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The Future of the Radio Format Change Controversy: The Case for the Competitive Marketplace

David M. Griffith

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NOTES

THE FUTURE OF THE RADIO FORMAT CHANGE CONTROVERSY: THE CASE FOR THE COMPETITIVE MARKETPLACE

INTRODUCTION

During the past ten years, the Federal Communications Commission (FCC) and the United States Court of Appeals for the District of Columbia have engaged in a controversy concerning the regulation of radio format changes. Factually, the confrontation begins when a broadcaster proposes to change the type of programming format his station offers. Legally, the controversy involves the broadcaster's ability to change formats under the FCC license and regulation standards. The disagreement between the FCC and the circuit court concerns the proper agency standard of review for monitoring proposed format changes that threaten the loss of "unique" programming.¹

Underlying the promotion of unique programming is a belief in the importance of diverse entertainment opportunities.² Both the FCC and the circuit court agree not only that program diversity is

1. The latest round of debate occurred in *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824). In *WNCN*, the circuit court vacated the Commission's policy statement, *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976) [hereinafter cited as *Policy Statement*], which outlined the substantive evidence and theoretical premises underlying the agency's position on licensee format changes.

2. The goal of diversity in broadcast programming is linked historically to Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). In *Abrams*, Justice Holmes stated that "the best test of truth is the power of thought to get itself accepted in the competition of the market." *Id.* at 630. From this conceptual base, proponents of format diversity argue that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See generally Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, 310-14 (1970); D. GINSBURG, *REGULATION OF BROADCASTING* 317-22 (1979) (quoting Owen, *Diversity and Television* (1972) (staff research paper, Office of Telecommunications Policy)).

a desirable goal, but also that such diversity is mandated by the "public interest, convenience, and necessity" standard of the Communications Act of 1934.³ The FCC and the circuit court disagree, however, on the proper method to promote diversity in radio entertainment formats.⁴

The Commission favors the use of free competition to promote programming diversity. On the spectrum between free competition and agency regulation, the FCC maintains that market demands for programming formats can be achieved best through competition rather than regulation.⁵ The court of appeals, on the other

3. 47 U.S.C. §§ 151-609 (1976). Under §§ 309(a) and 310(d) of the Act, the Commission must determine, with respect to license applications, assignments, or transfers, whether "public interest, convenience, and necessity" would be served by the granting of such applications. *Id.* §§ 309(a), 310(d). The FCC has been advocating the cause of diversity in programming for almost forty years. See Policy Statement, *supra* note 1, at 861. See generally Polsby, *F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 SUP. CT. REV. 1, 5.

4. The agency's concern about regulation of program diversity involves a disaffection for other types of regulation, such as the fairness doctrine, ascertainment requirements, program balance and content guidelines, and comparative hearings. See Canby, *Programming in Response to the Community: The Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67, 69 & n.15 (1976). The court's position is stated well in *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824): "It 'is surely in the public interest,' therefore, 'as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible.'" *Id.* at 842 (citing Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC, 436 F.2d 263, 269 (D.C. Cir. 1970)). See also *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 948-49 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, 436 U.S. 775 (1978); *Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

5. Legal support for the FCC's position can be found in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). In *Sanders Bros.*, the Supreme Court commented that "the [Communications] Act recognizes that the field of broadcasting is one of free competition." *Id.* at 474. The Commission consistently has advanced the cause of licensee discretion and has noted that "the fulfillment of the public interest requires the free exercise of [the broadcaster's] independent judgment. . . . The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision." Report and Statement of Policy Res [sic]: Commission *en banc* Program Inquiry, 44 F.C.C. 2303, 2309 (1960). Much to the circuit court's displeasure, the Commission clung determinedly to this position after each agency-court confrontation. See *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 849-50 & n.31 (D.C. Cir. 1979) (citing *Charles A. Haskell*, 36 F.C.C.2d 78, 87 (1972), *aff'd on other grounds sub nom. Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973)), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824); *Zenith Radio Corp.*, 38 F.C.C.2d 838 (1972), *vacated and remanded en banc sub nom. Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974); *Twin States Broadcasting, Inc.*, 35 F.C.C.2d

hand, concludes that competition in radio broadcasting is insufficient to provide the benefits of diverse programming to all segments of American society.⁶ The court maintains that the FCC must regulate proposed format changes when the market has failed to maximize public interests. This viewpoint requires the FCC to overrule broadcaster discretion when significant format changes would deprive a particular audience of its "first preference" listening choice.⁷

This Note will examine the development of the positions taken by the FCC and the circuit court in the format change controversy. Upon presentation of this background material, the economic, statutory, and constitutional ramifications will be analyzed. Finally, the future of the format change controversy will be discussed. Although sympathetic to the views of the court of appeals and cognizant of the imperfections of the marketplace, this Note will emphasize that agency regulation as imposed by the court is inferior to market forces in achieving format diversity.

DECISIONAL BACKGROUND AND COMMISSION RESPONSE

The Controversy Emerges: 1969-1979

Prior to 1969, the FCC did not actively regulate radio entertainment formats to any significant extent.⁸ In adopting the 1965 AM and FM Program Form,⁹ for example, the Commission stated that

969 (1972), *rev'd sub nom.* Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973).

6. See, e.g., WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

7. In the two seminal decisions in the format change area, Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 267 (D.C. Cir. 1974) (*en banc*), and WNCN Listeners Guild v. FCC, 610 F.2d 838, 842 & n.4 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824), the circuit court relied on the Supreme Court's pronouncement in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *Id.* at 217.

8. Brief for Respondent FCC at 3, WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979). The reason for such inaction by the FCC in program diversity was that most stations offered "general service" formats that provided for diverse programming. Format specialization did not occur until about 1969, when stations began presenting specialized formats directed at target audiences. *Id.*

9. Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315, 1 F.C.C.2d 439 (1965).

licensees would be responsible for advising the FCC of "substantial changes" in programming during the license term.¹⁰ The report and order implementing the Program Form did not require the licensee to demonstrate that the "public interest" was served by such changes, but only provided that the licensee notify the Commission of any programming change.¹¹ This early reporting requirement survived until the FCC litigated the first of the format change cases, *Glenkaren Associates, Inc.*¹²

In *Glenkaren*, the Commission considered a proposed assignment of the operating rights of a classical music station in Atlanta, WGKA, to Strauss Broadcasting Company, which desired to change the station to a contemporary music format.¹³ More than eleven hundred letters and a group petition with over one thousand names were filed with the Commission in response to the proposed transfer.¹⁴ In defense of its position, Strauss amended the assignment application to include abbreviated summaries of interviews with thirteen prominent Atlanta citizens who supported the application. After reviewing the evidence submitted, the FCC approved the transfer without a hearing. The Commission found that Strauss had established "that its proposal would serve the needs and interests of the people in the Atlanta market and [that] the new specialized programming specifically serves the public

10. *Id.* at 441. See, e.g., *KSAN, Inc.*, 30 F.C.C.2d 907, 910 (1971).

11. *E.g.*, *KSAN, Inc.*, 30 F.C.C.2d 907, 910 (1971).

12. 19 F.C.C.2d 13 (1969), *vacated sub nom.* Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970). The Commission's phraseology in the AM and FM Program Form resulted in several definitional problems in the first of the format change cases. Such phrases as "program formats," "substantial change," and "public interest" have remained somewhat amorphous even in the format change cases of the present. The inability to reach a firm and manageable definition of these terms will appear throughout an examination of all the format change cases. See generally Note, *Federal Regulation of Radio Broadcasting—Standards and Procedures for Regulating Format Changes in the Public Interest*, 28 RUTGERS L. REV. 966, 968-70 (1975).

13. 19 F.C.C.2d at 13-14. When a licensee decides to sell its facilities and station license, the licensee and proposed assignee must file an application for assignment of license with the FCC. 47 U.S.C. § 310(d) (1976). The assignment application procedure differs substantially from the average comparative proceeding, in which the agency grants the license after examining the requests of a number of applicants. In an assignment proceeding, only the assignee's application may be reviewed by the agency in determining whether the "public interest, convenience, and necessity" will be served by the assignment. *Id.*

14. 19 F.C.C.2d at 14.

interest."¹⁵

A petition for reconsideration of the transfer approval was filed by a citizens committee interested in continuing the classical music format.¹⁶ This petition, as amended, alleged that the "ascertainment" study conducted by Strauss was inadequate and misrepresented the positions of various interviewees.¹⁷ The proposed assignee then submitted a second survey that indicated that seventy-three percent of those interviewed at random in the broadcast area preferred the proposed format over the existing one, whereas sixteen percent desired the retention of the old programming.¹⁸ In denying the petition for reconsideration, the FCC accepted the surveys as sufficient and held that a second classical station on the city's outskirts was an adequate alternative to WGKA.¹⁹ The Commission concluded that "[t]he case here comes down to a choice of program formats—a choice which in the circumstances is one for the judgment of the licensee."²⁰ Petitioners sought judicial review of the agency ruling in the United States Court of Appeals for the District of Columbia.²¹

Atlanta: *Hearing Threshold Standards*

Section 309 of the Communications Act of 1934²² states that if

15. *Id.* (quoting FCC Memorandum re: Glenkaren Assocs., Inc., 14 RAD. REG. 2D (P&F) 104, 105 (1968)).

16. When citizens groups wish to bring alleged deficiencies in program service to the FCC's attention, the petition to deny under § 309 of the Communications Act of 1934, 47 U.S.C. § 309 (1976), generally is conceded to be the most effective consumer weapon. *See Note, Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 405-09 (1975). Such a petition is inexpensive and can be filed whenever a licensee has any application before the FCC. The petitioner's success, however, depends on whether he can meet a substantial pleading burden which requires that the challenger state "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. 47 U.S.C. § 309(d)(1) (1976). The 99% dismissal rate is testimony to the difficulty of satisfying this requirement. *See generally* Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 765-68 (1972).

