10-1980

Federal Communications Commission v. WNCN Listeners Guild

Lewis F. Powell Jr.

Grant
(Hold for consolidated other cases)

Imp. cases in which CADC held that FCC - before approving transfer of ownership of a radio station to new ownership - must review proposed programs & determine whether in public interest. Here the station, under new ownership would broadcast rock music rather than classical.

PRELIMINARY MEMORANDUM

February 29, 1980 Conference
List 1, Sheet 2

No. 79-824

FCC

v.

WNCN LISTENERS GUILD

FCC (& SG) argues that statute doesn't require this & 1st Amend would not permit it.

Cert to DC CA
(en banc; Bazelon, concurring; MacKinnon & Tamm dissenting)

Federal/Civil — Timely

No. 79-825

INSILCO BROADCASTING CORP. — (Same)

v.

WNCN LISTENERS GUILD — (Same) — (Same)

No. 79-826

AMERICAN BROADCASTING CO. — (Same)

v.

WNCN LISTENERS GUILD — (Same) — (Same)

Grant. CADC well may have erred, and the issue is important.

Ellen

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS (Same)

V.

WNCN LISTENERS GUILD (Same) (Same)

1 SUMMARY: Whether the Communications Act of 1934 allows the FCC the discretion to decline to review entertainment program format changes when a radio broadcast license is renewed or transferred.

2. FACTS: Under the Communications Act of 1934, 47 U.S.C. § 310(d), no radio station license may be transferred or assigned "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." For the past 40 years, the Commission has consistently followed a practice of refusing to consider proposed program format changes in determining whether the license transfer or renewal is in the "public interest". ("Format changes" refers to changes from one type of musical programming to another, i.e. classical to country & western.) The Commission had consistently taken the position that such an inquiry was not intended by Congress since it could potentially interfere with the First Amendment rights of broadcasters and since the free market could effectively serve the programing interests of the public.

In a series of decisions, the DC CA has adopted a contrary interpretation of the statute. In 1972, a Chicago radio station with a classical music format entered into an agreement to sell the station to another owner who proposed to change the musical format to rock. A group of Chicago citizens petitioned the FCC, claiming that approval of the license transfer would result in the loss of any classical music station in the Chicago area. The FCC denied the residents' request and granted

the assignment of the license. The DC CA in Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (DC Cir. 1974 (en banc)) held that when the Commission considers an application to renew or transfer the license of a radio station with a "unique", financially viable entertainment format the Commission must consider whether granting the application will involve a change in that format. If such a change in programming format is involved, the Commission must determine whether the change would be in the public interest before acting on the application, including hearings on the question if necessary.

The court's statutory analysis was limited. The court found that under § 303(g) of the Act, "the 'public interest' to be served under the Communications Act is . . . the interest of the listening public in 'the larger and more effective use of radio'." The court relied on this Court's statement in National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943) that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." The court concluded that "a policy of free competition" in the programming format could not effectively serve the aim of "securing the maximum benefits of radio to all the people of the United States." This conclusion was premised on the CA's observation that the nature of the radio entertainment market was dependent upon advertising revenues. As a result, broadcasters find it in their interest to appeal to particular audiences which will maximize advertising revenues. The end result would be radio programs in line with the tastes of young adults with larger discretionary incomes, to the detriment of the preferences of older audiences with less discretionary income. The court therefore remanded for further proceedings consistent with the opinion.

The FCC did not seek review in this Court of the DC CA decision in

WEFM. Instead, the FCC isues a Notice of Inquiry instituting administrative proceedings with public comment on the appropriateness and feasability of the Commission's supervision of the selection of entertainment programming. The Commission also sought comments on the First Amendment implications of such regulation. Following notice and comment, the Commission issued a Policy Statement. The Statement concluded that format regulation of the kind required by the Court of Appeals' WEFM decision was inconsistent with the competitive policies adopted by Congress, presented intractable problems of administration, and was unlikely to provide any significant increase in program diversity over that provided by market forces. 60 FCC 2d at 858. In reaching this conclusion, the Commission relied on this Court's decision in FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 474-75 (1940), which emphasized that:

> "Broadcasters 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 electrially with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

The Commision added 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." The Statement noted that available data confirmed that competition provides a statutorily sufficient amount of diversity in radio entertainment programming. The practical difficulties which the Commission found would result included problems in determining what a station's existing format actually is, whether there are

reasonable substitutes in the market, and if not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail. If both the old and new formats were unique, it would be faced with the problem of determining which format better served the public interest. The Commission expressed serious doubt about its capacity to determine the answers to these questions. Finally, the Statement expressed serious constitutional difficulties with the regulation of entertainment formats.

Resps sought review of this statement of the FCC in the DC CA. In an en banc opinion, the CA reaffirmed its adherence to the "format doctrine" and invalidated the Policy Statement. The court, in an opinion by Judge McGowan, restated the basic premise of its previous holdings -- "that the Communications Act's 'public interest, convenience, and necessity' standard includes concern for diverse entertainment programming." Accordingly, the court concluded that Congress intended that "all major aspects of contemporary culture . . . be accomodated by the commonly-owned public resources whenever that is technically and economically feasible." The court rejected the Commission's findings that the doctrine would not be administratively feasible. The court concluded that it would not be necessary to make a "public interest" determination on the basis of a format change in all cases. If the format was not financially viable, or if the devotees of the endangered format were too few to be served by the available frequencies, or there was no substantial support for the endangered format as evidenced by an outcry of public protest, a hearing would not be required.

Judge Bazelon concurred in the court's decision to set aside the policy statement on procedural grounds. He concluded that the Commission had failed to make disclosure of a staff analysis paper prior to issuing

the statement. This procedural error was found sufficient to necessitate new proceedings. He specifically noted his disapproval, however, of the majority's "unwillingness to give appropriate deference to the Commission's judgment" on the substantive questions before the court. He also stressed First Amendment implications. Judge Tamm filed a dissenting opinion in which Judge MacKinnon joined. The dissent concluded that the majority decision "usurps the proper role of the Commission in the formulation of communications policy." The opinion concluded that the Commission's determination that application of WEFM will not measurably increase diversity of entertainment formats is neither arbitrary nor capricious.

3. CONTENTIONS: The SG, as well as the numerous other private petrs, all make related arguments. The principal contentions essentially are as follows. (1) Insufficient deference to the agency. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) reaffirmed that the agency is vested with the primary "public interest" policy-making function. The CA is said to have improperly usurped the Commission's role in determining the "public interest".

(2) Statutory interpretation. The petrs argue forcibly that the CA conducted only a superficial construction of the statute, and neglected to consider any legislative history. Several sections of the Act are cited to indicate that Congress did not intend for the Commission to undertake any review of programming format changes in granting transfers or renewals of licenses. First, under 47 U.S.C. § 153(h) Congress made explicit that broadcasters are not to be regulated as "common carriers." Under § 309(a) Congress provided that when the Commission acts on an application for renewal or transfer, it "may not consider whether the public interest, convenience, and necessity might be served by the

transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." This provision was said to be included so that the Commission could not grant or deny applications on the basis of the fact that other broadcasters might better serve the public interest. Finally, under § 326, Congress provided that:

> "Nothing in this Act 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."

In addition to the statutory language, the petrs cite legislative history to support the conclusion that Congress never intended for the FCC to interfere with the programming decisions of regulated broadcasters. It is also noted that Congress has funded public broadcasting efforts to provide programming which might not otherwise be economically viable in the competitive market. These congressional efforts are said to satisfy the needs for diverse programming in the radio market.

(3) First Amendment considerations. All petrs suggest that the ruling of the DC CA will lead to substantial First Amendment problems. The risk of losing a license or an opportunity to transfer a liense due to changes in program format might substantially "chill" a broadcaster's willingness to abandon present formats and deter experimentation in new formats. The Commission will be required, at least in some cases, to explicitly engage in content regulation of broadcasters.

(4) Inconsistency with this Court's opinions. Petrs all cite a number of decisions of this Court said to be in tension with the holding of the CA. In NCCB v. Democratic National Committee, 412 U.S. 94 (1973)

the DC CA overturned portions of the Commission's rulemaking on newspaper-broadcast cross-ownership, an area where Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public interest'." This Court held that Congress committed "the weighing of policies under the 'public interest' standard to the Commission, which was entitled to give greater force to best practicable service than to diversity of ownership. This Court reinstated the Commission's policy in its entirety. In that decision, the Court held that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." 412 U.S. at 110. The decision in FCC v. Sanders Bros., relied on by the FCC, and quoted above, is also cited as contrary to the decision of the CA.

Resps defend the decision of the CA as consistent with the statute in requiring the FCC to fully examine the "public interest." The resps also notes, however, that the proceedings of the FCC were deficient in that the Commission failed to release a staff study for public comment which later was included in the policy statement. This is the procedural deficiency which Judge Bazelon found sufficient to order further proceedings.

