Listeners' Rights: Public Intervention in Radio Format Changes

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LISTENERS' RIGHTS: PUBLIC INTERVENTION IN RADIO FORMAT CHANGES

INTRODUCTION

The rise of administrative agencies\(^1\) has been identified as "the most significant legal trend of the last century."\(^2\) Their policies and decisions can have more impact on public values and interests than do those of the courts. It is not surprising, therefore, that these powerful regulatory bodies have been subjected to serious criticism throughout their history.\(^3\) Since the 1960's, much of this criticism has focused on the area of consumer protection. Dissatisfaction with the agencies' unresponsiveness to public needs and interests has led to demands for citizen participation in the administrative process.\(^4\) In part as a result

\(^1\) Although some delegations of administrative power date back to the time of the Constitution, see, e.g., Act of Sept. 29, 1789, ch. XXIV, 1 Stat. 95 (payment of military pensions); Act of July 31, 1789 ch. V, 1 Stat. 29 (regulation of the collection of duties on imports), the real proliferation of administrative agencies occurred in the 1930's. See, e.g., Act of July 5, 1935, ch. 372, 49 Stat. 449 (National Labor Relations Board); Act of June 6, 1934, ch. 404, 48 Stat. 881 (Securities and Exchange Commission).  


\(^3\) Early criticism stemmed from the delegation doctrine, a constitutional barrier questioning the legitimacy of granting legislative power to an administrative agency. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). During the 1940's and 1950's the focus shifted, and the agencies were scrutinized and attacked upon considerations of procedural due process and protection for individuals against agencies' infringement of personal rights. The highlight of efforts to make procedures uniform and fair to those affected by agency action was the enactment of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 327). More recently, the Commission has been accused of pro-industry bias. See note 4 infra.

The sources of agency criticism have been diverse, ranging from the public and the regulated industries to the three branches of government. See generally K. Davis, Discretionary Justice (1969); H. Friendly, The Federal Administrative Agencies (1962).

The agency is theoretically the public's representative since it is charged with regulating in the public interest. Without any audience before the agency, the public began to feel that the agencies were becoming industry oriented. These charges did not necessarily imply corruption. The fact was that the agencies were listening only to the complaints of the industries and becoming sympathetic to their ideas.

Charges of pro-industry bias have come from higher levels. See 116 Cong. Rec. 10,246 (1970) (remarks of Senator Proxmire). "[A]gencies, originally established to protect the public interest, have been captured by the very interests they were established to regulate." Id. Similar allegations have even been brought from within the ranks. See Renewals of Broadcast Licenses for Ark., La. & Miss., 42 F.C.C.2d 1, 3 (1973) (Comm'r Johnson, dissenting). "Whatever may be the case elsewhere, however, the Federal Communications Commission is a classic case of what now Chief Justice Burger once called 'a curious neutrality in favor of the licensee.'" Id. at 6, citing Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969).
of these protests the somewhat rigid concept of standing has been relaxed, providing the public with more ready access to the regulatory processes of the agencies and a voice in the formulation of agency policies. Such public involvement is not only valuable but perhaps indispensable in securing adequate representation of consumer interests.\(^6\)

Increased public participation, stemming from the liberalization of standing requirements in a 1966 landmark decision, is highlighted by recent cases in the communications field.\(^7\) The courts had traditionally maintained that only those alleging the invasion of a legally protected interest or direct and substantial injury should be granted standing before administrative agencies. When found to have a potentially adverse effect upon the public interest, economic injury\(^8\) and

\(^6\) Under the early test, standing in administrative actions was granted to one who could allege "the invasion of some legal or equitable right." Alabama Power Co. v. Ickes, 302 U.S. 464, 483 (1938), quoting New Orleans, M. & Tex. R.R. v. Ellerman, 105 U.S. 166, 174 (1881). This "legal interest test" remained the sole basis for granting standing until the idea emerged that a statute could confer standing upon non-official persons as "private Attorney Generals [sic]." Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 329 U.S. 707 (1946) (per curiam). It was not until 1966 that non-economic injury was recognized as a basis for standing in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). See notes 13-16 and accompanying text infra. A more liberal standing test was finally enunciated by the Supreme Court in Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). Under this test, the plaintiff must allege "injury in fact economic or otherwise" and an "interest sought to be protected . . . arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. at 152-53; accord, Barlow v. Collins, 397 U.S. 159 (1970). See generally Davis, supra note 2, at §§ 22.00 et seq. (Supp. 1970). For a recent discussion of standing to intervene and standing to seek judicial review of agency action see Note, Selection of Administrative Intervenors: A Reappraisal of the Standing Dilemma, 42 GEO. WASH. L. REV. 991 (1974).

\(^7\) The revelations surrounding Watergate have only dramatized what many concerned citizens and public interest lawyers have known for a long time: we cannot rely on government to solve our problems. The regulatory agencies set up to serve the public interest all too often end up almost totally subservient to industry pressure.

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Seemingly congenital pro-industry bias, of course, is no reason to give up on the agency. Quite the contrary. It must be watched all the more closely. There must be appeals to the courts[\ldots] Congressional and press exposes of the FCC's most egregious decisions. . . . [and] public participation.

Renewals of Broadcast Licenses for Ark., La. & Miss., 42 F.C.C.2d 1, 6 (1973) (Comm'r Johnson, dissenting).

\(^8\) Sanders Bros. had challenged the application of another broadcaster for a construction permit to erect a new station in the former's city of license. When the Commission granted the application, the licensee sought rehearing of the decision on the issue of alleged economic injury to its station. Rehearing was denied and Sanders Brothers successfully appealed to the D.C. Circuit. In reversing the decision of the court of appeals, the Supreme Court recognized that while "it is not the purpose of the [Communications] Act to protect a licensee against competition," id. at 475, the question of competition is not
electrical interference\textsuperscript{10} were, on this theory, recognized as grounds for standing to be heard. When a listeners group, however, asserting the public's interest in receiving balanced programming of important public issues, petitioned to have a television station's license renewal application denied,\textsuperscript{11} the Federal Communications Commission (FCC) held that the petitioners had no standing "purely as members of the general public."\textsuperscript{12} The United States Court of Appeals for the District of Columbia Circuit reversed this restrictive interpretation of the standing doctrine and held in \textit{Office of Communication of the United Church of Christ v. FCC}\textsuperscript{13} that the Commission must allow "responsible representatives of the listening public" an opportunity to be heard.\textsuperscript{14} Speaking for a unanimous court, Judge, now Chief Justice, Burger criticized the Commission's rejection of effective public participation,\textsuperscript{15} for "experience demonstrates consumers are generally among the best vindicators of the public interest."\textsuperscript{16} Manifesting an awareness that broadcaster responsiveness to the public requires active citizen participation, numerous community groups and listener organizations have emerged throughout the country.\textsuperscript{17}
The liberalization of standing requirements in the landmark *Church of Christ* decision has been a great boon to interested members of the listening public. The extent to which the FCC has honored the *Church of Christ* mandate to expand the public's influence on Commission action, however, has been disappointing, and thus not all obstacles to effective public participation have been removed. Repeatedly, the United States Court of Appeals for the District of Columbia Circuit has had to overturn many of the FCC's decisions and remind the Agency of its paramount duty to regulate in the public interest.

Recently, changes in radio program formats have evoked the


Since 1966 citizens have become increasingly active in the broadcasting field. See Special Report: The Struggle over Broadcast Access (pts. 1-2), 81 BROADCASTING, Sept. 20, 1971, at 32; Sept. 27, 1971, at 24. FCC Chairman Burch noted that the industry is not very receptive toward this phenomenon:

> By and large, this may be the scheme that was originally intended — more citizens playing a role in broadcasting. I don't think broadcasters welcome this. It's easier to run your own show than to answer to anyone else.

Id. pt. 2, Sept. 27, 1971, at 25.

In 1971, Commissioner Johnson remarked that in the four years following the *Church of Christ* decision the Commission had "done little to encourage actual citizen participation in its proceedings other than to say that it 'encourages' such participation." Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo. L.J. 869, 877 (1971). He further explained that

> the FCC's initial, instinctive reaction was to oppose, not encourage, greater citizen participation in its proceedings, and that it took a forceful judicial opinion to preserve this valuable right. This bias against citizen-initiated criticisms of the broadcasting industry has remained within the structure, procedures, and pre-disposition of the Commission.

Id. See also note 20 and accompanying text infra.

A change in program format involves the abandonment of one type of specialized programming to permit the operation of another, as, for example, a change from "classical" or "progressive rock" to "middle-of-the-road" or "country-and-western." See, e.g., Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973); Citizens Comm. v. FCC, 436 F.2d 263 (D.C. Cir. 1970). While most format changes have accompanied an assignment of the license of the station, a few cases have involved changes in the middle of the licensed period. See notes 157-63 and accompanying text infra.
concern of a number of citizen groups. Wary of its authority to act in this area, the Commission has shown little initiative in establishing any firm policy toward format changes. As in other areas of broadcast regulation, the FCC has waited for the courts to define its role. This note will analyze varying views of the Commission's responsibilities in overseeing format changes.

