

NOTE

THE JUDICIAL ROLE IN THE FCC DECISIONMAKING PROCESS: A PERSPECTIVE ON THE COURT-AGENCY PARTNERSHIP IN THE ENTERTAINMENT FORMAT CASES

In recent years, the United States Court of Appeals for the District of Columbia has increased its input into what has traditionally been the exclusive substantive policy making function of the Federal Communications Commission (FCC). The FCC is required by the Communications Act of 1934¹ to determine whether the "public interest, convenience, and necessity" is served by the assignment of any broadcast license.² Exercising its exclusive appellate jurisdiction over FCC licensing decisions,³ this activist federal bench has defined for itself a collaborative role with the Commission in formulating administrative policy. However, this spirit of collaboration has degenerated into conflict involving various aspects of broadcast communications regulation. In the process of interpreting the Communications Act, the D.C. Circuit has defined the public interest in ways which conflict with articulated Commission policy.⁴ This variance between law and policy as to the substantive content of the Commission's public interest duties has resulted in a persistent, decade-long institutional antagonism between the FCC and the D.C. Circuit court.

Judicial encroachment upon FCC discretion to define for itself and administratively implement its public interest mandate has been justified by the D.C. Circuit in terms of its partnership doctrine. Judge Leventhal first articulated this concept for the D.C. Circuit by way of influential dicta that, in his opinion, "agencies and courts together constitute a 'partnership' in furtherance of the public interest."⁵ The partnership doctrine represents an evolving process through which the D.C. Circuit has redefined the institutional relationship between itself and the agencies which the court oversees. The court has suggested that this newly redefined judicial function is "one related to the administrative process—in part supervisory and in part collaborative."⁶

¹ 47 U.S.C. §§ 151-609 (1976).

² 47 U.S.C. § 309(a) (1976).

³ 47 U.S.C. § 402(b) (1976).

⁴ Compare, e.g., *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 267 (D.C. Cir. 1974) (the public interest in diversity of broadcast entertainment formats requires FCC regulation) with *Development of Policy Re: Changes in Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 863 (1976) (FCC policy statement that public interest in diversity of entertainment formats is served by policy of free competition).

⁵ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1973), *cert. denied*, 403 U.S. 923 (1971) (careful judicial attention to FCC procedures, findings and reasons is required in order to assure court that the agency decision satisfies the basic requirements of the Rule of Law, as established by Administrative Law Doctrine).

⁶ *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973) (explanation of the D.C. Circuit court's role in enforcement of Federal Trade Commission Act). See also *Public Serv. Comm'n for the State of New York v. Federal Power Comm'n*, 487 F.2d 1043, 1067 (D.C. Cir. 1973) (*The Texas Gulf Coast Area Natural Gas Rate Cases*).

Judicial involvement in the substantive policy-making function of the FCC is no more apparent than in the line of cases,⁷ heard before the D.C. Circuit, involving the loss of unique entertainment formats⁸ from radio broadcast service areas. Through these decisions the D.C. Circuit has sought to compel the Commission to regulate the assignment of radio licenses when it appears that the diversity⁹ of available entertainment formats will be reduced in the trans-

⁷ *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. v. FCC (WGKA)*, 436 F.2d 263 (D.C. Cir. 1970).

⁸ The questions of what constitutes an "entertainment format" and a "unique format" have embroiled the Commission and the D.C. Circuit in a continuing controversy. *Compare, e.g.*, *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926, 932 (D.C. Cir. 1973) ("format" is distinct from "occasional duplication of selections") with *Twin States Broadcasting, Inc.*, 36 F.C.C.2d 650, 652 (1972) (suggestion that top forty format which included some progressive rock music was suitable replacement for abandoned progressive rock format); *compare also* *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d at 262 (FCC must determine whether format is "unique or otherwise serves a specialized audience that would feel its loss.") with *Entertainment Formats*, 60 F.C.C.2d at 862 (FCC statement that the "elusive qualities" of a station's programming seem to make all broadcast formats equally unique). For examples of what constitutes an entertainment format, see *Entertainment Formats*, 60 F.C.C.2d at 880 (Table Z to Appendix B of Commission's Order lists sub-categories belonging to major format classifications). The significance of the uniqueness determination is best understood in relationship with the policy of diversification, explained at note 9 *infra*. Simply stated, the loss of a format which could be termed unique would appear to lessen the goal of maximum diversity of entertainment formats available to the listening public.

⁹ Diversification remains the most persuasive justification for government regulation of the broadcast industry. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 396-400 (1969). Diversification is the promotion of the maximum number of speakers in what has been perceived to be a technically scarce telecommunications commodity. This first amendment goal has been most carefully elaborated by Judge Learned Hand: "[The first amendment] presupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 53 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). See also *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d at 271 (Bazelon, C.J., concurring) ("multitude of tongues" is an irreducible principle not subject to verification).

Diversification is also a policy which gives content and form to the public interest standard and remains an important goal for the FCC in fulfilling its public interest duties in approving and denying license assignments. Diversification, therefore, can be justified on both statutory and constitutional grounds. Consequently, there has been considerable controversy regarding the co-extensiveness of the first amendment and public interest with regard to diversification. See note 16 *infra*.

It should be noted, however, that recent technological developments in telecommunications including microwave and satellite transmissions and cable television will undoubtedly prompt a rethinking of the goal of diversification, since it presumes scarcity for its justification. Judge Bazelon's concurring opinion in *WNCN Listener's Guild* explicitly mentions the potential impact of these innovations, suggesting that they may moot the entire question of regulation for diversity: "[T]he dawning technological revolution may eliminate this dilemma [of regulating to promote diversity] by opening up an unprecedented number of accessible outlets for speech." *WNCN Listener's Guild v. FCC*, 610 F.2d 838, 859 (D.C. Cir. 1979) (Bazelon, C.J., concurring). See generally Baer, *Telecommunications Technology in the 1980's*, in COMMUNICATIONS FOR

fer. The judicial pronouncements in those cases requiring regulation of entertainment formats conflict directly with Commission policy.¹⁰ To date the Commission has refused to develop administrative standards in accordance with the court's decision in the entertainment format cases. Since the responses of both the D.C. Circuit and the Commission have not varied, and since neither institution will accommodate the other's views, it is apparent that any institutional settlement will result from appeal to higher authority.¹¹

In an area of institutional conflict between the FCC and the D.C. Circuit paralleling the entertainment format controversy, the Supreme Court has resolved the antagonism by ruling in favor of the FCC. In *FCC v. National Citizens Committee for Broadcasting (NCCB)*,¹² the Supreme Court recently overturned a D.C. Circuit court decision¹³ which reviewed the Commission's newspaper-broadcast cross-ownership rule.¹⁴ The Commission's rule sought to promote diversification of media ownership by prohibiting the co-location of certain newspaper-broadcast combinations within the same service community. The Commission fashioned its new cross-ownership rule to operate prospectively, thereby permitting existing combinations to persist in most broadcast service areas.¹⁵ The D.C. Circuit Court of Appeals found this use

TOMORROW: POLICY PERSPECTIVES FOR THE 1980's 61 (G. Robinson ed. 1978). See also *WEFM*, 506 F.2d 279 n.32 (Bazelon, C.J., concurring) (reconsideration of scarcity assumption required by FCC, Congress, and the courts); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 76 (D.C. Cir 1972), *cert. denied*, 412 U.S. 922 (1973). But see *Red Lion Broadcasting*, 395 U.S. at 396 ("scarcity is not entirely a thing of the past."); *FCC v. NCCB*, 436 U.S. 775 (scarcity rationale reaffirmed).

¹⁰ *Entertainment Formats*, 60 F.C.C.2d 856 (1976). The Commission stated that regulation to promote diversity of entertainment formats as envisioned by the D.C. Circuit "would be flatly inconsistent with [FCC's] understanding of congressional policy as manifested in the Communications Act, counterproductive in terms of maximizing the welfare of the radio listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming." *Id.* at 865-66.

¹¹ At this writing the Supreme Court has certified this issue for its consideration. *FCC v. WNCN Listener's Guild*, *cert. granted*, 445 U.S. 914 (1980).

¹² 436 U.S. 775 (1978).

¹³ *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

¹⁴ FCC rules prohibiting multiple ownership of media sources are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636 (1979). These recent amendments to the multiple ownership rules were developed through the agency's notice and comment rulemaking procedure. 50 F.C.C.2d 1046 (1974), *reconsidered*, 53 F.C.C.2d 589 (1975). FCC regulation to promote diversification goes back forty years. In 1941, the Commission enacted its "chain-broadcasting" rules forbidding the licensing in the same areas of multiple stations owned by the same network. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 206-07 (1943).

The FCC decisions to promote diversity have been based upon two related premises, one rooted in antitrust policy and the other in first amendment theory. See note 16 *infra*. Although the Commission is not empowered to enforce the antitrust laws, the Supreme Court has noted that it may take cognizance of potential or existing antitrust violations and antitrust policy in determining the public interest. *United States v. RCA*, 358 U.S. 334, 351 (1954).

¹⁵ The Commission's decision not to enforce retroactive divestiture of all newspaper-broadcast combinations across the board was based on its conclusions that

of a "grandfather clause," which had the effect of entrenching existing newspaper-broadcast combinations, to be arbitrary and capricious within the meaning of the Administrative Procedure Act (APA)¹⁶ since the Commission articulated no reason to rebut the presumption, raised by cross-ownership, that such combinations are on their face contrary to the public interest.¹⁷

On appeal the Supreme Court unanimously held that the means selected by the Commission to achieve the goal of diversity were not unreasonable,

disruption of the status quo in these instances was unwarranted, since such cross-owners as a group had "a long record of service" in the public interest. In re Amendment of Sections 73.34, 73.240 and 73.636 of the Commission & Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations (Second Report and Order), 50 F.C.C.2d 1046, 1078 (1975). The Commission also expressed fear that local ownership of broadcast outlets would decline. *Id.* at 1068-69. Consequently, divestiture was made the exception rather than the rule. The Commission's order required divestiture only in "egregious cases," *i.e.*, those instances in which the only broadcast outlet and newspaper co-located in the same service areas were owned by the same party so as to create an "effective monopoly" of informational sources. *Id.* at 1049.

¹⁶ *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 965 (D.C. Cir. 1977). The court was engaged in construing the meaning of the Act, 5 U.S.C. § 706(2)(A) (1976). It should be noted, however, that the FCC based its decision to ban future combinations upon first amendment grounds only, and to permit existing combinations upon first amendment and antitrust policies. 50 F.C.C.2d at 1040. This distinction is significant in that the Commission's prospective ruling can be justified in accordance with the first amendment's "faith" in diversification. See note 13 *supra*. Based purely upon this stated purpose, the prospective ban can be justified without evidence of specific abuses by cross owners such as suppression of information and news distortion. The Commission, the court of appeals, and the Supreme Court are all in agreement that "diversity and its effect are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *FCC v. NCCB*, 436 U.S. at 796-97 (quoting *NCCB*, 555 F.2d at 961).

The decision on the part of the Commission to justify its retroactive ban in the sixteen "egregious" cases of media monopolization on first amendment and antitrust grounds illuminates a long standing controversy concerning the co-extensiveness of first amendment values and the public interest mandate. As early as 1943, Judge Learned Hand remarked that the public interest goal of diversity had been "closely akin to, if indeed it is not the same as, the interest protected by the First Amendment." *United States v. Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1, 23 (1945). Nevertheless, there appears to be a difference of opinion on the Supreme Court bench concerning the relation between the agency's public interest mandate and the first amendment. See *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 142 (1972) (Stewart, J., concurring); *id.* at 148 (Blackmun, J., concurring); *id.* at 170 n.2 (Brennan, J., dissenting). This same controversy exists on the D.C. Circuit court bench and establishes the basis for much of Judge Bazelon's theoretical differences in his concurring opinions in the entertainment format cases. While the majority opinions are typically written in the form of "statutory review proceedings," see, e.g., *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (the 'public interest' standard requires diversification of radio entertainment formats), Judge Bazelon's concurrences are written with primary concern for the first amendment. See *id.* at 281 (Bazelon, C.J., concurring). Bazelon also suggests, however, that the "traditional schema of the First Amendment," *i.e.*, the diversity of tongues, "may be inadequate in the field of telecommunications." *Id.* at 273.

¹⁷ *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d at 963.

that the use of a grandfather clause limiting divestiture of broadcast facilities reflected a rational weighing of competing policies, and as such were not arbitrary use of the agency's discretion.¹⁸ The implications of the Supreme Court's *NCCB* decision in the D.C. Circuit court partnership doctrine applied in the entertainment format cases should not be overlooked. As one author indicates, the *NCCB* case superficially appears to be of little import to administrative or constitutional law.¹⁹ When the case is read in context, however, the *NCCB* decision assumes a greater significance.

The *NCCB* case presents a clear indication of the Supreme Court's efforts to demarcate the structural boundaries of public interest decisionmaking in the telecommunications field. By reversing the circuit court's judgment concerning the Commission's order, the Supreme Court pared judicial review of the agency's decision, permitting it to exercise unfettered discretion. The D.C. Circuit court challenged the reasonableness of any articulated agency policy which departed from achieving the maximum diversification of telecommunications facility ownership. In the process the court of appeals unabashedly arrogated to itself the power to judge the substantive rulemaking competence of an independent administrative agency.²⁰ Due to the fact that the Commission had not articulated its reasons for applying its cross-ownership rule to future cases only,²¹ the Supreme Court should not be seen as affirming the rationality of the agency's decision. The *NCCB* case should be viewed as a message from the Supreme Court to the D.C. Circuit to modify its pronounced activist posture in formulating policy for the Commission.²²

¹⁸ *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 803. In the context of *NCCB*, the circuit court would vacate the retroactive aspect of the Commission's order since it did not promote the policy of maximum diversity. The court of appeals emphasized the equation of statutory and constitutional concepts in making its case of arbitrariness and capriciousness. "The 'public interest' standard necessarily invites reference to First Amendment principles." *NCCB*, 555 F.2d at 949 (quoting *Columbia Broadcasting Sys., Inc.*, 412 U.S. at 122). The circuit court recognized that the first amendment seeks to further the "search for truth," and reasoned that diversity would facilitate that search. *NCCB*, 555 F.2d at 951.

