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Development of New Public Interest Standards in the Format Change Cases

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DEVELOPMENT OF NEW PUBLIC INTEREST STANDARDS IN THE *FORMAT CHANGE CASES*

In several recent decisions, known collectively as the *Format Change Cases*,[1] the Federal Communications Commission (FCC) and the United States Court of Appeals for the District of Columbia Circuit[2] have grappled with the problem of citizens' protests to entertainment format[3] changes proposed by broadcast stations. In its most recent decision, *Citizens Committee to Save WEFM v. FCC*,[4] the appeals court reversed the Commission's ruling[5] on such a protest and held that the FCC must conduct an evidentiary hearing to determine whether the public interest is served when the assignee of a broadcast license proposes to eliminate either a unique entertainment format or one which, while perhaps not unique, nevertheless serves a specialized audience which would suffer by its removal.[6] This article will explore the development of entertainment format regulation and the consequences of the court's decision in *WEFM*.

I. THE TRANSITION FROM LAISSEZ-FAIRE TO REGULATION

A. The Broadcaster's Business Judgment

Since the inception of federal regulation of the broadcast media in 1934,[7]

1. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973); Lakewood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973); Hartford Communications Comm. v. FCC, 467 F.2d 408 (D.C. Cir. 1972); Citizens Comm. to Preserve the Voice of the Arts v. FCC, 436 F.2d 263 (D.C. Cir. 1970).

2. The Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970), provides that jurisdiction over appeals from decisions involving licensing by the FCC resides with the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 402(b) (1970).

3. "Entertainment format" is the term used by the FCC and the courts to describe the type of music or entertainment programming that is regularly played on a broadcast station. Entertainment format is only one element of what the FCC defines as "broadcast programming." In its Report and Statement on Programming Policy, 44 F.C.C. 2303 (1960) (en banc), the FCC defined "programming" as "[t]he major elements usually necessary to meet the public interest needs and desires of the community in which the station is located as developed by the industry." *Id.* at 2314.

4. 506 F.2d 246 (D.C. Cir. 1974).

5. Zenith Radio Corp. (WEFM), 38 F.C.C.2d 838, *reconsideration denied*, 40 F.C.C.2d 223 (1972).

6. 506 F.2d at 262.

7. The Federal Communications Act, 47 U.S.C. §§ 151-609 (1970), was enacted in

the FCC and the courts have struggled to define the dimensions of broadcasters' freedom to utilize the airwaves. The freedom afforded broadcasters generally has been viewed as the freedom to compete in the open market. However, tension develops when that freedom collides with the mandate of the Communications Act that the broadcaster serve the "public interest, convenience or necessity."[8]

Initially, the courts and the FCC considered broadcasters' business decisions to fall beyond the scope of government regulation. In *FCC v. Sanders Brothers Radio Station*,[9] the Supreme Court held that "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of programs, of the business management or of policy [of the licensee]."[10] The FCC has interpreted this holding as sanctioning few, if any, restrictions on a broadcaster's choice of station entertainment format.[11] The Commission has held that a broadcaster's selection of entertainment format is solely a business decision.[12] Noting that as a practical matter entertainment programming is "subject to constantly changing public interests in particular types of entertainment,"[13] the FCC has

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1934. For a history of prior regulation of the broadcast media, see 1 A. SOCOLOW, THE LAW OF RADIO BROADCASTING 38-54 (1939).

8. 47 U.S.C. § 307(a) (1970).

9. 309 U.S. 470 (1940).

10. *Id.* at 475. In *Sanders Brothers*, the FCC had granted an application for a new broadcast station over the objection of an existing station that it would be economically injured because the local market could not support two competing broadcast facilities. Deciding that the field of broadcasting is open to free competition, the Court indicated that while the FCC should inquire into economic problems when such problems have an "important bearing upon the ability of the applicant adequately to serve his public," *id.* at 476, in general the licensee should be free to conduct its own business affairs. *Id.* at 474-76. The Court stated that

> 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.

Id. at 475.