An examination of the statutory scheme of broadcast regulation indicates that while Congress in the early twentieth century could not have possibly envisioned the complex system of electronic media which would evolve in the next fifty years, it possessed the foresight to create a statutory framework sufficiently flexible to meet future demands of the industry. In particular, it has been suggested that the public interest standard established in the Communications Act could be read as authorizing the Commission "to directly increase diversity of ideas and programming . . . ." Developments in the nature and character of radio broadcasting and enlightened participation by the listening public demand that the Commission recognize its responsibility to allow for effective public input in formulating broadcast regulatory policies. Recent decisions of the Court of Appeals of the District of Columbia Circuit indicate some movement in this direction. Effective achievement of this goal, however, would seem to require not only substantial changes in the FCC's view of its authority, but also an expansion of current procedural remedies.

COMMUNICATIONS REGULATION — A SCENARIO

It has always been assumed that broadcasting is a unique area. Although the airways and broadcast spectrum constitute "public domain," the number of airwaves is limited, and access to this valuable

22 For a discussion of recent attempts by listeners' groups to block entertainment format changes see notes 108-40 and accompanying text infra.

23 The Commission has taken the position that

the station's program format is a matter best left to the discretion of the licensee or applicant, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 679, 21 P & F Radio Reg. 2d 1507, 1538 (1971) (footnote omitted).

24 See, e.g., Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971) (application of fairness doctrine to product advertising); Citizens Communication Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971) (Commission's policies on license renewals); Office of Communication of the United Church of Christ v. FCC, 399 F.2d 994 (D.C. Cir. 1968) (intervention by members of the listening public).

25 See notes 141-56 and accompanying text infra.


27 "The ether is a public medium, and its use must be for public benefit. The use
public resource is necessarily restricted. Technical restraints and limitations—allocation of available frequencies and the regulation of the employment of transmission equipment—are necessary in order to put the airwaves to any effective use at all. Realizing this, in 1912, Congress, pursuant to its authority to regulate interstate commerce, vested in the Secretary of Commerce the initial authority to regulate interstate communication by radio. Because of the limited powers granted to the Secretary, this legislation proved to be ineffective to deal with the broadcast interference and virtual chaos created by the emerging commercial radio industry. Responding to demands from the public and the industry itself, to remedy this situation, Congress enacted the Radio Act of 1927. The Act vested in the Federal Radio Commission broad licensing and regulatory powers over radio communication. Spurred by dissatisfaction with the 1927 Act, Congress later passed the Communications Act of 1934. To execute and enforce the Act in accordance with the “public interest, convenience, and necessity,” the Federal Communications Commission was created.

of a radio channel is justified only if there is a public benefit.” Hearings on S. 1 & S. 1754 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess., pt. 1, at 56 (1926) (Opening Address by Herbert Hoover, Secretary of Commerce).

Although the Act contained no express grant of authority to make regulations, the Secretary was given the power to award licenses. This authority was rendered meaningless, however, when in 1923, the Court of Appeals of the District of Columbia Circuit ruled that mandamus would lie to compel the Secretary to issue a license. The court held that the duty imposed was “purely ministerial” and that the only permissible exercise of discretion by the Secretary was “in selecting a wave length, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference.” Hoover v. Intercity Radio Co., 286 F.1003, 1006, 1007 (D.C. Cir. 1923), appeal dismissed per stipulation, 266 U.S. 636 (1924). The final blow to any vestige of authority came in 1926 when a district court held that a licensee may use any wavelengths within the specifications of the Act, regardless of the limitations set forth in the license by the Secretary. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). Confusion and chaos resulted from the lack of regulation. “With everybody on the air, nobody could be heard.” National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943).

The elusive concept of “public interest, convenience, and necessity” is the broad “standard” under which Congress delegated authority to both the FRC and the FCC. See notes 44-51 and accompanying text infra.
and was given broad licensing, rulemaking, and administrative authority.

Having recognized the technical and economic need for some type of broadcasting regulation, Congress could have elected to provide for government control, a course pursued by numerous other countries. Instead, Congress chose to maintain the area of communications as one of free competition under the aegis of an independent supervisory commission. The choice was undoubtedly motivated by traditional views of democracy and free enterprise. Consequently, the idea that a broadcaster should operate as a common carrier was explicitly rejected by the legislators. On the other hand, allocation and regulation, and not the creation of any private property rights, are the clear purposes

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35 See id. § 303(a), (f), (h), (i), (j), (n), 47 U.S.C. § 303(a), (f), (h), (i), (j), (n).
36 See id. § 312(a), 47 U.S.C. § 312(a) (revocation of license); id. § 312(b), 47 U.S.C. § 312(b) (issuance of cease and desist orders); id. § 316(a), 47 U.S.C. § 316(a) (modification of licenses); id. § 503(b), 47 U.S.C. § 503(b) (assessment of forfeitures).
37 For an in-depth analysis of broadcasting systems in all parts of the world see W. Emery, National and International Systems of Broadcasting: Their History, Operation and Control (1969). The author notes a number of interesting trends in the regulatory systems of many countries:

1. Especially in Western Europe, national regulatory policies seem to be shifting away from strict governmental control toward greater autonomy in broadcasting. The author also indicates, however, that there are countervailing trends in a minority of countries.
2. There has been a general increase in the diversity of programs, i.e., a trend toward "balanced programming" designed to meet a variety of public interests and needs.
3. There has been an expanded use of the mass media for educational purposes.
4. In some areas, citizens groups have become increasingly active in working for greater freedom of expression and access to conflicting points of view on issues of public importance.

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

The exercise of this power is fraught with such great possibilities that it should not be entrusted to any one man nor to any administrative department of the Government. This regulatory power should be as free from political influence or arbitrary control as possible.

Id. at 2.
40 Fearful of the discretionary power on the part of a broadcaster to reject applications for service, a number of Congressmen were of the opinion that radio should be regulated as a public utility. See, e.g., 67 Cong. Rec. 5483 (1925) (remarks of Congressman Davis). Congress specifically rejected these contentions by enacting § 9(h) of the Communications Act of 1934, 47 U.S.C. § 153(h) (1970), which provides, in part, that "a person engaged in radio broadcasting shall not, insofar as such person is engaged, be deemed a common carrier."
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of the Act. No person may operate a broadcasting facility except in accordance with the Act, and with a license granted thereunder by the Commission. In reviewing an application for a license, the Commission must find not only that the applicant is technically, financially, and legally qualified to operate the station, but also that the grant of such application will serve the public interest, convenience, and necessity.

Public Interest Mandate

A salient feature of the broadcast media's regulatory system is the public interest mandate which pervades the Communications Act and establishes the standard for broadcast regulation. Coming to grips with the expansive perimeter of this mandate is essential in order to reach a proper definition of the FCC's role in broadcasting regulation. Yet, the very breadth of this provision militates against achieving such a goal.

Vague, indefinite standards which often result from a broad definition of authority are typical of congressional delegations. It is thought that restrictive, inflexible definitions of authority would thwart the purpose of an independent body of experts established to carry out Congress' legislative policy. A broad mandate, on the other hand, lends an air of legitimacy to agency action, or inaction, as the case may be, and in that sense is supportive. Its unquestionable ambiguity "produces a fertile field for imaginative advocacy in arguing about what

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41 The stated purpose of the subchapter relating to radio is to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. Communications Act of 1934 § 301, 47 U.S.C. § 301 (1970) (emphasis added). See also FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474-75 (1940).


43 Id. § 307(a), (d), 47 U.S.C. § 307(a), (d); id. § 309(a), 47 U.S.C. § 309(a); Henry v. FCC, 502 F.2d 191 (D.C. Cir. 1969).

44 See Communications Act of 1934 § 307(a), (d), 47 U.S.C. § 307(a), (d) (1970); id. § 309(a), 47 U.S.C. § 309(a); id. § 310(b), 47 U.S.C. § 310(b); id. § 311(c), 47 U.S.C. § 311(c); id. § 316(a), 47 U.S.C. § 316(a); id. § 319(c), (d), 47 U.S.C. § 319(c), (d).