4. DISCUSSION: Jurisdiction over FCC actions is limited to the D.C. Court of Appeals so a conflict on this question will never develop. The statutory arguments of the petrs are quite substantial. The only possible impediment to review on the merits is the alleged procedural deficiency which formed the basis for Judge Bazelon's concurring opinion. It seems clear, however, that the majority of the Court did not rely on this deficiency, although they did characterize it as error. Resolution of the statutory issue might be possible without regard to the

alleged procedural error if the statute and its history make clear that the Commission must not engage in program format review. Furthermore, even if the Commission's factual findings are necessary to support its position on this issue, and the procedures were deficient, it might be better to remand for further proceedings than to let the judgment of the CA vacating the statement outright stand without review. I would recommend a grant.

Responses filed.

2/20/80 Mahoney Op in petn.
CMS

Argued ....., 19... *Assigned* ....., 19... No. 79-824

Submitted ....., 19... *Announced* ....., 19...

FCC

vs.

WNCN LISTENERS GUILD

Grant & consolidate ~~all~~ four - allow total of 2 hrs

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										

Hold
or
Grant
& consolidate
with 79-824

PRELIMINARY MEMORANDUM

February 29, 1980 Conference
List 1, Sheet 2

No. 79-825

INSILCO BROADCASTING CORP.

v.

WNCN LISTENERS GUILD

Cert to DC CA
(en banc; Bazelon, concurring;
MacKinnon & Tamm dissenting)

Federal/Civil

Timely

Please see Preliminary Memo No. 79-824, FCC v. WNCN Listeners Guild, February 29, 1980 Conference, List 1, Sheet 2.

2/20/80
CMS

Mahoney

Op in petn.

Argued ....., 19... *Assigned* ....., 19... No. 79-825

Submitted ....., 19... *Announced* ....., 19...

INSILCO BROADCASTING CORP.

vs.

WNCN LISTENERS GUILD

Grant & Consolidate with 79-824

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Separate vote on 79-824

Hold or Consolidate with 79-824

PRELIMINARY MEMORANDUM

February 29, 1980 Conference
List 1, Sheet 2

No. 79-826

AMERICAN BROADCASTING CO. — Cert to DC CA (en banc; Bazelon, concurring; MacKinnon & Tamm dissenting)

v.

WNCN LISTENERS GUILD — Federal/Civil — Timely

Please see Preliminary Memo No. 79-824, FCC v. WNCN Listeners Guild, February 29, 1980, List 1, Sheet 2.

2/20/80 — Mahoney — Op in petn.
CMS

February 29, 1980

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-826

AMERICAN BROADCASTING CO.

vs.

WNCN LISTENERS GUILD

Grant
+
to consolidate
with
79-824

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Hold
w
grant
& consolidate
with
79-824

PRELIMINARY MEMORANDUM

February 29, 1980 Conference
List 1, Sheet 2

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS	Cert to DC CA (en banc; Bazelon, concurring; MacKinnon & Tamm dissenting)	
v.		
WNCN LISTENERS GUILD	Federal/Civil	Timely

Please see Preliminary Memo. No. 79-824, FCC v. WNCN Listeners Guild, February 29, 1980 Conference, List 1, Sheet 2

2/20/80 CMS	Mahoney	Op in petn.

February 29, 1980

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-827

NATL. ASSN. OF BROADCASTERS

vs.

WNCN LISTENERS GUILD

Grant & Consolidate with 79-824

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Assign printing costs to petrs. - as suggested Marcel by SG.

010

SUPPLEMENTAL MEMORANDUM

April 11, 1980 Conference
List 3, Sheet 4

No. 79-824

FCC, et al.

v.

WNCN LISTENERS GUILD, et al.

Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record

No. 79-825

INSILCO BROADCASTING CORP.

v.

WNCN LISTENERS GUILD, et al.

(Same)

No. 79-827

NATL. ASSN. OF BROADCASTERS

v.

WNCN LISTENERS GUILD, et al.

(Same)

The SG, on behalf of all petrs, has filed a response to resps' motion to dispense with printing the appendix or assign costs to designating party.

If the SG wants the appendix, it only seems right that he pay for it - DOS.

The SG believes that a short printed appendix will assist the Court and is prepared to acquiesce in the motion to the extent that it prays for an order assigning all costs of printing the appendix to petrs regardless of the outcome.

4/8/80 Marsel

PJC

April 11, 1980

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 79-824

Submitted ....., *19*... *Announced* ....., *19*...

FCC

vs.

WNCN LISTENERS GUILD

Motion to dispense with the printing of the appendix and to proceed on the original record.

grant SG's motion (grant relief he requests)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

April 11, 1980

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-825

INSILCO BROADCASTING CORP.

vs.

WNCN LISTENERS GUILD

Motion to dispense with the printing of the appendix and to proceed on the original record.

Granted
SG's
motion

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

April 11, 1980

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 79-827

NATL. ASSN. OF BROADCASTERS

vs.

WNCN LISTENERS GUILD

Motion to dispense with the printing of the appendix and to proceed on the original record.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

GRANT

Marsel

April 11, 1980 Conference
List 3, Sheet 4

No. 79-824	Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record
FCC	
v.	
WNCN LISTENERS GUILD, et al.	
No. 79-825	(Same)
INSILCO BROADCASTING CORP.	
v.	
WNCN LISTENERS GUILD, et al.	
No. 79-827	(Same)
NATL. ASSN OF BROADCASTERS	
v.	
WNCN LISTENERS GUILD, et al.	

Resps move to dispense with printing the appendix pursuant to Rule 36. The questions presented in this case are solely questions of law. The factual setting has been fully set out in the proceedings below and appear in the appendix to the cert petn. All necessary material is in the appendix to the cert petn, or the original record. The FCC has the full administrative record.

The request appears appropriate.

3/31/80 Marsel

PJC

Grant. DOS

April 11, 1980 Conference
List 3, Sheet 4

No. 79-825

INSILCO BROADCASTING CORP.

v.

WNCN LISTENERS GUILD, et al.

See Memorandum No. 79-824.

3/31/80 Marsel

PJC

Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record

SUPPLEMENTAL MEMORANDUM

April 11, 1980 Conference
List 3, Sheet 4

No. 79-825

INSILCO BROADCASTING CORP.

v.

WNCN LISTENERS GUILD, et al.

Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record

See Memorandum No. 79-824.

4/8/80 Marsel

PJC

SUPPLEMENTAL MEMORANDUM

April 11, 1980 Conference
List 3, Sheet 4

No. 79-827

NATL. ASSN. OF BROADCASTERS

v.

WNCN LISTENERS GUILD, et al.

Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record

See Memorandum No. 79-824.

4/8/80 Marsel

PJC

April 11, 1980 Conference
List 3, Sheet 4

No. 79-827

NATL. ASSN OF BROADCASTERS

v.

WNCN LISTENERS GUILD, et al.

See Memorandum No. 79-825.

3/31/80 Marsel

PJC

Motion to Dispense with the Printing of the Appendix and to Proceed on the Original Record

Received 11/1

jpb 10/31/80

Excellent memo, with which - regrettably - I am inclined to agree.

The ultimate issue (a statutory - not a Const. one) is whether the FCC or a reviewing court has the primary authority to ~~make~~ apply the "public interest" standard of §§ 309(a) & 310(b) - subject, of course, to judicial review of a claim of "arbitrary or capricious" action.

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Peter Byrne

DATE: October 27, 1980

RE: No. 79-824, -825, -826, -827, FCC v. WNCN Listeners Guild

No express language places the primary authority in the courts to ~~require~~ FCC to review program changes that will result from transfer of radio broadcast license. Nor does leg. history support an intent to depose FCC of authority ~~to~~ to decide that public interest ~~is~~ is not served by oversight of programs,

Question Presented

Does the Communications Act of 1934 requires the FCC to review entertainment program format changes when a radio broadcast license is renewed or transfered?

FCC thinks public interest best served by free market principles. CADC thinks "public interest" ~~requires~~ requires FCC to make a judgment (after hearing) whether program change is in best interest

Background

This case presents four consolidated challenges to CADC decision invalidating an FCC policy statement. The FCC and the CADC have fought over the question for ten years. The basic problem for this Court is to allocate responsibility between the CADC and the FCC for interpreting and furthering the "public interest" standard of §§ 309(a) and 310(b) of the Act.

While it is necessary to understand the interpretations that each entity has placed upon the Act, the question ultimately is not which interpretation is correct, but who gets to decide.

The line of cases involved here began with Citizens Committe (Atlanta) v. FCC, 436 F.2d 263 (1970), where the CADC set aside a radio station's license assignement because the assignee planned to change the station's format from "classical" to "popular" music. Despite a public outcry that Atlanta was to deprived of its only classical music station, the Commission approved the assignment, because of its view that choice of program formats was within the discretion of licensee. The CA held that the FCC must hold a hearing before approving the transfer. Section 310(b) of the Act provides that no license may be tranferred without a finding by the Commission that the assignement will serve the "public interest". Section 309(e) provides that a hearing must be held before approval if "a substantial and material issue of fact is presented". Pointing to a survey that showed that 16% of the population preferred the classical to the new format, the CA reasoned that "it is surely in the public interest ... for all major aspects of contemporary culture to be accomadated by the commonly-owned public resources [i.e., the radio spectrum] whenever that is technically and financially feasible." 436 F.2d at 269. In the case before it, the CA held that the FCC had to hold a hearing to determine if the old format was economically viable and if the Atlanta was served adequately by a nearby classical station.