11. *See* Report and Statement on Programming Policy, 44 F.C.C. 2303, 2308-09 (1960) (en banc); Zenith Radio Corp., 38 F.C.C.2d 838, 845-46 (1972), *vacated and remanded sub nom.* Citizens Comm. To Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

12. WCAB, Inc., 27 F.C.C.2d 743 (1971). The FCC stated that although the broadcaster is required to consider the needs and interests of the community in selecting his entertainment format, the broadcaster could nevertheless take into account economic considerations as well. *Id.* at 746. It should be noted, however, that the Commission has not permitted licensees a similar high degree of discretion concerning their selection of nonentertainment programming. *See* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 267 (D.C. Cir. 1974).

13. WCAB, Inc., 27 F.C.C.2d 743, 746 (1971). *See* Zenith Radio Corp., 40 F.C.C.

been unwilling to "lock in" a broadcaster to a particular entertainment format.[14] Consequently, broadcasters have been given wide discretion by the Commission to select entertainment formats that produce desired economic results.

B. Citizen Challenges to Entertainment Format Changes

The FCC's deference to a broadcaster's decision to change a particular entertainment format, however, has not gone unchallenged.[15] These challenges have arisen when petitions to deny, opposing applications for assignment of station licenses in which the assignee had proposed a new entertainment format, were filed with the FCC.[16] Formerly, the FCC had routinely approved such proposed assignments and formats without evidentiary hearings, on the basis that the change of a licensee's entertainment format by an assignee was a business decision within his discretion.[17]

The District of Columbia Circuit has taken a different view. The court's initial weighing of the public interest in opposing format changes against the business judgment of the broadcaster in proposing such changes appeared in *Citizens Committee to Preserve the Voice of the Arts v. FCC*.[18] There the

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2d 223, 231 (1973) (additional views of Chm. Burch), *vacated and remanded sub nom.* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

14. Zenith Radio Corp., 40 F.C.C.2d 223, 231 (1973), *vacated and remanded sub nom.* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

15. *See* cases cited note 1 *supra.*

16. The Communications Act provides in part that "[a]ny party in interest may file with the Commission a petition to deny any application . . ." 47 U.S.C. § 309(d)(1) (1970). A citizens' group is a party in interest and has standing to challenge an assignment of license or a license renewal. *See* Charles A. Haskell, 36 F.C.C.2d 78 (1972), *aff'd sub nom.* Lakewood Broadcasting v. FCC, 478 F.2d 912 (D.C. Cir. 1973).

17. *See* cases cited note 1 *supra.* Whenever a broadcast licensee decides to sell its broadcast facilities and station license, the licensee and its proposed assignee must file an application for assignment of license for approval by the Commission. 47 U.S.C. § 310(b) (1970). The assignment application procedure differs considerably from the standard comparative application procedure. Any person meeting the requirements of *id.* § 308(b) may file an application in initial licensing proceedings. However, in an assignment of license application procedure pursuant to *id.* § 310(b), only the assignee's application will be reviewed by the FCC. The FCC thus reviews the assignee's application to determine whether the "public interest, convenience and necessity" is served. *Id.* § 310(b).

18. 436 F.2d 263 (D.C. Cir. 1970). The FCC's approach in considering citizens' protests to assignment applications without format changes had previously come under considerable fire in the appeals court. In Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968), the court found that the FCC had failed to perform its statutory duty by failing to find whether the public interest would be served by the grant of an assignment application and by refusing to consider a citizen's protest of the acquisition of a Chicago radio station by a newspaper company. After summarily dismissing the FCC's argument

court held that prior to approving an assignment, the FCC must hold an evidentiary hearing on a proposed format change when a protesting group of citizens raises substantial and material questions of fact regarding an assignee's proposal.[19] An assignment application had been filed by an assignee of a classical music station in Atlanta, Georgia, proposing a contemporary music format. A citizens' committee filed a petition to deny the application.[20] The committee, interested in continuing the classical format, sought a hearing to determine whether the public interest would be served by the format change. Denying the hearing and granting the assignment application, the FCC stated that the listening audience would be served by an alternative source of classical music.[21] The Commission added that the public interest would be served by the format change because the assignee had shown in a survey that 73 percent of those interviewed at random in the relevant broadcast area preferred the proposed format over the existing one.[22]

The appeals court reversed, holding that when a protesting group raises substantial and material questions of fact on the question of whether the affected listening audience has a reasonable alternative to the entertainment format proposed to be abandoned, the FCC must hold an evidentiary hearing to determine whether the format change is in the public interest.[23]

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that the group lacked standing, the court stated that "[w]hen Congress requires a finding, its instruction is not to be ignored or given only lip service." *Id.* at 211.