The Supreme Court, in reversing the lower federal court decision, emphasized that the Commission's statutory public interest mandate permitted the FCC to make decisions that were "primarily of a judgmental or predictive nature." *FCC v. NCCB*, 436 U.S. at 813-14. The high court reaffirmed the Commission's legislative "weighing process." It concluded that FCC fears of disruption of local broadcast service justifying a rule limiting divestiture of cross-owned combinations reflected a "rational weighing of competing policies." In the Court's opinion, the first amendment "faith" in the multitude of tongues did not control, since the Commission's statutory duty permitted the FCC to consider other factors which would tend to achieve the Commission's "general goal of 'achieving the best practicable service to the public.'" *FCC v. NCCB*, 436 U.S. at 810.

¹⁹ Polsby, *FCC v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 SUP. CT. REV. 1 (1978) [hereinafter cited as Polsby].

²⁰ *Id.* at 2.

²¹ Amendment to Commission's Rules Relating to Multiple Ownership, 50 F.C.C.2d 1046, 1078 (mere recitation of "competing policies" to justify prospective application only).

²² Polsby, *supra* note 19, at 2-3.

This note is a comprehensive study of the court-agency partnership as developed in the entertainment format cases. At the outset, the note will examine the institutional relationship between the FCC and the D.C. Circuit Court of Appeals as envisioned by the statutory scheme of the Communications Act, and how that relationship has been developed under traditional standards of judicial review. The note will proceed to demonstrate how that relationship has been unilaterally redefined by the D.C. Circuit court's activist doctrines. The note will then examine how this expanded judicial function has affected the entertainment format cases, recite the theoretical basis for that expansion, and then catalogue the specific instances of conflict between law and policy in this area. The note will conclude with an analysis of the current state of the institutional partnership and a prediction for the potential resolution of this conflict. It will be submitted that the institutional settlement of the entertainment format controversy will entail Supreme Court enforcement of agency discretion in these matters, effectively overruling the D.C. Circuit court's partnership concept.²³ In light of the *NCCB* decision in particular, it is increasingly apparent that the Supreme Court views the FCC as the proper government institution to formulate telecommunications policy.

I. THE PARAMETERS OF INSTITUTIONAL DISCRETION

A. *The Statutory Scheme*

The Communications Act of 1934 grants the FCC broad powers to regulate the publicly owned airwaves.²⁴ Congress envisioned the liberal use of Commission discretion to exercise those powers in fulfilling its public interest mandate to "provide for the larger and more effective use of radio." This discretionary power is critically important when the agency is in the process of making the statutorily required public interest finding. Prior to the grant of any license and the approval of license assignments,²⁵ section 309(b) of the

²³ In fact, these very implications of the *NCCB* case appear to have been recognized by Judge Bazelon in his concurring opinion in *WNCN Listener's Guild v. FCC*, 610 F.2d 838, 858 (D.C. Cir. 1979). He analyzes the *NCCB* reversal as a manifestation by the Supreme Court that the court of appeals decision had not been sufficiently deferential to the Commission's judgment. *Id.* at 858-59 n.4.

²⁴ The battery of powers delegated to the Commission runs the full gamut of remedies available to an executive agency: power to impose fines for certain willful violations of the Act, 47 U.S.C. § 503(b) (1976); power to issue cease and desist orders, 47 U.S.C. § 312(b) (1976); power to suspend broadcast license, 47 U.S.C. § 303(m)(i) (1976); power to revoke broadcast license, 47 U.S.C. § 312(a) (1976). Perhaps the most persuasive and frequently used power is the authorization in 47 U.S.C. § 303(f) (1976) to make rules and regulations and to prescribe conditions and restrictions not inconsistent with the law necessary to carry out the provisions of the Act.

²⁵ 47 U.S.C. § 310(b) (1976). The license assignment is made in a non-comparative proceeding, *i.e.*, no other license applicant can be considered at the time of transfer other than the proposed transferee. The D.C. Circuit has frequently recognized that the narrowness of its supervisory function had been purposely designed by Congress in the statutory scheme of the Communications Act. *See, e.g.*, *Hartford Communications Comm. v. FCC*, 467 F.2d 408, 412 (D.C. Cir. 1972) ("Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings in this field whenever

Act requires that the Commission find any assignment of a broadcast license to be in the public interest before granting approval to the transfer.²⁶

The Commission is empowered to authorize a license transfer, exercising its discretion unilaterally, without a formal public hearing unless "substantial and material questions of fact" exist at the time of assignment.²⁷ Members of the listening public may seek to prevent the transfer of a broadcast license by filing with the Commission a petition to deny assignment.²⁸ Petitioners must specifically allege material facts sufficient for the Commission to find that there exists a legitimate issue that the public interest is disserved by granting the license assignment. The procedural requirements of the petition to deny demand (1) that the petitioner state with specificity allegations of fact,²⁹ (2) that he establish a prima facie case that the grant of the license application is inconsistent with the public interest,³⁰ and (3) that substantial and material questions of fact are present to warrant a hearing prior to the FCC determination.³¹

The formal pleading requirements of the section 309(b) petition to deny have been strictly enforced by the Commission to discourage frivolous claims.³² The legislative history preceding the enactment of section 309 indi-

possible, and we [should] ordinarily defer to that purpose . . ." (quoting *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965)); accord, *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d at 934 n. 25.

²⁶ 47 U.S.C. § 309(b) (1976).

²⁷ 47 U.S.C. § 309(c) (1976).

²⁸ 47 U.S.C. § 309(d) (1976). Disgruntled members of the listening public, organized into citizens committees, have been very effective in having their claims recognized by the D.C. Circuit. See generally Schneyer, *Overview of Public Interest Activity in the Communications Field*, 1977 Wis. L. Rev. 619-83, for an excellent discussion of the effect of citizens committees in the communications law field. See also *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (responsible representatives of listening public have standing as parties in interest to contest renewal of broadcast license). In the area of entertainment format law, citizens groups have effectively prevented the abandonment of unique program formats from the radio spectrum by petitioning to deny assignment. See note 7 *supra* for list of entertainment format cases successfully brought before the D.C. Circuit court. Each of the entertainment format cases arose in the context of license assignments in circumstances where, in the process of transferring ownership of the broadcast license, an allegedly unique program format was to be abandoned and no suitable alternative was to be provided to the listening public.

Other procedural mechanisms available to the public for drawing alleged inadequacies in the broadcast service to the attention of the FCC are: (1) the informal complaint—generally recognized to be ineffective; and (2) the competing application for the broadcast license—unrealistic for most citizens groups. 47 U.S.C. § 307 (1976). The petition to deny is considered the most cost-effective procedural avenue for lodging a complaint with the FCC. See generally Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 405-06 (1975).

²⁹ 47 U.S.C. § 309(d)(1) (1976).

³⁰ 47 U.S.C. § 309(d)(1) (1976).

³¹ 47 U.S.C. § 309(d)(2) (1976).

³² See, e.g., *In re Corvallis Television Cable Co.*, 59 F.C.C.2d 1282, 1286 (1976) (petitioner failed to raise any question of fact which established prima facie case inconsistent with the public interest); *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d 52, 63 (1972) (petition to deny dismissed on grounds that petitioner failed to establish

cates that the procedural obstacles were purposely designed by the Congress to prevent warrantless demands upon the Commission's time and energies.³³ The Commission has repeatedly denied many petitions by ruling that the petitioner failed to meet the stringent requirements of the formal petition, reciting especially failure for lack of specificity and materiality.³⁴ Agency discretion is not unlimited, however. A 1960 amendment to section 309(a) requires that the FCC, upon dismissal of the petition to deny, issue a concise statement of the reasons for dismissal in order to "furnish [the petitioner] with an adequate basis for immediate judicial review" ³⁵

Section 402(b) of the Communications Act delegates exclusive jurisdiction over FCC licensing decisions to the United States Court of Appeals for the District of Columbia Circuit.³⁶ Section 405 of the Act states that the procedural standing prerequisites for applying to the court for judicial remedy are: a) the petitioner must have been an unsuccessful petitioner for reconsideration of the agency's order, or b) the petitioner must have been a party to the proceedings.³⁷ A petition to reconsider, filed with the Commission after its denial of the petition to deny, represents the exclusive administrative remedy and as such is the statutory condition precedent to judicial review of the merits of the petitioner's claim.³⁸ Having exhausted administrative remedies, a petitioner may seek to have the agency's decision reviewed by the D.C. Circuit to assure that the FCC decision complied with the principles of administrative law. As noted below, the court's review has become stricter in recent years, as reflected in the changed standards of review by which it assesses agency action.

prima facie case of unrepresentativeness of Spanish-speaking persons in ascertainment survey).

³³ H.R. REP. NO. 1800, 86th Cong., 2d Sess. 12, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS at 3520; S. REP. NO. 691, 86th Cong., 1st Sess. 5 (1959).

³⁴ *See, e.g.,* Hartford Communications Comm. v. FCC, 467 F.2d 408, 414 (D.C. Cir. 1972) (petitioner's allegations of financial qualifications of license applicant lack statutorily required specificity); Stone v. FCC, 466 F.2d 316, 330 (D.C. Cir. 1972) (petitioner's allegations held not a proper basis for disapproval of license renewal request); Marsh v. FCC, 436 F.2d 132, 136 (D.C. Cir. 1970) (petitioner failed to state facts that might change the result of FCC decision). *See also* Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 407 (discussion of the pleading requirements for a petition to deny). The legislative history of 47 U.S.C. § 309, as amended in 1960, provides a definition of "material question of fact":

For the purpose of sections 309(d) and (e) a material question of fact is a question of fact which is material to the determination whether the public interest, convenience, or necessity would be served by the granting of application with respect to which such question is raised.

H.R. REP. NO. 1800, 86th Cong., 2d Sess. 12, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS at 3520.

³⁵ 47 U.S.C. § 309(d)(2) (1960).

³⁶ 47 U.S.C. § 402(b) (1976).

³⁷ 47 U.S.C. § 405 (1976); *but see* Joseph v. FCC, 404 F.2d at 208-11 (substantial compliance with procedural requirements enforced judicially rather than strict compliance).

³⁸ *Joseph*, 404 F.2d at 209.

B. *The Changing Standards of Judicial Review*

In reviewing FCC licensing decisions, the D.C. Circuit court traditionally yielded to the Commission's discretion. In general terms, the judicial authority to review FCC decisions was exercised with a great deal of restraint. The court merely would examine the administrative record to satisfy itself of the FCC's procedural compliance with principles of administrative law in its decisionmaking process.³⁹ The court was satisfied that the Commission was performing its administrative duty if it determined that the FCC had made a rational decision based on all of the available facts. The D.C. Circuit deferred to the Commission's expertise⁴⁰ and afforded the agency a presumption of regularity to its proceedings.⁴¹ In addition, the court upheld the Commission's decisions when its reasons were articulated with sufficient clarity,⁴² or when the Commission's decisions turned on "inferences to be drawn from facts already known and the legal conclusions to be derived from those facts."⁴³

In the past ten years, however, the D.C. Circuit has developed an approach that has been progressively less deferential and more judicially expansive in reviewing FCC matters. Two concepts—the hard look doctrine⁴⁴ and the court-agency partnership concept⁴⁵—represent marked departures from the traditional judicial view of the relationship between the D.C. Circuit and

³⁹ See note 5 *supra*. The precise standard of judicial review of agency discretion is the "palpably improper" standard. See, e.g., *Citizens Comm. to Save WGKA*, 436 F.2d at 268 (that the Commission has a discretion in licensing matters "which will not be disturbed unless it is palpably abused" is "a general truth which needs no demonstration").

⁴⁰ *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970).

⁴¹ See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969); see also *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 460 (D.C. Cir. 1967).

⁴² See, e.g., *West Michigan Telecasters, Inc. v. FCC*, 460 F.2d, 883, 891 (D.C. Cir. 1972).

⁴³ *Anti-Defamation League of the B'nai B'rith v. FCC*, 403 F.2d 169, 171 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

⁴⁴ The D.C. Circuit's hard look doctrine represents a judicial assertion of its competence to determine from the administrative record whether the Commission had engaged in rational decisionmaking. Under this doctrine, an agency is required, before the exercise of its administrative discretion, to "inform that discretion as accurately as possible by reliable facts relevant to that exercise." See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970). "The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues." *Id.* at 851. See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). In addition, the agency is required to set out in the record its reasons for deciding the case. See *Greater Boston Television Corp.*, 444 F.2d 841 (the hard look doctrine "calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."). *Id.* at 851.

⁴⁵ The partnership concept appears to be the D.C. Circuit court's justification for intrusion upon the substantive policy-making function of the FCC. Under this doctrine, the circuit court envisions an ongoing joint venture in the furtherance of the public interest. The D.C. Circuit has announced that the FCC and the court are "collaborative instrumentalities of justice." *Greater Boston Television Corp.*, 444 F.2d at 851-52.

the regulatory agencies which it supervises. The hard look doctrine was first applied in *Greater Boston Television Corp. v. FCC*.⁴⁶ Under the hard look doctrine, the court asserts its competence "to probe the mind of the administrator" in order to satisfy itself that the Commission's decision had been based on a thorough consideration of all the relevant factors⁴⁷ and, thereby, to insure that the agency engaged in reasoned decisionmaking.⁴⁸ One of the purposes of the doctrine is to pierce the strict pleading requirements established by the section 309(b) petition to deny in order to compel the FCC to make a broader investigation of the facts.⁴⁹ The court will remand the Commission's licensing decision for an evidentiary hearing⁵⁰ when it perceives from "a combination of danger signals"⁵¹ that the Commission used the procedural barriers of the section 309 pleading requirements to avoid the substantive issues raised by the petitioner. The hard look doctrine represents a judicial assertion of power based on the requirements of procedural fairness; the D.C. Circuit sets aside the Commission's actions on the grounds that a danger signal indicates that "an impermissible factor . . . entered the decision or a crucial factor had not been considered."⁵² Nevertheless, the opportunity for judicial abuse of this doctrine is evident once one realizes that the determination of exactly what signals are dangerous is made by the court and is governed wholly by its perceptions of inadequacies in the record.⁵³

The partnership doctrine, by contrast, goes beyond merely assuring procedural regularity and represents an assertion of judicial power in the formation of substantive administrative policy. Again, this concept sprang from the

⁴⁶ 444 F.2d at 851. The court concluded that its supervisory function calls on the court to intervene if it becomes aware that the "agency has not really taken a 'hard look' at the salient problems." See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1156-57 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203, 1210 (D.C. Cir.), *cert. denied*, 409 U.S. 1027 (1972).

⁴⁷ See *WAIT Radio*, 418 F.2d at 1156.

⁴⁸ *Greater Boston Television Corp.*, 444 F.2d at 851. The hard look doctrine is "a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." *Id.*

⁴⁹ See text and notes at notes 28-35 *supra*.