The Commission was plainly unhappy with its new responsibility, leading Judge Tamm to note that the Commission wished to narrow the precedent to "cases involving Atlanta classical music stations." Citizens Committee to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C.Cir. 1973). In that case the CA set aside a license assignment approved by the Commission which would have resulted in a change from an allegedy unique progressive rock format to middle of the road music. The fact that the assignee had promised to play some progressive rock selections was deemed immaterial since: "We deal here with format, not occassional duplications of selections." Id. at 932. The FCC's duty to resolve issues of disputed fact in a hearing was held to arise whenever there was significant "public grumbling" at the proposed format change.

In Citizens Committe to Save WEFM v. FCC, 506 F.2d 246 (D.C.Cir. 1974)(en banc), the court reaffirmed and clarified its format doctine, while setting aside another Commission approved assignement of a license, when the assignee intended to replace a classical music format with "contemproary" programming:

> When faced with a proposed format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a apecialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning

the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself ...." id. at 262.

WEFM marked a heightening of the dispute between the FCC and the CADC. The en banc hearing had been prompted in part by a statment appended to the Commission's order, wherein six commissioners had expressed the view that the format doctrine was wrong-headed and that the best balance between freedom and diversity could be acheived by leaving program choice to the free market. The CA specifically rejected this view. It wrote that there is not a perfect free market in radio entertainment. First, access to the specxtrum is limited by technology, existing government regulation, and economic factors. Broadcasters wish to satisfy advertisers rather than listeners; advertisers may prefer to reach a larger or demographically more desireable audience to maximise revenues, and in this quest ignore the legitimate demands of other listeners. The court acknowledged that it is not entrusted with making "radio policy," but thought its duty was to further the Congressional aim of securing the maximum benefits or radio for all the people. National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943).

Judge Bazelon concurred in the result, but added an opinion dealing with the First Amendment implications of the court's rule. He noted that broadcasting is a difficult First Amendment area, where courts are forced to balance conflicting

First Amendment values: the freedom of the broadcaster to present what he wishes and the need for diversity of voices on scarce radio bands. Without being satisfied by his reasoning, he concluded that the FCC should have no authority to consider program content, except in a comparitive hearing. His main concern was that when he FCC chooses among speakers, its choice can never be content neutral.

Don't understand Barclon's view

?

The FCC ~~now~~ regrouped and attempted to lay a foundation for refuting the CA's format doctrine. It issued a Notice of Inquiry, inviting interested parties to offer comments on the format doctrine, and the ways the FCC might administer it. The Notice is full of indications that the FCC thought the CA misguided. The Commission expressed its view that it could not through regulation acheive superior diversity in formats than the free market, and that the attempt to do so would raise serious First Amendment difficulties by injecting the government into private programming choices. This theme was elaborated in separate statements by Chairmen Wiley and Commissioner Robinson. The latter wrote a powerful attack on the format doctrine, which you might find useful to read (App. at 82a). The separate statements emphasized the difficulties of effective regulation in this area: the Commission thought it difficult to define "format", differentiate among particular formats and conclude whether a particular format is unique. The application of the format doctrine to any particular case would be subjective and would embroil the government in scrutiny and disapproval of program content to an extent inconsistent with

I should read

the First Amendment. It would also chill format innovation, because a broadcaster would fear legnthy, expensive hearings before being able to abandon the format.

FCC's Opinion

Having received evidence and comments the Commission issued its Memorandum Opinion and Order. Therein, the Commission continued its argument against the format doctrine. Reviewing its statutory mandate, the Commission emphasized that the Act did not impose common carrier obligations on broadcasters, 47 U.S.C. §3(h), but contemplates that the "field of broadcasting is one of free competition." FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940). Congress had intended broadcasters to serve the public interest through competition in entertainment, and that competition had created a "bewildering array of diversity" in major markets. Conceding that the market does not match perfectly listener preferences with programming, the Commission found no reason to believe that regulation would foster greater diversity. Herein, the Commission bewailed CADC decisions forcing it to distinguish formats: progressive rock from ther r&ock music, 19th Century from 20th Century classical music. Moreover, in the Commission's view every format is in important respects unique: style, timing, selection of material, and personalaities all combined to give each station a particular "sound". The Commission supported this observation by citing a staff study which purported to demonstrate that audience shares for stations varied as much within as among format types. Finally, the Commission reiteratfed its concern about harm to First

Amendment values from government interference in entertainment broadcast decisions. In summary:

> Any such regulatory scheme would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximising the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.

CADC's opinion in this case

The CA's rejection of the Memorandum Opinion and Order is what is now before this Court for consideration. CADC was far from pleased with the Commission's treatment of its formast rule, finding that the administrative proceedings "cast serious doubt on the rationality and impartiality of its action." First, the CA criticized the Commission for relying on a study never disclosed prior to final decision. Second, the CA ridiculed the Commission's "administrative nightmare" argument, by pointing out that only one format dispute had actually blossomed into a protracted hearing. Third, CADC found the Notice of Inquiry so biased against the format doctrine that the subsequent proceedings must necessarily be slanted. Finally, CADC complained that the Commission had misconstrued the sweep of the format doctrine, terming it among otner things, "a system of broadcast programming by government decree", and failed to attempt to implement the rule with appropriate administrative standards.

CADC say its "format doctrine" is narrow

The CA emphasized the narrowness of the format doctrine. It does contemplate that most broadcasting will be chosen through the free market; however, all must recognize

that imperfections in the market call for some regulatory corrective to assure sufficient diversity on the radio. The obligation placed ont he Commission is narrow:

> [T]he Commission's obligation to consider format issues ~~only~~ arises only when there is strong prima facie evidence that the market has in fact broken down. No public interest issue is raised if (1) there is an adequate substitute in the service area for the format being abanoned, (2)there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable .... The small remainder of cases are simply those in which the evidence strongly indicates that market mechanisms have not satisfied the Communications Act's mandate that radio serve the needs of all the people.

CADC's view is narrowly focused

CADC relied on language of Act

CADC emphasized its duty to construe the "public interest" standard of the Act. Its format doctrine was not policy, but law. While the Commission's interpretation of its organic act is entitled to deference, CBS, Inc. v. DNC, 412 U.S. 94, 121-22 (1973), here the CA has consistently held that the Commission's decision not to hold a hearing when a unique format is to be eliminated cannot be sustained under the Act. The Commission's recent report was littlw more than a refusal to follow valid court interpretation of the law. As such thé Order was void.

Judge Bazelon concurred in the result because he thought that the Commission's reliance on the undisclosed study violated fundamental rulemaking principles, Portland Cement Ass'n v. Ruckelshaus, 486 F,2d 375, 393 (D.C.Cir. 1973), cert. denied 417 U.S. 921 (1974). He, however, plainly thought that

the Commission's free market approach was more in accord with the First Amendment. Judge Tamm wrote a dissent, arguing that the CA had "usurped" the role of the FCC in setting communications policy. He thought the court was bound to uphold the Commission's policy as reasonable.

Tamm's dissent

> In sum, the majority's opinion presents an unjustified rebuttal to the Commission's conclusion that the public interest may not be discerably? furthered by the implementation of the WEFM doctrine. The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a changed format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a preexisting format. Finally, the majority has failed to identify the principle within the Communications Act that mandates regulation favoring the interests of fewer listeners over the interests of more listeners.

Judge Tamm also thought that reliance on the undisclosed study was not dispositive and that the court had not given due deference to the Commission's assessment of market forces; complete factual support in the record for the Commission's predictions or judgments in neither practical nor required. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978).

Contentions

The above presents only in summary the terms and history of the debate about the wisdom of holding a hearing when a unique format is endangered. To give full vent and analysis to the parties' contentions about the merits of the policy would take pages and weeks. While standing prepared to delve further into this most interesting question, I think it

Yes!

preferrable to concentrate here on the contentions involving what I think the dispositive issue in the case: who gets to decide whether the format doctrine should be implemented? The real issue is whether the FCC has discretion to construe the "public interest" standard ~~not to require~~ as not requiring government action when the loss of a unique format is threatened.

The various parties opposed to the CADC decision make similar arguments on this issue and will be referrred to collectively as petrs. Petrs' main argument is that nothing in the Act explicitly requires the FCC to preserve formats, and, absent such specific directive, the Commission's interpretation of how the public interest standard is best served must be upheld by a court unless it is unreasonable.

1. Does the Communications Act require the FCC to intervene in the market to preserve unique formats?

(a) Petrs point out that the CADC pointed to no provision of the Act to support directly its format rule. Rather, the court relied on the public interest standard contained in §310(d). As this Court has held, weighing of policies under the public interest standard is primarily entrusted to the Commission. FCC v. National Citizen's Committee for Broadcasting, 436 U.S. 775, 810 (1978). CADC also drew support from § 303(g), which merely admonishes the Commission to "generally encourage the larger and more effective use of radio in the public interest." Petrs contend that this horatory provision gives no support to format regulation specifically, and certainly does not limit the means available to the

Commission to further the stated goal. See Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 215-219 (1943).