19. 436 F.2d at 268. 47 U.S.C. § 309(d)(2) (1970) provides the standards applicable to FCC review of petitions to deny applications. If there are no substantial and material questions of fact alleged in the petition, the FCC may grant the application without a hearing. If there is a substantial and material question of fact presented, or if the Commission for any reason is unable to make the prescribed finding that the grant of the application will serve the "public interest, convenience, [or] necessity," it must formally designate the application for a hearing. *Id.* § 309(e).

20. Glenarken Associates, 19 F.C.C.2d 13 (1969).

21. *Id.* at 15 n.3. The FCC noted that another classical music station, WOMN, served a large portion of the city of Atlanta. *Id.*

22. *Id.* at 14-15. The survey showed that 73 percent of those questioned favored contemporary music, 16 percent preferred classical music, and the remainder preferred neither. The citizens' committee objected that the random survey was misleading in that it sought a response only to the preference of the interviewees for contemporary or classical music. The Committee further asserted that even in the event the survey was a true reflection of the preferences for particular entertainment in Atlanta, the FCC could not deprive 16 percent, or a substantial minority of Atlanta's citizens, of their sole classical music format merely because 73 percent of those interviewed in a random survey preferred contemporary music.

23. 436 F.2d at 272. The court remanded the case with a requirement that the Commission hold a hearing to consider the following factors: the availability of an alternative music format; the alleged misrepresentations made by the assignee concerning the music preferences of the population sample surveyed; and allegations made by the as-

The court expressed serious doubt that the other classical music station could provide a viable alternative for the listening audience of the Atlanta area.[24] Stating that the FCC had acted arbitrarily in deciding on the basis of the preference of a majority of the community that a format change would serve the public interest,[25] the court found that a broader investigation was required when elimination of a format would result in a reduction of broadcast services to the community.[26] Under this standard, the court ruled that the FCC must consider whether a format change would serve the public interest when a "significant minority" of the community objected.[27]

After the *Citizens Committee to Preserve the Voice of the Arts* decision, the FCC cast a narrow role for itself in reviewing format changes. The Commission decided that only when there was substantial change in an existing program format would the Commission be required to determine whether the change was in the public interest.[28] If it made a finding that

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signee that it was changing the format based on the nonprofitability of the existing operation of the station. *Id.* at 268-71. *See* Note, *The Public Interest In Balanced Programming Content: The Case For FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933 (1972).

24. 436 F.2d at 271-72. The court held that it was important for the Commission to determine whether the alternative classical music stations covered the entire city of the licensee in order for such stations to be considered adequate substitutes. *See* note 73 *infra.*

25. 346 F.2d at 269. The court stated that the Commission's reasoning that the majority preference for music should be determinative of the public interest would be correct only if there were only one station broadcasting in Atlanta. However, since there were 20 stations, none of which offered classical music, 16 percent of the public (those desiring to listen to classical music) constituted a significant minority. As a result, the FCC was required to consider their interest when the classical format was threatened.

26. *Id.* at 272. The court, citing *Sanders Brothers*, stated:

> It is, of course, true that a licensee has considerable latitude in the matter of programming; and it is not for the Commission arbitrarily to dictate what the programming content shall be . . . . But it is not true that the Commission is devoid of any responsibility whatsoever for programming, or that its concern with it stops whenever 51% of the people in the area are shown to favor a particular format.

Id.

27. *Id.* at 269. The test for determining the amount of protest sufficient to raise the necessity for a public interest finding by the FCC was further developed in Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 934 (D.C. Cir. 1973). *See* note 48 & accompanying text *infra.*

28. In 1971, the FCC issued the Report and Order on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971), which stated that

> any application involving a *substantial change in program format*—including assignment and transfer applications (where this type of question has usually arisen) . . . —will be scrutinized in light of this [the *Citizens Committee to Preserve the Voice of the Arts*] decision; and applicants should be prepared to support their proposals to change formats in light of the needs and tastes

another station within the licensee's community had a similar entertainment format, there would be no need to hold a hearing to determine whether the format change served the public interest.[29]