⁵⁰ The practical effect of a D.C. Circuit remand to the Commission is to compel a pre-trial settlement between the petitioning citizens group and the broadcast licensee. See *WNCN Listener's Guild*, 610 F.2d at 848-49 (discussion of history of settlement in entertainment format cases).

⁵¹ *Joseph v. FCC*, 404 F.2d 207, 212 (D.C. Cir. 1968).

⁵² *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

⁵³ See Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401, 408; compare *WAIT Radio*, 418 F.2d at 1160 (danger signals found in FCC perfunctory dismissal of application for waiver of FCC rule even though application contained allegations stated with clarity and supported by data), with *Joseph v. FCC*, 404 F.2d at 212 (danger signal found in FCC's approval without hearing of an assignment of radio station to an assignee who was the owner of major newspaper in the service area). Also compare *Citizens Comm. v. FCC (WGKA)*, 436 F.2d at 270 (hard look required when FCC made flat assumption as to unique radio format's unprofitability in its approval of license assignment without hearing), with *Greater Boston Television Corp. v. FCC*, 444 F.2d at 863 (no danger signals found due to the FCC's extensive decisionmaking processes).

fertile dicta in *Greater Boston Television Corp.*, in which the D.C. Circuit asserted that "agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'" ⁵⁴ The court envisioned this newly defined relationship with the agencies as a new departure from its formerly deferential role when it stated:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or that a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.⁵⁵

The scope of review of administrative decisions thus has evolved to a point where the judicial scan represents a thoroughly "hard look." This high intensity judicial supervision monitors administrative discretion in an effort to ensure rational decisionmaking.

Analytically, the hard look and partnership doctrines do not appear to be dissimilar. Under the partnership concept, the court appears to be exercising a right which it had asserted all along: to review the record to determine whether the agency's decision was based on a thorough consideration of all crucial factors without the inclusion of impermissible factors. But language suggesting that the court and the Commission are joined in a "responsible partnership in the public interest"⁵⁶ is ambiguous. Such language indicates a discernible shift in the attitude of the court. It is submitted that this language reveals a willingness by the court to forego its conventional, judicial function based in the common law and the Administrative Procedure Act. Partnership language which claims that the court "is in a real sense part of the total administrative process"⁵⁷ creates the intellectual grounds upon which the court may exceed the mere supervisory function of ascertaining consistency with law and legislative mandate and require the administrative enforcement of substantive policies at great expense to agency discretion.

The entertainment format cases⁵⁸ illustrate how the partnership concept has resulted in a perceptible shift from the traditional standard of judicial

⁵⁴ 444 F.2d at 851-52. See also Polsby, *supra* note 19, at 15-16 n.38, for a discussion of the origins of the court-agency partnership concept.

⁵⁵ The D.C. Circuit court has spoken of the court-agency partnership in other agency contexts. See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d at 597.

⁵⁶ *Public Service Comm'n., State of N.Y. v. FPC*, 487 F.2d 1043, 1067 (D.C. Cir. 1973).

⁵⁷ *Greater Boston Television Corp.*, 444 F.2d at 852.

⁵⁸ See cases cited in note 7 *supra*.

restraint.⁵⁹ The D.C. Circuit has expressed a willingness to remand FCC licensing decisions for procedural flaws which have not been deducible from any prohibition in the Communications Act, but rather are deemed to be offensive to judicial notions of fairness.⁶⁰ The entertainment format cases imply that the D.C. Circuit is willing to go even further to require FCC enforcement of substantive policies which the court claims are mandated by the Communications Act.

II. CATALOG OF CONFLICT: "LAW" AND "POLICY" IN THE ENTERTAINMENT FORMAT CASES

The controversy between the FCC and the D.C. Circuit court centers around the unresolved issue of how to best maximize diversity of entertainment programming. The ideological conflict focuses upon the means to achieve the desired goal of "diversification"—the FCC believing that competitive market forces produce sufficient variety and the D.C. Circuit insisting upon government regulation to prevent a reduction of diversity.

A. Articulation of Entertainment Format Law

Procedurally, each of the entertainment format cases came before the D.C. Circuit court on appeal from an FCC decision to approve assignment of a radio broadcast license and deny to the appellant citizens committees (petitioners below) their request for an evidentiary hearing on alleged factual disputes relevant to the transfer.⁶¹ The substance of the appellants' argument in each of these cases was that the public interest had not been served by the license assignment, since in the process of transfer a unique entertainment format was abandoned,⁶² thereby lessening diversity.

⁵⁹ The partnership concept pervades the collaborative dialogue between the D.C. Circuit and the FCC in these cases. The *WEFM* decision, 506 F.2d 296 (D.C. Cir. 1974) made the message explicit to the Commission that there was no way to reconcile the law of entertainment formats with its own policies. The *WEFM* court indicated how it perceived the institutional partnership and how it should be managed. In the Commission's view, "when such partners come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive." Policy Statement on Entertainment Formats, 60 F.C.C.2d at 865. The D.C. Circuit replied that the "proper relationship between court and agency" was not a partnership between equals. "We should have thought that *WEFM* represents, not a *policy* but rather the *law* of the land . . ." *WNCN Listener's Guild*, 610 F.2d at 854 (original emphasis). Clearly in the joint venture in the public interest, the D.C. Circuit has awarded itself the role of senior managing partner.

⁶⁰ See, e.g., *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d at 265-66 (failure of FCC to assign burden of proof regarding radio station's financial situation to party with access to relevant information, viz. license assignor, is fundamentally unfair); *WNCN Listener's Guild*, 610 F.2d at 846 (FCC failure to disclose important technical document for public comment raised question of procedural fairness to parties opposed to it.)

⁶¹ See note 30 *supra* for a discussion of the role played by citizens committees in FCC public interest litigation and the standing of representatives of the listening public to contest licensing decisions in federal courts.

⁶² *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (assignment of radio license entailed the abandonment of only classical format in Chicago);

1. *Citizens Committee to Save WGKA v. FCC*: The Public's Paramount Right and the Commission's Affirmative Duty

The D.C. Circuit Court of Appeals first indicated its concern over the agency's licensing decisions that involved questions of entertainment format diversity in *Citizens Committee to Save the 'Voice of the Arts in Atlanta' v. FCC*.⁶³ In March 1968, Strauss Broadcasting Company of Atlanta sought approval from the FCC for transfer of the operating rights of the Atlanta radio stations WGKA-AM and WGKA-FM.⁶⁴ Strauss had anticipated the transfer of stock ownership of the radio stations from Glenkaren Associates, Inc.⁶⁵ Glenkaren, the proposed assignor of the radio license, had maintained the only classical music format in Atlanta for many years. Strauss' proposed program format consisted of a "blend of popular favorites, Broadway hits, musical standards, and light classics."⁶⁶ Publication of the proposed transfer provoked a groundswell of public disapproval. In September 1968, the Commission granted the transfer application without a hearing, finding that the financial situation of the assignor, Glenkaren, necessitated the assignment.⁶⁷ The Commission stated in its conclusion that the community surveys conducted by Strauss established that the public interest would be served by the proposed programming and that the informal objections of the listening public raised no substantial question requiring a hearing.⁶⁸

Appellant Citizens Committee filed with the Commission a petition for reconsideration of the agency's decision in response to the Citizens Committee's challenge to the community surveys conducted by Strauss.⁶⁹ The Commission requested Strauss " 'to ascertain by a more comprehensive survey' [than the original ascertainment survey] the tastes and needs of the community."⁷⁰ This statistical survey of program preferences⁷¹ in the listening area indicated that while 73% of those interviewed preferred the popular favorites programming proposed by Strauss, 16% of the public preferred the retention of the classical music format to be abandoned in the transfer.⁷² Using these

Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973) (assignment of radio license entailed abandonment of the only progressive rock format in Toledo); *Lakewood Broadcasting Serv. Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) (petitioners allege abandonment of the only "all news" radio format in Denver metropolitan area); *Citizens Comm. to Save the 'Voice of the Arts in Atlanta' v. FCC (WGKA)*, 436 F.2d 263 (D.C. Cir. 1970) (assignment of radio license entailed change of program format abandoning the only classical radio station in Atlanta).

⁶³ 436 F.2d 263 (D.C. Cir. 1970).

⁶⁴ *Citizens Comm. to Preserve the 'Voice of the Arts in Atlanta' v. FCC, (WGKA)*, 436 F.2d 263, 265 (D.C. Cir. 1970).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 266.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 267.

⁷¹ The Commission's request for empirical data came after a series of allegations and counter-allegations between the petitioner and the proposed assignee concerning the public's preferences in program formats. *Id.* at 266-67.

⁷² *Id.* at 267.

figures, supplied to the Commission by the assignee Strauss, the Commission concluded that "[t]he case here comes down to a choice of program formats—a choice which in the circumstances is one for the judgment of the licensee."⁷³

On appeal, the D.C. Circuit in *Citizens Committee to Preserve the 'Voice of the Arts in Atlanta', WGKA-AM and WGKA-FM v. FCC* (hereinafter *WGKA*)⁷⁴ held that the procedural requirements of the Communications Act call for more detailed evidence than that on which the Commission had based its conclusions, and remanded the decisions back to the FCC for an evidentiary hearing.⁷⁵ The *WGKA* court rejected the Commission's numerical majority argument that since only 16% of the residents of Atlanta preferred classical music, the public interest would unquestionably be served if the programming proposed suited the tastes of a larger number of listeners. In its most important language, the court elaborated on the theme of the public's paramount right to diverse entertainment formats:

In a democracy like ours [the numerical majority argument] might, of course, make perfect sense if there were only one radio channel available to Atlanta. Its rationality becomes less plain when it is remembered that there are some 20 such channels, all owned by the public as a whole, classics lovers and rock enthusiasts alike. The 'public interest, convenience and necessity' can be served in the one case in a way that it cannot be in the other, since *it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly owned public resources whenever that is technically and economically feasible.*⁷⁶

The court broadly construed the public interest to include a concern for diverse entertainment formats. The scope of the "public interest" standard included the public right to the broadest possible range of entertainment formats. The Court insisted that the FCC factor these new rights into the ultimate public interest determination.

The *WGKA* court recognized a public right to diverse entertainment formats which had eluded the Commission's analysis of the public interest when approving the transfer of operating rights to Strauss. The *WGKA* court found the Commission's approach untenable and required it to re-study the various interests involved through "the Congressional requirement of a hearing."⁷⁷ The court framed the factual issues in controversy to be resolved in the evidentiary hearing upon remand: the financial viability of the assignor,⁷⁸ the accuracy of Strauss' preference surveys,⁷⁹ and the availability of an alternative program source.⁸⁰ The key aspect of the *WGKA* opinion was the court's rec-

⁷³ *Id.* Glen Karen Associates, Inc., 19 F.C.C.2d 13 (1969).

⁷⁴ 436 F.2d 263 (D.C. Cir. 1970).

⁷⁵ *Id.* at 272.

⁷⁶ *Id.* at 269 (emphasis supplied).

⁷⁷ *Id.*

⁷⁸ *Id.* at 269-70.

⁷⁹ *Id.* at 270-71.

⁸⁰ *Id.* at 271-72.

ognition of a new public right in diversity which had to be considered by the Commission in future cases. The assertion of this articulated public right clashed headlong with the Commission's existing policy,⁸¹ a policy which was reflected in its conclusion that the choice of program formats is one best left to the licensee's judgment.

The public interest in diverse programming was described by the court as the public's paramount right, a right superior to the private interests of the broadcast companies party to the license assignment. The law as laid down in *WGKA* thus attempted to compel the Commission to subordinate the broadcaster's economic interests to the public's paramount right in those instances where the marketplace had broken down and tended to constrict the available selection of entertainment formats rather than foster their diversity. The broadcaster's first amendment right of free speech,⁸² given great deference by Commission policy, was deemed by the *WGKA* court to be less worthy of protection than the competing public interest right of listeners.⁸³ Twice in the *WGKA* opinion the court suggested that the Commission had derogated the public's interest by promoting merely the private economic interests of the broadcasters. The court made particular mention of Strauss' statement in the first amendment to its application for license assignment. In that amendment Strauss commented that "[t]here has not been any general acceptance by the public or *commercial advertisers* of classical music"⁸⁴ to support its proposed change in format. In commenting on the nature of the Commission's duty in

⁸¹ Commission policy regarding programming had not been extended beyond the non-entertainment, informational aspects of a broadcaster's format. The only FCC regulations implemented to ensure that the broadcaster's programming was responsive to the community entailed the ascertainment process. See notes 103 & 104 *infra* and accompanying text. The broadcast licensee has been given, in great measure, the responsibility for programming to meet the needs and interests of the public and "his honest and prudent judgment will be accorded great weight by the Commission." See Report and Statement of Policy re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291 (1960). Commission policy assumed that no businessman, including broadcasters, could possibly succeed in business without responding to the public's wants and needs. Yet the duties of the license applicant in the ascertainment process do not require canvassing the public as to their program preferences, but merely require the determination of community problems. *Id.* In addition, the broadcaster is not required to note the frequency of responses by the sample to a particular problem, nor the intensity of those responses. See generally Note, *Judicial Review of FCC Programming Diversity Regulation*, 75 COLUM. L. REV. at 402-19. In essence, the ascertainment process, as conceived by Commission policy, required identification and not quantification of the community response to problems.

⁸² As Judge Bazelon pointed out in his concurrence in *WEFM*: "There can be little doubt at this late date that artistic or entertainment programming is within the scope of the First Amendment." *WEFM*, 506 F.2d at 271 n.9 (Bazelon, C.J., concurring) (citing *Jenkins v. Georgia*, 418 U.S. 153 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁸³ The D.C. Circuit appeared to be operating within the bounds of the broad dictum of the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1979). In *Red Lion*, the Supreme Court arranged the order of competing first amendment claims by stating: "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount." *Id.* at 390.