Petrs argue that, on the contrary, leaving choices of entertainment programming entirely to the discretion of licensee is consistent with the Act and its legislative history. Enforcement of the CA's format doctrine would impose common carrier obligations on broadcasters in violation of §3(h). See FCC v. Midwest Video Corp, 440 U.S. 689 (1979). It would also conflict with §326 which forbids the FCC from censoring broadcasters or interfering with their right of free speech. At a minimum, the Commission could rely on these policies to refrain from interfering with choices of entertainement "to preserve editorial control of programming in the licensee." Id. at 705. See also CBS v. DNC, 412 U.S. at 105.

Petrs rely on leg. history

Petrs claim that the legislative history evinces a Congressional intent to secure broadcasters the widest freedom in choosing programming consistent with the public interest. This intent is extracted from Congressional refusal to adopt "priorities" for programming, i.e. rules that broadcasters must play more "high class music" than jazz, or allocate so much time for religious or other preferred programming.

Resps argument

(b) For convenience, I will group as resps the various listener groups, musical organizations, and public interest groups who support the CADC either as resps or amici. Resps make the same statutory argument as did CADC. Section 309(a) requires the Commission to deterimine whether granting a

license application would serve the public interest; §310(d) provides the same rule for assignment of licenses. Section 309(d)(1) provides that an interested party may challenge the application as not being in the public interest. Listeners have standing to bring this claim. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C.Cir.1966)(per Burger, J.). Section 309(d)(2) provides that if the challenges raise a "substantial and material issue of fact" as to whether the application is in the public interest, the Commission must hold a hearing. Diverse programming that will serve the preferences of all the people is in the public interest. When significant numbers of listeners complain to the FCC that assignment of the license will result in the loss of a unique, financially viable program format, they have raised a material issue of fact, and the Commission must hold a hearing. The provision for a hearing indicates that the Commission must consider the complaints of listeners and not allow license assignemnts to be governed only by market forces.

Resp. rely on "public interest" standard of §310(d)

The CA's interpretation of §§309 and 310 does not conflict with other provisions of the Act. Preventing the loss of a unique format does not make the broadcaster a common carrier. This Court has found this provision violated only when rules have given the public a right of access to the airwaves. CBS V. DNC; FCC V. Midwest Video. Under the format doctrine no non-licensee would have access to the airwaves. Moreover, the doctrine does not involve impermissible censorship. The Court has long recognized that the FCC does not exceed its power when

it concerns itself with the nature of the programming a broadcaster presents. Nat'l Broadcasting Co. v. U.S., supra. See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Indeed, the Commission for years has been considering in comparative hearings the programming a broadcast applicant proposes to air. See generally Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). Finally, responding to valid listener complaints about loss of a unique format does not involve the Commission in enforcing government preferences about what programming is best for the public.

2. Who decides whether government action to prevent the loss of a unique, financially viable radio format is in the "public interest"?

(a) Petrs contend that the FCC and not the courts decide which regulatory efforts are in the public interest. This Court has held that Congress has delegated the weighing of policies under the public interest standard to the Commission. FCC v. Nat'l Citizens Committee for Broadcasting, supra, 436 412 U.S. at 810. That case involved CADC invalidation of FCC rules exempting from a general ban on co-ownership of newspapers and broadcast facilities most pre-existing combinations. This Court held that the CA hed erred in substituting its policy judgment for that of the responsible agency; even while pursing a clear policy goal, the Commission can balance competing interests to acheive practical benefits. Similar is CBS v. DNC, 412 U.S. 94 (1973), where the CADC set aside the agency's determination that broadcasters need not sell time to parties wishing to

Petrs argue FCC alone has authority to decide "public interest"

advocate controversial views on public issues. This Court reversed because it found nothing in the Act to compel a conclusion contrary to that of the Commission, and because the CA had failed to give "due weight" to the agency's judgment. Generally, the CA has violated the admmonishmeny in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978), that administrative decisions should be set aside only for procedural or substantive reasons as mandated by statute. Here, as demonstrated above, nothing in the Act precludes the Commission's construction of the public interest. Judge Tamm was correct in dissent below that the CA has confined " the FCC to a spectator's role".

(6) Resps contend that the CADC has merely construed a statute, which on its face requires that the FCC hold a hearing when complainants raise a material issue of fact as to whether a license assignment is in the public interest. This Court has set aside FCC decisons because the Court believed that the decision did not comport with the statute. In FCC v. Midwest Video, 440 U.S. 689 (1979), the Court set aside regulations dealing with access to cabal television stations because it thought that the regulations imposed a common carrier's duty on the broadcaster in violation of the Act. Here, the CA merely held that the public interest hearing provision prohibited the Commission from relegating the decision as to whether the public iterest would be served by an assignment to the marketplace. The CA's decision went no further than the

explication of the statute, as it evident from the vast discretion it left the Commission as to the definition of format and the standards of proof for demonstrating that a format is unique or financially sustainable.

3. Was the FCC's decision not to regulate format loss arbitrary or capricious? Petrs argue tht the Commission's decision to leave format selection enitirely to the market is reasonable and supported by the record. The Commission accepted the view that diversity of voices on the radio is desireable. It concluded that the free market had done a reasonably good job in creating and sustaining diversuty; in so cvoncluding it relied on the staff's study of format diversity in the 25 largest markets. The Commission also made a reasoned judgment that government efforts were unlikly to contribute to diversity and would not be worth the costs. More specifically, the Commission described at some legnth the difficulty of classifying formats, each of which was in some sense unique. Moreover, the Commission has no way to measure the intensity of the viewers' preference for the format proposed to be abandoned; given this handicap, the Commission has no rational basis for determining in a particular case whether the public interest would be served by retention of a particular format. While regulation would be ineffiient, it would also pose First Amendment problems. The spector of expensive administrative hearings would chill broadcasters' willingness to experiment with new formats, the abandonment of which might lead to public grumbling. These conclusions by the Commission need not be be

Petrs say FCC's decision not arbitrary

supported by overwhemling evidence, because a "forecast of the direction in which the future public interest lies necessarily involves deductions beased on the expert knowledge of the agency." FCC v. NCCB, supra, 436 U.S. at 814.

Resps answer that the Commission was so biased against the format doctrine that its consideration was arbitrary and capricious. The Commisson relied in part on the argument that administering the format doctrine would be an "administrative nightmare." The Commission was fporced to retract this poition at oral argument before the CADC upon admitting that there had only been one hearing conducted since 1970, all other cases had been settled or the CADC had afirmed the Commission's conclusion that no hearing need be held. This disingenuous argument illustrates the Commission's bias against the format doctrine. This bias is demonstrated even more clearly in the Commission's persisitent exaggeration and misstatement of the doctrine, claiming that it requires extensive and minute government regulation of entertainment broadcast content. Given this bias, the Commission failed to seriously consider ways of implementing the doctrine. Formats can be classified adequatelyand the CADC indicated that the Commission would have leaway in the classification. In short, the Commission did not give the format doctrine reasoned analysis, but prepared an advocate's brief against it.

Both parties also argue about whether the Commission's failure to provide the staff study to the public for comment before decision is a procedural error requiring a remand.

Resp's contend that the "comment" required by §553 of the A.P.A. includes an opportunity to rebut or challenge all relevent material prior to decision. See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977). Here, the staff study was "decisive" int he agency's view. Petrs argue that the A.P.A. noiwhere mentions this principle, that resp's position would add procedural requirements in violation of Vermont Yankee, and that the CADC never found this to be a ground for reversal in this case.

Discussion

My organization of the parties' contentions reflects my view of this case. The central issue is whether the FCC or the CADC has paramount authority to interpret the public interest standard of the Act. I conclude that unless a fairly specific provision of the Act or the First Amendment prohibit the Commission's policy choice, as was the case in Midwest Video, supra, then, assuming that the APA has been complied with, that choice is unreviewable. This assessment is unremarkable and seems compelled by general principles of administrative law and direct precedents, including CBS v. DNC, and FCC v. NCCB.

CADC could point to no explicit provision in the Act requiring the Commission to preserve unique radio formats. Its reliance on §§ 309 and 310 is appealing, but unpersuasive. These provisions require no more than thta the Commission must hold a hearing if a party raises a substantial, material issue of fact about whether granting the pending application is in

the public interest. However, nothing there prevents the Commission from concluding that an application can never be against the public interest solely because its approval would result in the elimination of a valued format. To hold otherwise bootstraps a procedural requirement into a substantive command. The question of whether format regulation is in the public interest still resides at the Commission. Likewise, §303(g)'s goal that the Commission acheive the larger and more effective use of radio says nothing about preserving formats.

The parties argue at great legnth about the First Amendment, primarily questioning whether the format doctrine is or is not constitutional. The question obviously is whether ~~rather~~ the refusal to implement the format doctrine is constitutional. It is a truism that First Amendment analysis of broadcasting does, as Judge Bazelon remarked, make skeptics of us all; it is a frustrating area were preservation of one First Amendment value seems to require abandonmentemnt of another. Still, it is hard to see how a government decision not to interfere with private decisions about the entertainment content of broadcasts can violate the First Amendment. Even this issue is not presented here, as no ruling on the question was entered below.

