Glendale PFCL ¶ 155); and, the oversight which led the Station Manager to count only mentions of problems in the community leader interviews during the fourth quarter of 1991 (Glendale PFCL ¶ 156).

46. In point of fact, WHSG-TV came on the air in late February, 1991, only five weeks before the end of the first quarter of 1991, so WHSG-TV did not fail to do any ascertainment for the whole first quarter, only for the last five weeks of the calendar quarter, which coincided with the first five weeks of Station operation (TBN PFCL ¶ 20). Mr. Jackson, the Station Manager, began the ascertainment process soon thereafter by consulting the coverage of community issues in the local newspaper. This ascertainment process was

used to determine the problems, needs and interests of the community and in the preparation of the Station's preliminary report to TBN until Mr. Jackson began ascertainment interviews in September, 1991 (TBN PFCL ¶ 23). Accordingly, Glendale's charge that TBN had no information concerning the problems, needs and interests of the WHSG-TV service area during the third quarter of 1991 was factually inaccurate--Mr. Jackson had been preparing Preliminary Reports based on his review of the local newspapers for at least the preceding two quarters. The large number of community leader interviews conducted beginning September 1991 (75 during the remainder of the Quarter) went into the preparation of the Station's final report at the end of the quarter, and provided ample additional information to the network to prepare issue-responsive programming during the first month of the fourth quarter, 1991.

47. Glendale's charge that WHSG-TV's ascertainment is totally invalid because it failed to conduct interviews in Monroe and Walton County is simply wrong, and has been addressed at greater length in both the Mass Media Bureau's conclusions, paragraph 11, and in paragraphs 29 and 30, above.

48. Likewise, Glendale's charge that WHSG-TV's ascertainment for the fourth quarter, 1991, is invalid because Mr. Johnson did not include the mentions from his review of newspapers in his tabulation of problems is simply absurd. The record shows that WHSG-TV conducted 75 community leader interviews during the fourth quarter of 1991 in each of 19 different community leader categories (TBN PFCL ¶ 25). The Commission no longer specifies the methods that a licensee must use to determine the problems, needs and interests of the community, leaving the methods to the good faith discretion of the licensee.

"Commercial television licensees may determine issues in their community that warrant consideration by any means they consider appropriate." Deregulation of Television, 98 F.C.C.2d 1076, 56 Rad. Reg. 2d (P&F) 1005, 1022 (1984). If WHSG-TV chooses to rely on 75 community leader interviews during the last quarter of 1991, for whatever reason, spread among 19 different categories of leaders, to determine the problems, needs and interests of the service area, that was wholly within the discretion of the licensee and the Commission cannot now find that the WHSG-TV's reliance on the community leader interviews alone was an unreasonable method to determine the issues within the service area. To use a comparison, the 75 community leader interviews conducted during the last quarter of 1991 were a great many more interviews than the number of community leader interviews that the Commission found "diligent" and "systematic" in Fox Television, Inc., supra, 72 Rad. Reg. 2d (P&F) at 308 (260 community leader interviews over a license term of over two-and-a-half years), or the 75 interviews per year found adequate in Metroplex Communications, Inc., supra, 67 Rad. Reg. 2d (P&F) at 191.

49. The fact that the licensee did more than simply interview a large number of community leaders within 19 different categories of leaders, but omitted to calculate this information simply out of oversight, does not invalidate a diligent, reasonable and consistent effort to determine the service area's problems, needs and issues during the calendar quarter in question. If the licensee had chosen to omit review of mentions of such problems in the newspapers, rather than simply forget to omit the information, the Commission could not quarrel with the decision as a bone fide exercise of licensee discretion. It surely cannot

argue that the unintentional omission of the information invalidates the results of what can only be characterized as a fastidious and strenuous ascertainment effort.

(6) Glendale Claims WHSG-TV Issue-Responsive Programming Should Be Rejected as Non-Responsive Because it is "Subjective." This Argument Fails twice, However, Both on the Facts and the Law

50. Glendale urges the Commission to reject a vast amount of the issue-responsive programming broadcast on WHSG-TV during the License Term as "non-responsive" to issues in the service area because the programming is alleged to be "subjective" (Glendale PFCL ¶ 176). This charge is made with particular vehemence with respect to programming which TBN claims is responsive to the issue of "drugs and alcohol" (Glendale PFCL ¶ 179) and "crime" (Glendale PFCL ¶ 174). Both of these issues were considered important issues in every quarter of the Station's License Term.