The Commission thereafter decided two cases involving citizens' protests to substantial changes in entertainment formats. In *Charles A. Haskell,*[30] the assignee of a Denver, Colorado "all news" station sought to change the station's format to modern country music. A citizens' committee protested the assignment and sought an evidentiary hearing to determine whether the public interest was served by the format change. The committee alleged that there was no alternative "all news" format available to the community.[31] The FCC, however, found there was no need to question the assignee's proposed format on public interest grounds because there was a plethora of news available on broadcast stations in Denver, and concluded that there was adequate alternative service available to the affected listening audience.[32] The appeals court affirmed,[33] holding that the FCC had made an adequate finding that the elimination of an "all news" format was not contrary to the public interest because of the alternative sources of news. On the same day, however, the court reversed another FCC decision involving a format change.[34]

In *Twin States Broadcasting, Inc.,*[35] a large group of citizens protested the proposed abandonment of a "progressive rock" format by the assignee of a broadcast station. It was clear that there existed no other "progressive rock" format in the area.[36] Nonetheless, the FCC denied the protesting citizens an evidentiary hearing on the ground that there were no substantial or

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of the community and the types of programming available from other stations. *Id.* at 680. The assignee is not required to make a formal ascertainment survey of the community regarding the programming preferences of the community. Charles A. Haskell, 36 F.C.C.2d 78, 84-85 (1972), *aff'd sub nom.* Lakewood Broadcasting v. FCC, 478 F.2d 912 (D.C. Cir. 1973). The purpose of the ascertainment survey is to discover community problems, not to elicit programming preferences. Report and Order, *supra,* at 682. Consequently, although the FCC required a formal ascertainment to be filed by the assignee showing community problems, it required only a substantial showing of community programming preferences to be made by the assignee when a format was to be changed.

29. WCAB, Inc., 27 F.C.C.2d 743 (1971).

30. 36 F.C.C.2d 78 (1972), *aff'd sub nom.* Lakewood Broadcasting v. FCC, 478 F.2d 919 (D.C. Cir. 1973).

31. 36 F.C.C.2d at 81.

32. *Id.* at 87.

33. Lakewood Broadcasting v. FCC, 478 F.2d 919 (D.C. Cir. 1973).

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

35. 35 F.C.C.2d 969 (1972).

36. *Id.* at 971.

material facts in dispute as to whether the public preferred one format over the other.[37] The Commission completely avoided the question of an alternate source of entertainment format by holding that "unless it is shown or appears to the Commission that the format choice is not reasonably attuned to the tastes and general interest of the community of license, [the Commission] will not question the licensee's judgment in these matters."[38]

The appeals court reversed this decision in *Citizens Committee to Keep Progressive Rock v. FCC*,[39] and ruled that the FCC is required to hold an evidentiary hearing to determine whether there will be alternative sources of the same music available should a requested format change be granted.[40] The FCC was directed to determine whether it was economically feasible for the assignee requesting the format change to return to the station's original format if the FCC found that there was no adequate alternative entertainment format.[41] Recognizing the FCC's reluctance to follow its previous decision in *Citizens Committee to Preserve the Voice of the Arts*, the court took the opportunity to elaborate on and to broaden what it considered the essential public interest question inherent in format change cases.[42]

The court held that when a protest is lodged against a change in an entertainment format, the FCC must first determine whether there is a similar entertainment format available.[43] If not, the format is to be

37. *Id.*

38. *Id.* The FCC was especially concerned with the possibility of locking an assignee into a format which it said would "severely impinge on the discretion and the flexibility that a broadcaster must exercise in order to operate his station." *Id.* Additionally, the FCC noted that at the time the assignee contracted to buy the station, the licensee was programming a "middle of the road format" that had little public support. *Id.* After the assignment application was filed, with the proposed format change, the licensee changed its format to "progressive rock" which engendered enthusiasm from the community. The FCC said that the assignee should not be held responsible for the continuation of a format which was not in existence when it filed its application. *Id.* at 971 n.3.

39. 478 F.2d 926 (D.C. Cir. 1973).

40. *Id.* at 931-32.