45 See DAvis, supra note 2, ¶ 2.03, at 81-87.

46 While this criterion [public interest, convenience, and necessity] is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. . . . Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

serves the public interest." 47 Further, it insures that the Commission's duty to "generally encourage the larger and more effective use of radio in the public interest" 48 is not read as limited to regulating the engineering and technical aspects of radio communication. The notion of the Commission merely acting "as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other" is inconsistent with the statutory mandate. 49 Yet, the Act cannot be construed to confer unlimited authority. 50 One certainty resulting from this generalized public interest mandate, therefore, is that it will continue to provide "the battleground for broadcasting's regulatory debate." 51

First Amendment Considerations

Broadcasting, even for entertainment purposes, is clearly within the ambit of the constitutional guarantee of free speech. 52 The inextricable involvement of the first amendment in the area of broadcasting — both from the public's and the broadcaster's viewpoints — makes the Commission's task of regulation all the more arduous.

The underlying premise of the first amendment is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." 53 The traditional pursuit of such diversity through "a multitude of tongues" 54 completely unrestricted in speech, however, is not feasible in radio broadcasting because it is subject to inherent physical limitations. The Commission's principal approach to increasing the variety of speakers has been to require diversification of control. 55 Yet, this insures only

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47 BENNETT, supra note 17, at 29.
50 This [public interest] criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . The requirement is to be interpreted by its context . . . .

55 Two kinds of rules comprise the Commission's present policy concerning diversification of control of radio broadcast facilities. See 47 C.F.R. §§ 73.35, 73.240 (1974); Amendment of §§ 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations (First Report and Order),
limited diversity and the right of unrestricted speech remains abridged
to many who may wish to use radio as a means of communication.

In direct conflict with the first amendment interests of the public
is the broadcaster's right to exercise his freedom of speech in using
the medium which has been licensed to him. These competing interests
engender an inquiry into the extent to which the responsibility for
creating the widest possible diversity may be impressed upon the
broadcaster. The history of broadcast regulation indicates that the
licensee's first amendment rights are "abridgeable," but that does
not mean that they are nonexistent. The argument has been, and
continues to be, made that broadcasting is a form of journalism and,
therefore, should be permitted to enjoy the same unrestricted freedom

ownership, operation or control of more than one unlimited-time broadcast station in the
same area, regardless of the type of broadcast service involved." Id. at 307, 18 P & F Radio
Reg. 2d at 1738 (footnote omitted). The concentration of control rules provide that
a license for a broadcast station will not be granted to a party if the grant would
result in that party's owning, operating or controlling more than a specified
number [seven for AM and FM radio] of stations in the same broadcast service.

Id. at 307, 18 P & F Radio Reg. 2d at 1737.

While the FCC intended that diversification of control be a significant factor in
weighing applications for new stations, assignments, and transfers, it proposed to ignore
the issue in renewal situations. See id. at 306-07, 18 P & F Radio Reg. 2d at 1736-37. The
District of Columbia Court of Appeals has specifically disapproved of this policy. See
Citizens Communication Center v. FCC, 447 F.2d 1201, 1214 n.36 (D.C. Cir. 1971) ("Di-
versification is a factor properly to be weighed . . . at a renewal hearing.").

56 See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 146
(1973). The inherent physical limitations of the broadcast medium formed the basic
rationale for the Court's upholding of the FCC's Chain Broadcasting Regulations in
National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Countering the broad-
casters' argument that the regulations constituted a denial of free speech, the Court stated:

"The right of free speech does not include, however, the right to use the facilities
of radio without a license. . . . The standard [Congress] provided for the licensing
of stations was the "public interest, convenience, or necessity." Denial of a station
license on that ground, if valid under the Act, is not a denial of free speech.

Id. at 227 (Murphy, J., dissenting). The Court again sanctioned limitations on the
broadcasters' freedom of speech in a scarce medium in Red Lion Broadcasting Co. v. FCC,
395 U.S. 367, 392 (1969) ("There is no sanctuary in the First Amendment for unlimited
private censorship operating in a medium not open to all."). Here, however, the Court
went beyond the scarcity rationale in its recognition of a "collective right [of the people
as a whole] to have the medium function consistently with the ends and purposes of the
First Amendment." Id. at 390.

57 See, e.g., NATIONAL ASSOCIATION OF BROADCASTERS, BROADCASTING AND THE BILL
OF RIGHTS (1971) [hereinafter cited as N.A.B.]. This book contains a compilation of the formal
statements made by various representatives of the broadcasting industry at public hearings
held in 1947. The hearings were before a subcommittee of the Committee on Interstate
and Foreign Commerce regarding a bill (S. 1333) to amend the Communications Act.
"Audible journalism," id. at 113, the broadcasters feel, deserves equal rights under the
law, along with the press. Id. at 54-64 (statement by Robert K. Richards), 82-83 (state-
ment by J. Harold Ryan), 110-13 (statement by Don. S. Elias), 150-51 (statement by Frank
Stanton).
as does the press.\textsuperscript{58} Indeed, until recently, the first amendment rights of the broadcast licensee have been paramount. It has never been accepted, however, that freedom of the press can exist to the same extent in a medium which is licensed by the government.\textsuperscript{59} Yet, when members of the public have attempted to assert a complementary first amendment interest in the operation of the radio, they have encountered

not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action" — a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]."\textsuperscript{60}

The history of regulation shows that the public interest mandate is broad and flexible. While the Commission is clearly prohibited from acting as a censor,\textsuperscript{61} it cannot neglect its duty to promote the legitimate interests of the public.\textsuperscript{62} Yet, the broadcaster will argue that he best vindicates the public interest,\textsuperscript{63} and that competition among broadcasters for a listening audience alone will insure his responsiveness to at least a majority of the public.\textsuperscript{64} That success in the market-

\textsuperscript{59} See id. at 117-18 (1973).

Broadcasters are licensed by the Government. Newspapers are not and may not, under our Constitution, be licensed by any governmental authority. This is an essential difference. The public responsibility of newspapers rests on professional ethics and tradition which encompass the entire relation between the editor and his readers — the free press and the American people. In broadcasting, the responsibility derived from its status as "free press" is in addition to other responsibilities, flowing from the fact of a Government license. The sum of these responsibilities is imposed by law.


The Commission's role has been characterized by the Supreme Court as that of an "overseer" and ultimate arbiter and guardian of the public interest." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

See, e.g., N.A.B., supra note 57, at 112.

The essential freedom of radio is safer in the hands of these 1,700 broadcasters ... than in the custody of seven men domiciled in Washington. ... We broadcasters are more representative of the varied social, economic, political and geographical pattern which is the United States of America. We are necessarily closer to the listeners for whom radio exists; therefore, more sensitive to the disciplines of listener opinions.

\textsuperscript{64} See, e.g., id. at 107-08.

The natural law of preference on the part of the public has been the natural law
place does not necessarily indicate satisfaction of the interests and needs of substantial portions of the listening public is evident from the frequent protests by sizeable listeners' groups dissatisfied with current radio programming. It would seem, therefore, as Chief Justice Bazelon of the District of Columbia Circuit Court of Appeals has said, that "[t]he question to be faced ultimately is . . . whether . . . [we] should move away from the [traditional] rule of a multitude of tongues unrestricted in speech in pursuit of the goal of a true diversity of ideas." 65

The FCC and the courts have thus far pursued a balancing approach to the competing first amendment interests involved in programming decisions. 66 Although it is clearly the right of the listeners which is to be paramount, 67 balancing the conflicting interests of the licensee and the listening public in the area of program format is particularly problematic since decisions concerning the content of programming traditionally have been thought to lie in the sole discretion of the licensee. 68 Nevertheless, the FCC has, on its own initiative, and

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determining the success or failure of private American business enterprise. The manufacturer, the individual merchant, the newspaper—all survive and thrive or decline and fall on the natural law of public preference. . . .

All the business regulation that radio needs is open competition in its field, and the radio audience and the advertisers will become the most compelling and exacting regulatory forces that could be devised.

Id. (statements by Marshall Pengra, Manager, Station KRNR, Roseburg, Oregon).


The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

Id. at 117.

67 See Hearings on S. 1 & S. 1754 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess., pt. I, at 56 (1926) (Opening Address by Herbert Hoover, Secretary of Commerce). "The dominant element for consideration in the radio field is, and always will be, the great body of the listening public . . . ." Id.

The emphasis must be first and foremost on the interest, the convenience, and necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.


In advising the public that they cannot direct the broadcaster as to the airing of
more often upon the insistence of the courts and the public, circumscribed the free exercise of discretion by the broadcasting licensee in programming matters.