51. With respect to crime, in particular, Glendale dismisses WHSG-TV's programming responsive to the issue as describing "religious experiences" and not mentioning any person in the station's service area (Glendale PFCL ¶ 176). Likewise, Glendale discards much of WHSG-TV's programming responsive to the issue of "drugs and alcohol" as simply "religious experiences" (Glendale PFCL ¶ 179), and argues that descriptions of these "subjective" experiences may not be considered responsive to the problems ascertained (Id.). Glendale's arguments fail twice, however, both on the facts and on the law.

52. In the first instance, Glendale inaccurately and unfairly characterizes WHSG-TV's responsive programming as simply describing religious experiences. Religious experiences were, to be sure, a feature of many discussions of these issues. To be fair,

however, the program descriptions describe a great deal more. For example, the discussions of the issue of crime always include portions of the discussion which relate to how the person became involved in crime, the personal and other factors which led to their behavior, and how unhappy they were following that lifestyle. For example, in Treasures Out of Darkness, broadcast on September 7, 1991, the discussions of crime started with a description of the mafia and what it was like being a member of the mafia (TBF Ex. 32, Tab B, p. 49). In addition to the person's "religious experience" the difficulty of breaking away from the lifestyle was discussed (Id.). Similarly, in many instances the programming at issue described not just the religious experience which turned the person away from crime, but also the instrumentality or program which helped them change their life and remain "on the straight and narrow," or on their own ministry or program to assist those who are in jail or have been in trouble with the law. For example, in Joy, broadcast on July 29, 1991, in addition to the "religious experience," the discussion included a description of gangs and gang membership, prison life, how the individual helped prisoners change and an exhortation to viewers to become involved in helping prisoners stop the cycle of crime in their lives (TBN Ex. 32, Tab B, p. 50).

53. The same may be said about programming which Glendale back-handedly dismisses as "religious experiences" when the discussion turns to drugs and alcohol. Once again, the described discussions include religious references, but they also include discussions of how the person got into drugs and the terrible experience that drug or alcohol addiction was for them. In many, indeed, most instances, the discussion also turns to the drug or alcohol ministry that the person is now involved in, where someone with a drug or

alcohol addiction problem may receive help. See, e.g., Joy, broadcast October 14, 1991 (TBN Ex. 32, Tab B, p. 73). Often the discussion includes a description of the methods used by the program or ministry to provide help to the chemically dependent. See, e.g., Joy, broadcast October 21, 1991 (TBN Ex. 32, Tab B, p. 74).

54. For example, one of the programs which Glendale cavalierly dismisses as simply reporting a "religious experience" is a program discussing drug use among businessmen, The 700 Club, broadcast on March 26, 1992 (TBN Ex. 32, Tab B, p. 96). Another program which would be discarded by Glendale is the Feedback program, broadcast on January 23, 1992, which described the 12 steps to sobriety and how that program helped them to recover (TBN Ex. 32, Tab B, p. 101).

55. Clearly, any fair minded person (like the Mass Media Bureau) who reviewed these program descriptions would justly conclude that these discussions regardless of the "religious experiences" reported, contain substantive information that is clearly responsive to the issues of "crime" and "drugs and alcohol." These discussions include descriptions of how a viewer could become involved in crime or chemical dependency, the dangers in terms of the personal cost of such a lifestyle, and where one could go for assistance with the problem if assistance is desired. A discussion of just one of these factors would seemingly ensure that the discussion could reasonably be presumed to be responsive to the issue being discussed. Certainly, the discussion of all three would qualify under any reasonable definition of "responsive."

56. Moreover, the Commission has made clear that a licensee's decisions concerning the amount and kind of programming necessary to address which needs is a

matter left to the licensee's discretion. Seattle Public Schools, *supra*, 65 Rad. Reg. 2d (P&F) at 1629. The record shows that there was no abuse of its discretion for TBN to regard the issue-responsive programming described in its Quarterly Reports as being responsive to the issues of "crime" and "alcohol and drugs."