17. Glenkaren Assocs., Inc., 19 F.C.C.2d at 14, 16.

18. *Id.* at 14-15.

19. *Id.* at 15 n.3.

20. *Id.* at 15.

21. Judicial review of FCC actions regarding licensee applications may be sought only in the United States Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b) (1976).

22. *Id.* § 309 (1976). Applications for assignment under § 319(d) are to be examined under the same § 309 standards as § 308 initial license applications. *See id.* § 310(d).

the FCC finds "no substantial and material questions of fact" concerning a licensee's application, the Commission must grant the license transfer;²³ but, if the petition to deny raises such fact questions or if the Commission is unable to determine that the application would serve the "public interest, convenience, and necessity," the FCC must hold a hearing.²⁴ In *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC*,²⁵ the circuit court vacated the FCC order granting assignment and remanded the case to the agency for failure to comply with section 309. The court found that the agency had ignored several substantial and material questions of fact: the unprofitability of the station which necessitated the transfer;²⁶ the existence of adequate alternative sources of classical music in the Atlanta area;²⁷ and the accuracy of the assignee's ascertainment surveys and the alleged misrepresentations therein.²⁸ The questions of fact ignored by the FCC were material to FCC evaluation of the degree of existing program diversity, to the desirability of the continuation of the old format, and to public opinion. Upon consideration of these factors, the FCC then would be capable of deciding whether to grant a proposed for-

23. *Id.* § 309(e). The Supreme Court of the United States generally has upheld administrative agency regulations that establish reasonable threshold standards for granting hearings and barring frivolous complaints. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-21 (1973); *FPC v. Texaco, Inc.*, 377 U.S. 33, 39 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

24. 47 U.S.C. § 309(e) (1976).

25. 436 F.2d 263 (D.C. Cir. 1970).

26. *Id.* at 269-70. The original licensee presented figures demonstrating a net loss of \$20,635 for the six-year period before the proposed transfer. Petitioners challenged this claim on the ground that substantial capital expenditures were made that should not have been included in those calculations. The FCC failed to resolve the question in informal proceedings, and the court, therefore, remanded the issue for further investigation. *Id.*

27. *Id.* at 271-72. In questioning the adequacy of alternative sources of classical music in Atlanta, petitioners claimed that station WOMN was not a sufficient substitute because, even in the daytime, its contour charts showed that at least one-sixth of the city was not serviced by the station's signal. See *Glenkaren Assocs., Inc.*, 19 F.C.C.2d 13, 15 (1969) (Johnson, Comm'r, dissenting), *vacated sub nom. Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). The court again felt that the FCC had not investigated sufficiently the question of WOMN's suitability as WGKA's surrogate and, therefore, required that the FCC examine this issue in a formal hearing.

28. 436 F.2d at 270-71. Strauss presented only summaries of 13 interviews before the Commission. The petitioners complained that such summaries were inadequate. They also presented affidavits of some of the interviewees that contradicted those summaries offered by Strauss. *Id.*

mat change under the public interest standard.

Thus the court disagreed with the FCC on the issue of threshold standards for hearings. To the court, the issues of profitability, alternative sources, and accuracy of ascertainment surveys crossed the threshold of the section 309 requirement for an evidentiary hearing on disputed issues of material fact. The court regarded profitability and alternative sources of programming as substantial questions of material fact; therefore, profitability and alternative sources of programming comprised factors bearing on the overall standard of the public interest in the FCC's approval of a format change.

The Commission Response to Atlanta

The FCC did not interpret *Atlanta* to require a more active role by the agency in its review of applications proposing format changes.²⁹ The court's concluding language, stating that a licensee must be allowed "considerable latitude in the matter of programming,"³⁰ seemed to support the agency's underlying reliance on licensee discretion. Seeking to integrate its interpretation of *Atlanta* into its developing ascertainment policy, the Commission gave notice to broadcast applicants that

any application involving a *substantial change in program format*—including assignment and transfer applications . . . and also applications for renewal or major changes in facilities if they involve a basic programming change—will be scrutinized in light of this decision [*Atlanta*]; and applicants should be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other stations.³¹

The agency applied its new approach in subsequent decisions, denying hearings based on the finding that the proposed format change did not threaten "to remove from the market a unique program service which would not otherwise be available to a substan-

29. Brief for Respondent FCC at 5-6, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979).

30. 436 F.2d at 272.

31. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 680 (1971) [hereinafter cited as *Ascertainment Primer*].

tial segment of the listening public."³² In *Charles A. Haskell*,³³ for example, the Commission considered a petition to deny an assignee's proposal to drop an "all news" format in favor of modern "country and western" programming. The agency denied the hearing request, based on findings that: twenty other area radio stations provided a wide variety of news services;³⁴ two stations altered their formats to "fill the void" and provide "all news" programming during prime time listening hours;³⁵ and the assignor station suffered substantial losses totalling \$528,589 over the previous five years.³⁶ This approach seemed to satisfy the circuit court because, on appeal, the court in *Lakewood Broadcasting Service, Inc. v. FCC*³⁷ upheld the Commission's ruling that no material and substantial questions of fact existed and that the public interest would be supported by granting the application.³⁸ Thus, the presence of a wide array of alternative stations presenting the format being changed and the financial problems of the station whose format was being changed constituted sufficient evidence that the public interest was not in issue.

Progressive Rock: *The Public Grumbling Requirement*

In an opinion handed down the same day as *Lakewood Broadcasting*, however, the circuit court indicated that the new agency approach was still insufficient. In *Twin States Broadcasting, Inc.*,³⁹ an assignee proposed abandonment of the sole "progressive rock" format in the Toledo, Ohio area for a "middle of the road" or "Top Forty" sound.⁴⁰ Despite assertions by the petitioners that no alternative sources of progressive rock existed in the area,⁴¹ the FCC

32. Robert P. Adams, 38 F.C.C.2d 1, 5 (1972). See *WCAB, Inc.*, 27 F.C.C.2d 743, 746 (1971).

33. 36 F.C.C.2d 78 (1972), *aff'd sub nom.* *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973).

34. *Id.* at 83.

35. *Id.* at 83 & n.6.

36. *Id.* at 79-80.

37. 478 F.2d 919 (D.C. Cir. 1973).

38. *Id.* at 925.

39. 35 F.C.C.2d 969 (1972), *rev'd sub nom.* *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973).

40. *Id.* at 970-71.

41. *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926, 932 (D.C. Cir. 1973).

denied a hearing on the grounds that no substantial or material facts were in dispute and that no showing was made that the new format was not reasonably attuned to community interest.⁴²

The circuit court reversed *Twin States in Citizens Committee to Keep Progressive Rock v. FCC*.⁴³ In *Progressive Rock*, the court pointed out that *Atlanta* dictated that, within the technical and economic limits available in the particular service area, "it is in the public's best interest to have all segments [of contemporary culture] represented" in program formats,⁴⁴ if the format appeals to some significant minority.⁴⁵ In other words, when the "public grumbling" reaches "significant proportions," then the format change itself is an issue, and disputed facts concerning the change become "substantial and material," requiring a hearing.⁴⁶ Among the fact questions that the court discussed were two of the primary issues first articulated in *Atlanta* and *Lakewood Broadcasting*, the economic viability of the format and the adequacy of alternative sources of the preexisting programming.⁴⁷ The court announced that, to be upheld on review, the FCC must make specific findings of any material fact questions allegedly in dispute. Because the court found material fact questions relating to economic feasibility of the assignor station and to sufficient substitute programming,

42. 35 F.C.C.2d at 971.

43. 478 F.2d 926 (D.C. Cir. 1973).

44. *Id.* at 929.

45. The court refused to define "significant minority," stating only that "the commission should [not] . . . establish a quantitative minimum. Each situation is different Certainly the degree of support . . . can be of critical importance in . . . 'close cases.'" *Id.* at 929 n.7.

46. *Id.* at 929, 934.

47. *Id.* at 931-33. The court reformulated the economic feasibility standard in ostensibly more objective terms, by stating that "the question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the format is so economically unfeasible that an assignment encompassing a format change should be granted." *Id.* This standard was a significant departure from the standard first established in *Atlanta*, and it presented the Commission with additional analytical difficulties, including the evaluation of station management practices and the calculation of reasonable rates of return for comparable programming. This revised standard eventually led to the charge that the court was attempting to impose common carrier obligations on broadcasters in violation of the holding in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). See Brief for Respondent FCC at 33-34, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979). See also notes 126-31 *infra* & accompanying text.

the court remanded the case for an evidentiary hearing.⁴⁸

WEFM: Adequate Alternative Source Clarified

Respecting the intensity with which the circuit court was approaching its review function in the format change area, the Commission attempted to document carefully its refusal to hold an evidentiary hearing in *Zenith Radio Corp.*⁴⁹ In *Zenith*, the assignor, after more than thirty years as a classical music outlet, contracted to sell the station to GCC Communications of Chicago, Inc. GCC Communications proposed a "contemporary music" format. In its petition to deny the application for the format change, a citizens committee alleged several material and substantial fact questions, including whether the remaining classical stations in Chicago, WFMT and WNIB, adequately covered the departing station's listening audience and whether the assignor's stated financial losses satisfied the *Progressive Rock* standard.⁵⁰

The Commission rejected the petitioner's contentions by distinguishing *Atlanta* in finding that "there are two other classical music stations in Chicago."⁵¹ Based on a review of contour maps, the FCC found that WNIB, although not duplicating WEFM's service area, reached and serviced all of Chicago, its city of license.⁵² In addition, the FCC found that WFMT fully covered all of WEFM's listening public.⁵³ On the question of financial loss, the FCC dismissed the committee's charges, concluding that neither facts nor serious allegations were presented to dispute Zenith's claim of losses.⁵⁴

A three judge panel of the circuit court affirmed the agency's

48. 478 F.2d at 934.