**Supervision of Programming**

Under the Radio Act of 1927, the Federal Radio Commission made limited inquiries into program content. In a few early cases it refused to renew the licenses of broadcasters whose programs were found to be fraudulent or defamatory.\(^6\) Similarly, under the Communications Act, the FCC has imposed sanctions for illegal and deceptive broadcasts\(^7\) and has even gone so far as to consider, in evaluating renewal applications, the broadcasting of offensive or improper material.\(^8\) Recently the Commission has assessed forfeitures\(^2\) against stations whose broadcasts it determined to be obscene.\(^3\)

More often, the FCC has exerted greater influence over programming through indirect means, viz., the imposition of general standards and programming policies. Fear of being denied an application for the grant or renewal of a license has forced broadcaster compliance with these prescriptions. In 1960 the FCC released a *Programming Policy Statement*\(^4\) defining the respective roles of the licensee\(^5\) and the Commission. Particularly, the Commissioners made it clear that they are not "arbiters of taste." Moreover, their concern "is with matters which affect the community generally (the public interest) rather than with the personal preferences or grievances of individuals." Broadcast Procedure Manual, 39 Fed. Reg. 92,228, 92,289, *The Public and Broadcasting—A Procedure Manual*, 49 F.C.C.2d 1, 3 (1974) [although differently entitled in the official and unofficial compilations, this manual will be hereinafter cited as Procedure Manual].


\(^7\) In KWK Radio, Inc., 34 F.C.C. 1039, 25 P & F Radio Reg. 577 (1963), the Commission ordered the revocation of KWK's license for the broadcast of fraudulent and deceptive contests. In WRBL Radio Station, Inc., 2 F.C.C. 687 (1935), the FCC designated the station's renewal application for a hearing because of complaints about broadcasts relating to illegal lotteries. Ultimately renewal was granted, however, since the station cancelled the programs in question.


\(^2\) A milder sanction than revocation, forfeiture is a monetary penalty imposed for the violation of Commission rules or regulations. See Communications Act of 1934 § 503(b), 47 U.S.C. § 503(b) (1970).


mission in the area of programming. The statement enunciated 14 general categories of program types which would be used by the Commission in judging an applicant’s past or proposed programming. Additionally, the statement stressed that

the principal ingredient of the licensee’s obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area for broadcast service.

This “ascertainment requirement” was subsequently explained by the Commission as requiring the applicant to consult with community leaders and members of the general public to discover their problems, needs, and interests. Thus, all license applications require the applicant to demonstrate that he has complied with the FCC’s ascertainment procedures, to report the results of community surveys, and to

76 Responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee.... The fulfillment of the public interest requires the free exercise of his independent judgment.

Id. at 7295, 20 P & F Radio Reg. at 1908.

77 In discussing the limitations imposed by the first amendment and § 326 of the Communications Act on its authority to act in the area of programming, the Commission stated that while

[it] does not conceive that it is barred by the Constitution or by statute from exercising any responsibility for programming... [t] readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc.

Id., 20 P & F Radio Reg. at 1909 (emphasis added).

78 The “major elements usually necessary to meet the public interest” as set forth by the Commission included:


Id. at 7295, 20 P & F Radio Reg. at 1913. The Commission emphasized that these guidelines were not intended as a rigid mold for station performance, nor... as a Commission formula for broadcast service in the public interest. Rather, they should be considered as indica of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.

Id., 20 P & F Radio Reg. at 1912.

In revising application forms in 1965, the Commission reduced the programming types to eight major categories. See Amendment of Section IV of Broadcast Application Forms 301, 303, 314, and 315, 1 F.C.C.2d 452, 452-43, 5 P & F Radio Reg. 2d 1717, 1777-78 (1965).

propose programming and commercial practices designed to meet the ascertainment problems and needs.\textsuperscript{80}

Based on the assumption that a licensee using public property should not be entitled to monopolize that use for the presentation of a single point of view, a series of early decisions developed the concept of fairness.\textsuperscript{81} Spurred by these decisions, in 1949 the FCC issued a \textit{Report on Editorializing by Broadcast Licensees},\textsuperscript{82} which enunciated the Commission's policy on the discussion of public issues. This policy, which has since been known as the fairness doctrine, "imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints."\textsuperscript{83} The doctrine has been given statutory\textsuperscript{84} and judicial approval.\textsuperscript{85} The fairness doctrine leaves the question of access and the specific handling of public issues to the discretion of the licensee.\textsuperscript{86} With respect to political broadcasts, however, the Commission has developed access requirements in the "personal attack"\textsuperscript{87} and "equal opportunity"\textsuperscript{88} rules.

One of the most effective means for regulation of program content employed by the Commission, however, is the licensing process itself. In considering an application for the issuance, renewal, or transfer of


\textsuperscript{82} 13 F.C.C. 1246, 1 P & F Radio Reg. ¶ 91, at 91:201 (1949).


\textsuperscript{86} \textit{Equal opportunity for political candidates has been required by § 315 of the Act since its passage in 1934. See Communications Act of 1934 § 315(a), 47 U.S.C. § 315(a) (Supp. III, 1973). The rule requires a licensee who permits "any person who is a legally qualified candidate for any public office to use a broadcasting station, [to] afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."} \textit{Id. See also 47 C.F.R. §§ 73.120, 73.290 (1974).}
a station license, the Commission will necessarily look to a station’s past or proposed programming in determining whether such grant would serve the public interest. Since members of the public “possess first-hand knowledge of their community’s needs and the broadcaster’s performance in meeting them,”89 they have the opportunity to make a valuable contribution to the improvement of broadcasting by actively participating in the agency’s licensing procedures.90 Listeners’ groups, being the most adversely affected by unsatisfactory programming, have been particularly outspoken in the area of program content.

Since all new applicants and existing licensees are required to give public notice of the filing of an application,91 listeners have the opportunity through the filing of an “informal objection” to alert the Commission, before any action is taken on the application, as to any matter, including objectionable programming, which might lead to the disqualification of a particular applicant.92 If listeners seek more active participation, they may, subject to certain statutory requirements,93 request to become a party to the proceedings before the Com-

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89 JENNINGS, supra note 17, at 2.
90 Another means of participation which may be easily pursued by any person, at any time, is the filing with the Commission of a letter of complaint against a broadcast station. If the letter of complaint alleges specific facts which indicate substantial violation of a statute, Commission rule, or policy, the matter will be investigated. Depending upon what the investigation uncovers, Commission sanctions may range from the assessment of a monetary forfeiture to denial of renewal or revocation of a station license. A total of 61,322 complaints against broadcast stations were received by the Commission during the fiscal year 1973. See Procedure Manual, supra note 68, at 32,288-91, 49 F.C.C.2d at 3-7.

92 See Procedure Manual, supra note 68, at 32,291, 49 F.C.C.2d at 7-8. The objection may be filed in simple letter form: The only requirement is that it be signed by the objector. See 47 C.F.R. § 1.587 (1974). An objection which raises a substantial public interest question will be made the subject of investigation by the FCC. If there remains a substantial and material question of fact, or the Commission is unable to make the finding that the grant of the pending application would be in the public interest, a hearing may be ordered. At the subsequent hearing, the complainant may be permitted to participate as a witness, see id. § 1.225, or acquire the status of a party to the proceeding by filing a petition to intervene. See 47 U.S.C. § 309(e) (1970); 47 C.F.R. § 1.223 (1974).
93 See Communications Act of 1934 § 309(d), 47 U.S.C. § 309(d) (1970); Procedure Manual, supra note 68, at 32,291-93, 49 F.C.C.2d at 8-10. If a petition fails to meet these requirements, the Commission will treat it as an informal objection.
mission by filing a formal objection in the form of a "petition to deny" the issuance, renewal, or assignment of a station license.\textsuperscript{94} Pending the FCC's decision whether or not to order a hearing on the questions raised by a community group, the station might attempt to negotiate a settlement of their differences. Subject to Commission approval, the station and the petitioners may enter into an agreement whereby the listeners will withdraw their petition to deny in exchange for promises of improved service by the licensee.\textsuperscript{95}

Broadcasters, however, have not been receptive to any broadening of governmental regulation. Arguing that Commission scrutiny of the business practices of the licensee amounts to censorship, broadcasters have urged Congress to amend the Communications Act to specifically limit the FCC's regulatory authority to economic areas.\textsuperscript{96} It is suggested, however, that it would be impossible for the Commission to fulfill its duty under the public interest mandate should its determi-


\textsuperscript{95}See Communications Act of 1934 § 311(c), 47 U.S.C. § 311(c) (1970). Although this section specifically refers to agreements between competing applicants, the Commission has assumed the same authority to evaluate the terms of a compromise between a station and members of the public. See note 173 and accompanying text \textit{infra}. It should be noted that such agreements will not pass Commission scrutiny if they are adjudged to "improperly curtail the licensee's flexibility and discretion in the matters of programming and program scheduling . . . ." Bob Jones Univ., Inc., 22 F.C.C.2d 781, 23 P & F RADIO RFG. 2d 410, 411 (1971).