Exactly: There are competing 1st Amend values

The Commission's decision to allow the market to allocate entertainment programming is reasonable. Formats are hard to classify and crude classifications might do more harm than good. The market, including non-profit stations, does provide considerable diversity in major cities and many rural areas. Moreover, the market is more resonsive to changes in

viewer tastes, which are dynamic, than is government regulation. There are, additionally, better regulatory mechanisms than format retention to further diversity which the Commission is persuing: greater diversity of ownership and more stations. That reasonable people can differ over the efficacy of various diversity enhancing regulations only further argues that deference should be paid to the Commission's choices.

The Commission's hyperbolic characterizations of the format doctrine is disturbing. WEFM never contemplated the kinds of sweeping regulation that the Commission declaimed against. Still, the unusual posture of this case goes some way toward excusing the Commission's reaction. The agency clearly felt that a court was forcing an unwanted regulatory venture upon it. Given that the agency thought its view of broadcating policy was being disregarded, I cannot say that its consideration of the policy question was so arbitrary as to render the agency's final decision invalid under the APA.

Beyond the immediate legal question presented, there is strong reason to decide for the Commission. Communications are going through a technological revolution: home video equipment, satelite transmissions, two-way video communications, and expanded broadcast bands are either here or coming soon. The Commission should retain the flexibility to respond to these changes and not be committed to definitions of the public interest which can only be changed by Congressional enactment. Upholding the CADC here could stall for a long time the Commission's major efforts to further deregulate both radio

and television. Such efforts may or may not be wise, but the issue should be resolved in political fora like the Commission, not in court.

The remaining issue is whether not disclosing the staff study more quickly is a serious procedural error requiring a remand to the agency. This issue was never finally decided by the CADC, and the Court may wish to remand to CADC for a determination. Generally, information relied on by an agency should be exposed to comment before decision, although this Court has never explicitly approved this principle. One suspects that returning this matter to the agency to receive comments on the study would be a waste of time. The Court could either hold that the information upon which the study was based was in the public domain already, or that sufficient other information supports the Commission's policy choice.

79-824 FCC v. WNCN

Argued 11/3/80

Saylor (for FCC)

Even on initial application for a license, FCC does not consider nature of its "entertainment programs". FCC does consider whether there will be reasonable "non-entertaining" programs - e.g. 10% of news & public affairs. This is a quantitative quantitative rather than qualitative consideration.

CADC didn't say hearing is necessary in every case. (See its four inquiries)

FCC agrees that diversity is important. But diversity to FCC means

FCC avoids "value judgments" - preferring to leave them to the licensee

Dyk (for Peter) (Wilmer + Pickering)

There is legislative history to effect that Congress did not intend FCC to regulate entertainment program content.

In this case FCC has made the policy judg not to substitute its views for the free market.

Radio is different from TV. It is highly competitive, & stations are responsive to public desires.

x x x

Saylor (for FCC – Rebuttal argument)

This case presents a substantive – not merely a procedural Q.

Responding to J PS, Saylor ~~so~~ said: FCC would allow free market to decide whether to renew a station that broadcast only 12½ century music – with zero listening audience. (I can't believe this)

Mr. Glenn (Respts) (Listeners Guild) (able lawyer!)

FCC mischaracterized what CA DC has decided.

This is a simple case. It involves "procedure" only: how FCC should go about deciding these cases.

What Congress intended was to require FCC to license stations according to which will better serve public interest.

§ 309(a) – FCC, on "each application" must decide ~~to~~ Q on basis of which ~~one~~ station will best serve public

The "public interest" standard includes diversity. Q whether ~~a to license on~~ choosing a licensee will contribute to diversity.

~~Q~~ This type case – where a transfer is proposed where this involves a change of programs – is only situation in which Comm. does not consider diversity of programs. (see Summary of Argument in Mr. Glenn's Brief).

What is answer to this?

Under FCC's present view, parties like Respts will never even have a hearing.

FCC has surrendered its ~~duty~~ duty to decide "public interest"; & delegated this decision to the ~~app~~ licensees.

FCC can't avoid its statutory duty to decide whether abandonment of the last classical music stations is in pub. interest

Mr. Glenn (cont.).

Radio stations appeal to audience with disposable income - not the "poor."
Advertisers determine programs

CADC's op. in extremely narrow

A license has no vested right in a license. FCC takes a look every 3 yrs.

Q re whether public interest in diversity is being protected.

If an applicant is seeking a license for first time (a new frequency or one that may have been ~~vacated~~ abandoned) FCC does make a factual judg. whether its proposed programming will increase diversity. Why a different rule when a transfer is under consid.

Mr. Cooke (Church of Christ)

FCC can't avoid duty by drawing distinction bet. "entertainment" & "news & public interest" programs. (I agree there may be no difference: I am more "entertained" by many educational programs than by rock or country music.

"Administrative nightmare" argument is weak. FCC seeks to avoid its public interest duty.

TO: Mr. Justice Powell

FROM: Peter Byrne

DATE: November 4, 1980

RE: No. 79-824, FCC v. WNCN Listener's Guild

At your request, I have attempted to get a clearer understanding of what attention the F.C.C. gives to programming content in comparative hearings on initial applications for licenses. This inguriy was prompted by resp Listener's Guild's contention that the FCC has drawn a distinction between license renewals and assignements, where it refuses to examine the content of the broadcaster's programs, and initial licensing, where programming is examined to determine if it will be in the public unterest and add to diversity. My conclusion is that resp has overstated the degree of FCC scrutiny into programming at the initial license phase.

Program content is one, and indeed a minor, factor in comparative hearings to determine which applicant should be assigned a license; such factors as technical expertise, diversity of ownership, and financial stability seem more important. See Flint Family Radio, 69 F.C.C.2d 38 (1977). As stated at oral arguement, the nature of the Commission's programming inquiry at the initial phase is quantitative, rather than qualitiative. There are categories of programs, including relgious, education, public affairs, local programming, news, sports, and entertainment. The Commission will look to see whether the applicant's program proposal contains a mix of the various programs, and if one category is

predominant may inquire into whether emphasis on the one program type is in the public interest and fulfills a need in the community. See id.; En Banc Programming Inquiry, 44 F.C.C. 2303 (1960); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964). However, the Commission remains indifferent to the kind of entertainment programming the applicant proposes to air. Programming Inquiry at 2308-09. Thus, whether to broadcast rock or classical (or even big band music) is left to the discretion of the licensee and the operation of the market. Moreover, the examination of non-entertainment programming is limited to categorization and the Commission abstains from further evaluation of quality.

Resp's legal argument must be that the Commission's refusal to examine content in the present case is arbitrary, since it examines program content with success in granting initial applications. This argument can be rejected because of the limited examination of content in the intial license phase. The FCC is considering whether to elimiate even the limited non-entertainment program inquiry and leave airing of public affairs to the discretion of the broadcaster and the dictates of the market. Deragulation of Radio, 73 F.C.C.2d 457 (1979).

In summary, I continue to believe that the Commission has properly exercised its discretion in applying the "public interest" standard of the Act by deciding not to regulate abandonment of unique formats.

79-824 FCC v WNCN
(Pre Conference Notes)

Opinion of CADC is carefully limited. Nevertheless, I am inclined to Reverse

CADC would require F.C.C. to make a judg. as to "program content". Statute does not mandate this.

FCC's reliance on "free market" in radio is more consistent with our traditions — +, I believe, prior decisions.

Counsel for Resp. overstated degree of FCC scrutiny at initial licensing phase.
Would it reach Const. issue.

79-824 FCC v. WNCN Reverse 8-1 Conf. 11/5/80

The Chief Justice Reverse

C.J.'s clerk could find no evr. to support CADC views as to inadequacy of the free market to serve public interest.

Electronic media are not common carriers. But market is not entirely free

But Congress has not expressed an intent to have Govt (FCC) decide what entertainment programs public should have.

Mr. Justice Brennan Affirm

Q of statutory construction: what does "public interest" mean in this context.

FCC does take close look at program plans of new applicants.

If viewed as a standing Q, consumer groups have same right to be heard as applicants. But do not view this as a standing case.

Inclined to think CADC has better view of what statute means. FCC should afford hearing & allow consumer groups to be heard.

Mr. Justice Stewart Reverse

Agree Q is statutory one. Need not consider 1st Amend or its interests.

PS read Q from SG's brief; says it correctly states the Q (excluding reference to 1st Amend). SG is about right

FCC may hold hearing & consider what it thinks relevant.

Mr. Justice White *Reverse*

Agree with P. S.
FCC has discretion to allow free market to determine entertainment program content. This always has been view of FCC, & its long construction of statute is entitled to some weight.

Mr. Justice Marshall *Affirmance of CADC, but would reverse in part & remand.*
FCC should consider programs in determining public interest.

I'm not sure I understand TM's views. Thus noted are not complete

Mr. Justice Blackmun *Reverse*

Statutory issue. No need to consider Staff Report. Bazelon's op. = joint mem. of dissent, & merits consideration.

Congress has vested in FCC the power to decide what is in public interest, & CADC has usurped this power.

This power of FCC is not subject to close analysis.

Mr. Justice Powell *Reverse*

Agree generally with P.S., BRW & HAB.
See also my pre-Conference notes.