49. 38 F.C.C.2d 838 (1972), *vacated and remanded en banc sub nom.* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

50. *Id.* at 839-45.

51. *Id.* at 845.

52. See *Zenith Radio Corp.*, 40 F.C.C.2d 223, 225-26 (1973). GCC had agreed that if its application was approved it would provide WNIB with WEFM's classical library and provide technical assistance for WNIB to increase its power and audience coverage. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250 n.9 (D.C. Cir. 1973), *vacated and remanded en banc*, 506 F.2d 246 (D.C. Cir. 1974).

53. See *Zenith Radio Corp.* 40 F.C.C.2d 223, 225 (1973).

54. 38 F.C.C.2d at 845.

ruling,⁵⁵ but this decision was overturned *en banc* shortly thereafter in *Citizens Committee to Save WEFM v. FCC*.⁵⁶ The majority reiterated the threshold standards for hearings that had been established in previous decisions. If a format change engenders no significant public outcry, the agency need not proceed further. If there is significant public concern, a hearing still will not be required if no substantial material questions arise as to either the adequacy of alternative programming sources or the economic unfeasibility of the existing format. The FCC must conduct a public hearing to determine whether the public interest is being served, however, if the endangered format is unique or serves a specialized audience and material questions of fact are presented.⁵⁷

In questioning the agency's findings on the sufficiency of alternative programming, the court employed a stricter test for substitution, requiring that any available substitute must serve the entire service region of the assignor and not just the city of license.⁵⁸ Station WNIB, therefore, did not qualify as an adequate alternative.⁵⁹ As to WFMT's suitability as a substitute for WEFM, the court found that WFMT held itself out as a "unique fine arts" station and not as a classical music outlet; by definition, WFMT was not a substitute.⁶⁰ The court noted that, although the FCC may have had the discretion to find that WFMT's format was an adequate replacement, the Commission's failure to make an affirmative finding of fact warranted a full hearing, in light of the conflicting data.⁶¹

Perhaps the most significant portion of the court's decision in *WEFM* came in dictum at the end of the majority opinion. The court stated that "there is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the

55. 506 F.2d 246 (D.C. Cir. 1973), *vacated and remanded en banc*, 506 F.2d 246 (D.C. Cir. 1974).

56. 506 F.2d 246 (D.C. Cir. 1974) (*en banc*).

57. *Id.* at 262.

58. *Id.* at 263.

59. *Id.*

60. *Id.* at 264.

61. *Id.* at 264-65. The court also concluded that a hearing was necessary because certain nonformat questions, for example, the accuracy of Zenith's loss statements as support for the assignment, were in dispute. *Id.* at 265-66.

same time to pursue a policy of free competition."⁶² The FCC's mechanistic deference to licensee discretion, the court concluded, was inconsistent with "the avowed aim of the Communications Act of 1934 . . . to secure the maximum benefits of radio to all the people of the United States."⁶³

The Commission Response to WEFM

Attempting to implement *WEFM*, the FCC issued a Notice of Inquiry,⁶⁴ seeking to establish a comprehensive statement of policy governing the agency's proper role in the regulation of broadcast entertainment formats. The Commission's investigation was guided by the notion that the role envisioned for the agency by the circuit court was both unworkable, because classifying station formats would require extremely subjective decision making, and unproductive, because regulation would be inferior to the marketplace in achieving diversity.⁶⁵ The Commission set forth economic,⁶⁶ consti-

62. *Id.* at 267.

63. *Id.* at 267-68 (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943)). The court, in essence, stated that FCC intervention was necessary because the very nature of the advertiser-supported broadcast industry guaranteed the failure of market forces to allocate programming equitably among all listeners based on their "first preference" format. The majority believed that the demographically desirable audiences, for example, those with greater disposable income and those more susceptible to advertiser appeals, would be served before certain minority segments of the population. *Id.* at 268. By relying on this classical economic prognosis of market inadequacies, the court sparked further controversy within the already heated debate between itself and the Commission.

64. Notice of Inquiry, Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1976) [hereinafter cited as Notice of Inquiry].

65. *Id.* at 582-83. "We are deeply concerned that, by rejecting the programming choices of individual broadcasters in favor of a system of pervasive government regulation, the Commission would embark on a course which may have serious adverse consequences for the public interest." *Id.* at 582.

66. Commissioner Robinson, in his concurrence to the Notice of Inquiry, took issue with the court's argument in *WEFM* that the advertiser-supported system does not promote sufficient diversity or provide programming that "reasonably corresponds to audience preference." *Id.* at 592. Robinson contended that stripping the system of the advertiser middleman and providing a direct marketplace exchange between broadcaster and consumer would not produce results materially different from those produced by the current arrangement. The current duplication of formats and mass audience appeal, in Robinson's opinion, is predominantly a function of the number of competitive outlets and of the size of the listening market rather than of advertiser control. *Id.* (citing Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952)).

tutional,⁶⁷ and practical⁶⁸ considerations that it felt militated against the view taken by the circuit court. The FCC suggested a balancing approach in which "any administrative regulation or policy tending to constrain an applicant from selecting programming of its choice 'must be justified by the existence and immediate imminency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions.'"⁶⁹ In the agency's opinion, reliance on market forces to promote diversity posed no "clear danger" to the common good; therefore, the regulations mandated by *WEFM* were unwarranted.⁷⁰

In July 1976, the FCC, after having received more than fifty responses to its Notice of Inquiry, issued a Policy Statement⁷¹ that essentially affirmed and expanded on those concerns expressed in the earlier document. The FCC disagreed with *WEFM* on four ba-

67. Commissioner Robinson also set forth a most comprehensive constitutional objection to the court's opinion. He reaffirmed the majority's concern that further government regulation would have a "chilling" effect on broadcaster innovation, resulting in conformity and loss in program diversity. Notice of Inquiry, *supra* note 64, at 599-601. This argument parallels his conclusions in Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 121 (1967):

[T]he Commission's own policies do little to encourage diversity or originality either in style or content of individual programs or in the overall format of a station's program operations. Indeed, its policies have, if anything, added to the inherent tendency of broadcasters to conform to safe, established patterns of operation and programming.

Id.

68. Robinson emphasized the improbability that administrative rulemaking would be flexible enough to respond to the idiosyncratic format complaints of a given segment of the listening public. Notice of Inquiry, *supra* note 64, at 593-99. He stated:

The standard for "uniqueness" . . . is obviously . . . subjective. . . . What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" It follows, therefore, that by the subjective standards that the court seems to embrace, any format is unique; from which it follows, all must be preserved.

Id. at 594-95 (footnotes omitted).

69. *Id.* at 585 (quoting *United States v. CIO*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring)).

70. *Id.* at 585.

71. *Supra* note 1.

sic matters: (1) the court required regulation of programming that was inconsistent with the Communications Act of 1934; (2) market forces adequately provided diverse programming formats; (3) the standard of review announced by the court required continual FCC surveillance that the agency could not practically handle; and (4) audience perceptions could not be defined or correlated with specific format descriptions.⁷² All four of these criticisms appear warranted.

First, the Policy Statement expressly repudiated the holding in *WEFM* on the basis of its inconsistency with the role that Congress had adopted for the FCC in the Communications Act.⁷³ Unlike common carriers, who have a duty to continue service in the public interest, radio broadcasters operate in a free market.⁷⁴ Competition in the broadcasting industry centers around program formats; to survive in the broadcasting field, a radio station must be allowed to select and implement its own format.⁷⁵ Thus, this underlying bias of the court toward requiring FCC regulation is inconsistent with the free competition standards embodied in the Communications Act of 1934.⁷⁶

Second, the Commission noted that, through use of its own staff survey and other expert studies of program diversity,⁷⁷ empirical

72. *Id.*

73. The Commission lamented that *WEFM* represented an "extremely unwise policy." *Id.* at 866. The agency further stated that, after having attempted to implement the various court rulings, it no longer could adhere to the position stated in the Ascertainment Primer, *supra* note 31, and *Zenith Radio Corp.*, 38 F.C.C.2d 838 (1972), *vacated and remanded en banc sub nom. Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). The FCC would no longer "take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming"; in the future, the Commission would rely on the marketplace to allocate entertainment formats. Policy Statement, *supra* note 1, at 866 n.8. The Commission's conclusions were based partly on the holding in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), that broadcasters "are not common carriers and are not to be dealt with as such." *Id.* at 475. *See also* note 5 *supra*.

74. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

75. *See* Policy Statement, *supra* note 1, at 860. *See also* notes 112-16 *infra* & accompanying text.

76. *See* notes 126-32 *infra* & accompanying text.