⁸⁴ 436 F.2d at 266 (emphasis in original).

making its public interest finding the court stated: "The Commission's judgmental function does not end simply upon a showing that a numerical majority prefer the Beatles to Beethoven, impressive as that fact may be in the eyes of the advertisers."⁸⁵

The D.C. Circuit appears to have made two points through these remarks. First, in the court's view, broadcasters tend to program not in response to public preferences, but in response to advertising dollars. Reliance upon the business judgment of a broadcaster in the face of widespread public dissatisfaction to a proposed format change tends to emphasize the economic interests of the broadcasters and their advertisers to the detriment of an expressed public preference and in derogation of a public right. Second, the exercise of the Commission's duty to promote the public interest requires it to make more than rough judgments as to how a license assignment serves that interest. In the *WGKA* court's view, the Commission is statutorily required to promote the interests of a minority of the listening public when they constitute a "not insignificant" portion of the service area "whenever that is technically and economically feasible."⁸⁶

The *WGKA* court closely examined the Commission's reasoning through the reviewing lens of the hard look doctrine.⁸⁷ The court found that the Commission had exercised its discretion without considering all the crucial factors⁸⁸ relevant to the exercise of that discretion. The Commission's original order approving the license assignment in *WGKA* had been held without a hearing because the Commission believed that there existed no substantial and material questions of fact bearing significantly upon the exercise of its judgment.⁸⁹ In its initial order the Commission had recited as fact that the unprofitability of the assignor's broadcast operation created the financial necessity for the transfer without any supporting factual references.⁹⁰ The parties to the assignment had submitted financial reports which indicated that station expenditures had exceeded its revenues for six years prior to the transfer.⁹¹ The appellant Citizens Committee argued successfully to the D.C. Circuit that such a financial analysis was not the proper measure of profitability. The appellant alleged that certain large capital expenditures for the improvement of the station's broadcast facilities had caused the financial reports

⁸⁵ *Id.* at 269.

⁸⁶ *Id.*

⁸⁷ *Id.* at 270.

⁸⁸ The court was unpersuaded by the rationality of the Commission's public interest determination for several reasons. First, the Commission's assumption concerning the financial necessity of transferring Glenkaren's license "appears in the Commission's initial order without any supporting factual references." *WGKA*, 436 F.2d at 269. Second, the controversy surrounding the accuracy of Strauss' preference surveys is precisely the type of situation "which motivated the Congress to stress the availability to the Commission of the hearing procedure." *Id.* at 271. Finally, the availability of an alternative source for the abandoned format is a factor "which would be highly relevant to a reasoned disposition" of the public interest issue, and "it is obviously important that this dispute of fact be explored and resolved." *Id.* at 271-72.

⁸⁹ *Glen Karen Associates, Inc.*, 19 F.C.C.2d 13 (1969).

⁹⁰ *WGKA*, 436 F.2d at 209.

⁹¹ *Id.*

to reflect a distorted picture of the station's financial situation.⁹² The court in *WGKA* indicated that the financial viability of a station's format was an important factor to be considered by the Commission in determining whether retention of the endangered unique format was economically feasible.⁹³ The *WGKA* court stated, however, that it did not pretend to know what the actual financial situation of the assignor was, or what the remanded record would reveal upon hearing. The court's decision to remand was based upon "the Commission's flat assumption" as to the unprofitability of the station's operation which required the closer look of a formal evidentiary hearing.⁹⁴

The *WGKA* court then determined that a separate procedural defect in the record constituted independent grounds for remand. In upholding its original order approving assignment, the Commission stated that a substitute station existed which provided substantially the same classical format as that abandoned by *WGKA*.⁹⁵ In response to this statement, the appellant Citizens Committee made a factual allegation to the Commission that the substitute's signal "reached few Atlanta listeners at an acceptable level of signal quality."⁹⁶ At oral argument before the D.C. Circuit none of the parties to the *WGKA* case—the Citizens Committee, Strauss Broadcasting, or the former station owner, Glenkaren Associates, Inc.—were familiar with the contour charts "which would be highly relevant to a reasoned disposition of this question."⁹⁷ The *WGKA* court went on to conclude that: "Since the Commission appears to justify its action in some considerable part by the asserted availability to Atlanta listeners of at least a daytime classical format, it is obviously important that this dispute of fact be explored and resolved."⁹⁸

In *WGKA* the court established two important principles which would be developed more fully in the later entertainment format cases.⁹⁹ First, the

⁹² *Id.* at 269-70.

⁹³ *Id.*

⁹⁴ *Id.* at 270.

⁹⁵ *Id.* at 271. The Commission accepted the Strauss assertion that a daytime-only, 500-watt classical station in Decatur, Georgia (WOMN), 10 miles out of Atlanta, adequately served the needs of *WGKA*'s former audience. The Commission's order recites that WOMN serves a "large portion of the city of Atlanta." *Id.*

⁹⁶ *Id.* at 267.

⁹⁷ *Id.* at 271.

⁹⁸ *Id.* at 271-72.

⁹⁹ These two principles had been foreshadowed in *Joseph v. FCC*, 404 F.2d 207 (D.C. Cir. 1968). First, although *Joseph* is not an entertainment format case, it demonstrates the extent to which the reviewing court will invalidate a Commission order which rejects a citizen's petition to deny assignment for mere technical pleading errors. The *Joseph* court emphasized that it rejected the need for mechanical compliance, with the prerequisites for judicial review, *id.* at 210, and would look with leniency upon a citizen's claim which, though formally incorrect, had substantially complied with the requirements for review. *Id.* The court made no effort to disguise its protective attitude towards claims from members of the public. It stressed that the appellant was a representative of the listening public and as such did not have the same sort of Washington representation to uncover threats to their interests, or to display apparatus to combat them, as do parties whose interests are economic." *Id.* The court thereby heightened the role of the listening public in the Commission's license assignment decisionmaking process, expressing a distinct bias towards protecting the public's paramount right.

D.C. Circuit established conclusively the paramount right of the listening public to a diversity of entertainment formats. Relying on its interpretation of the Communications Act of 1934, the *WGKA* court stated that the public interest is served only when maximum diversity is promoted "whenever that is technically and economically feasible."¹⁰⁰ Second, the nature of the Commission's duty in deciding whether an assignment of a radio license would be in the public interest had been greatly broadened. The *WGKA* court found in the Commission's failure to seriously investigate the financial viability of the assignor's operations or the availability of an alternative source for the abandoned format a sufficient justification to remand the administrative record for an evidentiary hearing. In hard look doctrine terms, the court found that the "crucial factors" had not been considered by the Commission before issuing its approval order.¹⁰¹ Although justified on procedural grounds, the remand carried with it the first murmurs of an independently conceived set of substantive criteria to be implemented by the Commission in making its public interest finding.

The preference survey submitted by the proposed assignee Strauss Broadcasting to substantiate its application created another potential conflict between policy and law in the entertainment format cases. The Citizens Committee urged in its amendments to its petition for reconsideration that Strauss had misrepresented the support for the proposed format change in its original ascertainment survey of thirteen community leaders. The Committee attached to its amendments affidavits of six of the interviewees which contradicted the summaries of the interviews submitted by Strauss. In passing on the materiality of this alleged misrepresentation, the D.C. Circuit implicitly reviewed the Commission's programming policy. The Commission's programming policy as articulated in the Commission's *En Banc* Programming Inquiry¹⁰² and its *Primer on Ascertainment*¹⁰³ requires the broadcast appli-

Second, the *Joseph* court defined the nature and depth of the Commission's inquiry when making its public interest finding. The court interpreted the Communications Act to impose upon the Commission an affirmative duty to designate an assignment decision for a public hearing if the petition to deny raises "a substantial and material question of fact or if the Commission is unable 'for any reason' " to find that the public interest is served by granting the assignment. *Id.* at 211. From this language, the court created an independent duty of factual investigation to be made by the FCC during its licensing decisions. The nature of this duty was later elaborated in *WEFM*, 506 F.2d at 262 n.21. "Even in the absence of intervention (by public protestants), the FCC is obliged to be certain it is not dealing with a formal change affected with the public interest" *Id.*

¹⁰⁰ 436 F.2d at 209.

¹⁰¹ The *WGKA* court agreed that the Commission has discretion regarding the existence of material and substantial questions of fact which bear on the Commission's judgment and which ought not to be disturbed "unless it is palpably abused." *Id.* at 268. Nevertheless, the court went on to state that the Commission's bare assertion did not answer the question of whether that discretion in this particular case was required, prior to its exercise, to be informed as accurately as possible by reliable facts relevant to that exercise. *Id.* at 268-69.

¹⁰² 25 Fed. Reg. 7291 (1960) (entertainment format is a matter best left to the discretion of the licensee). See also note 72 *supra* and accompanying text.

¹⁰³ See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

cant to conduct interviews with representatives in the service area to determine community problems.¹⁰⁴ Explicitly rejected in the Primer was the notion that the Commission required the applicant to determine the community's program preferences.¹⁰⁵ There appeared to be a manifest contradiction between the D.C. Circuit and the Commission as to what the agency's policy ought to be regarding the determination of the public's program preferences. The Commission required no inquiry as to the preferences in any case, defining the nature of the broadcaster's public interest duty in terms of responding to community problems. The D.C. Circuit, however, would have given weight to any proffered empirical evidence demonstrating the listening public's preferences in those cases involving the abandonment of a unique entertainment format.

The *WGKA* court did not determine whether a preference survey was required in these instances, thereby avoiding direct conflict with articulated Commission policy. The court side-stepped the potential conflict in its opinion: "We are not disposed, at least on this record, to attribute [actual misrepresentation] to intervenor, or to permit appellant's allegations in this regard to play a part in the conclusions we reach as to the proper disposition of this appeal."¹⁰⁶ The court suggested that the factual variance may have been due to the confusion and misunderstanding "inherent in a process in which the statements and opinions of one individual are sought to be determined from what two adversary parties say that he said or thinks."¹⁰⁷ Rather than ascribe actual misrepresentation as the purpose of the assignee Strauss, the court remanded the issue of preferences, along with the issues of financial viability and alternative sources, for resolution "in the crucible of an evidentiary hearing."¹⁰⁸ Thus, the court created confusion as to the role of preference surveys in making licensing decisions.¹⁰⁹ The obscurity of the court's opinion served, predictably, to generate future litigation which centered on this issue.

¹⁰⁴ *Id.* at 663-71. See also *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976) (ascertainment required to be continuous). Two basic areas of controversy surrounding the ascertainment process requirement should be noted. First, ascertainment is essentially procedural, *i.e.* the Commission has come to rely upon the efficacy of the process of ascertainment to the point where the FCC assumes that it *guarantees* rather than merely fosters responsiveness to the community and its problems. For a more complete analysis of the difficulties encountered by a petitioner in arguing the unresponsiveness of a broadcaster's programming to community problems, see Note, *Judicial Review of FCC Programming Diversity Regulation*, 75 COLUM. L. REV. at 402-19. Second, the purpose of the ascertainment procedure is to determine community problems, not preferences as to program content or formats. As explained in the text, *infra*, this limited function of the procedural duties of the broadcast licensee has created anomalies and confusion in the entertainment format cases.

¹⁰⁵ 27 F.C.C.2d at 656-57.

¹⁰⁶ 436 F.2d at 271.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ In *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972), decided two years after the *WGKA* case, the court found that the assignee had made a reasonable and good faith effort to ascertain the needs and interests of the community in accordance with the Commission's Primer on the Ascertainment of Community Problems by Broadcast Applicants and *had made no misrepresentations in that regard*. *Id.* at 411. Although the *Hartford Communications* court did not intimate what might consti-

2. *Lakewood Broadcasting Service, Inc. v. FCC*: The Tentative Accommodations

The FCC had not acted upon the court's suggestion in *WGKA* to formulate standards for judging the effects of entertainment format diversity. Shortly after its decision in *WGKA*, the court was confronted by a similar suit brought by members of the listening public who alleged loss of a unique format incident to a transfer of radio licenses. The facts presented in *Lakewood Broadcasting Service, Inc. v. FCC*¹¹⁰ were quite similar to those in *WGKA*; the procedure by which the case came before the D.C. Circuit court was identical. In 1971 executors of the deceased owner of KBTR (AM) Radio Station had contracted to sell the "all news" station to Mission Denver Company.¹¹¹ Mission Denver, the proposed license assignee, had indicated in its assignment application before the Commission a desire to change KBTR (AM)'s format to a country and western music format.¹¹² Announcement of this proposed change engendered petitions to deny from Lakewood Broadcasting Service, Inc., another country and western Denver station and primary competitor of the altered KBTR (AM) music format, and Colorado Citizens for Broadcasting, a public interest citizens group. The petitioners jointly sought a hearing on the public interest ramifications of abandoning the unique, all news format, and Lakewood additionally challenged the financial qualifications of Mission Denver, the proposed assignee.¹¹³ The Commission found that a hearing was not required¹¹⁴ and determined that the public interest would best be served by granting the assignment application.¹¹⁵ On appeal, the D.C. Circuit affirmed the Commission's determination that no material and substantial questions of fact were presented by the petitioners, thereby permitting the

tute a material misrepresentation, it did indicate the relationship between such misrepresentation and the need for a public hearing. The court stated: "Even where there are factual disputes, there is no automatic hearing requirement, for '[c]ontradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest.'" *Id.* at 411-12 (quoting *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968)). The *Hartford Communications* court further elaborated the materiality requirement by quoting from its own analysis in another recent case. "[A] hearing is not required to resolve issues which the Commission finds are either not 'substantial' or 'material', regardless of whether the facts involved are in dispute." *Id.* at 412 (quoting *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972)). In the final analysis, the court concluded that the determination as to whether the factual issues are substantial and material depends on whether "the relevant facts were adequately presented" to the Commission and whether anything properly before the Commission suggests "that a further hearing would produce additional facts that might change the result." *Id. Accord*, *Capitol Broadcasting Co. v. FCC*, 324 F.2d 402, 405 (D.C. Cir. 1963). *See also* *Marsh v. FCC*, 436 F.2d 132, 135-36 (D.C. Cir. 1970).

¹¹⁰ 478 F.2d 919 (D.C. Cir. 1973).

¹¹¹ *Id.* at 921-22.

¹¹² *Id.* at 922.

¹¹³ *Id.*

¹¹⁴ Charles A. Haskell, 36 F.C.C.2d 78, 86 (1972). The Commission's opinion represented what the D.C. Circuit court termed "a painstakingly thorough decision," *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d at 922.

¹¹⁵ 36 F.C.C.2d at 88.