Mr. Justice Rehnquist *Reverse*

Agrees with other voting to Reverse

Mr. Justice Stevens *Reverse*

Statute doesn't require FCC to adopt the restraint it has practiced. But this discretion was vested in FCC - not courts (I agree with this, & we should make this point. P.S. + BRW agree).

There may be some limits to ~~a~~ release by free market. Release need not be an unbending rule.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 29 DEC 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–824, 79–825, 79–826, AND 79–827

Federal Communications Commission et al., Petitioners,
79–824 *v.*
WNCN Listeners Guild et al.

Insilco Broadcasting Corporation et al., Petitioners,
79–825 *v.*
WNCN Listeners Guild et al.

American Broadcasting Companies, Inc., et al., Petitioners,
79–826 *v.*
WNCN Listeners Guild et al.

National Association of Broadcasters et al., Petitioners,
79–827 *v.*
WNCN Listeners Guild et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

Sections 309 (a) and 310 (d) of the Communications Act of 1934, 47 U. S. C. § 151 *et seq.* (Act), empower the Federal Communications Commission to grant an application for license transfer[1] or renewal only if it determines that "the public interest, convenience and necessity" will be served

[1] We shall refer to transfers and assignments of licenses as "transfers."

Renewed
L.F.P.
12/30/80

Join

thereby.[2] The issue before us is whether the Commission, when it rules on applications for renewals and transfers of radio broadcast licenses, must review past or anticipated changes in a station's entertainment programming rather than relying on market forces to achieve diversity and thus serve the public interest.

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[2] 47 U. S. C. § 309 (a) provides:

"(a) Subject to the provisions of this section, the Commission shall determine in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served thereby, it shall grant such application."

47 U. S. C. § 310 (d) provides in part:

"(d) No construction permit or station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

The Act requires licensees to apply for license renewal every three years. 47 U. S. C. § 307 (d). It provides that the Commission shall grant the application for renewal if it determines that the public interest, convenience and necessity will be served thereby. 47 U. S. C. §§ 307 (a), (d), 309 (a), (d).

Section 309 (d)(1) of the Act provides that any party in interest may petition the Commission to deny an application for license transfer or renewal, but the petition must contain specific allegations of fact sufficient to show that granting the application would be "prima facie inconsistent" with the public interest. 47 U. S. C. § 309 (d)(1). If the Commission determines on the basis of the application, the pleadings filed, or other matters which it may officially notice that no substantial and material questions of fact are presented, it may grant the application and deny the petition without conducting a hearing. 47 U. S. C. § 309 (d)(2). However, if a substantial and material question of fact is presented or if the Commission is unable to determine that granting the application would be consistent with the public interest, the Commission must conduct a hearing on the application. 47 U. S. C. § 309 (d)(2).

This issue arose when, pursuant to its informal rulemaking authority, the Commission issued a "Policy Statement" concluding that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters and that a change in entertainment programming is therefore not a material factor that should be considered by the Commission in ruling on an application for license renewal or transfer. Respondents, a number of citizen groups interested in fostering and preserving particular entertainment formats, petitioned for review in the Court of Appeals for the District of Columbia. That court held that the Commission's Policy Statement violated the Act. We reverse the decision of the Court of Appeals.

I

Beginning in 1970, in a series of cases involving license transfers,[3] the Court of Appeals for the District of Columbia Circuit gradually developed a set of criteria for determining when the "public-interest" standard requires the Commission to hold a hearing to review proposed changes in entertainment formats.[4] Noting that the aim of the Act is "to secure the maximum benefits of radio to all the people of the United States," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217 (1943), the Court of Appeals ruled in 1974 that

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[3] *Citizens Committee to Save WEFM* v. *FCC*, — U. S. App. D. C. —, 506 F. 2d 246 (1974) (en banc); *Citizens Committee to Keep Progressive Rock* v. *FCC*, — U. S. App. D. C. —, 478 F. 2d 926 (1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, — U. S. App. D. C. —, 478 F. 2d 919 (1973); *Hartford Communications Committee* v. *FCC*, — U. S. App. D. C. —, 467 F. 2d 408 (1972); *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, — U. S. App. D. C. —, 436 F. 2d 263 (1970).

[4] We shall refer to the Court of Appeals' views on when the Commission must review changes in entertainment format as the "format doctrine," and we shall often refer to a change in entertainment programming by a radio broadcaster as a change in format.

"preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Citizens Committee to Save WEFM* v. *FCC*, — U. S. App. D. C. —, —, 506 F. 2d 246, 268 (1974) (en banc). It concluded that a change in format would not present "substantial and material questions of fact" requiring a hearing if (1) notice of the change had not precipitated "significant public grumbling"; (2) the segment of the population preferring the format was too small to be accommodated by available frequencies; (3) there was an adequate substitute in the service area for the format being abandoned; [5] or (4) the format would be economically unfeasible even if the station were managed efficiently.[6] The court rejected the Commission's position that the choice of entertainment formats should be left to the judgment of the licensee,[7] stating

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[5] In *Citizens Committee to Save WEFM* v. *FCC*, *supra*, for example, the court directed the Commission to consider whether a "fine arts" format was a reasonable substitute for a classical music format. — U. S. App. D. C., at —, 506 F. 2d, at 264–265. The court observed that 19th-century classical music and 20th-century classical music could be classified as different formats, since "the loss of either would unquestionably lessen diversity." —U. S. App. D. C., at —, n. 28, 506 F. 2d, at 265, n. 28.

[6] These criteria were summarized by the Court of Appeals in the opinion below. *WNCN Listeners Guild* v. *FCC*, — U. S. App. D. C., —, —, 610 F. 2d 838, 842–843 (1979) (footnotes omitted). It was also stated that the format doctrine logically applies to renewal as well as transfer applications. The court noted that a mid-term format change would not be considered until the broadcaster applied for license renewal. — U. S. App. D. C., at —, and n. 30, 610 F. 2d, at 849, and n. 30. See also *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, *supra*, — U. S. App. D. C., at —, 436 F. 2d, at 272.

[7] See *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, *supra*, — U. S. App. D. C., at —, 436 F. 2d, at 267. See also *WNCN Listeners Guild* v. *FCC*, *supra*, — U. S. App. D. C., at —, n. 31, 610 F. 2d, at 849, n. 31.

that the Commission's interpretation of the public-interest standard was arbitrary and unreasonable.[8]

In January 1976 the Commission responded to these decisions by undertaking an inquiry into its role in reviewing format changes.[9] In particular, the Commission sought public comment on whether the public interest would be better served by Commission scrutiny of entertainment programming or by reliance on the competitive marketplace.[10]

Following public notice and comment, the Commission issued a Policy Statement [11] pursuant to its rulemaking authority under the Act.[12] The Commission concluded in the Policy Statement that review of format changes was not compelled by the language or history of the Act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovation in radio programming. In support of its position, the Commission quoted from *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475 (1940): "Congress intended to

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[8] *Citizens Committee to Keep Progressive Rock* v. *FCC*, *supra*, — U. S. App. D. C., at —, n. 25, 478 F. 2d, at 934, n. 25. Although the issue before the court was whether a hearing was required, the court warned the Commission that its public-interest determination would also be subject to judicial review:

"[F]ailure to render a reasoned decision will be, as always, reversible error. No more is required, no less is accepted." — U. S. App. D. C., at —, 478 F. 2d, at 934 (footnote omitted).

[9] *Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F. C. C. 2d 580 (1976).

[10] The Commission also invited interested parties to consider the impact of the format doctrine on First Amendment values.

[11] *Memorandum Opinion and Order*, 60 F. C. C. 2d 858 (1976) ("Policy Statement"), reconsideration denied, 66 F. C. C. 2d 78 (1977).

[12] Section 303 (r) of the Act, 47 U. S. C. § 303 (r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."

leave competition in the business of broadcasting where it found it, to permit the licensee . . . to survive or succumb according to his ability to make his programs attractive to the public." [13] The Commission also emphasized that a broadcaster is not a common carrier [14] and therefore should not be subjected to a burden similar to the common carrier's obligation to continue to provide service if abandonment of that service would conflict with public convenience or necessity.[15]

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[13] The Commission observed that radio broadcasters naturally compete in the area of program formats, since there is virtually no other form of competition available. A staff study of program diversity in major markets supported the Commission's view that competition is effective in promoting diversity in entertainment formats. *Policy Statement, supra,* 60 F. C. C. 2d, at 861.

The *Notice of Inquiry* also explained the Commission's reasons for relying on competition to provide diverse entertainment formats:

"Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that . . . [f]requently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format." *Notice of Inquiry, supra,* 57 F. C. C. 2d, at 583.

[14] Section 3 (h) of the Act provides that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." 47 U. S. C. § 153 (h). See also, *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474 (1940) ("[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.")