\textsuperscript{96}See N.A.B., \textit{supra} note 57. In recommending that the Commission be prohibited from regulating the business practices and programming of a broadcaster, one representative commented:

"The authority to refuse to renew a license because of the nature of programs that have been broadcast is a form of censorship much more powerful than the blue pencilling kind of censorship. It permits the Commission a tremendously wide latitude in determining what the listeners of the country may or may not hear. It gives the Commission most persuasive powers of suggestion as to the program which it feels should be broadcast. No licensee can feel free to ignore such suggestions when to do so would jeopardize the continuation of his license. This is a much greater power than the power to delete."\textsuperscript{97}

\textit{Id.} at 191 (statement by Niles Trammell, Pres., Nat'1 Broadcasting Co., Inc.). For a presentation of different views on current renewal policies and proposed legislative revision see Goldberg, \textit{A Proposal to Deregulate Broadcast Programming}, 42 GEO. WASH. L. REV. 73 (1973) and Kramer, \textit{An Argument for Maintaining the Current FCC Controls}, \textit{id.} at 93.

While the suppression of future publication because of past performance amounts to an unconstitutional prior restraint, \textit{Near v. Minnesota}, 283 U.S. 697, 713 (1931), the analogy to radio broadcasting has never been accepted by Congress or the courts. See note 59 and accompanying text \textit{infra}.
nation as to the qualifications of a licensee be restricted to the evaluation of technical and economic considerations.

Because of the sensitive first amendment issues and the statutory prohibition against censorship, the Commission has traditionally taken a reticent attitude toward programming. Its principal approach has been through the procedural and structural means outlined above. The fairness and ascertainment requirements may be viewed as significant restraints upon the broadcaster’s choice of programming in that his compliance with the prescribed rules and procedures will be a critical factor in the Commission’s determination as to the issuance, renewal, or transfer of a station license. The FCC becomes most directly involved with programming through the fairness doctrine and related rules concerning political broadcasts not only because continuous violations might be grounds for denial of an application, but also because the Commission applies these rules to complaints against a station on a case-by-case basis.\(^7\) The FCC’s attempts to foster diversity have been limited, however, to news and public affairs programming. The Commission makes no distinction among the many varieties of cultural and entertainment programs,\(^8\) nor does it require that broadcasters ascertain program preferences.\(^9\) Until very recently, the Commission has successfully resisted any involvement with decisions on specialized station formats.

**Program Format Changes**

With the development of television and the overall expansion in the number of radio frequencies, a new trend in radio broadcasting emerged — specialized formats.\(^{10}\)

\(^7\) The Commission periodically publishes a digest of its fairness doctrine rulings. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964). Upon recent consideration of proposals to limit review of fairness complaints to renewal time, the Commission reaffirmed its present procedure of reviewing complaints on an ongoing basis. *See* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 17-21 (1974).

\(^8\) The Commission’s definition of “entertainment programs” includes “all programs intended primarily as entertainment, such as music, drama, variety, comedy, quiz etc.” *See* AM-FM Program Forms, FCC Form Nos. 301, 303, § IV-A (Definitions), appearing in P & F Radio Reg. Current Service Volume ¶ 98, at 98:301-20, 98:303-6.


\(^{10}\) *See* H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963) [hereinafter cited as H.R. Rep. No. 281]. “Certain things, programwise, that had been done well in radio could be done superbly in television... Television left for radio a more limited field of programming.”
In this evolution, radio did not initiate these changes; it adjusted to them through necessity — through the necessity of building a local and frequently specialized program that would support the continuing interest of the public.  

Regulation of this specialized system of broadcasting necessitates a reevaluation of policy, since uniform standards of “balanced programming” previously developed to regulate the unspecialized broadcaster can no longer govern programming responsibility. In addition, promotion of diversity, as applied to stations operating within specialized frameworks, is complicated by the fact that some program formats are inherently more profitable than others. Thus, some stations will be permitted to reap enormous gains while others carry the burden of less profitable programming. The Commission’s regrettable adherence to traditional notions of programming responsibility, despite this metamorphosis in broadcasting, has led to the current dilemma with radio format changes.

Recent Decisions

Although it is expected that a station will adhere to the programming proposals set forth in its most recent application, the Commission has never regarded the licensee’s proposal as a “binding commitment.” This policy is designed to enable a licensee to fulfill its responsibility to its listening community by allowing it sufficient flexibility to remain responsive to changes in public interests and needs. Therefore, the Commission has only required that a licensee give notice of

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Id. at 437. Thus, “[t]here emerged a new lexicon in radio broadcasting—music and news stations, the top 40 formula, good music stations, sports stations and the like.” Id.

The FCC has recognized that in an area served by a number of broadcasting facilities, the public interest in diversified programming could be served by complementary specialized formats. Herbert Muschel, 33 F.C.C. 37, 79, 18 P & F Radio Reg. 8, 30 (1962).


102 See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701, 706 (1964). The author points out that different criteria will have to be employed when dealing with large metropolitan areas relying on a number of frequencies and smaller geographical areas served by only one or two.

103 A popular music format, for example, generally has a broader range of appeal than a classical format, and, consequently is more attractive to advertisers. Also, because classical music selections are typically lengthy, there are less opportunities during a broadcast day for commercial advertising interruptions.

104 See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701, 706 (1964).

substantial changes in operation. No prior approval by the Commission is necessary. If there were objections to such changes, they would be considered upon renewal or assignment of the station license. To date, however, there seems to be no effective Commission supervision of program format changes. For example, when objections were raised to an assignee's proposed format change, the Commission maintained that choice of program formats is properly within the discretion of the licensee.

Upon review of this decision, in *Citizens Committee v. FCC (Atlanta)*, the District of Columbia Circuit censured the Commission's abdication of its duty to consider the effect of a format change on the public interest. Numerous informal objections had been filed by concerned citizens when the transferee of two Atlanta radio stations proposed to change the stations' classical music format to a "blend of popular favorites." Nevertheless, the Commission granted the assignment without a hearing. A citizens group coalesced in an effort to save the abandoned format and filed a petition for reconsideration and a stay of the order granting the transfer application pending a hearing on the question of format change. When the FCC majority refused to grant a hearing, the group enlisted the aid of the appellate court. The petitioner disputed the alleged financial necessity of the format change and challenged the representativeness of the transferee's community survey which purportedly reflected views favorable to the new format. They stressed the fact that this change involved the loss of the only classical music station in Atlanta. The court found three substantial questions of fact mandating reversal of the Commission's order and requiring an evidentiary hearing: (1) the

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106 See Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 814, and 315, 1 F.C.C.2d 439, 441, 5 P & F Radio Reg. 2d 1773, 1776 (1965).
109 Id. at 265-66.
110 Although the proposed change provoked protests to the FCC by more than 2,000 persons as well as adverse comment in a leading newspaper, id. at 265, the Commission found that the objections raised no substantial questions requiring a hearing. Glenkaren Associates, Inc., 14 P & F Radio Reg. 2d 104, 106 (1968).
113 436 F.2d at 269-71.
114 Id. at 271-72.
financial necessity of the format change; (2) the accuracy of the transferee's survey; and, (3) the availability of alternative sources of the abandoned format.\textsuperscript{115}

The Atlanta decision spurred the FCC, in its Primer on Ascertainment of Community Problems by Broadcast Applicants,\textsuperscript{116} to note that future applications involving a substantial change in program format would be scrutinized in light of that decision. The Commission warned that "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."\textsuperscript{117} Yet, despite its apparent willingness to adopt the philosophy of Atlanta, the Commission, in subsequent cases, has exhibited a reticent attitude towards implementing the policy of the decision. For example, the Commission avoided intervention in subsequent challenges to proposed format changes where the transferor had incurred substantial operating losses under the old format rendering its continued operation economically unfeasible.\textsuperscript{118} Similarly, the Commission held that Atlanta did not control where it was found that radio stations in the area provided alternative listening sources for the abandoned format.\textsuperscript{119}

In Lakewood Broadcasting Service, Inc. v. FCC,\textsuperscript{120} the District of Columbia Circuit was again called into a format change controversy. In this case, the assignee's proposals to change a Denver station's "all news" format to "country and western" music engendered petitions to deny from a competing station and a citizens organization.\textsuperscript{121} This time, however, the court affirmed what it categorized as the Commission's "painstakingly thorough decision"\textsuperscript{122} to grant the proposed assignment without a hearing. The petitioners alleged misrepresentation on the part of the assignee by reason of its failure to question and include the comments of interviewees on the proposed format change.\textsuperscript{123} In response, the court adopted the Commission's reasoning that since ascertainment procedures only require the discovery of com-

\textsuperscript{115}Id. at 269-72.
\textsuperscript{117}Id. at 680, 21 P & F Radio Reg. 2d at 1539 (footnote omitted).
\textsuperscript{118}In WCAB, Inc., 27 F.C.C.2d 743 (1971), the Commission stated that it "could not reasonably expect the continuation of [a] format on into bankruptcy." Id. at 745. Accord, Biola Schools and Colleges, Inc., 29 F.C.C.2d 787, 21 P & F Radio Reg. 2d 1275 (1971).
\textsuperscript{121}478 F.2d at 921-22.
\textsuperscript{122}Id. at 922.
\textsuperscript{123}Id. at 923.
community problems, failure to solicit views regarding format preferences did not raise substantial and material questions of fact. In addition, the court found substantial evidence in the record to support the FCC's findings of serious financial losses under the old format and a plethora of other available news sources in the area.