57. Finally, the fact that the programming which TBN claims is responsive to these issues is largely religious in nature does not automatically render the program unfit to serve either the public interest or the problems, needs and interests of the community. The Commission has held, at least since the En Banc Programming Inquiry, 44 FCC 2310, 2314 (1960), that the broadcast of religious programming was one of the factors of a licensee's service that served the public interest. The Review Board disposed of exactly the same argument made by Glendale here in Intercontinental Radio, Inc., 98 F.C.C.2d 608, 56 Rad. Reg. 2d (P&F) 903, 925 (Rev. Bd. 1984) *aff'd*, 100 F.C.C.2d 817, 57 Rad. Reg. 2d (P&F) 1616 (1985), when it upheld the credit given a renewal licensee for the broadcast of religious programming, because the religious programming was in the public interest. Similarly, the Review Board in Pillar of Fire, *supra*, 57 Rad. Reg. 2d (P&F) at 614, held that religious programming could be issue responsive. Here TBN's programming clearly meets any rational definition of "issue responsive."

58. Moreover, even if Glendale were right, and the sum total of TBN's programming responsive to the issues of "alcohol and drugs" and "crime" were descriptions of a religious experience by people who were formerly criminals or chemically dependent, it would not be unreasonable for a licensee to conclude that the programming was responsive to the issue. There are two aspects of almost every program which successfully rehabilitates

hardened criminals and those who are chemically dependent--a life changing experience or conversion in their thinking or way of living and a sense that success is possible. TBN's programming provides both an example of a successful life-changing experience and examples of people who have undergone such a metamorphose and successfully turned their lives around. Especially to the chemically dependent such programming engenders a sense of hope that one can escape the dependence as well as positive role models who prove it can be done.

(7) Glendale's Proffer That Certain Programs Are Not "Issue-Responsive" Because Of Their Subject Matter Is Absurd, and Rests Solely on its Desire to Substitute its Judgment For That of the Licensee

59. Glendale likewise attempts to denigrate TBN's issue-responsive programming by arguing that the subject matter of certain programs is not responsive to the issue. For example, Glendale attempts to discredit programming claimed as responsive to the issue of "education and schools" on Feedback which discusses a proposed school curriculum dealing with homosexuality because there was no showing that such a curriculum was proposed for use within the service area (Glendale PFCL ¶ 180). Likewise, Glendale proposes to label as "non-responsive" to the issue of "education and schools" programming broadcast on A Call To Action which discussed the role of religion in public schools (Id.). Clearly, Glendale would not be satisfied unless the Commission scrutinized every programming choice made by TBN during its License Term to respond to the issues and compared the licensee's choice with Glendale's standard of what is required to be responsive to the particular need.^{12/}

^{12/} Glendale, for example, points out that programming which WHSG-TV broadcast during
(continued...)

The Commission cannot, however, substitute Glendale's judgment of what is needed to respond to an issue in a service area for the licensee's, nor can it substitute its own. The Commission's review is limited to the determination of whether the licensee properly used the broad discretion given it by law to respond to the service area's needs. Despite Glendale's arguments, TBN has not abused its discretion.

60. The instances provided argued by Glendale are a good example. Given the recent controversy and national news coverage over New York City's attempt to inaugurate a curriculum which referred to homosexuality, TBN's programming clearly was addressing a sensitive and current educational issue. Similarly, the tug and pull concerning the role of religion in public schools has been dogging communities for over 30 years. Given the number of secular stations in the television market whose programming may not be sympathetic to religion or religious values, it is not unreasonable for a religious station to broadcast programming which addresses the concerns of thousands of viewers with religious sympathies who believe that religion and religious values should play a greater role in education. Again, the issue is not whether Glendale or the Commission agrees with the point of view of the program, but whether TBN made a reasonable good faith choice in choosing

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the License Term as responsive to the issue of "education and schools" seldom included a discussion of public schools (Glendale PFCL ¶ 180). Such a statement is absurd. It is not within the Commission's power to require any licensee to focus its discussion on public schools when it is treating the issue of "education and schools." This is particularly true when there are a large number of stations in a large television market to discuss the needs of public schools, and there are thousands of parents in the service area who send their children to private schools or home school, and whose need for information about such school choices are not fulfilled by other stations. Indeed, it is unique, and otherwise unavailable program service provided by WHSG-TV that sets it apart and demonstrates a valuable public service.

that program to provide information about "education and schools." Clearly it did, and its program service must be credited accordingly.