[15] The Commission discussed the problems arising from "the obligation to continue service" created by the Court of Appeals' format doctrine. The Commission apparently used this phrase to describe those cases in which it thought the Court of Appeals would hold that an application for license transfer or renewal should have been denied because the abandonment of a unique entertainment format was inconsistent with the public interest. Although the format cases only addressed whether a hearing was required, the Court of Appeals implied that in some situations the Commission would be required to deny an application because of a change

The Commission also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats. Such regulation would require the Commission to categorize the formats of a station's prior and subsequent programming to determine whether a change in format had occurred; to determine whether the prior format was "unique";[16] and to weigh the public detriment resulting from the abandonment of a unique format against the public benefit resulting from that change. The Commission emphasized the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format.[17]

Finally, the Commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment for-

in entertainment format. See *Citizens Committee to Keep Progressive Rock* v. *FCC*, *supra*, — U. S. App. D. C., at —, 478 F. 2d, at 934.

The Commission also addressed the "constitutional dimension" of the format doctrine. It concluded that the doctrine would be likely to deter many licensees from experimenting with new forms of entertainment programming, since the licensee could be burdened with the expense of participating in a hearing before the Commission if for some reason it wished to abandon the experimental format. Thus,

"[t]he existence of the obligation to continue service . . . inevitably deprives the public of the best efforts of the broadcasting industry and results in an inhibition of constitutionally protected forms of communication with no offsetting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms."

[16] In the *Notice of Inquiry*, the Commission discussed the difficult task of categorizing formats, noting that the Court of Appeals had suggested in the *WEFM* case that 19th-century classical music should be distinguished from 20th-century classical music. *Notice of Inquiry*, *supra*, 57 F. C. C. 2d, at 583, and n. 2.

[17] *Policy Statement*, *supra*, 60 F. C. C. 2d, at 865.

mats.[18] Second, format allocation by market forces accommodates listeners' desires for diversity within a given format and also produces a variety of formats.[19] Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that "the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners." [20]

The Court of Appeals, sitting en banc, held that the Commission's policy was contrary to the Act as construed and applied in the court's prior format decisions. *WNCN Listeners Guild* v. *FCC*, — U. S. App. D. C. —, 610 F. 2d 838 (1979). The court questioned whether the Commission had rationally and impartially re-examined its position [21] and particularly criticized the Commission's failure to disclose a staff study on the effectiveness of market allocation of formats before it issued the Policy Statement.[22] The court then

[18] *Id.*, at 863.

[19] The Commission pointed out that a significant segment of the public may strongly prefer one station to another even if both stations play the same type of music. Although it would be difficult for the Commission to compare the strength of intra-format preferences to the strength of inter-format preferences, market forces would naturally respond to intra-format preferences, albeit in an imperfect manner. *Policy Statement, supra,* 60 F. C. C. 2d, at 864.

[20] *Policy Statement, supra,* 60 F. C. C. 2d, at 866, n. 8.

[21] The court was of the view that the Commission's "Notice of Inquiry" revealed a substantial bias against the *WEFM* decision, and that the Commission had overstated the administrative problems created by the format doctrine.

[22] The study was released prior to the Commission's denial of reconsideration of its Policy Statement The court questioned whether the public had had an adequate opportunity to comment on the study but found it unnecessary to consider whether the Policy Statement should be set aside on that ground:

"Petitioners urge this defect as an independent ground for overturning the Commission. We agree that the study does raise serious questions

responded to the Commission's criticisms of the format doctrine. First, although conceding that market forces generally lead to diversification of formats, it concluded that the market only imperfectly reflects listener preferences [23] and that the Commission is statutorily obligated to review format changes whenever there is "strong prima facie evidence that the market has in fact broken down." —— U. S. App. D. C., at ——, 610 F. 2d, at 851. Second, the court stated that the administrative problems posed by the format doctrine were not insurmountable. Hearings would only be required in a small number of cases, and the Commission could cope with problems such as classifying radio formats by adopting "rational classification schema." —— U. S. App. D. C., at ——, 610 F. 2d, at 853. Third, the court observed that the Commission had not demonstrated that the format doctrine would deter innovative programming.[24] Finally, the court explained that it had not directed the Commission to engage in censorship or to impose common carrier obligations on licensees:

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about the overall rationality and fairness of the Commission's decision. However, because certain broader defects, of which the study is symptomatic, are fatal to the Commission's actions, we need not decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*." —— U. S. App. D. C., at ——, n. 24, 610 F. 2d, at 847, n. 24.

Respondents urge the Court to set aside the Policy Statement because of this alleged procedural error if the Court determines that the Commission's views do not conflict with the Act or the First Amendment. We have considered the submissions of the parties and do not consider the action of the Commission, even if a procedural lapse, to be a sufficient ground for reopening the proceedings before the Commission.

[23] The court observed, as it had in *WEFM*, that because broadcasters rely on advertising revenue they tend to serve persons with large discretionary incomes. —— U. S. App. D. C., at ——, 610 F. 2d, at 851. The dissenting opinion noted that the Commission had not rejected this assumption. —— U. S. App. D. C., at ——, 610 F. 2d, at 851.

[24] The court stated that the Commission's staff study demonstrated that licenseees had continued to develop diverse entertainment formats after the *WEFM* decision.

WEFM did not authorize the Commission to interfere with licensee programming choices or to force retention of an existing format; it merely stated that the Commission had the power to consider a station's format in deciding whether license renewal or transfer would be consistent with the public interest. — U. S. App. D. C., at —, 610 F. 2d, at 851–852.

Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the Court of Appeals asserted that the format doctrine was "law," not "policy," [25] and was of the view that the Commission had not disproved the factual assumptions underlying the format doctrine.[26] Accordingly, the court declared that the Policy Statement was "unavailing and of no force and effect." — U. S. App. D. C., at —, 610 F. 2d, at 858.[27]

II

Rejecting the Commission's reliance on market forces to develop diversity in programming as an arbitrary and unreasonable interpretation of the Act's public interest standard, the Court of Appeals held that in certain circumstances the Commission

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[25] The court acknowledged that Congress had entrusted to the Commission the task of ensuring that license grants are used in the public interest. Nevertheless, the Commission's position on review of entertainment format changes "could not be sustained even when all due deference was given that construction." — U. S. App. D. C., at —, n. 51, 610 F. 2d, at 855, n. 51.

[26] The Court of Appeals ~~would be~~ was not satisfied that the market functioned adequately in every case; nor was it persuaded that the loss of a unique format is comparable to the loss of a favorite station within a particular format.

[27] Two judges dissented, arguing that the Policy Statement should have been upheld, since the Commission had made a reasonable judgment that the format doctrine was unnecessary to further the public interest. A third judge agreed with the dissenters that the majority had not accorded sufficient deference to the Commission's judgment, but concluded that the Commission's order should be vacated so that the record could be reopened to permit public comment on the staff study.

is required to regard a change in entertainment format as a substantial and material fact in deciding whether a license renewal or transfer is in the public interest. With all due respect, however, we are unconvinced that the Court of Appeals' format doctrine is compelled by the Act and that the Commission's interpretation of the public interest standard must therefore be set aside.

It is common ground that the Act does not define the term "public interest, convenience, and necessity."[28] The Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). Although it was declared in *National Broadcasting Co.* v. *United States, supra,* that the goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," 319 U. S., at 217, it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved. The Court accordingly declined to substitute its own views on the best method of encouraging effective use of the radio for the views of the Commission. 319 U. S., at 218. Similiarly, in *FCC* v. *National Citizens Committee for Broadcasting,* 436 U. S. 775 (1978), we deemed the policy of promoting the widest possible dissemination from diverse sources to be consistent with both the public-interest standard and the First Amendment, 436 U. S., at 775, but emphasized the Commission's broad power to regulate in the public interest. We noted that the Act permits the Commission to promulgate "such rules and regulations, not inconsistent with law, as may be necessary to carry out the provisions of the Act,"[29] and

[28] The Act provides in general terms that the Commission shall perform administrative functions "as public convenience, interest, or necessity requires." 47 U. S. C. § 303.

[29] See 47 U. S. C. § 303 (r), quoted at n. 12, *supra.*

that this general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *Id.*, at 793.[30] Furthermore, we recognize that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [31]

The Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. The Court of Appeals and the Commission agree that in the vast majority of cases market forces provide sufficient diversity. The Court of Appeals favors government intervention when there is evidence that market forces have deprived the public of a "unique" format, while the Commission is content to rely on the market, pointing out that in many cases when a station changes its format, other stations will change their formats

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[30] Section 10 (e) of the Administrative Procedure Act provides in part: "The reviewing court shall—

. . . . . .

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U. S. C. § 706 (2) (A).

In *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775 (1978), we observed that a reviewing court applying this standard " 'is not empowered to substitute its judgment for that of the agency.' " 436 U. S., at 803, quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1971).

[31] *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U. S., at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 29 (1961).

to attract listeners who preferred the discontinued format.[32] The Court of Appeals places great value on preserving diversity among formats, while the Commission emphasizes the value of intra-format as well as inter-format diversity. Finally, the Court of Appeals is convinced that review of format changes would result in a broader range of formats, while the Commission believes that government intervention is likely to deter innovative programming.