Commission to decide the case without an evidentiary hearing.¹¹⁶ The *Lakewood* court agreed with the Commission's conclusion that the public interest would be served by granting the application and found that the Commission had engaged in rational decisionmaking in reaching that conclusion.¹¹⁷

In deciding *Lakewood*, the D.C. Circuit clarified the issue of material misrepresentation. The appellant Citizens Committee (petitioner below) claimed that the interview summaries submitted to the Commission with the assignee's application for license transfer were defective.¹¹⁸ The Committee alleged that the interviewees were not informed of the proposed format change incident to the assignment, and, therefore, the applicant had misrepresented the nature and purpose of the interview.¹¹⁹ The Committee petitioned the court to remand the record for an evidentiary hearing since such actions raised factual questions concerning the adequacy and accuracy of the proffered ascertainment data.¹²⁰ The *Lakewood* court agreed with the Commission that the Committee's allegation of misrepresentation was immaterial to the Commission's decision, since it had resulted from a "persistent 'misreading of the purpose of ascertainment procedures.'"¹²¹ Before proceeding to distinguish *WGKA*, the D.C. Circuit spoke in one voice with the Commission as to the correctness of the agency's programming policy procedures: "Clearly the Primer elucidates that the ascertainment procedures are meant to determine the problems of the community, e.g., drug abuse, pollution, race relations, crime, as opposed to the programming preferences of the interviewees."¹²²

The *Lakewood* court distinguished *WGKA* on the material misrepresentation issue. The court observed that the summaries submitted by the applicant in *WGKA* were expressly designed to bolster the applicant's assertion that there had been no widespread public preference for the abandoned format.¹²³ Preferences were at issue in *WGKA*, and, to the extent that the summaries did not accurately reflect those preferences, the materiality of the misrepresentations was manifest.¹²⁴ Adopting the logic of the Commission in its license decision, the *Lakewood* court continued: "In the situation *sub judice*, however, statements of preference simply are not relevant to the ascertainment survey as presently constituted, and so the Commission's conclusion that the alleged misrepresentations regarding format preferences do not raise material issues of fact cannot be faulted."¹²⁵ Thus, *WGKA* and *Lakewood*, in combination, set forth the D.C. Circuit's views on the issue of misrepresentation. The court summarized its position in a footnote in *Lakewood*:

Thus the absence of any references to preference in the ascertainment survey cannot be considered a misrepresentation. If the format

¹¹⁶ 478 F.2d at 925.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 923.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (quoting Charles A. Haskell, 36 F.C.C.2d at 84-85 (1972)).

¹²² 478 F.2d at 923.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

change does become a public issue, however, and surveys *et al.* are submitted by the applicant to support [its] proposals to change formats, misrepresentations contained therein certainly become material.¹²⁶

It is tempting to read *Lakewood* as the beginning of an accommodation between the D.C. Circuit and the Commission. By resolving the issue of misrepresentation in accordance with the philosophy of ascertainment contained in the Commission's Primer, the court and the Commission seemed finally to be in accord. Additionally, language in the opinion's final footnote explained the court's self-perceived role in the entertainment format cases through *Lakewood*. Taken at face value, this language was encouraging to those wishing to settle the institutional antagonism. The court stated: "While we have recognized that format changes may impair the public's paramount interest in diversified programming, we have never attempted to set out specific guidelines for achieving the marketplace ideal. The first, tentative steps into this complex area of regulation must be taken by the Commission."¹²⁷ Hopes for settlement were further bolstered by similar conciliatory language in the Commission's Primer, the agency's guide to programming issues promulgated after the *WGKA* opinion.¹²⁸

Nevertheless, the sought-after institutional settlement did not result from these tentative accommodations. The D.C. Circuit, following the lead of *WGKA*, explained that the law of entertainment formats was still in a state of transition.¹²⁹ As the judicially imposed standards became more fully expounded, the institutional rift became increasingly apparent.

3. *Citizens Committee to Keep Progressive Rock v. FCC*: The Criteria Explained

In *Citizens Committee to Keep Progressive Rock v. FCC*,¹³⁰ the court solidified the law regarding entertainment formats by expounding the meaning of the prior case law in three areas: (1) determination of when a public interest issue is raised in assignments—the "public grumblings" test;¹³¹ (2) elaboration of the financial viability standard;¹³² and (3) further definition of the meaning of

¹²⁶ *Id.* at 924 n.9.

¹²⁷ *Id.* at 925 n.14.

¹²⁸ Primer on Ascertainment, 27 F.C.C.2d 650, 680 (1971). "Suffice it to say that any application involving a *substantial change in program format* including assignment and transfer applications . . . will be scrutinized in light of the [WCKA decision]; and applicants should be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other stations." *Id.* at 680.

¹²⁹ *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d at 925 n.14.

¹³⁰ 478 F.2d 926 (D.C. Cir. 1973).

¹³¹ *Id.* at 934. The "public grumblings" test was introduced in *Progressive Rock*. Upon becoming aware of a groundswell of public dissatisfaction over a proposed format change, the Commission is obliged to consider public sentiment in making its "public interest" determination. *Id.*

¹³² *Id.* at 931. The "financial viability" of an abandoned entertainment format is a factor to be considered by the Commission once the "public interest" is brought into issue by the "public grumblings" test of listeners support.

"available alternative sources."¹³³ In *Progressive Rock*, the D.C. Circuit heard, yet again, another citizens committee appeal from an order of the FCC affirming a prior grant of the assignment application.¹³⁴ Twin States Broadcasting, Inc. operated the radio station WGLN (FM) in Sylvania, Ohio—a suburban commuter community outside Toledo. After experimenting with two equally unsuccessful entertainment formats, Twin States sought FCC approval to assign its license to Midwestern Broadcasting Corp.¹³⁵ Midwestern proposed to change the existing golden oldies format to middle of the road programming.¹³⁶ While application for the assignment was still pending, WGLN (FM) began experimenting with a progressive rock format. Success with the progressive rock programming prompted the management to make a complete change of format.¹³⁷ On June 30, 1972, the Commission released an order affirming the previous grant of the Twin States application.¹³⁸ Incident to its assignment order, the FCC found that the license grant would be in the public interest.¹³⁹

A number of avid progressive rock listeners organized a citizens committee to petition the FCC for reconsideration. Despite allegations by the committee that the progressive rock format was unique to the Toledo area, and that middle of the road programming was offered on at least six other frequencies,¹⁴⁰ the Commission denied the petitioner's request for a hearing on the issue.¹⁴¹ On appeal, the D.C. Circuit court reversed the Commission's order and remanded the case for further proceedings consistent with the *Progressive Rock* opinion.¹⁴²

The *Progressive Rock* court clearly articulated the threshold at which the issue of public interest in a format change rises to the level requiring the Commission's resolution prior to license assignment.¹⁴³ The court reasoned that when a format changes, the public interest is at issue. The Commission is required to consider all relevant factors in making its ultimate determination.¹⁴⁴ The *Progressive Rock* court found that the public interest issue is

¹³³ *Id.* at 932. Clearly, an entertainment format cannot be considered "unique" unless there are no alternative sources available to disaffected listeners.

¹³⁴ Twin States Broadcasting, Inc., 35 F.C.C.2d 969 (1972).

¹³⁵ *Id.* at 969.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 973.

¹³⁹ *Id.*

¹⁴⁰ Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 928 (D.C. Cir. 1973).

¹⁴¹ *Id.*

¹⁴² *Id.* at 934.

¹⁴³ *Id.* at 929 n.7. The court proposed some guidelines on the public gumblings test. The public interest issue is only raised if

a 'significant minority' voices support for the format to be discontinued. *De minimis non curant arbitri*, but neither may the Commission ignore a minority's petitions nor should it establish a quantitative minimum. Each situation is different and should be treated as such. Certainly the degree of support for retention of a unique format can be of critical importance in what otherwise are 'close cases.'

Id.

¹⁴⁴ *Id.* at 930.

raised during the transfer process involving the change of a unique format "when the public grumbling reaches significant proportions."¹⁴⁵ At this point, the court explained, unresolved issues regarding the extent of support for the format become material, "and if substantial then the proper procedure is either a survey of the area residents or a hearing on the issue."¹⁴⁶

The court also made explicit two criteria for judging the public interest in a license assignment involving a change in format: the financial viability and the alternative source concepts originally introduced in *WGKA*.¹⁴⁷ The court observed with dismay that its prior decision in *WGKA* "had become the subject of dichotomous interpretation."¹⁴⁸ Consequently, the court proceeded to articulate these issues more fully. Addressing itself first to the financial viability issue, the court agreed with the allegations of the citizens committee that there existed a legitimate dispute as to the financial viability of the endangered format.¹⁴⁹ Despite the fact that the assignor had experienced financial difficulties in the past with various other entertainment formats,¹⁵⁰ in the court's opinion those losses were not demonstrated to have been caused by the endangered format. On the contrary, evidence before the court indicated that the format itself was commercially successful.¹⁵¹ The *Progressive Rock* court clarified its financial viability criteria by focusing on the economic feasibility of the format itself and not on the broadcaster's financial predicament. As the court phrased it, "The question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the *format* is so economically unfeasible that an assignment encompassing a *format change* should be granted."¹⁵² The court found that the financial losses of the licensee under prior formats would become relevant to the format change determination by the Commission only "in the event that no purchaser can be

¹⁴⁵ *Id.* at 934.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 930.

¹⁴⁸ *Id.* at 929.

¹⁴⁹ *Id.* at 931-32.

¹⁵⁰ *Id.* at 928.

¹⁵¹ *Id.* at 931. The petitioners had produced affidavits from station employees at Twin States who asserted that the progressive rock format was rapidly achieving financial viability. Industry surveys indicated a significant rise in audience gains by the station. Additionally, the viability of the format was demonstrated by the fact that, as a result of the format's success, the station adjusted its advertising rates up 500% and instituted strict advertising policies. *Id.* The *Progressive Rock* court was careful to distinguish the economic feasibility tests used in the entertainment format cases from that used to avoid application of the Commission's three year rule, 47 C.F.R. § 73.3597 (1979) (formerly 47 C.F.R. § 1.597(a)). The three year rule was designed to prevent trafficking in broadcast licenses, an evil encouraged by the fact that broadcast licenses are scarce and in high demand among broadcasters. Under the three year rule, the assignment of a station operated by a proposed assignor for less than three years creates a presumption of trafficking which warrants resolution in a public hearing under section 309(e). *Id.* If an assignor can make an affirmative factual showing, supported by affidavits, that due to a lack of capital the proposed assignment or transfer of control over the station would be in the public interest, the hearing requirement can be suspended. *Id.*

¹⁵² 478 F.2d at 931 (emphasis in original).

found willing to program the new economically feasible format . . . , and the public is thus faced with abandonment of the channel altogether."¹⁵³ The assignor's financial reports were dismissed as only minimally relevant to the question of financial viability and the factual dispute was assigned for disposition at an evidentiary hearing.¹⁵⁴

Turning to the alternative source criteria, the court made legislative line-drawing decisions as to what comprises an entertainment format. The Commission had based its approval of assignment upon its assertion that the service area had two other stations which provided a similar entertainment format.¹⁵⁵ The assertion rested on the conclusion that other stations offered top forty formats which, though not an exact duplicate of the abandoned format, did include some progressive rock music.¹⁵⁶ The court could not find that this bare assertion by the Commission constituted a showing of the availability of an alternative format source, and instead found that the assertion had been made "in the face of contrary allegations by the appellant."¹⁵⁷ After designating this issue for a hearing, the court announced: "We deal here with format, not occasional duplication of selections."¹⁵⁸

The circuit court demonstrated its dissatisfaction with the Commission's reluctance to follow its lead set down in *WGKA*. The court perceived a manifestation of this reluctance in the Commission's oral and written argument in *Lakewood* and *Progressive Rock*.¹⁵⁹ The court commented that the Commission's argument for a limiting interpretation of the entertainment format law indicated an unwillingness to encompass the judicial pronouncements of the *WGKA* decision into its regulatory scheme.¹⁶⁰ The growing suspicion of the court compelled it to articulate more precisely those criteria which it asserted must be considered by the Commission in making its public interest determination. This suspicion led the court to further remark, "not altogether facetiously, that the Commission would be more than willing to limit the procedural effect of [*WGKA*] to cases involving Atlanta classical music stations."¹⁶¹

Thus, in the court's view, agency inaction in the formulation of regulations amounted to a dereliction of the Commission's affirmative duty to promote the public interest. The administrative regulations envisioned by the court in its earlier entertainment format cases were not forthcoming. In the absence of agency rules protecting the public interest, the court returned the record to the agency for another hard look to be made in the crucible of a public evidentiary hearing.

¹⁵³ *Id.* at n.14.

¹⁵⁴ *Id.* at 934.

¹⁵⁵ *Twin States Broadcasting, Inc.*, 36 F.C.C.2d 650, 652 (1972) (denial of motion to stay order).

¹⁵⁶ *Id.*

¹⁵⁷ 478 F.2d at 932.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 930.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

4. *Citizens Committee to Save WEFM v. FCC*: The Complete Judicial Statement

The law regarding entertainment formats was presented in its clearest and most complete form in *Citizens Committee to Save WEFM v. FCC*¹⁶² (*WEFM*). The factual context of the case is a variation upon the theme running through the entertainment format cases. A citizens committee was organized to contest the assignment of the license to radio station WEFM (FM), Chicago, by Zenith Radio Corporation to GCC Communications of Chicago, Inc.¹⁶³ In its application for assignment, GCC proposed to present a contemporary music format and abandon the existing classical programming.¹⁶⁴ In December, 1972, the FCC issued a memorandum opinion denying the committee all relief and granting the assignment.¹⁶⁵ The Commission denied the request for a hearing, reciting as fact that the Chicago area was being served by two other classical stations¹⁶⁶ and that the radio station had been suffering continuous operating losses under Zenith's ownership.¹⁶⁷ This position was reiterated by the Commission in its denial of reconsideration¹⁶⁸ which additionally stated its refusal to question Zenith's claimed losses since the petitioner had alleged no facts casting doubt on them.¹⁶⁹

On appeal, the D.C. Circuit reversed the Commission's decision and remanded the case to the FCC for a hearing¹⁷⁰ on the issues of the suitability of alternative sources,¹⁷¹ the assignee's financial viability,¹⁷² and the misrepresentation created by the assignee's survey.¹⁷³ The majority opinion written by Judge McGowan contained the strongest language to date disapproving of the Commission's "abdication of its responsibility."¹⁷⁴ In this opinion Judge

¹⁶² 506 F.2d 246 (D.C. Cir. 1974).

¹⁶³ *Id.* at 249.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 255-56.

¹⁶⁶ Zenith Radio Corp., 38 F.C.C.2d 838, 839 (1972) (order of assignment).

¹⁶⁷ *Id.* at 840-41.

¹⁶⁸ Zenith Radio Corp., 40 F.C.C.2d 223 (1973) (denial of reconsideration).

¹⁶⁹ *Id.* at 230. Appended to this denial of reconsideration was an opinion entitled "Additional Views of Chairman Burch in Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hook Joined" that set out the Commissioners' underlying analysis on which the FCC's decision in this case was based. *Id.*

¹⁷⁰ 506 F.2d at 268.

¹⁷¹ *Id.* at 265.

¹⁷² *Id.* at 266.