77. The Commission also relied on a study by Professor Bruce Owen of Stanford University, which was appended to the comments of an intervenor, National Association of Broadcasters. Policy Statement, *supra* note 1, app. B, at 873. Using these studies, the FCC concluded that from both an economic standpoint—"maximizing the welfare of consumers of

evidence showed market forces were effective in satisfying listener demands.⁷⁸ Although the agency found that the market allocation method does not mirror perfectly broadcast consumer preference,⁷⁹ the FCC concluded that free format competition was preferable to regulation by "fiat."⁸⁰ This determination was based on two particular findings: audiences discriminate nearly as much in choosing between stations within clearly defined format categories as they do in selecting from programming of a markedly different variety; and "maximization of format diversity will not necessarily lead to increased listener satisfaction."⁸¹ Indeed, the circuit court's threshold standards actually may result in a diminution of consumer welfare because the protected format may be less in demand than the proposed programming.⁸² The relative merits of two different types of programming formats cannot be determined in a "zero pricing" system of government regulation, because the intensity of demand for any given product cannot be measured without a pricing mechanism.⁸³ The Commission therefore concluded that the court was proposing a costly program of subjective restraints that provided only a minimal opportunity for achieving its public interest goal.⁸⁴

The Commission also objected to the intrusive regulatory role of constant broadcaster surveillance that *WEFM* would entail. The FCC anticipated that such regulation would be inadequate to meet rapidly changing public tastes and would chill licensee innovation.⁸⁵ Implementation of *WEFM* would require continual agency review in response to complaints that a licensee was deviating from an FCC mandated format. To gain the necessary experience to administer competently such a complex scheme, unprecedented

radio programs"—and a first amendment standpoint—"promoting the greatest diversity of listening choices for the public"—the marketplace is the "best way to allocate entertainment formats in radio." *Id.* at 863.

78. *Id.* at 864.

79. *Id.* at 863.

80. *Id.* at 863-64.

81. *Id.*

82. *Id.* at 864.

83. An argument can be made, however, that free market radio broadcasting is also a "zero price" system because consumers do not pay to choose their programming; there is no direct purchase of goods. See generally, R. NOLL, M. PECK, & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 32-33 (1973).

84. Policy Statement, *supra* note 1, at 864.

85. *Id.* at 864-65.

agency initiative in a traditionally private area would be necessary.⁸⁶ Moreover, such an approach would burden both the public and broadcasters with a cumbersome hearing process that ultimately only may reaffirm market choices or, even worse, insulate a less valued format.

Finally, echoing its original lament in the Notice of Inquiry concerning the futility of rational rulemaking in the format change area, the Commission pointed out that the inability to reduce audience perceptions to defined categories or format types makes the protection of specialized audiences impossible.⁸⁷ Standards to determine whether a format has been changed and whether other stations have provided alternative sources of programming are not available, and because of the inherent elusiveness of these standards, any such regulatory effort would not promote the public interest.⁸⁸

The Controversy Matures: WNCN (1979)

Various citizens groups petitioned the United States Court of Appeals for the District of Columbia to overturn the FCC's "abdication" of responsibility in the format change controversy, which was announced in the Policy Statement. The court, sitting *en banc*,⁸⁹ accepted this challenge and vacated the Policy Statement in a caustic ruling openly critical of the Commission's failure to implement the "law of the land" as stated in *WEFM*.⁹⁰ The court's

86. *Id.* at 865.

87. *Id.* at 862.

88. Even in the relatively easy situation of an obvious format change, the Commission still would be faced with the "adequate alternative" analysis mandated by *WEFM* which, in a large market, could plunge the agency into a web of subjectivity from which it could not extricate itself.

89. The court sat *en banc* because no panel of the court could overrule the *en banc* holding in *WEFM* as the agency had requested. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 841 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

90. The court felt it necessary to again set forth its view of the "partnership" between the agency and the judiciary, first declared in *Greater Boston Television Corp. v. FCC*, 444 F.2d 84, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The majority pointed out that, though the Commission is authorized by Congress to make "policy," the courts have the "final say" in interpreting the law. To the extent that "*WEFM* was an interpretation of a statute applicable to an adjudicatory proceeding," the court's decision was final. *WNCN Listeners Guild v. FCC*, 610 F.2d at 854-55. The court of appeals was clearly unhappy to be reexamining an issue that the judges felt was closed by the *WEFM* decision. *Id.* at 860

opinion may be separated into five major areas: (1) affirmation of the basic premises of *WEFM* concerning the drawbacks of the market as a format allocation mechanism; (2) reelaboration of the hearing threshold requirements; (3) rebuttal of the Commission's findings on both substantive and procedural grounds; (4) criticism of the agency's interpretation of *WEFM* and clarification of the court's view of the proper Commission role; and (5) suggestion of ways in which the FCC might implement the hearing requirement.

The majority opinion concluded that, although the underlying rationale of *WEFM* involved a recognition that market forces generally provide diversification of formats, "evidence strongly indicates that market mechanisms have not satisfied the Communications Act's mandate that radio serve the needs of all the people."⁹¹ Because any loss in diversity of programming raises a potential public interest question, the Commission must consider the impact on diversity when reviewing assignment applications that entail abandonment of the assignor's format.

The agency need not hold an evidentiary hearing on the public-interest-in-diversity issue if those parties challenging the application fail to meet certain threshold standards. First, an "outpouring of protest" or "significant public grumbling" over the proposed change must occur; absent such protest, the Commission may assume that the new format is acceptable.⁹² Second, the complaining group's preferred choice must be supported by a segment of the population large enough to be "accommodated by the available frequencies."⁹³ Third, no adequate substitute for the existing format can exist within the service area.⁹⁴ Finally, the station must be economically viable in the given market.⁹⁵ If the Commission establishes through undisputed facts that any one of the above requirements has not been met, no public interest issue is presented and,

(Tamm, J., dissenting).

91. 610 F.2d at 851.

92. *Id.* at 842, 851.

93. *Id.* This standard was not suggested in *WEFM* and appears somewhat contradictory and redundant. The "preferred format" is already on the air, being "accommodated by the available frequencies," so that, if the population segment which supports it is too small, the only conclusion possible is that the format is not financially viable. This standard also tends to contradict the antimajoritarian position the court has advocated.

94. *Id.*

95. *Id.*

therefore, no hearing is required.⁹⁶ Additionally, other "substantial questions of material facts," not described by the court, may necessitate a hearing.⁹⁷

In rebutting the FCC's findings on procedural and substantive grounds, the court attacked the staff study employed to document the Commission's major premise that free competition promotes the maximization of listener satisfaction. Specifically, the court criticized the agency's failure to release the study for "adversarial testing of its data base, methodology, and conclusions" prior to issuance of its Policy Statement.⁹⁸ The Commission's substantive conclusions, as derived from the evidence of the FCC study and the public comments, were equally criticized. Generally, the circuit court agreed with the first half of the study, in which a survey of the twenty-five largest radio markets revealed a substantial diversity in programming.⁹⁹ The court disagreed, however, with the Commission's conclusion, in the second half of the study, that the agency could not categorize formats effectively, a vital first step in

96. *Id.*

97. Other issues, unrelated to the public interest issue, may require an evidentiary hearing under § 309. For example, the question remains open whether a flawed ascertainment study might present substantial and material questions of fact. *See, e.g., Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 266 (D.C. Cir. 1974) (possible misrepresentation in the ascertainment survey may merit a hearing).

98. 610 F.2d at 846-47. The court declined, however, to predicate its action to vacate the Policy Statement upon this procedural ground. *Id.* at 847 n.24. Whether the court's characterization of the study as a technical document was correct is open to question. Although "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, [to a] critical degree, is known only to the agency," *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), the FCC staff study "constituted no more than a statistical compilation of data that is routinely available to the public and an interpretation of that data by the Commission's staff." Brief for Respondent FCC at 63, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979) (footnote omitted). In that sense, the requested internal documents—compiled and interpreted public information—may have been protected from public comment under a veil of confidentiality. *See, e.g., Braniff Airways v. CAB*, 379 F.2d 453, 462 (D.C. Cir. 1967).

99. 610 F.2d at 856. The court never has disagreed that market forces promote diversity to a considerable extent. Even in major markets, however, the court noted the absence of "important" formats such as classical music. To a significant degree, the FCC's disagreement with the court's position stems from its unwillingness to make subjective judgments that, for example, classical music is an "important" format necessary to diversity in programming or that "formats within formats" are duplicative. *See* Policy Statement, *supra* note 1, at 862-63.

regulating diversity.¹⁰⁰ This inability, the agency argued, would prevent governmental regulation from being any more effective than a free market.¹⁰¹ The court countered this argument by pointing out that "pervasive governmental format allocation" was not required; only in cases of "prima facie market breakdown" did the court expect the agency to act.¹⁰² The determination of a true breakdown required only common sense: "[w]hen a unique format is abandoned, those loyal to that format will have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programming the same format."¹⁰³

Rebutting the Commission's allegations that implementation of *WEFM* would pose a significant burden on both the agency and participants in any required hearing process, the court emphasized that, in the ten years since *Atlanta*, only one evidentiary hearing had been held; that hearing, while extensive, imposed less of a burden than did the standard renewal proceeding.¹⁰⁴ The court also noted that two of the prior cases remanded for hearing, *Atlanta* and *Progressive Rock*, were settled between the parties without further proceedings.¹⁰⁵ From past experience, therefore, the Commission's "administrative nightmare" characterization of *WEFM* lacked merit.¹⁰⁶

The major criticism of the Commission's actions was its failure to read *WEFM* narrowly and to implement the spirit of the decision properly. Whereas the agency had portrayed the alternative to

100. See Policy Statement, *supra* note 1, at 874-75.

101. 610 F.2d at 856.

102. *Id.*

103. *Id.* at 857.

104. *Id.* at 848-49 (citing Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 406 n.33 (1975)).

105. *Id.* at 848.