In making these judgments, the Commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. This decision was in major part based on predictions as to the probable conduct of licensees and the functioning of the broadcasting market and on the Commission's assessment of its capacity to make the determinations required by the format doctrine. These predictions are within the institutional competence of the Commission. The Commission's implementation of the public interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC* v. *National Citizens Committee for Broadcasting, supra,* 436 U. S., at 810.[33] The Commission's position on review of format

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[32] The Commission recognizes that it will never be possible to achieve a perfect correlation between listener preferences and available programming. The Court of Appeals does not contend that a perfect correlation can ever be achieved, but it insists that the Commission must actively seek to accommodate the "first preference" of any "significant segment" of the listening public.

[33] The Court has repeatedly stated that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. See, *e. g., FCC* v. *National Citizens Committee for*

changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. As we see it, the Commission's Policy Statement is in harmony with cases recognizing that the Communications Act seeks to preserve journalistic discretion while promoting the interests of the listening public.[34]

The Policy Statement is also consistent with the legislative history of the Act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming.[35] Similiarly, one of the bills submitted prior to passage of the Radio Act of 1927.[36] included a provision requiring stations to comply with programming priorities based on subject matter.[37] This provision was eventually deleted since it was considered to border on censorship.[38] Congress eventually added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence]

Broadcasting, supra; FCC v. *WOKO, Inc.*, 329 U. S. 223, 229 (1946); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224 (1943).

[34] See, *e. g., FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 705 (1979) (recognizing the "policy of the Act to preserve editorial control of programming in the licensee"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 120 (discussing the Commission's duty to chart a workable "middle course" to preserve "essentially private broadcast journalism held only broadly accountable to public interest standards").

[35] Congress rejected a proposal to allocate 25% of all radio stations to educational, religious, agricultural, and similar nonprofit associations. See 78 Cong. Rec. 8843–8846 (1934).

[36] 44 Stat. 1162. The Radio Act of 1927 was the predecessor to the Communications Act.

[37] This bill would have required the administrative agency created by the Radio Act of 1927 to prescribe "priorities as to subject matter to be observed by each class of licensed stations." H. R. 7357, 68th Cong., 1st Sess., § 1 (B) (1924).

[38] Hearings on H. R. 5589 before the House Committee on the Merchant Marine & Fisheries, 69th Cong., 1st Sess., 39 (1926).

with the right of free speech by means of radio communication." [39] That section was retained in the Communications Act.[40] As we read the legislative history of the Act, Congress did not unequivocally express its disfavor of entertainment format review by the Commission, but neither is there substantial indication that Congress expected the public interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

In the past we have stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." [41] Prior to 1979, the Commission consistently stated that the choice of programming formats should be left to the licensee.[42] In 1971 the Commission restated that position but announced that any application for license transfer or renewal involving a substantial change in program format

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[39] Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926). H. R. Conf. Rep. No. 1886, 69th Cong., 2d Sess., 16–19 (1927).

[40] Section 326 of the Act 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." 47 U. S. C. § 326.

In *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978), the Court concluded that although this section prohibits the Commission from editing proposed broadcasts in advance, it does not preclude subsequent review of program content. 438 U. S., at 735, 737.

[41] *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 121 (1973).

[42] See, *e. g., Programming Policy Statement,* 44 F. C. C 2303, 2308–2309 (1960); *Bay Radio, Inc.,* 22 F. C. C. 1351, 1351, 1364 (1957).

would have to be reviewed in light of the Court of Appeals' decision in *Citizens Committee to Preserve the Voice of the Arts in Atlanta*, — U. S. App. D. C. —, 436 F. 2d 267 (1970), in which the Court of Appeals first articulated the format doctrine.[43] In 1973, in a statement accompanying the grant of the transfer application that was later challenged in *WEFM*, a majority of the Commissioners joined in a commitment to "take an extra hard look at the reasonableness of and proposal which would deprive a community of its only source of a particular type of programming."[44] However, the

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[43] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F. C. C. 2d 650, 679–680 (1971).

The Commission explained:

"Our view has been that the station's program format is a matter best left to the discretion of the licensee or applicant, since as a matter of public acceptance and economic necessity he will tend to program to meet the preferences of the area and fill whatever void is left by the programming of other stations." 27 F. C. C. 2d, at 679.

The Commission noted that this policy only applied to entertainment programming. "It does not include matters such as an increase in commercial matter or decrease in the amount of non-entertainment programming, both of which are subjects of review and concern, and have been for some time." *Id.*, at n. 15.

The Commission continues to review nonentertainment programming to some degree. It has provided a rational explanation for distinguishing between entertainment and nonentertainment programming:

"To the extent that the Commission exercises some direct control of programming, it is primarily through the fairness doctrine and political broadcasting rules pursuant to Section 315. In both cases the Commission's role is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community. . . . These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day. In contrast, [under the format doctrine] we would be faced with the prospect of rejecting virtually the entire broadcast schedule proposed by the prviate licensee . . . ." 66 F. C. C. 2d 78, 83 (denying reconsideration of the Policy Statement).

[44] *Zenith Radio Corp.*, 40 F. C. C. 2d 223, 230 (1973) (Additional Views of Chairman Burch).

Commission's later Policy Statement concluded that this approach was "neither administratively tenable nor necessary in the public interest." [45] It is thus apparent that although the Commission was obliged to modify its policies to conform to the Court of Appeals' format doctrine, the Policy Statement reasserted the Commission's traditional preference for achieving diversity in entertainment programming through market forces.

Respondents contend that the Court of Appeal's judgment should be affirmed because, even if not violative of the Act, the Policy Statement conflicts with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experience." *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969). *Red Lion* held that the Commission's "fairness doctrine" was consistent with the public-interest standard of the Communications Act and did not violate the First Amendment, but rather enhanced First Amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public." 395 U. S., at 385. Although observing that the interests of the people as a whole were promoted by debate of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs. The Commission seeks to further interests of the listening public as a whole by relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners.[46] This policy does not conflict with the First Amendment.[47]

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[45] *Policy Statement, supra*, 60 F. C. C. 2d, at 866, n. 8.

[46] Respondents place particular emphasis on the role of foreign language programming in providing information to non-English speaking citizens. However, the Policy Statement only applies to entertainment programming. It does not address the broadcaster's obligation to respond to

[*Footnote 47 is on p. 18*]

Contrary to the judgment of the Court of Appeals, the Commission's Policy Statement is not inconsistent with the Act. It is also a constitutionally permissible means of implementing the public-interest standard of the Act. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

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community needs in the area of informational programming. See Tr. of Oral Arg., at 81 (remarks of counsel for the Commission).

[47] Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973), (the First Amendment does not require the Commission to adopt a "fairness doctrine" with respect to paid editorial advertisements).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 29, 1980

Re: Nos. 79-824, 825, 826, and 827 - FCC, et al. v. WNCN Listeners Guild, Inc.

Dear Byron:

I shall try my hand at a dissent in this one.

Sincerely,

T.M.

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 30, 1980

RE: Nos. 79-824, 825, 826 and 827 - FCC, Insilco Broadcasting, American Broadcasting and National Broadcasting v. WNCN Listeners Guild, et al.

Dear Byron:

I'll await the dissent.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

To Peter

To: Mr. Justice Powell
From: Peter Byrne
Re: Nos. 79-824,-825,-826,-827, FCC v. WNCN Listeners Guild
December 30, 1980

I am pleased to recommend that you join this excellent opinion. I ~~agree~~ agree. I believe that it accords fully with your views. Primarily, it focusses on the question of who interprets the public interest standard, rather than what the public interest standard contains.

There is one minor point of questionable accuracy in the opinion. At pages 4-5, the opinion states that the CA at one time ruled that the Commission's interpretation of the public interest standard was arbitrary and unreasonable. The citation for this point is ambiguous, but seems to say that the Commission's refusal to hold a hearing in a particular case was arbitrary. I interpret the CA's position to be that the Commission's interpretation of the public interest standard is contrary to law, and the opinion agrees at all points but the one mentioned. I don't know if this little ambiguity is worth mentioning to Justice White as it has no effect on the holding or reasoning of the opinion.

Spoke to BRW's clerk - point will be corrected JPB

Peter - ask BRW's clerk about this. It is not terribly important

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 30, 1980

Re: 79-824, 79-825, 79-826, and 79-827
FCC v. WNCN LISTENERS GUILD

Dear Byron,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 30, 1980

Re: Nos. 79-824, 79-825, 79-826 & 79-827 FCC v. WNCN Listeners Guild

Dear Byron:

Please join me.

Sincerely,

Wm

Mr. Justice White

Copies to the Conference

December 31, 1980

79-824, etc. FCC v. WNCN

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 2, 1981

Re: Nos. 79-824 - 827, FCC v. WNCN

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1981

Re: 79-824, 79-825, 79-826, and 79-827
FCC v. WNCN

Dear Byron:

Please join me.

Respectfully,

J.P.S.

Justice White

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
			11/15/80					
join BRW 3/5/81	await dissent 12/30/80	join BRW 12/30/80	1st draft 12/29/80	will dissent 12/29/80	join BRW 1/2/81	join BRW 12/31/80	join BRW 12/30/80	join BRW 1/5/81
	join TM 2/26/81		2nd draft 12/30/80 3rd draft 3/4/81	dissent 1st draft 2/23/81				
			4th draft 3/5/81	2nd draft 3/2/81 3rd draft 3/19/81				
				79-824 FCC v. WNCN				