¹⁷³ *Id.* In addition, the court commented on the "Additional Views" appendix, disputing the Commissioners' theoretical basis for its hands-off policy in the entertainment format area. *Id.* at 267.

¹⁷⁴ *Id.* at 262 n.21. The opinion was accompanied by an elaborate discussion by Judge Bazelon on the constitutional implications of government regulation to achieve diversity of entertainment formats. *WEFM*, 506 F.2d at 268 (Bazelon, C.J., concurring) (a broad analysis of the traditional first amendment scheme and its relationship to FCC regulatory policy). Additionally, Judges Robb and MacKinnon expressed their views in two separate dissents to the majority. *WEFM*, 506 F.2d at 284 (Robb, J., dissenting) (no substantial issue of fact existed regarding the availability of an alternative source for the proposed format to be abandoned during assignment); *WEFM*, 506 F.2d at 285 (MacKinnon, J., dissenting) (all government and judicial interference into the content of radio broadcasts should be minimized). The *WEFM* opinion indicates not only that the institutional conflict had reached severe proportions, but also that there was grow-

McGowan reviewed the prior case law in an effort to consolidate and synthesize the court's position.¹⁷⁵ The majority also undertook to describe in depth the nature of the Commission's "affirmative obligation," claiming that the agency's own perception of its role in these matters had been misperceived.¹⁷⁶ More importantly, since the Commission's opinion contained a broad explanation of the underlying analysis upon which the FCC based its decision, Judge McGowan took the opportunity to address the Commission's policy arguments directly, attacking specifically the agency's reliance on its policy of free competition.¹⁷⁷

Judge McGowan further described the Commission's resolution of the issues as having been dictated by its own policy, rather than by its analysis of the economic feasibility of the endangered musical format: "The Commission's resolution of this issue . . . depended not on the claimed losses, but rather on its view of its *own role* in cases where the format to be abandoned is not unique."¹⁷⁸ The court noted that the Commission had decided that it did not have to involve itself in an evidentiary hearing since the availability of alternative formats prevented WEFM from being characterized as a unique format.¹⁷⁹ Nevertheless, the *WEFM* court clarified and broadened its notion of the Commission's role in a license assignment encompassing a format change. The Commission was obligated, according to the court, to determine whether the format to be lost is "unique or *otherwise serves a specialized audience that would feel its loss.*"¹⁸⁰ This language encompassed the rationale of Commissioner Johnson's dissent to the FCC order approving the license assignment in the *WEFM* case.¹⁸¹ Commissioner Johnson had argued that the effect of *WGKA* could not be limited to those instances when a unique format was involved, but rather the public interest consideration should depend on whether "the effect of the proposed change [lessens] the diversity of radio service, not necessarily the total elimination of a particular format."¹⁸² The effect of the court's language was to compel the Commission to assess the impact of any format change in order to guarantee against the *lessening* of diversity before granting approval of the assignment.

The *WEFM* court's definition of the Commission's role in making its public interest determination resulted from the court's construction of the Communications Act¹⁸³ as it applies to the requirement of evidentiary hearings.

ing dissension on the bench itself concerning the wisdom of the court's latest assertion of power.

¹⁷⁵ *Id.* at 260-62. *See id.* at 262 for an excellent brief summarization by the court of the teaching of the entertainment format cases.

¹⁷⁶ *Id.* at 202 n.21.

¹⁷⁷ *Id.* at 267.

¹⁷⁸ *Id.* at 256 (emphasis supplied).

¹⁷⁹ *Id.* at 262.

¹⁸⁰ *Id.* (emphasis supplied).

¹⁸¹ *See Zenith Radio Corp.*, 38 F.C.C.2d at 848 (Johnson, Comm'r. dissenting).

¹⁸² *Id.* at 850.

¹⁸³ 47 U.S.C. § 309(d)(2) (1976) in relevant part provides:

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact *and* that a grant of the application

The court found from the language of the act two situations that required the FCC to hold such a hearing. That each of these situations required a hearing appeared "clear from the face of the statute."¹⁸⁴ The first instance had been fully elaborated in earlier decisions.¹⁸⁵ The court observed that it had previously found a hearing necessary when substantial and material questions are raised by the petition to deny.¹⁸⁶ In addition, the court found that the language of the Act required a hearing when the Commission, for any reason, is unable to make its public interest determination.¹⁸⁷ As the *WEFM* court concluded, "This situation might obtain with respect to a particular application regardless of whether there are disputed fact issues as opposed to a simple need for more information."¹⁸⁸ The court appeared to be clarifying its conception of the Commission's role in protecting the public interest when approving license assignments. In the court's opinion, the FCC's role in determining the public interest should be more active than that of merely refuting allegations contained in petitions to deny that the assignment is not in the public interest. As the *WEFM* court explained, "The FCC's mandate to approve applications consistent with the public interest, and only such applications, is not dependent upon the assiduousness of intervenors such as the [citizens] Committee. An agency charged with regulation in the public interest cannot abdicate its responsibility, preferring for itself the role of an umpire between the regulated industry and public protestants."¹⁸⁹

In summary, the *WEFM* definition of the Commission's role in the format cases imposed burdens of inquiry additional to those required by Commission policy. First, the existence of a petition to deny was no longer necessary since "the FCC's mandate to approve applications consistent with the public interest . . . is not dependent upon the assiduousness of intervenors such as the Committee."¹⁹⁰ The Commission instead must independently consider format changes and their effect upon the diversity of available entertainment formats. Second, the threshold at which the format change becomes affected by the public interest because of the prior format's uniqueness had been lowered.

would be consistent with (the public interest, convenience, or necessity), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience and necessity], it shall proceed as provided in subsection (e) of this section.

Id. (emphasis added). Subsection (e) governs the procedures for a formal evidentiary hearing on unresolved issues of fact.

¹⁸⁴ *Id.* at 259.

¹⁸⁵ *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve WGKA v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

¹⁸⁶ 506 F.2d at 259.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *WEFM*, 506 F.2d at 262 n.21 (citing *Office of Communications of the United Church of Christ v. FCC*, 425 F.2d 542 (D.C. Cir. 1969)).

¹⁹⁰ *Id.*

The court-instituted sanction against the abandonment of a format which serves a specialized audience that would feel its loss appeared to be a much broader sanction than that which depended merely upon the prior format's uniqueness. This standard presumably required the Commission to affirmatively consider the public interest aspects of an assignment in a larger number of cases.

In addition to requiring that the resolution of the financial viability and misrepresentation issues take place in a hearing, the court also suggested an examination of the suitability of a proposed substitute for the service previously offered by WEFM.¹⁹¹ The court determined that the Commission had not resolved the issue of the financial non-viability of WEFM's classical format in accordance with its public interest duty.¹⁹² The Commission had dismissed the Citizens Committee's challenge¹⁹³ to the assignor's claim of losses because, according to the Commission, the Committee had "neither alleged any facts which could cast doubt on the reliability of those losses claimed by Zenith in the operation of WEFM nor had it seriously questioned those figures."¹⁹⁴ The court found that this reliance on the strict pleading requirements of the petition to deny was fundamentally unfair to the Citizens Committee.¹⁹⁵ The court noted that the Committee could not base its allegations on Zenith's financial reports, because the FCC considered such reports to be confidential and would not make them available to the petitioners.¹⁹⁶ The court found that the FCC should have used its power within the meaning of section 309(e) of the Act¹⁹⁷ to assign the burden of proof respecting these losses "to the party with access to the relevant information, viz., Zenith."¹⁹⁸ Again, the court made this determination without reconciling this provision with the pleading requirements in the petition to deny procedures, and without examining the legislative history of the section.

Even more troubling is the manner in which the *WEFM* court handled the issue of misrepresentation raised by the petitioners. The court referred to the applicant's ascertainment survey as a "community needs survey" with the implication that the purpose of the survey was to elicit the community representative's preference.¹⁹⁹ In the opinion of the court, allegations by the

¹⁹¹ *Id.* at 264-65.

¹⁹² *Id.* at 265.

¹⁹³ *Zenith Radio Corp.*, 385 F.C.C.2d 838 (1972). The Committee alleged that Zenith's operating loss was exacerbated by its continuing to advertise its own products on WEFM, and its failure to attempt to seek enough other advertising to make WEFM self-supporting. *Id.* at 841.

¹⁹⁴ *Zenith Radio Corp.*, 40 F.C.C.2d 223, 225 (1973) (denial of reconsideration). Section 309 requires that a petitioner state with specificity those facts to support an allegation that the assignment would not be in the public interest. 47 U.S.C. § 309(d)(1) (1976).

¹⁹⁵ 506 F.2d at 265.

¹⁹⁶ *Id.*

¹⁹⁷ 47 U.S.C. § 309(d) (1976) states in relevant part: "[T]he burden of proof shall be on the applicant, except that with respect to any issue presented by petition to deny . . . such burdens shall be as determined by the Commission." *Id.*

¹⁹⁸ 506 F.2d at 266.

¹⁹⁹ *Id.*

Committee that the applicant had misled the interviewers concerning the nature of the format change cast "some doubt on the bona fides of [the applicant's] representation."²⁰⁰ In light of the circuit court's disposition of the misrepresentation issue in *Lakewood*, it is difficult to determine how the alleged misrepresentations raised a material issue of fact. In *Lakewood*, the court had found evidence of similar misrepresentations to be immaterial since the petitioner's allegations were based on a misreading of the purposes of the ascertainment procedures.²⁰¹ The *Lakewood* court had expressed approval of the policy behind the ascertainment procedure, arguing that since the procedure was not intended to determine the community's preferences, any failure to inform the interviewees as to the purpose of the interviews was not material.²⁰² The Commission had specifically changed the language in its Programming Inquiry,²⁰³ requiring an applicant to survey the community needs to that used in the Commission's Primer.²⁰⁴ The Primer used the word "problems" to define the specific purpose of the ascertainment procedure. Quoting the Primer: "[O]ur experience has shown that a large segment of the broadcast industry has steadfastly interpreted community 'needs' to mean preferences. . . . Therefore, . . . we sought in preparing the Primer to use a new word to emphasize our intent: hence, 'problems.' "²⁰⁵ It is difficult to perceive how the court, having found itself in unison with the stated purposes of the ascertainment procedure and the underlying Commission policy, could find allegations of fact raised by the Committee's petition to deny in the instant case material to the Commission's disposition of the assignment decision.

After having reviewed the prior case law on the subject and having remanded the application for assignment for a hearing on the issues raised by the petitioner, the *WEFM* court took the opportunity to discuss the Commission's policy which constituted the underlying analysis on which the FCC's decision in the case was based.²⁰⁶ The Commission's policy on format choice appeared in the appendix to its opinion on reconsideration, entitled "Additional Views of Chairman Burch,"²⁰⁷ in which Chairman Burch quoted the Supreme Court opinion in *FCC v. Sanders Brothers Radio Station*²⁰⁸ for the proposition that the Communications Act "recognizes that the field of broadcasting is one of free competition."²⁰⁹ FCC policy, according to the Commissioners, was the result of striking the "balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in

²⁰⁰ *Id.*

²⁰¹ 478 F.2d at 923.

²⁰² *Id.* at 923-24.

²⁰³ Report and Statement of Policy re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291 (1960).

²⁰⁴ Primer on the Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

²⁰⁵ *Id.* at 656.

²⁰⁶ 506 F.2d at 266-68.

²⁰⁷ 40 F.C.C.2d 223, 230 (1973).

²⁰⁸ 309 U.S. 470 (1940).

²⁰⁹ *Id.* at 474.

the Communications Act, on the other."²¹⁰ The Commission argued in the appendix that the balance had been struck when the Commission required regulation of the broadcaster's non-entertainment programming through the ascertainment procedure and advocated permitting the licensee wide discretion in the content of his entertainment format. This latitude, the Commission maintained, ensured diversity without government regulation because economic forces would fill in any void created by the abandonment of a viable radio format.²¹¹ The majority of the *WEFM* court found it curious that the Commission had struck the balance by placing "entertainment programming in one pan and everything else in the other."²¹²

The *WEFM* decision attacked the Commission's policy of free competition on statutory grounds. The court reasoned that the public interest mandate frequently conflicted with the policy of leaving regulation to marketplace forces to produce diversity. Although the circuit court in *WEFM* quoted the Supreme Court to justify its position,²¹³ the real justification soon became apparent. The court postulated: "There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time."²¹⁴ The court concluded from this that broadcasters driven only by the profit motive would seek to maximize profits by appealing to those audiences with the largest disposable income, such as young adults, leaving other segments of society without a radio station of their preference.²¹⁵ According to the court, this policy of "mechanistic deference to competition"²¹⁶ does not ensure that the assignment decisions would be made in the public interest of "securing the maximum benefits of radio to all people of the United States."²¹⁷

The positions of the D.C. Circuit court and the Commission began to emerge as polar opposites with no potential for reconciliation and no indication that either of these two institutions would back down. After the *WEFM* decision, the outlines of the conflict were sharply defined. The Commission had explained its reasons for maintaining the same response to petitioner's claims despite almost certain reversal by the court. The Commission believed that these reasons framed an issue which transcended the narrow fact situations of the individual cases and, therefore, addressed the underlying

²¹⁰ 40 F.C.C.2d at 230.

²¹¹ *Id.* at 231.

²¹² 506 F.2d at 267. It seemed inconsistent to the court that the Commission had relied upon the broadcaster's first amendment rights for justification of its policy of non-interference in entertainment programming. The court thought that the "familiar First Amendment concepts would indicate a lesser—not a greater—governmental role" in non-entertainment programming. *Id.*

²¹³ *Id.* at 267 (quoting *FCC v. R.C.A. Communications, Inc.*, 346 U.S. 86, 93 (1953)). "The very fact that Congress has seen fit to enter into the comprehensive regulation of communication embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in Communications." *Id.*

²¹⁴ 506 F.2d at 269.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

rationale that had dictated its response in each of the format cases. That rationale, restated briefly, was that the marketplace is the best mechanism for assuring diversity of entertainment formats. The Commission had stated its belief that any void created by the abandonment of a financially viable programming format would be quickly filled by the broadcasters themselves. The court, on the other hand, in articulating the law regarding format changes, had dismissed the Commission's policy as an abdication of its statutory duty, a characterization it felt competent to make as the agency's reviewing court. The court and the Commission were thus engaged in a level of discourse beyond the narrow contexts of the individual cases. Instead, the issue had evolved into a struggle between judge and administrator over the proper allocation of discretion and authority.