It is clear, however, that Lakewood was not intended to be a general judicial statement approving Commission policies. In Citizens Committee to Keep Progressive Rock v. FCC, the District of Columbia Circuit criticized "[t]he Commission's failure to recognize its obligation" and reversed a Commission order granting the application for assignment of an Ohio radio station. The licensee sought a transfer because of years of unsuccessful operation under "country and western" and "golden oldies" formats. The assignee proposed to change the station's format to "middle of the road" music. While the transfer application was still pending, the licensee experimented with, and later, because of its overwhelming success, permanently adopted, a "progressive rock" format. The assignment was ultimately granted, and when the assignee abandoned the rock format, a citizens committee was formed to petition for reconsideration. The Commission majority denied the petition, refusing to question the discretion of the licensee where it did not appear that the proposed change would not serve the interests of the public. On appeal, the court found that the absence of a showing that there were alternative

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124 Id. at 923-24. The court explained that a hearing had been required on the accuracy of ascertainment surveys in the Atlanta case only because the transferee had voluntarily submitted summaries of interviews with citizens regarding program preferences.

Thus the absence of any references to preference in the ascertainment survey cannot be considered a misrepresentation. If the format change does become a public interest issue, however, and surveys et al. are submitted by the applicant "to support [its] proposals to change formats," misrepresentations contained therein certainly become material.

125 Id. at 921-22 n.2, 924 n.11.

126 Id. at 924 n.10.


128 Id. at 933.

129 Id. at 927-28.

130 Id. at 928.

131 Id.

132 Twin States Broadcasting, Inc., 35 F.C.C.2d 969, 24 P & F Radio Reg. 2d 766 (1972). The Commission's real concern seems to have been with upsetting the assignee's "business judgment." Id. at 971, 24 P & F Radio Reg. 2d at 769. Commissioner Johnson, on the other hand, criticized the Commission's ignorance of the D.C. Circuit's mandate in the Atlanta case "that in the face of objections to a music format change, the Commission had to hold an evidentiary hearing in order to determine whether the public would be served by such a change." Id. at 974, 24 P & F Radio Reg. 2d at 771 (Comm'r Johnson, dissenting) (emphasis added).
sources of the abandoned format or that its continuation was economically unfeasible created substantial questions of fact warranting a hearing on the format change. Speaking for a unanimous court, Judge Tamm remarked that in the instant case and in Lakewood, the court had received the "distinct impression" from the Commission's briefs and oral arguments that

the Commission desires as limiting an interpretation [of the Atlanta decision] as is possible. . . . [and] would be more than willing to limit the precedential effect of [that decision] to cases involving Atlanta classical music stations. The FCC's willingness to limit the applicability of the Atlanta case became even more apparent in Citizens Committee to Save WEFM v. FCC. Although the WEFM controversy arose under facts strikingly similar to those presented in Atlanta, the Commission reached a completely opposite conclusion through a very narrow reading of the court's earlier holding. The assignee advised the FCC that upon being granted the proposed transfer, it would, for purely economic reasons, change WEFM's classical format to contemporary music. The Commission majority refused to grant a hearing on the Citizens Committee's allegations that the transferor's financial losses were not attributable to WEFM's classical format and that no adequate substitute for the abandoned format was available. Although the Commission's decision was initially accepted by the District of Columbia Circuit, upon rehearing en banc the case was reversed and remanded for an evidenc-

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133 478 F.2d at 931-33.  
134 Id. at 930.  
The court found the Committee's allegations respecting claimed losses sufficient to at least shift the burden of proof at the hearing to the transferor, the party having access to such information. Additionally, in the opinion of the court, evidence introduced by the petitioners regarding the assignee's representations in its community survey created factual issues bearing on the question of alleged misrepresentation.

**Impact and Analysis**

The court, in *Lakewood*, disavowed any intent to “set out specific guidelines for achieving the marketplace ideal” in the area of radio programming. Instead, it encouraged the Commission to adopt an affirmative policy of its own on how to balance the competing public and private interests in format controversies. In short, the court has imposed a definite obligation on the FCC to determine whether it would be in the public interest to abandon a format which is “unique or otherwise serves a specialized audience that would feel its loss.”

In the aforementioned decisions, the court repeatedly relied upon specific criteria in resolving the issue of whether or not an evidentiary hearing on the issue of format changes should be ordered. Two relevant considerations in this inquiry were the size of the protesting group and the availability of alternative sources of the old format. In *Atlanta,*

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139 Id. at 265-66.
140 Id. at 266.
142 The court noted that “[t]he first, tentative steps into this complex area of regulation must be taken by the Commission.” *Id.*

The court’s role is not that of policymaker. On the contrary, it is limited by a defined scope of review that “combines judicial supervision with a salutary principle of judicial restraint.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted), *cert. denied*, 406 U.S. 950 (1971). In admitting the narrow scope of its review, the court has stated: “[W]e 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 Mich. Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968). *See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

143 Citizens Comm. to Save WEFM v. FCC, 506 F.2d 252, 262 (D.C. Cir. 1974) (rehearing en banc).
144 It has been argued that the application of “guidelines” will serve to insulate the licensee from challenges based on program format. *See Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 252, 278 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring); *Note, Developing Standards for Diversification of Broadcasting Formats*, 52 TEXAS L. REV. 562-63 (1974). It is not the guidelines themselves, however, which will overly protect the licensee, but rather their less than diligent application by the Commission to actual controversies.
for example, 16 percent of the public had expressed interest in the continuation of the abandoned format.\textsuperscript{146} Where the community was served by twenty broadcast frequencies, this percentage was held to constitute a significant enough segment of the public to preclude the FCC from finding, absent a hearing, that the proposed change was in the public interest.\textsuperscript{140} Of course, "the fewer the radio sources the more the tastes of the majority must be recognized."\textsuperscript{147} The presence and adequacy of a listening alternative has been characterized as "undoubtedly the most important, and normally the most conclusive element"\textsuperscript{148} for the Commission's consideration. The licensee's business judgment may go undisturbed where the proposed change does not diminish the diversity of programming available. Thus, in \textit{Lakewood}, the new services of twenty other Denver radio stations were found to constitute a sufficient alternative to the station's abandoned all news format.\textsuperscript{149}

The economic feasibility of the abandoned format is another criterion to be considered. Bare allegations that financial considerations necessitate the format change warrant close scrutiny by the Commission.\textsuperscript{160} Examination of the station's financial records may reveal that the "necessity" for the change is in actuality nothing more than a desire, on the part of the broadcaster, to realize greater profits from the operation of the station. Commissioner Cox, dissenting in the \textit{Atlanta...
controversy, disputed the financial necessity for the change in that case, maintaining that

[the stations were profitable, so it cannot be said that a change of format was necessary to keep them alive. But the transferees believe they can make more money with a popular format having broader appeal. They probably felt they could buy a classical station for less than they would have to pay for one more nearly serving the needs they now seek to program for — where the refinements in format they have made would have been less disruptive to the listening audience. And presumably they offered the transferor more money than he could expect from someone else who would have been willing to continue the stations' classical programing. So the private interests of the transferor and the transferees have been served; only the interests of the one-sixth of the public to whom classical music is the preferred service have suffered.161

The licensees' only support for their allegation was an excess of expenditures over revenues, as contained in the stations' financial reports. On appeal, the District of Columbia Circuit found these figures an unreliable index to operating profitability and remanded the case for a hearing.162 The court similarly remanded the Progressive Rock163 and WEFM164 cases for a hearing on the economic feasibility of the change.

Despite the court's apparent delineation of the Commission's responsibility in this area, the FCC remains committed to the principle that the determination of entertainment program format is best left to the business judgment of the licensee.165 Adherence to this approach has caused the Commission to construe the court's mandate in the foregoing decisions very narrowly. As the court pointed out in WEFM,

163 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.
164 The court similarly remanded the Progressive Rock and WEFM cases for a hearing on the economic feasibility of the change.
165 Adhering to the position that the determination of entertainment format is within the purview and judgment of the licensee, the Commission has refused to act upon objections to proposed format changes in a number of cases. See, e.g., Walter E. Webster, Jr., 43 F.C.C.2d 300, 28 P & F Radio Reg. 2d 773 (1973); Brannen and Brannen, 42 F.C.C.2d 1020, 28 P & F Radio Reg. 2d 722 (1973); Radio Station WQFM-FM, 40 F.C.C.2d 534, 27 P & F Radio Reg. 2d 1247 (1973); Gunther Heinreich, 27 P & F Radio Reg. 2d 211 (1973); Sentinel Heights FM Broadcasters, Inc., 29 F.C.C.2d 83, 21 P & F Radio Reg. 2d 966 (1971), rev'd sub nom. Citizens Comm. to Preserve the Present Programming of WONO(FM) v. FCC, No. 71-1336 (D.C. Cir. May 13, 1971).
this "will only result in a continuation of this series of similar cases that began with [the Atlanta decision] four years ago."156

WNCN: ARE LISTENERS' REMEDIES ADEQUATE IN MIDSTREAM FORMAT CHANGES?