(8) Glendale argues that there is no connection between WHSG-TV's ascertainment of service area needs and the programming produced by the network

61. Because Mrs. Connolly could not remember any specific programs produced in response to an issue or need ascertained in the WHSG-TV service area, and there were few guests on network programming hailing from the service area, Glendale charges that there is little or no evidence that there was any connection between the programming broadcast on the network and the needs ascertained in the WHSG-TV service area (Glendale PFCL ¶ 164). In making this argument, however, Glendale ignores human nature and minimizes the record evidence.

62. At the time Mrs. Connolly submitted her testimony the License Term at issue ended over two-and-a-half years earlier. Her personal worksheets and records of the time had been destroyed, and could not be used to refresh her recollection. During her tenure at TBN she scheduled hundreds of guests to appear on TBN produced programs. During that time period she would have had to review literally hundreds of preliminary and final quarterly reports from the number of stations owned by and affiliated with TBN. Mrs. Connolly testified that there was a large amount of overlap between the problems ascertained in each service area (TBN PFCL ¶ 33).

63. Given these facts it is hardly probative of anything that Mrs. Connolly doesn't remember scheduling guests in response to a specific issue in the WHSG-TV service

area.^{13/} What Mrs. Connolly did testify to was her job--which was to be aware, and make those taking continuity aware, of the problems reported by stations like WHSG-TV (TBN PFCL ¶¶ 33, 35), and to schedule guests on programs to be responsive to those needs. Mrs. Connolly testified that she did remember that she had to be particularly sensitive to the WHSG-TV service area's needs because the Station did not have a local studio and was wholly dependent on network programming to be responsive to local needs (TBN PFCL ¶ 36). Finally, Mrs. Connolly testified that she used to keep grids where she listed the problems ascertained in each service area, and kept a list of guests responsive to each of the needs ascertained (TBN PFCL ¶ 32). She specifically remembered grids for the WHSG-TV service area (Id.). This evidence establishes beyond peradventure, unless Mrs. Connolly's testimony is wholly rejected, that there was an intimate connection between network program production and the needs ascertained in the WHSG-TV service area.

64. The fact that WHSG-TV programming featured few guests from the service area, or included few references to the service area, is irrelevant if the programming that WHSG-TV did broadcast could reasonably be said to be responsive to the problems, needs and interests of the service area--which it was. As noted above, TBN could not reasonably be said to abuse its discretion in its choice of issue-responsive programming.

^{13/} Glendale's senior counsel has personal experience with the difficulty of remembering facts over two and a half years earlier. WWOR-TV, Inc., 7 FCC Rcd. 636, 639-40, 642-43 (1992), aff'd sub nom., Garden State Broadcasting L.P. v. FCC, 996, F.2d 386 (D.C. Cir. 1993).

(9) WHSG-TV Broadcast Issue Responsive Programming and Has Earned a Renewal Expectancy

65. Among its other contentions concerning WHSG-TV's issue responsive programming Glendale also insists that WHSG-TV does not deserve a renewal expectancy because it did not broadcast programming responsive to issues such as "government/state/federal," "senior citizens" or "aging," or "housing" which WHSG-TV's ascertainment revealed were important issues during the third quarter of 1991 and the first quarter of 1992. Glendale's strident argument overstates the impact of WHSG-TV's omission and ignores Commission policies and precedent concerning the function of ascertainment and the discretion of a licensee.

66. In the first case, the *sine qua non* of a licensee's broadcast service is not its devotion to broadcast programming responsive to a particular issue, for example, the fourth most important issue versus the eighth most important issue, but "by its showing of responsiveness to community issues." Fox Television, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 308. As noted by the Mass Media Bureau, even in its truncated License Term, which coincided with the Station's commencement of broadcast service, WHSG-TV amply satisfied its burden to show that it broadcast sufficient amounts of programming responsive to community issues (MMB PFCL ¶¶ 9-11).