B. Policy Regarding Entertainment Formats: The FCC Rulemaking Response

One year after the D.C. Circuit court denied a rehearing of the *WEFM* case, the FCC issued a Notice of Inquiry,²¹⁸ a preliminary to its notice and comment rulemaking procedure.²¹⁹ The regulatory scheme outlined in *WEFM* was so contrary to the Commission's own policy regarding entertainment formats that it attempted to have the court reconsider its position based upon a complete exposition of the Commission's arguments. The Commission perceived that the limitations placed on its regulatory function by the Communications Act²²⁰ and the Constitution precluded reconciliation with the judicial position laid down in *WEFM*.²²¹ The Commission attempted a more complete statement of its policy of non-interference in entertainment programming than that which had appeared in the appendix to its license decision in *WEFM*. In so doing the Commission was cognizant of the institutional relationship between the court and the agency; even though "partners," the Commission lacked the authority to overrule or to avoid a court of appeals mandate.²²² Consequently, as the Commission explained, the agency did not mean to obviate the court's mandate in *WEFM*. The purpose of the policy statement was "simply to apprise the Court of the fact that, after a thorough reconsideration of the issues concerning changes in entertainment formats, [the Commission was] firmly convinced that the regulatory policy outlined in *WEFM* represented a serious departure from the policies which we believe are required by the Communications Act and the First Amendment."²²³ The Commission responded to the notion of the court-agency partnership in furtherance of the public interest and noted that, when partners come to a point of fundamental disagreement, each partner must carefully scrutinize his position "if the relationship is to be creative rather than destructive."²²⁴

²¹⁸ Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1975) (Notice of Inquiry).

²¹⁹ 47 U.S.C. § 403 (1976).

²²⁰ 47 U.S.C. § 326 (1970).

²²¹ 57 F.C.C.2d at 582-83.

²²² Entertainment Policy Statement, 66 F.C.C.2d 78 (1977) (Denial of Reconsideration).

²²³ *Id.* at 79.

²²⁴ Entertainment Policy Statement, 60 F.C.C.2d 856, 865 (1976) (Memorandum Opinion and Order).

In order to compile supporting data for its policy statement, the Commission delineated two important questions on which it solicited reasoned comment by interested parties: (1) whether the Communications Act's public interest standard required close scrutiny of entertainment formats to achieve diversity, and (2) whether the first amendment permitted this close scrutiny of program content.²²⁵ The Commission was concerned that a "system of pervasive governmental regulation"²²⁶ rejecting broadcaster programming choice would have an adverse effect on the public interest by eliminating the proper function of marketplace forces.²²⁷

The Commission initiated its discussion of the Communications Act public interest standard by comparing it with the standard used in common carrier regulation. The Commission pointed out that the congressional history indicated that the legislators purposely intended to keep the domains of radio broadcasting and common carriage distinct.²²⁸ The two features of common carriage which distinguish it from broadcast regulation are (1) the duty to furnish "communications service upon reasonable request . . .,"²²⁹ and (2) the requirement of Commission authority to commence or discontinue communications service.²³⁰ The Commission argued that neither of these types of regulation were incorporated into broadcast regulation of the airwaves.²³¹

The Commission went on to say that in recent years the D.C. Circuit court had attempted to impose "common-carrier-like" obligations upon broadcast licensees by straining the meaning of the public interest standard or the Constitution to require them.²³² In contrast to the common carrier's obligation to continue service, the Commission argued that the Communications Act "recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition."²³³ The Commission applied this analysis to the entertainment format context to reach the conclusion that free competition was the policy through which Congress intended to regulate the selection and diversity of formats.

²²⁵ Entertainment Policy Statement, 57 F.C.C.2d at 582.

²²⁶ Entertainment Policy Statement, 60 F.C.C.2d at 858.

²²⁷ *Id.* at 863.

²²⁸ *Id.* at 863 (citing *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103-09 (1973)).

²²⁹ See 47 U.S.C. § 201(a) (1976).

²³⁰ 47 U.S.C. § 214 (1976).

²³¹ 60 F.C.C.2d at 859.

²³² Entertainment Policy Statement, 60 F.C.C.2d at 859-60. The Commission discussed the D.C. Circuit court's decision in *Business Executives for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), and its later reversal *sub nom.* *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 n.203 (1973). The *Business Executives* court held that a broadcast licensee's policy of refusing to accept paid announcements concerning controversial matters of public importance violated both the public interest mandate of the Communications Act and the first amendment. 450 F.2d at 660. This right of public access was rejected by the Supreme Court which held that it was Congress's "intent and manifest desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." 412 U.S. at 109.

²³³ 60 F.C.C.2d at 860 (quoting *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940)).

The Commission buttressed its policy argument with empirical data contained in Appendix B,²³⁴ attached to the Statement of Policy, which it claimed decisively demonstrated how effective the tool of competition has been in carrying out Congress' plan for entertainment programming. This statistical study attempted to demonstrate the fallacy in the court of appeals position by attacking its assumptions that audiences discriminate among various entertainment formats and that maximizing format diversity would promote listener satisfaction.²³⁵ The study attempted to demonstrate empirically that audience shares of radio markets tend to differ nearly as much within the same format as they do between stations broadcasting markedly different programs.²³⁶ The apparent inference from the study is that promoting diversity of program formats could be counterproductive to fostering the satisfaction and welfare of the consuming public, because government mandated restrictions on format changes in accordance with *WEFM* would have no correlation with the casual manner in which listeners make their preference selections.²³⁷ The ultimate conclusion reached by the FCC was that a system of regulation fashioned along the lines of *WEFM* would not be compatible with the agency's public interest mandate.²³⁸

The Commission pointed to several practical problems involved in administering the *WEFM* regulations. According to the Commission every time an assignment involves a prospective format change, *WEFM* compels the Commission to determine first, what the existing format is, second, whether there are any reasonable substitutes for that format in the service area, and finally, if there are none, whether the benefits accruing to the public from the format change outweigh the public detriment which the format's abandonment would entail.²³⁹ The Commission expressed its concern over the substantial line-drawing problems in an area open to obviously subjective discriminations.²⁴⁰ As the Commission stated, the elusive qualities of a station's programming seem to make all broadcast formats equally unique.²⁴¹ The Commission quoted Commissioner Robinson's observations in his concurring statement in the Policy Statement's Notice of Inquiry:²⁴² "What makes one format unique makes all formats unique Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and that citizen's groups (and alas, appellate judges) call format."²⁴³

²³⁴ 60 F.C.C.2d at 872-81.

²³⁵ Entertainment Policy Statement, 60 F.C.C.2d at 861.

²³⁶ *Id.* at 863.

²³⁷ *Id.* at 863-64.

²³⁸ *Id.* at 864.

²³⁹ *Id.* at 861-62.

²⁴⁰ *Id.* at 862.

²⁴¹ *Id.*

²⁴² *Id.* (quoting Entertainment Policy Statement, 57 F.C.C.2d 580, 595 (1976) (concurring statement)).

²⁴³ *Id.*

The conclusions in the Policy Statement reiterate the Commission's faith in the ability of the market system to promote diversity. In addition to its own empirical study, the Commission pointed to the situations of several "large markets, with many aural services and intense competition" as further proof that market allocation produces "an almost bewildering array of 'diversity' " among entertainment formats.²⁴⁴ In summary, the Commission concluded that after careful re-evaluation of its position, including a supporting empirical study, it was justified in persisting in its policy of free competition. The Commission determined that a regulatory scheme similar to the one proposed by the D.C. Circuit in *WEFM* "would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, counterproductive in terms of maximizing the welfare of the listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming."²⁴⁵ The Policy Statement purports to be a complete re-evaluation of the Commission's policy and, since the effectiveness of the Commission's order was stayed pending judicial review of the order, the agency awaited the court's own re-evaluation in return.²⁴⁶

C. WNCN Listener's Guild: *The Judicial Retrenchment*

As the opinion of Judge Leventhal in *WNCN Listener's Guild v. FCC*²⁴⁷ indicates, the mutuality of respect and understanding upon which the court-agency partnership depends has finally felt the strains of a decade-long institutional antagonism. In *WNCN Listener's Guild*, the decision reviewing the Commission's order, the tenor of the judicial language suggests that the court-agency partnership in the public interest has deteriorated badly. In his concurring opinion, Judge Leventhal, architect of the partnership concept, revealed that the majority of that federal bench viewed the agency's procedural attempt with considerable consternation. Judge Leventhal characterized the agency attempt as having been prompted by its hostility to the court's result in the *WEFM* case which has led the FCC to distort the meaning of its *WEFM* opinion.²⁴⁸

Despite the Commission's statement of purpose to the contrary,²⁴⁹ Judge McGowan characterized the FCC Statement of Policy as an attempt to overrule *WEFM* through the Commission's rulemaking process.²⁵⁰ The court was obviously affronted by what it viewed as the FCC's attempt at "circumvention of a recent court decision in an adjudicatory context."²⁵¹ In Judge McGowan's opinion, the FCC's commitment to licensee discretion had resulted in its opposition to the D.C. Circuit's decisions throughout the format controversy.

²⁴⁴ Entertainment Policy Statement, 60 F.C.C.2d at 863.

²⁴⁵ *Id.* at 865-66.

²⁴⁶ *Id.* at 866.

²⁴⁷ 610 F.2d 838 (D.C. Cir. 1979).

²⁴⁸ *WNCN Listener's Guild*, 610 F.2d at 859 (Leventhal, J., concurring).

²⁴⁹ 66 F.C.C.2d 78, 79 (1977) (denial of reconsideration).

²⁵⁰ *WNCN Listener's Guild*, 610 F.2d at 850.

²⁵¹ *Id.*

This opposition had led the Commission to misinterpret and exaggerate the meanings of the court's decisions.²⁵²

To prevent this misinterpretation, the *WNCN* court again attempted to articulate the analytical framework of its format decisions.²⁵³ After restating the Commission's repudiation of the *WEFM* regulatory scheme, the court criticized the FCC statement that it had impartially reexamined the issue raised by *WEFM*.²⁵⁴ In the mind of the court, the FCC's reliance on its "previously undisclosed" staff study, Appendix B, and the administrative nightmare argument created "serious doubts on the rationality and impartiality" of the FCC's actions.²⁵⁵

The court maintained that, in view of the weight given Appendix B, the FCC should have released the study results for adversarial testing.²⁵⁶ The court stated that the Commission's failure to disclose the results of the study had raised serious doubts about both the accuracy of the agency's decision and its procedural fairness.²⁵⁷ In the court's opinion, the administrative nightmare argument used by the Commission²⁵⁸ was "little more than a dream."²⁵⁹ The court made an examination of the actual burdens which the administration of the format change law had imposed upon the Commission since *WGKA*, and concluded that in the ten years of administration "a mere handful of format changes cases have reached this court."²⁶⁰ As determined from the response of the Commission counsel at oral argument, the future burden also appeared to be relatively insignificant.²⁶¹ The court termed the reliance of the Commission on the floodgate argument—"to the point of almost frenzied rhetorical excess"²⁶²—to have diminished the credibility of the agency's argument in light of the actual facts.²⁶³

The court of appeals preceded its discussion of the arguments which the Commission made in its Policy Statement with the observation that the FCC's aversion to the court's decisions had perpetuated its misunderstanding and exaggeration of their meanings.²⁶⁴ The court thought it significant that the FCC had never *sua sponte* initiated a hearing in a format case,²⁶⁵ that the FCC

²⁵² *Id.* at 849.

²⁵³ *Id.* at 842-43.

²⁵⁴ *Id.* at 846.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* The court noted various factors which indicated that the Commission had acted in a manifestly unfair manner: (1) that it took a Freedom of Information request to obtain data; (2) that the Commission did not indicate its plans to rely on the staff study in its decision; (3) that the computer worksheets finally delivered were obscure and incomprehensible to the readers without a key; and (4) that the Commission had failed in good faith to send the key to all petitioners. *Id.* at 847.

²⁵⁸ 60 F.C.C.2d at 864, 865.

²⁵⁹ *WNCN Listener's Guild*, 610 F.2d at 848.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 849.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 849-50.

had repeatedly argued for the court to reverse or curtail its decisions,²⁶⁶ and that it had attempted to "overrule" the *WEFM* decision through its rulemaking procedure.²⁶⁷ The court indicated that it thought these activities created a pattern of behavior in the Commission which demonstrated its commitment to licensee discretion.²⁶⁸ The court dismissed the administrative burden argument by indicating that it was the Commission's own misreading of the format cases which had led it to conclude that the court was imposing a system of pervasive government regulation on the broadcast industry.²⁶⁹ The court admitted, however, that in the majority of cases no public interest issue affected a license transfer, and that the Commission was called upon to protect the public by promoting diversity of formats only in those instances where strong *prima facie* evidence demonstrated that the market had broken down.²⁷⁰ The court concluded that those instances in which a hearing was required on this issue were rare.²⁷¹ The court also concluded that *WEFM* did not intrude unconstitutionally or beyond the drafter's intent into licensee programming discretion, since there was no evidence that *WEFM* had in fact deterred the licensee's format choices.²⁷² Its emphasis on the limitation of the Commission's remedial powers²⁷³ led the court to reject the agency's censorship and common carrier arguments. In summary, the court of appeals looked to the Commission to develop those administrative standards to implement the law set down in the entertainment cases so as "to minimize their drawbacks while preserving their essence."²⁷⁴

The partnership reference made in the Commission's Policy Statement²⁷⁵ gave the court the opportunity to comment briefly on what it perceived to be the proper institutional relationship between the FCC and the court of appeals. The court took umbrage at the Commission's suggestion that the fundamental conflict surrounding their separate policies required the court to reexamine its policy.²⁷⁶ The court set the tone of its discussion of the institutional relationship by stating "we should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Com-

²⁶⁶ *Id.* at 850.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 849.

²⁶⁹ *Id.* at 850.

²⁷⁰ *Id.* at 851. The court reiterated the teaching of the format cases that no public interest issue arose if: (1) an adequate substitute existed in the service area for the abandoned format; (2) no substantial support for the endangered format was shown by way of significant public grumblings; (3) devotees of the endangered format are too few to be served by the available frequencies, and (4) the format itself was not financially viable. *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* The court emphasized that the FCC cannot interfere with a licensee's programming choices since it lacked the power (1) to retrain the broadcast of any program; (2) to dictate the adoption of a new format; (3) to force the retention of an existing format; and (4) to command provision of access to non-licensees. *Id.* at 851-52.

²⁷⁴ *Id.* at 852.

²⁷⁵ 60 F.C.C.2d at 865.