106. The court recognized that the hearing requirement also may apply in renewal situations in which format changes are involved. This should not increase the burden on the agency significantly, however, because the same restrictive hearing standards would apply as in transfer applications. *Id.* at 849. See generally Note, *Federal Regulation of Radio Broadcasting—Standards and Procedures for Regulating Format Changes in the Public Interest*, 28 RUTGERS L. REV. 966, 971-75 (1975). Conversely, *WEFM* would not apply to mid-term format changes by the licensee himself, except that the change could be challenged at renewal. See, e.g., *WNCN Listeners Guild v. FCC*, 610 F.2d at 849 n.29; *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263, 272 (D.C. Cir. 1970).

free competition, "pervasive" government regulation, in stark "Manichaeian" terms, the court of appeals stated that the "narrowness of the commission's remedial powers" limited excessive FCC interference.¹⁰⁷ The limited authority of the FCC is to be applied in developing administrative standards to consider format change issues when evidence of market failure appears.¹⁰⁸

Recognizing the Commission's expertise in formulating rules in the format area,¹⁰⁹ the court concluded its opinion with suggestions as to how the FCC might draft appropriate guidelines for review. Regarding the problem of developing a plan for format classification, the court suggested an "innovative" nonclassification scheme in which the search for adequate alternative programming would be obviated by a hearing requirement triggered by "public grumbling"—that is, triggered when a "significant sector of the populace is aggrieved by a planned programming change."¹¹⁰ In the area of more "traditional" solutions, the court suggested classifying formats in broad categories, thereby placing the burden of proving a *prima facie* case of uniqueness on the petitioners, requiring a relatively high level of "grumbling," and exempting experimental formats to avoid the "lock in" problem.¹¹¹

CRITIQUE OF THE PROPOSED FCC REGULATORY ROLE

Economic Analysis

The attack on the FCC's position concerning radio format change focused on the circuit court's repudiation of the agency findings in the staff study appended to the Policy Statement and on the court's advancement of its own untested "common sense" premise that the "public interest" is furthered by the greatest diversity in program formats. The court's position, however, is untenable for two reasons: it fails to recognize the changed nature of the radio marketplace in 1979; and it fails to refute successfully the FCC internal study which, despite having been procedurally deficient, has been supported substantively by many scholarly writings

107. 610 F.2d at 850-51.

108. *Id.* at 852.

109. *Id.*

110. *Id.* at 853 n.47.

111. *Id.* at 854.

in the field.¹¹²

A dramatic growth in radio has occurred during the forty-five years of FCC regulation.¹¹³ The role of radio has evolved rapidly, from a provider of common denominator, general services programming to, with the advent of television, a specialty medium competing for a much narrower audience.¹¹⁴ Strong evidence exists to show that an influx of stations, particularly FM outlets, has resulted in new stations capturing significant audience shares from existing stations through innovative programming that is more responsive to shifts in consumer tastes.¹¹⁵ This development has led to substantial format diversity in medium and large broadcast markets.¹¹⁶

The format regulation proposed by the court of appeals in *WNCN* lacks the flexibility to deal with the new fluid markets within the radio marketplace. The court in *WNCN* failed to ac-

112. For a cross section of literature in the area of the economics of television and radio, see K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963), R. NOLL, M. PECK & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* (1973), R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1977), Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15 (1977), Brenner, *Government Regulation of Radio Program Format Charges*, 127 U. PA. L. REV. 56 (1978), Rothenberg, *Consumer Sovereignty and the Economics of TV Programming*, STUDIES IN PUBLIC COMMUNICATIONS IV (1962), Spence & Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. ECON. 103 (1977), and Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

113. In 1927 only 681 radio stations existed. By 1960 the number of stations had grown to 4,674, and by July 1979, the total stood at 8,654. The rapid growth in this latter period is attributable to FM radio's rapid development. See 44 Fed. Reg. 57,636, 57,637-62 (1979). During the same period, significant diversification in the communications industry has occurred, with the rise of commercial, cable, and public television and other home entertainment choices.

114. *Id.* at 57,646; Policy Statement, *supra* note 1, at 870. BROADCASTING, Jan. 22, 1979, at 32, details the dramatic growth in audience share for those stations that switched to disco formats. Just as disco programming was achieving national exposure, however, its demise already was being chronicled in the program trend setting areas of the country.

115. 44 Fed. Reg. 57,636, 57,647 (1979). Program innovation often has both a national impact and a short duration. *Id.*

116. Efforts are currently underway to promote diversity through structural regulation rather than program-format content controls. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976). In order to increase minority programming, the FCC has instituted policies that favor minority ownership and equal employment opportunity on the assumption that such measures will result in programming that reflects the needs and interests of minorities.

knowledge that regulation actually may be detrimental to the public interest by preserving the status quo when changing consumer demands merit rapid format changeovers. If older stations are to adjust to new musical trends and competition from experimental stations, they must have the discretionary power to change their formats without interference from government regulation and citizen groups. Also, the court simply failed to address the situation in which a licensee with an allegedly unique programming format desires to adopt an untried experimental format. For example, the FCC cannot gauge whether a station with the only classical music format in the service area that transfers its license to a party proposing the first disco format in the area does so at a loss to the public interest in diversity. Without making extremely subjective and unsupportable value judgments, no court or agency can predict which particular combination of formats will serve the public welfare goal of diversity best.

A corollary to the above dilemma involves the court's dubious conclusion that maximum diversity in format choices promotes the public interest.¹¹⁷ The court reached this conclusion by relying on a "substitution" theory that assumes no public interest questions will be raised when nonunique programming formats are lost. As Judge Tamm pointed out in his dissent to *WNCN*, the substitution theory

runs afoul of the familiar economic principle that it is either impossible or extremely difficult to compare the intensity of preference of different persons. The range of audience preferences within the same format, for example, suggests that the Commission would be hard pressed to determine how much and how many listeners would prefer a variation of a pre-existing format to a unique format. Given the many aspects of a specific station's "sound" it is difficult to measure the amount or the depth of audience acceptance of a changed format without allowing broadcast of the new format—a solution which eradicates the controversy.¹¹⁸

Thus, even in an *Atlanta* situation, where, according to the majority opinion in *WNCN*, market forces evidently were not serving

117. *WNCN Listeners Guild v. FCC*, 610 F.2d at 856-57.

118. *Id.* at 863 (Tamm, J., dissenting).

the public interest,¹¹⁹ the conclusion was questionable in light of the inherent inability to predict whether retention of the existing format promotes maximum listener satisfaction. The best barometer of the public interest must be, by definition, the public, not the judiciary or the Commission.¹²⁰

The circuit court's criticism that the advertiser-supported broadcast industry has a tendency to program according to the preferences of the more "demographically" desirable groups, rather than to program for the public's diversity interest, necessitates one final observation.¹²¹ No one can dispute that advertisers support those broadcasters who reach the audiences most likely to purchase their products.¹²² Considerable empirical evidence, however, runs contrary to the assumption that an advertiser-supported radio network will favor duplication of formats over diversity: low income individuals tend, more than higher income individuals, to buy brand name products, so that advertisers may support more minority programming to reach these groups;¹²³ radio advertisers, viewed as a whole, do not favor any specific demographic group of the population to the exclusion of others;¹²⁴ and to the extent that smaller markets may have a less than optimal diversity of programming, economic conditions prevailing in these areas for all goods and services have as great an impact on such diversity as advertising demographics.¹²⁵ Arguably, diversity in such areas is promoted better by increasing the number of competitors through easing access to the remaining radio outlets than by government regulation to preserve existing formats.

Statutory Objections

Section 153(h) of the Communications Act of 1934 provides that

119. *Id.* at 856 n.52.

120. Judge Tamm commented: "I would have thought that the best judge of the most desirable entertainment formats is the listening audience itself." *Id.* at 863 (Tamm, J., dissenting).

121. *See also* note 66 *supra*.

122. Policy Statement, *supra* note 1, app. A, at 871.

123. 44 Fed. Reg. 57,636, 57,653 (1979).

124. Policy Statement, *supra* note 1, app. A. at 870-71.

125. 44 Fed. Reg. 57,636, 57,653-55 (1979).

radio broadcasters shall not be deemed common carriers.¹²⁶ In light of section 153(h), the FCC urges that the broadcast industry must remain free of heavy governmental regulation. In the Policy Statement, the Commission claims that *WEFM* has blurred this congressionally imposed distinction between common carriers and broadcasters.¹²⁷ The circuit court, on the other hand, views the Commission's interpretation of *WEFM* as "stretch[ing] *WEFM* virtually beyond recognition"¹²⁸ by expanding the holding to require a pervasive regulatory scheme. To determine the role of section 153(h) in this debate, the Supreme Court decision of *FCC v. Sanders Brothers Radio Station*¹²⁹ must be examined.

In *Sanders Brothers*, the Supreme Court held:

[B]roadcasters are not common carriers and are not to be dealt with as such. Thus the [Communications] Act recognizes that the field of broadcasting is one of free competition.

. . . .
. . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.¹³⁰

The Commission argues that *Sanders Brothers* unequivocally supports the view that if "broadcasters are to compete with one another, . . . they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take."¹³¹ The circuit court, on the other hand, downplaying the vitality of *Sanders Brothers*, views the existence of the regulatory scheme embodied in the Communications Act as evidence that Congress did not foresee that the maximum benefits of radio could be secured through free competition.¹³² In

126. 47 U.S.C. § 153(h) (1976).

127. Policy Statement, *supra* note 1, at 859.

128. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 852 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

129. 309 U.S. 470 (1940).

130. *Id.* at 474-75 (footnotes omitted).