The Commission's policy has even more serious implications in the event that a format change does not occur in conjunction with the transfer or renewal of a station license. While the majority of format changes have occurred in the context of an assignment situation, a licensee may alter its programming format during the license term. Although the licensee is expected to advise the Commission at the time a change is made, the wisdom of the licensee's decision goes unchallenged until the station license comes up for renewal. Having assumed that such business judgment of a licensee is beyond its scrutiny, the Commission has failed to devise any procedures for consideration of a change in operation during the license period.

The most recent example of such a midstream format change is the controversy involving the New York radio station WNCN.167 Starr Broadcasting Group, Inc., the licensee, acquired WNCN by transfer in 1970, at which time it represented that it would continue the established classical format.158 In August of 1974, it was announced that the station's format would be changed to progressive rock on October 5, 1974.159 A listeners group was immediately organized to oppose the change of this allegedly unique format. The group petitioned for revocation of the license or, in the alternative, for early submission of Starr's renewal application and, pending a full evidentiary hearing, other special relief including a stay of the format change.160 Fearful that midstream intervention would constitute a form of censorship, the Commission refused "to depart from the basic principle of licensee responsibility" and to consider the format change prior to the expiration of the normal licensing period.161 On appeal from this decision, the District of Columbia Circuit denied the petitioners' request for ex-

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157 News about the WNCN format change provoked adverse commentary in a leading New York magazine. See Rich, Mr. Buckley Passes the Buck, New York, Sept. 23, 1974, at 78. The retort offered by the chairman of the board of the licensee company may be found in Buckley, Buckley (Politely) Returns the Hand Grenade, New York, Oct. 7, 1974, at 54.
160 See id.
161 Id., 31 P & F Radio Reg. 2d at 649.
traordinary relief because it "would constitute judicial intervention at a time when the deliberations of the agency are far from complete." Having been denied the right to intervene at this stage, the listeners have been relegated to pursue inadequate and insufficient remedies.

Petitions to Deny

A number of factors illustrate the inefficiency of relegating public intervention to the renewal stage. Renewal proceedings very often extend over a period of years. It is unlikely that a publicly supported group which has petitioned to deny the renewal of a station license will be able to remain financially viable during such protracted litigation. If the change being contested occurs in midstream, moreover, the protesting group is forced to wait the remainder of the three-year license term before any relief is even considered. A delay of even a few months could mean the permanent loss of station personnel and a valuable record library. In addition, denial of renewal has occurred only in exceptional cases. Therefore, even if the group does survive

163 The FCC deferred consideration until "the entire matter is before the Commission in a proper posture," Starr WNCN, Inc., 48 F.C.C.2d 1221, 1222, 31 P & F Radio Reg. 2d 648, 649 (1974), presumably until the licensee sought either to assign or to renew its station license.
164 Broadcasters have repeatedly attempted to extend this period to five years instead of three. Eleven bills to that effect were introduced into the 92d Congress. See Broadcasting, Aug. 16, 1971, at 13, citing S. 663, H.R. 510, 594, 5242, 7862, 7900, 7901, 8522, 8927, 9153, 9652, 92d Cong., 2d Sess. (1971). Similar legislative proposals were introduced in 1973. See Goldberg, A Proposal to Deregulate Broadcast Programming, 42 Geo. Wash. L. Rev. 73 (1973); Kramer, An Argument for Maintaining the Current FCC Controls, 42 Geo. Wash. L. Rev. 93 (1973); Note, FCC Broadcast License Renewal Reform: Two Comments on Recent Legislative Proposals, 42 Geo. Wash. L. Rev. 67 (1973). Much of the blame for the death of such legislation during the 93d Congress was attributed to the failure of the House Commerce Committee's chairman, Harley Staggers, to appoint conference committees. See Broadcasting, Dec. 16, 1974, at 19. As many as 50 license renewal bills have thus far been introduced into the 94th Congress, nearly all of which provide for the lengthening of the renewal period from three to four or five years. See Broadcasting, July 7, 1975, at 13.
165 In WNCN, the listeners unsuccessfully argued before both the Commission and the court that a stay of the proposed format change was necessary to prevent irreparable injury to the public. Should the classical music format be restored at a later date, the Guild argued, a record library valued at $750,000, the station's classical music staff, and much of its audience would have been lost in the interim. Brief for Petitioner at 14, Starr WNCN, Inc., 48 F.C.C.2d 1221, 31 P & F Radio Reg. 2d 648 (1974).
166 It took two decisions of the D.C. Circuit to deny renewal of WLBT's license in the Church of Christ case. See Office of Communication of the United Church of Christ v. FCC, 425 F.2d 549 (D.C. Cir. 1969). From a 1969 case study of broadcast license renewals in New York and New Jersey, Commissioners Cox and Johnson concluded that a number of the FCC's decisions left them "with the uncomfortable sensation that no programing proposal, however irresponsible or frivolous, could lead the majority to deny a license renewal." Renewal of Radio and Television Licenses in New York and New Jersey, 18 F.C.C.2d 268, 269 (1969) (separate statement of Comm'rs Cox and Johnson).
the pendency of the action, the odds against its ultimate success are
great.

Should a broadcaster who has instituted a format change subse-
quently seek to transfer his station's license, the petition to deny may
again prove to be an ineffective tool for the purposes of restoring an
abandoned format. In some instances, the filing of a petition to deny
causes such delay in the FCC's consideration of the transfer application
that the contract for sale expires before approval.\textsuperscript{167} If it is unable to
renegotiate, the licensee will be forced to withdraw its transfer appli-
cation leaving its new format to go unchallenged until renewal.\textsuperscript{168}

\textit{Private Agreements}

While the FCC has never denied a renewal or transfer application
on the basis of the proposed entertainment format, either the designa-
tion of an application for a hearing, or a challenger's mere filing of a
petition to deny, with the concomitant prospects of costly and time-
consuming proceedings, often induces the parties to settle the contro-
versy by means of a private contractual agreement.\textsuperscript{169} For example, in
\textit{Progressive Rock} the litigants settled the dispute prior to the ordered
evidentiary hearing. In that case, the citizens group agreed to withdraw
its objections to the transfer in exchange for the assignee's promise to
revaluate the format change in the event that the other progressive

petitioner in this case had previously petitioned to deny the proposed transfer of
station KKDA. Because of its inability to negotiate an extension of time under the
contract of sale, the licensee had to request that the Commission dismiss its transfer
application. \textit{Id.} at 47-48.

\textsuperscript{168} See \textit{id.} When the \textit{KNOK} licensee itself changed the format, the petitioner brought
the instant action requesting the institution of revocation proceedings, or, in the alternate,
immediate submission of KKDA's application for renewal. The Commission denied
both requests. \textit{Id.} at 52.

\textsuperscript{169} For a discussion of the utility of such agreements in solving the dilemma of
format changes see \textit{Note, Developing Standards for Diversification of Broadcasting
rock station in the area ceased to provide an adequate alternate source.\textsuperscript{170} Similarly, the parties in the WNCN controversy\textsuperscript{171} have resorted to private agreement. Intimidated by the filing of petitions to deny the station's renewal by two listeners groups and a competing application by Concert Radio, Inc., Starr Broadcasting has reluctantly agreed to sell the FM station to GAF Corp.\textsuperscript{172} The five-party agreement envisions withdrawal of the petitions to deny and the competing application in return for certain concessions. The station's classical music format has been restored and Starr will continue to operate the station until the transfer to GAF is approved by the FCC. GAF, in turn, has pledged to provide for a listener's voice in the station's management and to give Concert Radio a five-year option to buy the station in the event GAF should want to sell or change the classical format at a later date. The deal also looks to the reimbursement of 75 percent of the legal expenses — an amount in excess of $100,000 — incurred by the three withdrawing groups during the year long controversy. It should be noted, however, that private agreement among the parties does not always mean final resolution of the controversy since such agreements are always subject to Commission approval, and any provision which might curtail the ultimate discretion of the licensee will not be given effect.\textsuperscript{173} The entire WNCN agreement as well as the transfer of the station, therefore, must ultimately pass Commission scrutiny.