²⁷⁶ *WNCN Listener's Guild*, 610 F.2d at 854.

mission."²⁷⁷ The court confessed to its lack of expertise and constitutional authority to make policy, and asserted that this legislative, line-drawing function had been delegated to the agency by the Congress.²⁷⁸ Nevertheless, the court expressed emphatically that as far as interpretation of the law was concerned, the court reserved sole and final constitutional authority to do so.²⁷⁹ The court concluded: "[A]lthough the distinction between law and policy is never clear-cut, it is nonetheless a touchstone of the proper relation between court and agency that we ignore at our peril."²⁸⁰ The superior authority of the law asserted by the D.C. Circuit pitched the balance of the court-agency partnership so that court emerged as senior partner.

III. ANALYSIS

The institutional antagonism revealed in the entertainment format cases has focused primarily on the question of materiality as applied to the hearing requirement²⁸¹ of the section 309 petition to deny.²⁸² Throughout the controversy, the FCC and the D.C. Circuit have perceived materiality differently. The Commission consistently maintained that the petitioners failed to raise material issues of fact, thus permitting the FCC to approve the license transfer without a formal hearing. The Commission's perception of materiality has been colored by its own laissez faire policy regarding entertainment programming. The Commission has maintained that, since the public interest in diversity of entertainment formats is best served by the interaction of market forces, a petition to deny alleging only a loss of a unique format cannot present issues of fact material to its public interest determination. The D.C. Circuit has taken the opposite position. By defining public interest to include a public right to diverse entertainment programming, the court found that material facts had been raised by the petition and remanded each case for a hearing on the issues as it framed them.

Throughout the controversy, the D.C. Circuit has attempted to assure itself that the FCC's determinations turn upon a consideration of public wants and not merely upon the economic interests of the broadcasting parties.²⁸³ The D.C. Circuit court decisions in the entertainment format area have attempted to promote the public's entertainment preferences by compelling broadcasters to program accordingly. Nevertheless, the court's influence on the programming judgments of broadcasters has been confined to the handful of cases before it. The Commission has failed to promulgate regulations reflecting the D.C. Circuit decisions which would have given the court's pronouncements greater effect. Additionally, the changes in program format

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 854-55.

²⁸⁰ *Id.* at 855.

²⁸¹ 47 U.S.C. § 309(c) (1976) prescribes the formal hearing procedures incident to the determination of unresolved issues of fact during license grant including license assignments.

²⁸² 47 U.S.C. § 309 (1976). See note 34 *supra* for text of § 309(d) (materiality requirements for a formal hearing).

²⁸³ See notes 74-77 *supra* and accompanying text.

which have occurred have *not* resulted from hearings ordered by the court. Rather, all but one of the format cases were resolved *before* an FCC hearing, with the petitioning public and the broadcasters reaching a negotiated settlement.²⁸⁴ The public's preferences were integrated into the license assignee's programming not as a result of the inherent persuasiveness of the court's logic, but rather from the coercion created by the prospects of a court-ordered formal administrative hearing.²⁸⁵

While some may view the attempts of the D.C. Circuit to increase public input into the FCC's public interest determinations as laudable, the court's use of the hard look and partnership doctrines to lower the procedural barriers imposed by section 309 of the Communications Act appears to run afoul of explicit congressional intent.²⁸⁶ Legislative history indicates that the strict pleading requirements of section 309 were purposely imposed by Congress to avoid warrantless demands upon the Commission's energies created by unnecessary hearings.²⁸⁷ House Report No. 1800 accompanying the 1960 amendment to the Communications Act indicates that a prior amendment to section 309 had proscribed FCC hearing procedures which "in all instances [have] proved to be cumbersome, time consuming, and in many cases of no value whatsoever."²⁸⁸ The report indicates that the former protest procedure, permitting a party in interest to challenge the Commission's action when it had granted a license without a hearing, had been abused.²⁸⁹ Formerly, protests deemed to be factually sufficient by the Commission were designated for a hearing upon issues relating to all matters specified in the petition as grounds for setting aside the grant. The report noted that "[t]he provisions of this subsection have been broadly interpreted by the courts²⁹⁰ and have proved to be a most effective device for delaying the disposition of Commission business."²⁹¹ The new pre-grant procedure embodied in the present version of section 309 attempted to limit the number of cases in which a hearing was required, in a direct response to judicial attempts to expand the instances in which a hearing was necessary.²⁹²

²⁸⁴ *WNCN Listener's Guild*, 610 F.2d at 848-49.

²⁸⁵ See Policy Statement re: Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 864-65 (1970), for a description of the administrative burden and expense of a hearing on remand from a court's format decision.

²⁸⁶ See Note, *Judicial Review of FCC Program Diversity Regulation*, 75 COLUM. L. REV. 401 (1975). The author suggests that the strict standard of judicial review and the hard look doctrine "compensates in part for the procedural difficulties imposed by section 309." *Id.* at 408.

²⁸⁷ H.R. REP. NO. 1800, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3516.

²⁸⁸ *Id.* at 3517.

²⁸⁹ *Id.*

²⁹⁰ Since the 1960 amendment there has been judicial expansion of the party in interest standing requirement of section 309(d) to include responsible members of the listening public. *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (1966). Prior to *United Church of Christ*, economic injury and electrical interference were the exclusive grounds for standing to intervene in proceedings before the Commission. *Id.* at 100.

²⁹¹ H.R. REP. NO. 1800, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3517.

²⁹² *Id.* The legislative history indicated that the old protest procedure required the protestant to demonstrate only "such allegations of fact as will show the protestant to be a party in interest and should specify with particularity the facts relied upon by the

The legislative history indicates that the new materiality pleading requirement was implemented "to afford the Commission an opportunity to dispose of those petitions which were of no real consequence by brief orders or opinions as the circumstances may warrant without the necessity for a formal hearing."²⁹³ The petition to deny as presently formulated will be set down for a hearing only if substantial and material questions of fact presented by the assignment application and the petition remain unresolved prior to granting the license.²⁹⁴ By imposing the added requirements of materiality and substantiality, Congress augmented the Commission's discretion to decide matters involving the public interest incident to license grants without the procedural burdens of a formal administrative hearing.²⁹⁵ A House committee member pointed out that "the committee expects that the Commission will use any procedural device available to it to expedite its business,"²⁹⁶ evidencing congressional intent for the liberal use of the materiality barrier by the FCC in the interest of promoting administrative efficiency.

Throughout the format cases, the D.C. Circuit bypassed the procedural barriers of the petition to deny by redefining materiality in terms of what it considered Commission policy should be regarding entertainment program diversity. The court in *WGKA* made a broad assumption regarding the congressional intent behind the Communications Act with respect to the public interest in diversity of entertainment formats. The court determined in *WGKA* that "it is surely in the public interest, as that was conceived by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources."²⁹⁷ Once the court established this paramount public right to diversity in entertainment formats in *WGKA*, the court formulated a set of substantive criteria—financial viability of format, assignee misrepresentation, and alternative source of

protestant as showing that the grant was improperly made." *Id.* Under the 1960 amendment, the new procedure requires the Commission to designate a license application for a hearing "where upon an examination of the application and the petition to deny or any other pleadings before it, the Commission is not able to make the public interest findings required." *Id.* at 3518. These new procedures were specifically designed to avoid "the abuses which are inherent in the present procedure." *Id.*

²⁹³ H.R. REP. No. 1800, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3516, 3520.

²⁹⁴ H.R. REP. No. 1800 defines "material question of fact" for purposes of section 309(d) and (e) to be "a question of fact which is material to determination of the question whether the public interest, convenience, or necessity would be served by the granting of the application with respect to which such question is raised." *Id.*

²⁹⁵ The 1952 version of the pre-grant procedure required the Commission to set the petition down for a hearing in all instances after having reviewed the petition for factual sufficiency. 47 U.S.C. 309(c) (1952). The 1960 amended version currently enforced requires a hearing only when the Commission determines that material and substantial questions of fact remain prior to the grant. 47 U.S.C. 309(d) (1976). The Commission's discretion is enlarged in these instances since it is incumbent upon the Commission to decide whether facts remaining are material or substantial to the resolution of the public interest determination.

²⁹⁶ *Id.* at 3521.

²⁹⁷ *Citizens Comm. to Preserve WGKA v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970) (emphasis supplied).

programming—at variance with FCC policy. In the court's analysis, the failure on the part of the Commission to consider these criteria protecting that public right resulted in a record which revealed unresolved material issues of fact. The court, therefore, compelled the Commission to consider these issues in the context of a formal administrative hearing in order to fulfill the public interest mandate.

Although the court's analysis was couched in terms of assuring the procedural adequacy and rationality of the Commission's decisions, the court imported its own substantive values into this area of FCC entertainment policy. The collaborative dialogue with the Commission under the partnership doctrine allowed the court to define those material issues which it considered necessary for the agency's public interest determination. By imposing its version of materiality on the FCC and compelling the Commission to decide the public interest in accordance with its own notions, the court substituted its judgment for that of the Commission, effectively overruling the agency's policy. In light of the specific legislative history behind the petition to deny and the more general congressional intent of Congress through the Communications Act to repose a high degree of substantive discretion in the Commission,²⁹⁸ the entertainment format cases do not comport with the congressional vision of the proper institutional relationship between the Commission and the D.C. Circuit.

Neither the D.C. Circuit nor the FCC appear to have capitulated in their respective positions regarding regulation to promote entertainment format diversity. After ten years of controversy, the FCC has not waived in its policy of allowing competition and marketplace forces to create the desired format diversity. The D.C. Circuit has remained unpersuaded by the Commission arguments that regulation in this area is incompatible with FCC interpretations of the Communications Act, impermissible in terms of the broadcaster's first amendment right, and impossible in terms of agency administration. Throughout the format cases, the D.C. Circuit has found Commission decisions regarding unique formats which are unreflective of the public's paramount right to diversity in entertainment to have exhibited danger signs of irrational decisionmaking. These positions have solidified as evidenced by the Commission's policy statement on entertainment formats written in response to the court's *WEFM* opinion²⁹⁹ and by the court's partnership analysis of the institutional relationship between the D.C. Circuit and the Commission in *WNCN Listener's Guild*.³⁰⁰ The court's position in *WNCN Listener's Guild*

²⁹⁸ The court has repeatedly recognized the institutional relationship as designed by Congress: "Admittedly, the scope of our review is quite narrow; we defer to the expertise and experience of the Commission within its field of specialty and would reverse only where the Commission's position is arbitrary, capricious, or unreasonable." *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968); *Sayger v. FCC*, 312 F.2d 352, 357 (D.C. Cir. 1962) ("The delicate balance in the public interest to be achieved by the assignment of radio frequencies is a matter committed to the expertise of the Commission."). See also *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 305 (D.C. Cir. 1967) ("Undue interference by the court is itself contrary to the public interest.").

²⁹⁹ See note 245 *supra* and accompanying text.

³⁰⁰ See notes 275-80 *supra* and accompanying text.

reaffirmed its partnership doctrine relegating questions of law to itself and questions of policy to the Commission. By formulating the controlling criteria for the Commission's decision in the entertainment format area and by imposing them on the Commission, however, the court has created substantive policy which offends Commission discretion. Since this antagonism does not appear to be reconcilable by the two institutions themselves, the controversy will have to be resolved by a decision of the Supreme Court. Ordering the respective spheres of institutional competence between the D.C. Circuit and the Commission will necessarily affect the court's current collaborative role in FCC policymaking as has been developed through the partnership doctrine.

The *National Citizens Committee for Broadcasting*³⁰¹ case is highly suggestive of the Supreme Court's inclination to dispose of this matter. As previously noted, in *NCCB*, the Supreme Court reversed the D.C. Circuit's conclusion that the Commission policy to "grandfather" its new multiple ownership rule regarding newspaper-broadcast combinations had been arbitrary and capricious. The *NCCB* case indicates that the Supreme Court is willing to uphold Commission discretion in a parallel area of controversy in the field of telecommunications regulations. The conclusion that the Supreme Court would re-affirm the Commission's discretion in the area of entertainment policy appears inevitable. The institutional ramifications of the *NCCB* case with regard to the D.C. Circuit's partnership doctrine have been noted by Judge Bazelon in his concurrence in *WNCN Listener's Guild*, the latest D.C. Circuit decision in the entertainment format area. Judge Bazelon noted that "[i]f we are directed to defer to the FCC's decision in *NCCB*, which seemed clearly at odds with the FCC's (public interest) mandate, surely we should be hesitant here, where the Commission's accommodation of the conflicting policy interests is neither wholly irrational nor wholly contrary to the purposes of the Communications Act."³⁰² The *NCCB* case may indicate that if the Supreme Court can find a rational basis for the Commission's definition of materiality, the Commission's discretion will be upheld. The fact that Congress had purposely intended the Commission to use the procedural device of materiality to screen warrantless claims implies that the Supreme Court will have little difficulty in upholding agency discretion in this area, effectively overruling the D.C. Circuit's partnership doctrine as it relates to entertainment policy.

In the context of administrative law, a Supreme Court decision re-affirming Commission discretion to define the substantive content of the "public interest" standard appears correct. The majority opinions in the format cases were written as statutory review proceedings focusing on the proper statutory interpretation of the Communications Act public interest mandate. By re-affirming the agency's discretion to define administrative policies in fulfilling its statutory mandate, the Court would be acting in accordance with Congress' vision of the proper institutional relationship between the agency and its reviewing court.

³⁰¹ 436 U.S. 775 (1978).

³⁰² *WNCN Listener's Guild*, 610 F.2d at 858-59 n.4 (Bazelon, C.J., concurring in vacation of the decision).

CONCLUSION

The institutional controversy between the FCC and the D.C. Circuit over regulation to promote diversity of entertainment programming has proved to be persistent and obdurate. The differences between the court and the Commission as to the proper definition of the public interest with regard to format diversity have revealed an underlying institutional rift between law and policy. The court's decisions are incompatible with the FCC's wide discretion in administering policies that will promote the public interest in diversity. As long as the FCC fails to promulgate regulations to promote entertainment format diversity, the D.C. Circuit will rule that the Commission has acted inconsistently with its public interest mandate.

The court's hard look and partnership doctrines employed in the format cases to overrule Commission policy demonstrate a marked departure from the court's traditionally deferential attitude toward the FCC. Owing to the persistence of this controversy and the inflexibility of the respective positions of the two institutions as evidenced by recent policy retrenchment, the Supreme Court may have to impose an authoritative resolution by drawing a line defining the spheres of discretion belonging to each institution. The more likely alternative is that the Supreme Court will look to the intent of Congress in drafting the Communications Act and resolve the current controversy by re-affirming FCC discretion in these matters.

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