131. Policy Statement, *supra* note 1, at 860.

132. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 267 (D.C. Cir. 1974). The court does not state expressly that *Sanders Bros.* has been circumscribed by National

essence, the court envisions an FCC regulatory role in the format change area that is not consonant with section 153(h) of the Communications Act, but instead treats broadcasters as common carriers.

The court of appeals in *WNCN* effectively counters the Commission's position that *WEFM* clearly sought to impose on broadcasters such common carrier obligations¹³³ as public access,¹³⁴ responsibility to continue in service until abandonment is approved by some regulatory body,¹³⁵ avoidance of wasteful duplication of facilities,¹³⁶ and rate regulation.¹³⁷ The Commission's strongest argument, that *WEFM* requires forced continuation of a specific format, does not survive strict scrutiny. As the court notes in *WNCN*, *WEFM* did not authorize the Commission to force retention of an existing format; *WEFM* merely required the agency "to take a station's format into consideration in deciding whether to grant certain applications."¹³⁸

For essentially the same reason, a literal reading of *WEFM* will

Broadcasting Co. v. United States, 319 U.S. 190 (1943), and the other cases cited in *WEFM*—*FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953), and *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974)—but the court implies it. The applicability of *Hawaiian Telephone* and *RCA* to the current controversy is in doubt because they both dealt with public utilities, in other words, common carriers, for which Congress instituted a less competitive statutory scheme. Policy Statement, *supra* note 1, at 861; Notice of Inquiry, *supra* note 64, at 593 n.4 (Robinson, Comm'r, concurring).

133. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 851-54 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

134. The Commission argued in its Policy Statement, *supra* note 1, at 859-60, that the court of appeals in *WEFM* attempted to impose a policy of public right of access to the broadcast airwaves in contradiction to the declared intent of Congress and the holding of *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 109 (1973). The Commission's argument is untenable because *WEFM* guaranteed continued public participation rights of citizens groups to challenge format changes and preserve their first preference programming, but it did not provide for citizen access to the broadcast booth.

135. Policy Statement, *supra* note 1, at 860. The agency quotes, in this regard, *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204 (D.C. Cir. 1960), in which "the Court of Appeals observed that a common carrier has 'a special legal status and obligations. . . . This includes an obligation, deeply imbedded in law, to continue service.'" Policy Statement, *supra* note 1, at 860 (quoting *Michigan Consol. Gas Co. v. FPC*, 283 F.2d at 214). See Brief for Respondent FCC at 33, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979).

136. Brief for Respondent FCC at 33, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979).

137. *Id.*

138. 610 F.2d at 851.

not support the Commission's observation that the "censorial" nature of format regulation allegedly jeopardizes the viability of format regulation under *Red Lion Broadcasting Co. v. FCC*¹³⁹ and section 326 of the Communications Act.¹⁴⁰ As the court concluded in *WNCN*, prior court holdings should not be viewed as authority to restrain the broadcasting of any program.¹⁴¹ Indeed, the Supreme Court's recent holding in *FCC v. Pacifica Foundation*¹⁴² would not support such a position.¹⁴³

The preceding analysis notwithstanding, practically speaking, the impact of format regulation probably will bear closer resemblance to the unhappy picture the Commission portrays than to the narrow legal description given by the circuit court. Although the agency has no power to exercise prior restraint in preventing the adoption of a new format or to force retention of existing programming, the net result of any proceeding which finds that a license transfer involving a format change would not serve the "public interest, convenience, and necessity" appears to be censorial in nature.¹⁴⁴ As a practical matter, preventing an assignee from changing a format by refusing to approve the assignment prevents the assignee, although not the assignor, from changing the format of the station. The assignor, however, will know that a change of format is contrary to the public interest in the eyes of the FCC, the body which must eventually renew the license of the assignor for the particular station, grant initial licenses for other stations, or

139. 395 U.S. 367 (1969). In *Red Lion* the Supreme Court warned that "refusal to permit the broadcaster to carry a particular program" would raise serious first amendment questions. *Id.* at 396.

140. 47 U.S.C. § 326 (1976). Section 326 provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Id.

141. *Id.*

142. 438 U.S. 726 (1978). "The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance . . ." *Id.* at 735.

143. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 851 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

144. The assignor in *WEFM* continued to carry an undesired classical music format until 1978, six years after filing the original application for assignment. D. GINSBURG, REGULATION OF BROADCASTING 316-17 (1978).

grant license transfer applications in the future.

*Constitutional Considerations*¹⁴⁵

The court of appeals in *WNCN* determined that the *WNCN* and *WEFM* decisions faced no statutory or constitutional impediments in requiring format regulation.¹⁴⁶ The Commission, in the Policy Statement, and Judge Bazelon, in concurrences to *WEFM* and *WNCN*, have taken a different stance on the constitutional impact of format regulation. These viewpoints, and others, are examined below to demonstrate the insufficiency of the court's analysis.

The Traditional Bases of Broadcast Regulation

Constitutional justification for the bulk of FCC regulation in the format-programming area depends on a perceived difference between the broadcast and print media.¹⁴⁷ Judge Bazelon notes that present intrusions into broadcast licensee discretion, such as the fairness doctrine, "would in any context other than mass communications be an uncontestable denial of freedom of the press."¹⁴⁸ A number of authorities recently have challenged the traditional justifications for dual regulatory standards for the print and broadcast media, arguing that the bases for this differential treatment—the scarcity, power, and captive audience theories are suspect from both a factual and analytical standpoint.¹⁴⁹

145. See, e.g., Note, *First Amendment Rights of the Broadcast Licensee and the Public Interest in Entertainment Programming*, 17 WASHBURN L.J. 262 (1978) (overview of entertainment programming regulation and first amendment limitations).

146. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 855 (D.C. Cir. 1979), cert. granted, 445 U.S. 914 (1980) (No. 79-824).

147. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 268-84 (D.C. Cir. 1974) (Bazelon, J., concurring); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213.

148. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 278 (D.C. Cir. 1974) (Bazelon, J., concurring).

149. 44 Fed. Reg. 57,636, 57,651-52 (1979). See Note, *Press Protections for Broadcasters: The Radio Format Change Cases Revisited*, 52 N.Y.U. L. REV. 324 (1974); Bazelon, *supra* note 147; Powe, "Or of the [Broadcast] Press," 55 TEX. L. REV. 39 (1976); Robinson, *supra* note 67. Judge Bazelon also presents a fourth basis for differential regulation. He argues that broadcasters have abused their discretion and fiduciary responsibility to act in the public interest by following a myopic path of maximizing their own self-interest. The first amendment, which protects journalistic judgment, therefore should not protect purely business judgments that do not advance the public discussion protected by the first amendment.

The scarcity theory first was proposed in *National Broadcasting Co. v. United States*,¹⁵⁰ in which the Supreme Court stated that government regulation may be justified based on the limited facilities of radio.¹⁵¹ The limited availability of broadcasting frequencies led the Court in *Red Lion*¹⁵² to impose a fiduciary duty on broadcasters to serve the public interest on behalf of those without access to the medium.¹⁵³ In the ten years since the Court decided *Red Lion*, the primary factual basis for the decision, the scarcity of frequencies on the radio spectrum, has continued to diminish in light of technological innovations. The improvement and expansion of FM radio and UHF television and the emergence of cable television have lessened the overall scarcity of broadcast outlets. Demand no longer exceeds supply; the radio spectrum is not saturated, and any limitations on entry are economic rather than technological.¹⁵⁴ Additionally, the number of competitive broadcast outlets far exceeds those in the newspaper field; therefore, scarcity alone does not justify the different regulatory treatment of the press and broadcast media.¹⁵⁵

A second group of supporters of broadcast regulation theorize that the broadcast medium has a powerful, often invisible, impact on consumers.¹⁵⁶ The argument is more often advanced in the context of television, but is still relevant to the radio format change

Bazelon, *supra* note 147, at 230-31.

150. 319 U.S. 190, 226-27 (1943).

151. This Note is not concerned with government allocation of frequencies via the licensing process to avoid interference. This justification for regulation has not been challenged recently and has no bearing on the scarcity rationale for programming regulation. Likewise, this Note is not concerned with the validity of the fairness doctrine; the argument here is that format regulation goes beyond the indirect programming regulation sanctioned in *Red Lion*. See text accompanying notes 169-78 *infra*.

152. 395 U.S. 367 (1969).

153. *Id.* at 389-90.

154. See 44 Fed. Reg. 57,636, 57,651-52 (1979). Additional AM and FM outlets are technologically feasible, but currently almost 400 vacant FM assignments exist.

155. Bazelon, *supra* note 147, at 224-27. The whole regulatory scheme supported by *Red Lion* and the scarcity rationale is not applicable in this situation. The court in *WNCN* is not attempting to promote the speech rights of those excluded from access to the air waves, but merely is insuring that certain broadcasters present the programming that complaining listeners want to hear. Thus, the argument presented in *Red Lion*, that program regulation will not inhibit speech but will promote the speech interests of unrepresented segments of the public, 395 U.S. at 187-89, is inapposite in the diversity of formats context.