67. Secondly, the problems, needs and interests in the service area to which the licensee responds, and how it responds, is a judgment left largely to the licensee's discretion:

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 20 percent of its broadcast time to meet the need expressed by 20 percent of its viewing public.

Stone v. FCC, 466 F.2d 316, 328 (DC Cir. 1972), quoted in Fox Television, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 308. The Commission may not find that WHSG-TV does not deserve a renewal expectancy because it only covered the four top issues instead of five issues during a quarter, or an issue which is among the top five issues ascertained in only two of the four calendar quarters during its truncated License Term. Such an occurrence is more a function of the normal up and down operations of a station, and why an entire license term is evaluated not isolated quarters. It hardly calls into question WHSG-TV's entitlement to a renewal expectancy, particularly in view of its record of providing programming responsive to the educational and informational needs of children, and its fully adequate record--even based on its truncated term--of providing programming responsive to the problems, needs and interests of the service area.

- (10) **There is no precedent for denying WHSG-TV a renewal expectancy because of the limited number of PSAs broadcast during the latter part of its License Term**

68. Glendale's argument that WHSG-TV should be denied a renewal expectancy because of the small number of PSAs broadcast during the later part of its short License Term is unsupported by Commission precedent and is hypertechnical fly-specking. As noted above, the Commission's examination of a licensee's broadcast service focusses on its issue-responsive programming, *see* Fox Television, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 308, and its programming to meet the educational and instructional needs of children, particularly "programming specifically designed to serve such needs." Report and Order in MM Docket No. 90-570 (Children's Programming), 6 FCC Rcd 2111, 68 Rad. Reg. 2d (P&F) 1615, 1622 (1991). PSAs are considered an adjunct to these central licensee obligations, a bonus--

there is no Commission pronouncement which requires a licensee to broadcast any PSAs during its License Term. There are, however, countless Commission cases which emphasize the importance of providing issue responsive programming, Fox Television, Inc., supra; Metroplex Communications, Inc., supra; Seattle Public Schools, supra; Intercontinental Radio, supra, and which require licensee's to provide programming designed to serve the educational and instructional needs of children. Children's Television Report and Policy Statement, supra, Report and Order in MM Docket No. 90-570 (Children's Programming), supra. The Commission can hardly ignore WHSG-TV's performance in fulfilling the central obligations of its public trust and deny credit for a renewal expectancy because of an alleged failure on what is essentially a peripheral issue.

69. Simon Geller, 90 F.C.C.2d 250, 51 Rad. Reg. 2d (P&F) 1019 (1982), cited by Glendale to support its arguments, is hardly apposite. Simon Geller involved a radio station whose lack of broadcast of public service announcements was consistent with its persistent failure during the License Term to broadcast issue responsive programming. Simon Geller, supra, 51 Rad. Reg. at 1032. Unlike Geller, TBN systematically ascertained the issues important in the WHSG-TV service area, had a mechanism to ensure that programming responsive to those needs was broadcast, and broadcast significant amounts of issue-responsive programming. WHSG-TV, in addition, broadcast substantial amounts of educational and instructional programming designed to serve the educational and informational needs of particular age groups of children.

(11) WHSG's failure to provide evidence under the "Reputation in the Community" and "Community Outreach Criterion" does not preclude award of a renewal expectancy

70. Glendale's contention that TBN's failure to provide any relevant evidence under the "Reputation in the Community" and the "Community outreach" criterion disqualify it from receiving credit for a renewal expectancy is legally unsupportable and factually absurd. After considering the licensee's ascertainment mechanism and programming response mechanism, other factors such as the licensee's reputation and community outreach activities are described as "supplemental indicia." Metroplex Communications, Inc., supra. The primary focus of any evaluation of a renewal record is the licensee's programmatic response to the community's needs.

71. Moreover, it would be arbitrary and irrational to evaluate WHSG-TV's record on these supplemental criteria in the same manner as it does the record of licensee's who have a full license term, rather than 20 percent of a license term, to establish such a record. WHSG-TV is further disadvantaged in providing evidence on these criteria because its short license term coincided with the initiation of broadcast service on the frequency, when WHSG-TV was presumptively a stranger to the community. This is why the cardinal criteria upon which a renewal expectancy rests is the soundness of the ascertainment process, and delivering programming which, in the licensee's good faith discretion, addresses and meets those ascertained needs.