A PROPOSED SOLUTION

In his concurring opinion in \textit{WEFM}, Chief Judge Bazelon of the District of Columbia Circuit challenged the majority's broad view of the Commission's authority, urging consideration of the first amend-

\textsuperscript{170} The original agreement required the assignee to reinstate the abandoned format if 20\% of the public were found to favor progressive rock. This agreement was rejected by the FCC, Twin States Broadcasting, Inc., 42 F.C.C.2d 1091, 28 P & F Radio Reg. 2d 145 (1973), but a modified agreement giving the licensee the ultimate discretion with respect to the format change was later approved. Twin States Broadcasting, Inc., 29 P & F Radio Reg. 2d 490 (1973).

\textsuperscript{171} See text accompanying notes 157-63 \textit{supra}.


\textsuperscript{173} The Commission has prefaced its approval of private agreements in a number of cases with the reminder that the ultimate responsibility in programming matters must lie with the licensee. See, e.g., Public Communications, Inc., 31 P & F Radio Reg. 2d 714 (1974); Democratic Party, 37 F.C.C.2d 526, 25 P & F Radio Reg. 2d 376 (1972); Bob Jones Univ., Inc., 32 F.C.C.2d 781, 23 P & F Radio Reg. 2d 410 (1971).
ment implications of its decision. Disturbed that "the whole gamut of FCC programming policies have [sic] developed over the last forty years . . . in a manner obdurately resistant to First Amendment values," Judge Bazelon suggested that consideration of a format change should only take place within the context of a comparative licensing proceeding. The first amendment value of diversity of ideas, he believed, could not support consideration of content in a noncomparative situation; but "[w]hen faced with mutually exclusive applicants for the same frequency the FCC is in a position where it must by the nature of the proceeding choose among speakers."

Admittedly, accommodation of the first amendment values involved requires a delicate balancing approach with respect to any intrusion into the area of programming content. It must be remembered, however, that the primary duty of both the station licensee and the Commission is to serve the general public. A narrow interpretation of the Commission's authority in this area, such as the one suggested by Chief Judge Bazelon, would give free reign to the licensee's discretion during the license term. This approach would seem to undermine the very purpose of the public interest mandate and would further seriously threaten the future effectiveness of listener participation in programming — unquestionably, the area of the public's greatest concern.

Under the authority of the public interest mandate, the Commission could require a broadcaster who had made the decision to depart from the established entertainment format to submit a program preference survey similar to the ascertainment survey presently required with respect to community problems. As it is now, before granting an initial application or an application for renewal of a station license, the Commission must find that the applicant's programming, as represented in its application form, would be in the public interest. If subsequent to the grant, the licensee or its assignee wishes to depart from these representations, it is submitted that it be required to demonstrate that any substituted performance would similarly be in the public interest. Such a procedure would forewarn the broadcaster of potential opposition to the change, if undertaken, and further promote broadcaster responsiveness to the community.

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175 Id. at 270.
176 Id. at 278-81.
177 Id. at 279 (footnote omitted).
178 See notes 79-80 and accompanying text supra.
Should the licensee, either undaunted or encouraged by the results of its survey, elect to pursue the format change, a swifter and more efficient method for concerned citizens to voice their opposition is necessary. Under the Commission's present approach, the licensee is only answerable for such a change upon a subsequent application for renewal of the station license. A solution most favorable to the listeners would be the adoption by the Commission of a new procedure allowing for immediate public intervention and FCC consideration of the format change issue during the license term. The institution of a wholly new procedural remedy, however, would unnecessarily increase the workload of an already overburdened agency.179

A more reasoned solution would be to permit members of the listening public to file a petition for early submission of the license renewal application.180 Since a station license is granted on the basis of specific representations of performance, it does not seem unreasonable that a broadcaster should not be permitted to substantially alter the station's operation without a preliminary determination by the Commission that such a change would be in the public interest. If the allegations of the petitioner raise substantial and material questions of fact regarding the format change, the Commission could then consider the propriety of the change in the context of this early comparative renewal proceeding where it would be required to determine whether a licensee's continued operation is in the public interest. Assuming that the format change was proposed in good faith, it would not occur at the beginning of the license period. Therefore, early submission of a renewal application would entail only a minor inconvenience to the licensee and the Commission since consideration of the change would have to take place within a relatively short period of time anyway. At the same time, it would prevent irreparable injury to the public which could be caused by a delay of even a few months.181

The Commission fears that any restriction on the exercise of discretion by the licensee in this area would in effect "lock" the broadcaster into a particular format and discourage experimentation with

179 For an interesting account of the daily workload of the Commission see Johnson & Dystel, A Day in the Life: The Federal Communications Commission, 82 YALE L.J. 1575 (1973).

180 In view of the fact that the Commission is "particularly reluctant to use a revocation proceeding to intrude into the area of a licensee's programming judgments," Radio Para La Raza, 40 F.C.C.2d 1102, 1106, 27 P & F RADIO REv. 2d 836, 842 (1973), an early renewal proceeding would be a more appropriate procedural context for consideration of the format change.

181 See note 165 and accompanying text supra.
new types of programming. The institution of procedures such as those outlined above, however, would not prevent a broadcaster from changing its format, but merely insure that any change in the licensee's performance was in the public interest. In some instances where, for example, other stations in the area provide adequate listening alternatives, or the continuation of a particular format would be economically unfeasible, a format change generally would be warranted. On the other hand, a licensee's profit motives should not be permitted to prevail at the expense of the listening pleasure and, in many cases, the cultural enrichment of the public. Insofar as the public is concerned, when a station alters its format, a whole new station has come into being. The fact that the ownership remains the same is of no consequence to the listener who is faced with all new radio programming and station personnel. Just as the Commission readily accepts its duty to determine whether a change in ownership would be in the public interest, it should not be permitted to shirk its responsibility to make a public interest determination with respect to format changes.

CONCLUSION

Admittedly, "any government effort to regulate the content of programming must be carefully scrutinized for possible interference with free expression." Yet, a laissez-faire attitude towards programming has proven ineffective to promote diversity and first amendment interests of the public. The Commission's traditional approach of non-intervention in the area of entertainment programming is not only unresponsive to recent developments in the broadcasting industry, but also inconsistent with its own policy with respect to other types of programming. In attempting to balance the respective interests of the licensee and the listening public, the FCC has imposed reasonable restrictions on the former's freedom of choice in news and public affairs programming. In the area of entertainment, however, it

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183 In some cases the facts surrounding the format change have suggested that the licensee has bought an unprofitable, though culturally valuable, radio station with the intention of subsequently converting its format to a more profitable and popular one. In this regard, see Commissioner Cox's analysis of the licensee's motives for the format change in the Atlanta case set forth in the text accompanying note 151 supra. Starr Broadcasting Co., the licensee in the WNCN case, has allegedly made switches of this type with three other radio stations. See Rich, Mr. Buckley Passes the Buck, New York, Sept. 23, (1974), at 78.
184 See notes 108-40 and accompanying text supra.
185 See, e.g., City of Camden, 18 F.C.C.2d 412, 16 P & F Radio Reg. 2d 555 (1969). The Commission denied the assignment application in this case where the assignee pro-
refuses to restrict the licensee's discretion beyond the requirement that it give notice of a format change.\textsuperscript{187} There is no sound reason for this distinction. The broadcaster's first amendment rights, the Commission's chief justification for nonintervention, "would, if anything, indicate a lesser — not a greater — governmental role in matters affecting news, public affairs, and religious programming."\textsuperscript{188} Entertainment programming is more a business venture for the broadcaster than a vehicle for self-expression. While profit motives are not to be ignored, they cannot be permitted to govern the licensee's judgment exclusively because broadcasting, unlike most other business enterprises, is engulfed with the public interest.

The Commission has expressed concern that requiring it to examine entertainment program content would be tantamount to making it a "national arbiter of taste."\textsuperscript{189} As noted in the Atlanta decision, "[t]he Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification."\textsuperscript{190} Requiring the licensee to ascertain community program preferences will help to insure that both the broadcaster and the Commission remain attuned to the programming tastes of the general public. Diligent application of the content-neutral guidelines\textsuperscript{191} suggested by the District of Columbia Circuit in its recent decisions will enable the Commission to determine how these interests should be met and settle future program format controversies in a manner which is consistent with both the public interest mandate of the Communications Act and the first amendment.

\textit{Joanne Welty}

\textsuperscript{187} See text accompanying notes 98-99 supra.

\textsuperscript{188} Citizens Comm. to Save WEFM v. FCC, 506 F.2d 252, 267 (D.C. Cir. 1974) (rehearing en banc).

\textsuperscript{189} Citizens Comm. v. FCC, 436 F.2d 263, 272 n.7 (D.C. Cir. 1970).

\textsuperscript{190} Id.

\textsuperscript{191} For a discussion of the specific criteria the court considered relevant to the question of format changes see notes 144-54 and accompanying text supra.