156. Bazelon, *supra* note 147, at 220-22.

issue. Allegedly, because of the immense number of listeners who may be reached through the semipersonal contact of broadcast communications, such massive impact by the broadcast medium must be regulated.¹⁵⁷ This theory suffers from two deficiencies: available empirical studies have not conclusively documented that broadcast communications play a more significant role in consumer influence than do other unregulated socializing influences;¹⁵⁸ and even if the power of the broadcast media is accepted, such power alone does not justify a generalized regulation of speech.¹⁵⁹ As Judge Bazelon has concluded:

[T]he assumption that the power of the telecommunications press justifies regulation strikes at the root of the First Amendment's guarantee of an independent journalistic institution: this assumption argues instead that the press is too powerful to be free. But it is important to distinguish between the power gained by oligopoly in the production of news and entertainment programming for radio and TV and the power inherent in the medium. . . . The latter form of power may be amenable to regulation to the extent, and only the extent, that the power itself causes a cognizable injury which we might deem worthy of suppression. . . . [T]o regulate on the basis of the content of the speech because of the added power given by a particular medium of communication seems to me a wholly different proposition which, if justifiable at all, cannot be defended on the basis of the particular power of the medium alone.¹⁶⁰

The third theory offered in support of regulation, the captive audience theory, also has weak underpinnings. The theory first arose in *Banzhaf v. FCC*,¹⁶¹ a case concerning the application of the fairness doctrine to cigarette commercials. Judge Bazelon, for the court, stated:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a

157. *Id.*

158. Powe, *supra* note 149, at 58-60.

159. Bazelon, *supra* note 147, at 222.

160. *Id.* (footnotes omitted).

161. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.¹⁶²

The theory next appeared in *CBS v. Democratic National Committee*.¹⁶³ There, Chief Justice Burger concluded that the FCC was "entitled to take into account the reality that, in a very real sense, listeners . . . constitute a 'captive audience.'" ¹⁶⁴Despite the superficial appeal of this theory, the idea of a "captive audience" relies heavily upon a belief in "Big Brother"; however, people are not required to listen to radio, and they are not limited in their listening choice to only one station.¹⁶⁵ Therefore, this theory also fails as a justification for regulation.

The Nature of Format Regulation

If one assumes, for purposes of analysis, that the traditional justification supporting broadcast regulation is still valid, the principal issue concerns whether format regulation by the FCC would intrude on the content of private communications so as to abridge the first amendment rights of the broadcasters. The debate focuses on whether the Commission's regulation involves continual monitoring of those licensees who have been denied a format change or whether the FCC's regulation becomes a single determination, at the outset of a transferee's or renewal applicant's term, that the overall programming will serve the public interest.

162. *Id.* at 1100-01.

163. 412 U.S. 94 (1973).

164. *Id.* at 127.

165. *Cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 764-66 (1978) (Brennan, J., dissenting) (in context of content regulation of broadcasts by the FCC, the privacy interests of a person in his home do not outweigh the first amendment interests of a broadcaster because radio is a public medium which the person within the home may turn on or off). *But cf. id.* at 748-49 (majority opinion) (FCC may deprive a broadcaster of his license if revocation serves the "public interest," because the broadcast media are a pervasive presence and the privacy of a person in his home outweighs the first amendment rights of the broadcaster); *id.* at 759-60 (Powell, J., concurring). See also Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 618 (1975).

The Commission contends that requiring a licensee to continue a particular format will involve the agency in oversight of "far more of the day-to-day operations of broadcasters' conduct" than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.¹⁶⁶ The circuit court reasons, to the contrary, that format regulation does not amount to continual administrative scrutiny of licensees' discretionary judgments.¹⁶⁷ The Commission has the power to make an initial license determination and then to take a hands-off approach, examining any question of abuse of the format at license renewal time. Neither *WEFM* nor *WNCN* require the FCC to function as a continuing censor.

Despite the preceding observation by the circuit court, format regulation is more intrusive than the court admits. By obligating a radio station to continue with a certain format, the FCC would be denying the broadcaster the right to present another format. Accordingly, format regulation under *WEFM* and *WNCN* restricts licensee discretion more than does the corresponding infringement in *Red Lion*, although perhaps less so than does the infringement in *CBS*.¹⁶⁸

Balancing the Rights of Listeners and Broadcasters

The proponents of format regulation readily point to the supposed "constitutional right to hear," advanced in *Red Lion*,¹⁶⁹ in

166. Notice of Inquiry, *supra* note 64, at 600 (citation omitted).

167. *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

168. The question remains open as to whether the holding in *Red Lion* could be extended to cover format regulation. Judge Bazelon argues in *WEFM* that *Red Lion* must be construed narrowly to cover only the situations of personal attack and editorial reply in which a compelling governmental interest justifies the intervention. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 279 (D.C. Cir. 1974) (Bazelon, J., concurring). The circuit court concluded in *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938 (1977), *aff'd in part and rev'd in part*, 436 U.S. 775 (1978), that "the fairness doctrine may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs." *Id.* at 950.

169. Justice White stated, in dictum, that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). See generally Thomas, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

support of their position. This listener's right, in contrast to the broadcaster's right of free speech, apparently was sufficient to carry the weight of authority in *WEFM* and *WNCN*. The court chose, however, not to expand the holding in *Red Lion* and provide a specific constitutional foundation for its argument. Instead, *WEFM* and *WNCN* leave only the implication that a listener's right is superior to the broadcaster's right in the first amendment scheme.¹⁷⁰

The listener's right to hear, so heavily relied on by the court, appears to be illusory. Such a right involves an unjustifiable interference with the speaker's right to determine the content of this message. The right to hear becomes self-defeating in that, by successfully forcing the speaker-broadcaster to carry a particular message-format, the required communication deprives other listeners of their right to hear a different message. These competing listener interests emphasize that the right to hear, as espoused in *Red Lion*, may be limited to a collective right rather than a right of any specialized broadcast audience or group of "public grumblers."

In contrast to the uncertain status of listener rights are the verifiable interests of the broadcaster in preserving programming discretion. Besides hindering the broadcaster's ability to meet consumer demand, format regulation falls inequitably upon a small class of broadcasters who have departed from the mainstream to program for specialized audiences. If the proposed goal of diversity is to be served by format regulation, no logical reason exists for stopping regulation short of requiring new licensee and renewal candidates to conduct ascertainment studies to develop programming formats that would meet all apparent, unserved format needs in the service area. While such an approach undoubtedly would run afoul of the first amendment, the FCC regulation would serve the meritorious purpose of equitable treatment for all broadcasters.

Another constitutional problem with format regulation involves the inhibiting effect upon broadcasters willing to abandon present formats and experiment with new programming.¹⁷¹ In *WNCN*, the

170. See Note, *Press Protections for Broadcasters: The Radio Format Change Cases Revisited*, 52 N.Y.U. L. Rev. 324, 334-35 (1977).

171. See text accompanying notes 113-17 *supra*.

court downplayed this "chilling" effect on broadcaster initiative,¹⁷² but the Commission rightfully appears to be concerned about this problem.¹⁷³ Just as the fairness doctrine has been cited as cause for the decline in controversial programming,¹⁷⁴ format regulation is likely to stifle innovation and experimentation in radio programming. The threat of an expensive hearing process or the "locking in" of an undesired format is a strong deterrent to "unique" formats; thus, rather than promoting diversity, regulation may prove to be counterproductive.¹⁷⁵

The final constitutional problem to be noted concerns Judge Bazelon's observation in *WNCN* that "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others."¹⁷⁶ The FCC is not the proper forum for overriding broadcaster discretion. Journalistic

172. The Commission "has provided little or no evidence that *WEFM* has in fact deterred licensees' format choices." *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 851 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824).

173. In the Policy Statement, *supra* note 1, app. A, at 871, the Commission reported the comments of several intervenors who proposed that some "chilling" of innovative programming has occurred already. The FCC has expressed concern about the difficulty in measuring the inhibiting effect of format regulation. Interview with C. Grey Pash, Staff Attorney, Federal Communications Commission, in Washington, D.C. (October 25, 1979). Such a lack of evidence should not destroy the validity of this argument, however, because the Supreme Court continues to uphold FCC measures favoring "diversity" even though "the possible benefits of competition do not lend themselves to detailed forecasts." *FCC v. National Citizens Comm. for Broadcasting*, 426 U.S. 775, 797 (1978) (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953)).

174. Professor Powe of the University of Texas concludes:

The [fairness] doctrine primarily serves as a nuisance that everyone from activists to oil company executives knows deters some controversial programming. Whenever a network airs a controversial documentary fairness complaints are generated even if unfounded. If the Commission forwards a complaint to the network, then the process of transferring network dollars to lawyers' pockets begins. This compounds the unprofitability of documentaries, none of which attracts a sufficiently large audience in the first place. Thus, any potential pitfalls created by the fairness doctrine, although relatively toothless, counsel avoidance of the thankless task of informing the public.

Powe, *supra* note 149, at 54.

175. *Id.* The circuit court's suggested exemption for experimental programs, *see* text accompanying note 111 *supra*, does not avoid this "chilling" effect because the Commission must determine what is experimental and how long to allow the experimentation. *See* Petition for Writ of Certiorari at 24 n.19, *FCC v. WNCN Listeners Guild*, 445 U.S. 914 (1980) (No. 79-824).

176. 610 F.2d at 859 (Bazelon, J., concurring).

discretion must be uninhibited if a free flow of information to the public is to be preserved.¹⁷⁷

In summary, the constitutional objections to the court's position in *WEFM* and *WNCN* are: (1) the traditional justification for program-format regulation is eroding, although its complete invalidity may not yet be concluded; (2) the nature of format regulation is subject to conjecture, but probably falls midway on the *Red Lion-CBS* spectrum of government intrusion into programming; and (3) broadcaster discretion, in contrast to the ill-defined rights of listeners, remains a cornerstone of first amendment protections of freedom of speech and press. If, as the agency concluded, the goal of program diversity can be achieved without substantially abridging broadcaster discretion, the court of appeals' position poses an unnecessary threat to first amendment freedoms.¹⁷⁸

Administrative Law Considerations

Based on an intense feeling that the circuit court had overstepped the traditional boundaries of judicial review to usurp agency discretion in *WNCN*, the FCC recently sought, and obtained, a writ of certiorari in the Supreme Court.¹⁷⁹ The agency-court clash over the format question was inevitable given the judicial temperament of the individual judges.¹⁸⁰ The United States

177. Judge Bazelon points out how content regulation may be twisted by ex parte contacts to serve private interests and interfere with the constitutional process of free flow of information.