(12) WHSG-TV Has Earned A Renewal Expectancy

72. TBN's operation of WHSG-TV has served the public interest with a variety of issue-responsive programming. When the shortness of the License Term and the fact that the

License Term included the initial months of station operation are taken into consideration the service provided by WHSG-TV was extremely noteworthy. The record shows that WHSG-TV made systematic and consistent efforts to determine the problems, needs and interests of the Station's service area, and WHSG-TV's ascertainment of community needs was at least as elaborate as the system used by the licensee which the Commission viewed favorably in Seattle Public Schools, 4 FCC Rcd 625, 65 Rad. Reg. 2d (P&F) 1621 (Rev. Bd. 1989). Moreover, TBN's system of preliminary and quarterly reports providing lists of community problems and needs, and Mrs. Connolly's use of these reports to schedule guests and topics for discussion on TBN's network produced programming, ensured that there was a direct link between the determination of the community's problems and needs and the production of programming responsive to those needs. See, e.g., Seattle Public Schools, *supra*, 65 Rad. Reg. 2d (P&F) at 1637. Just as the Commission found in Fox Television, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 303, WHSG-TV's ascertainment process "... were incorporated in the Station's planning process on an ongoing basis."

73. The record also shows that WHSG-TV broadcast programming responsive to the community's perceived needs, and that it has done so on a consistent and systematic basis. The record also shows that Joy, Praise the Lord, Treasures Out of Darkness, the 700 Club, Feedback, Calling Dr. Whitaker, The Doctor and the Word, A Call To Action, and A Date With Dale all regularly treated the problems, needs and interests of the WHSG-TV service area. Locally produced programs such as the Earl Paulk Show, In Touch, and Changing Your World were also broadcast on WHSG-TV and provided information concerning local outreach ministries and comment on issues of local importance.

74. WHSG-TV's record of responding to the needs of the children in its audience is singularly distinctive and meritorious. Service to that audience has long constituted an important aspect of a renewal applicant's service obligation. Children's Television Report and Policy Statement, *supra*, 31 Rad. Reg. 2d (P&F) at 1236. That service obligation has also been given additional importance by Congress' passage of the Children's Television Act. Congress requires that a licensee's record of service to children be closely evaluated in the context of its renewal application and TBN's record of service to the WHSG-TV service area's children is particularly praise-worthy. TBN broadcast a large quantity of children's programming--seven hours per week of programming and 13 separate programs--almost all broadcast during hours when children were likely to be in the audience watching. Not only was the programming free of excessive commercial matter, as mandated by Congress, it was free of any commercial matter whatsoever. The production and broadcast of so much public interest programming on a sustaining basis has long been the hallmark of an exemplary record of licensee performance.

75. All of TBN's children's programming was of program length, and all was specifically designed to meet the educational and informational needs of children. Each program's primary purpose was to "educate and inform, not simply to entertain." Children's Television Report and Policy Statement, *supra*, 31 Rad. Reg. 2d (P&F) at 1236. Programming was also designed to meet the needs of specific age and interest groups of children--even the oft neglected preschoolers. The amount of children's programming broadcast easily matched the amount of children's programming which impressed the Commission in Fox Television, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 305.

76. Given the short term and the paucity of some record factors due to the License Term's occurrence at the commencement of WHSG-TV's broadcast service, WHSG-TV's record of a sustaining ascertainment, and broadcasting substantial amounts of issue-responsive programming, coupled with its extraordinary level of service to children, warrant a renewal expectancy for WHSG-TV. WHSG-TV's record was, as a whole, "substantial, i.e., sound, favorable and substantially above a level of mediocre service which ought must minimally warrant renewal." Seattle Public Schools, supra, 65 Rad. Reg. 2d (P&F) at 1641, quoting Central Florida Enterprises, 683 F.2d 503, 508 (D.C. Cir. 1982), *cert. denied* 460 U.S. 1984 (1984).

IV. CONCLUSION

77. For the reasons stated here and in Trinity's Proposed Findings of Fact and Conclusions of Law, Glendale is not entitled to a waiver of the television spacing rule (Rule 73.610), and its application is thus technically disqualified. Even if Glendale were awarded