By forcing the press to share its space, its medium, with persons of the government's choosing, we are restricting the journalistic discretion which it is the purpose of the First Amendment to protect. If one group has a right of access or a right to have the licensee present that group's point of view, there is no independent press; there is only a multitude of speakers. That might be permissible if the First Amendment protected only free speech. However, it also protects the press.

Bazelon, *supra* note 147, at 235.

178. *Cf. Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (regardless of substantial legislative purpose, means used must be least restrictive of fundamental personal rights).

179. *FCC v. WNCN Listeners Guild*, 445 U.S. 914 (1980) (No. 79-824). In its petition for writ of certiorari, the Commission properly placed strong emphasis on the Court's recent decision in *FCC v. National Citizens Comm. for Broadcasting*, in which the court of appeals was reversed for failing to give proper weight to the agency's reasonable policy judgment. *FCC Petition for Writ of Certiorari, FCC v. WNCN Listeners Guild*, 445 U.S. 914 (1980) (No. 79-824).

180. Each of the circuit court judges has written extensively on the matter of judicial

Court of Appeals for the District of Columbia consistently has advocated aggressive judicial review of agency action. In *Greater Boston Television Corp. v. FCC*,¹⁸¹ one of the first expressions of judicial review in the communications field, the circuit court stated:

Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. . . . Its supervisory function calls on the court to intervene . . . if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards.¹⁸²

A strong look at the court's actions in *WNCN* shows that the court has committed the evil against which it had counseled; the court has supplanted the agency's reasoned policy decisions with its own "untested assumptions" concerning the operations of the broadcast market.¹⁸³ In *WNCN*, the majority's vehement response

review of administrative policies. Two views are present in much of this writing: (1) Congress has written vague laws, and the public is content to have the judiciary assume an ever expanding role to fill in the gaps left by inadequate drafting; and (2) the agencies and courts form a "partnership" that requires a precarious balance between judicial deference and self-assertion by the courts. Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); see McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119-74 (1977); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974). Ironically, Judge Skelly Wright gave a recent address at the Harvard Law School excoriating the judiciary for meddling in government affairs. In his lecture Judge Wright concluded: "Judges do not have a roving commission as agents of the Congress to oversee the implementation of legislation by the bureaucracy. . . . [They] should retrench from their disposition to act as the final arbiters of the public good" in cases involving challenges to actions by government agencies. *The Washington Post*, Oct. 17, 1979, at 1, col. 2.

181. 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 436 U.S. 805 (1971).

182. *Id.* at 851 (footnote omitted); see *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 948 (D.C. Cir. 1977) (prohibition against court substituting its judgment for that of the agency).

183. See *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 856 (D.C. Cir. 1979) (Tamm, J.,

to this observation is that although only the agency has the expertise to make policy, the court, and not the agency, has the duty to interpret the law.¹⁸⁴ Little disagreement has arisen, however, between the court and the FCC on questions of law. The agency readily concedes that it has a responsibility, under the Communications Act of 1934 and the "public interest, necessity, and convenience" standard, to promote diversity of programming.¹⁸⁵ The real dispute concerns the best means to promote diversity. After an extensive public inquiry, the Commission found that market forces were superior to any possible regulatory scheme. Overruling the Commission's Policy Statement, the court found fault with the FCC's factual conclusions. As Judge Tamm forcefully argues in his *WNCN* dissent:

"[C]omplete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" In the present case, the majority disregards the Commission's expert knowledge and, in so doing, violates the mandate of *FCC v. National Citizens Committee for Broadcasting*.¹⁸⁶

dissenting), *cert. granted*, 445 U.S. 914 (1980) (No. 79-824). This is clearly the view of the Commission. The FCC feels that the court, and particularly Judge McGowan, has decided the format cases on the basis of "personal expertise" in the communications field developed since the *Atlanta* decision. Interview with C. Grey Pash, *supra* note 173.

184. 610 F.2d at 854.

185. See note 3 *supra* & accompanying text.

186. 610 F.2d at 865 (Tamm, J., dissenting) (citation omitted) (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978)). The court is criticized also by Professor Polsby of Northwestern University who characterizes the format cases as

extraordinary illustrations of a court willing to expand its own function at the expense of the agency's discretion, to make remote inferences of policy from amorphous and general statutory language, and to go beyond mere oversight of the agency's work product to an extended collaborative dialogue with the Commission over what its substantive policies ought to be.

Polsby, *supra* note 3, at 17. Polsby argues that the court of appeals should extend the same deference to agency expertise in the format area as it does to complex factual determinations by the EPA in the environmental field. See, e.g., *Weyerhaeuser v. Costle*, 590 F.2d 1011 (1978).

THE FUTURE OF THE FORMAT CHANGE CONTROVERSY

Efforts are currently under way in Congress to revise the Communications Act of 1934 to reduce the FCC's present substantive regulation of broadcast programming and operations.¹⁸⁷ The agency has its own deregulation proposals presently open for public comment;¹⁸⁸ the agency proposals mirror the congressional proposals in philosophy¹⁸⁹ but cover different substantive areas.¹⁹⁰

At least one of the bills, H.R. 3333, would render the format controversy moot.¹⁹¹ Sections 411 and 421 of H.R. 3333 would interact to prohibit an agency "public interest" inquiry for licensee transfers involving format changes unless Congress specifically authorizes it or unless a legislative finding determines that the inadequacy of the market forces warrants such regulation.¹⁹²

The question remains open as to the impact of *WNCN* on congressional and FCC deregulation proposals. In fact, Commission

187. The court in *WNCN* provides a limited overview of the three pending deregulation bills: H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); and S. 622, 96th Cong., 1st Sess. (1979).

188. 44 Fed. Reg. 57,636 (1979).

189. *Id.* at 57,667. The FCC concludes "that market forces will, in most instances, yield programming that serves consumer well-being, and that whenever possible the Commission should allow consumer choices rather than regulatory decision-making to be the determinant of the public interest." *Id.* By way of comparison, H.R. 3333, 96th Cong., 1st Sess. § 101 (1979), contains the statement of purpose that "regulation of . . . telecommunications is necessary, to the extent marketplace forces are deficient, in order . . . to make available to the people of the United States . . . telecommunications services which are diverse, reliable, and efficient." *Id.* § 101(a).

190. Congress would limit substantially the FCC's regulatory power in the telecommunications, broadcasting, and cable television areas. The Commission proposal would deregulate in a more limited fashion by eliminating detailed nonentertainment programming regulation, ascertainment and federal program log requirements, and commercial advertisement controls. See *Deregulation of Radio*, 73 F.C.C.2d 456 (1970).

191. The FCC deregulation proposals do not touch on the format area, but the FCC findings do suggest support for its Policy Statement's conclusion that market forces have matured to the point at which they will promote format diversity successfully.

192. Since the court's ruling in *WNCN* in June 1979, the broadcast deregulation portions of Title IV of H.R. 3333 have been dealt a setback in committee hearings. Because of intense industry and public interest group pressure, no consensus was reached, and the bill did not even reach the "mark up" stages. When next introduced, the bill will not deal with broadcasting; only the telecommunications proposal will be presented. Interview with Edwina Dowell, Staff Attorney, House Subcommittee on Communications of the Committee on Foreign and Interstate Commerce, in Washington, D.C. (Oct. 25, 1979). Ms. Dowell reports that progress is even slower on the Senate bills.

concern with the effect of *WNCN* prompted its appeal.¹⁹³ The decision probably will not deter the agency's own deregulation initiatives, although the threat of a public interest group challenge in a sympathetic forum may loom large. Congress probably will take notice of the court's and agency's position on deregulation¹⁹⁴ and then pursue an independent course. A defeat in the Supreme Court obviously would signal the circuit court to back off from aggressive review of agency decisions and to rely on market forces to promote statutory public interest goals. On the other hand, a defeat of the Commission's position may dictate further agency-court clashes over deregulation issues.

CONCLUSION

This Note, illustrating the adversarial stance between the FCC and circuit court, has presented the strengths of the Federal Communication Commission's arguments in the format change controversy. On balance, the court of appeals has expressed a legitimate concern for those limited situations in which a significant listening audience is deprived of its first-preference format choice. Such concern, however, does not warrant obliging the FCC to impose drastic regulatory requirements to govern broadcast formats.

The court's position is both plausible and laudable; however, it requires FCC regulation based on an extremely subjective "common sense" scheme that affronts statutory and constitutional limitations on agency power. In promoting its own plan for achieving programming diversity, the court has substituted its own judgment for that of the agency's reasoned analysis. Rather than overturning the Policy Statement, the court should have remanded the issue for further hearings if the court questioned the underlying economic and factual premises of the FCC position.

The radio marketplace has changed considerably in the ten years since *Atlanta* was decided. After a lengthy public inquiry, the Commission found that market forces were achieving a substantial degree of diversity and that regulation would probably stifle, rather than promote, the public interest in diverse programming. Given the agency's expertise in the communications field, the court

193. See *Legal Times of Washington*, Sept. 3, 1979, at 1, col. 4.

194. *Id.* at 6.

should have deferred to the Commission's decision to continue to encourage diversity through the advancement of minority programming and other structural means rather than requiring intrusive and self-defeating format regulation.

DAVID M. GRIFFITH