41. *Id.* at 932. The court indicated that "[t]he question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the *format* is so economically unfeasible that an assignment encompassing a *format change* should be granted." *Id.* at 931. The Commission had previously noted that a strong factor in the assignee's favor for changing an entertainment format was the dire financial position of its business. WCAB, Inc., 27 F.C.C.2d 743, 747 (1971). The court's contrary view places a greater burden upon the assignee, who now has to prove that the unstable financial condition of the previous licensee was directly caused by an economically unfeasible format.

42. 478 F.2d at 930. The court "suspect[ed], not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of *Citizens Committee* [*to Preserve the Voice of the Arts*] to cases involving Atlanta classical music stations." *Id.*

43. According to the court, a majority of format changes involve formats which do

considered unique.[44] The question then becomes whether the elimination of a unique format serves the public interest. The court viewed the *Citizens Committee to Preserve the Voice of the Arts* decision as resting on the presumption that the public interest is served by maintaining diversity of programming within a community.[45] According to the court, the Commission had addressed itself to the completely different question of whether a majority preferred one type of format over another.[46] It thus ruled that the interest of the protesting minority must be considered when the elimination of a unique format threatens to reduce the amount of diversity of entertainment programming available to the general public.[47]

Finally, the court sought to determine at what point citizens' objections would become significant enough to require an evidentiary hearing by the Commission to consider them. The court held that an evidentiary hearing was required when "public grumbling reaches significant proportions."[48] As to the proper handling of the merits of such hearings, the court in a companion case expressly declined to set forth explicit standards as to the appropriate resolution of every protest over a format change.[49] It did, however, warn

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not diminish the diversity of entertainment available. Therefore, the decision to change a format which is not unique should be "left to the give and take of each market environment and the business judgment of the licensee." *Id.* at 929, *citing* WCAB, Inc., 27 F.C.C.2d 743 (1971).

44. 478 F.2d at 929. The court's use of the term "unique" in *Progressive Rock* is a clear extension of *Citizens Committee to Preserve the Voice of the Arts*, in which the court never spoke in terms of the threatened format's uniqueness, but was concerned only with alternative sources of music available. *See* note 23 *supra*. The court's use of the word "unique" would lead one to believe that the FCC's duty is to find an identical entertainment format before having a hearing to consider whether the public interest would be served by the format change.

45. *Id.* at 928-29.

46. *Id.* at 930.

47. *Id.* at 929 n.7.

48. *Id.* at 934. The court decided not to establish a quantative minimum for its "public grumbling" standard since every situation is different. The court assumed that it is in the public's best interest to have all segments represented. Therefore, a "significant minority" of voices was sufficient to satisfy the standard. *Id.* at 929 n.7.

49. Judge Tamm wrote both Lakewood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973), and *Progressive Rock* on the same day. The two decisions can be viewed as one integrated decision on format changes. In *Lakewood Broadcasting*, he stated that

> [W]hile we have recognized that format changes may impair the public's paramount interest in diversified programming, we have never attempted to set out specific guidelines for achieving the marketplace ideal. The first, tentative steps into this complex area of regulation must be taken by the Commission. The Commission, and perhaps rightly so, appears loathe to lightly undertake a task which smacks of establishing it as the "national arbiter of taste." The law in this area, following the lead of *Citizens Committee*, is in a state of transi-

the Commission that it had to make findings on alternative sources of entertainment programming before it could conclude that an assignment application coupled with a format change would serve the public interest.[50]

The court's clarification of *Citizens Committee to Preserve the Voice of the Arts* in *Progressive Rock* was intended as an instruction to the FCC that it must consider the importance of maintaining diversity of programming within a community when an assignee proposes a format change. The court clearly extended *Citizens Committee to Preserve the Voice of the Arts* by holding that a unique format demanded more from the FCC than a mere finding that there was a reasonable alternative source of entertainment available to the affected listening audience. The question left open after *Citizens Committtee to Preserve the Voice of the Arts* and *Progressive Rock* was whether the court would choose to require a public interest finding by the Commission even when the format proposed to be changed was not unique.

II. Defining the Parameters of Regulation of Format Changes

A. The WEFM Rationale

In *Zenith Radio Corp. (WEFM)*,[51] the FCC set forth its views in full on the question of format changes. Zenith Radio Corporation had been operating a classical music station as an experimental laboratory for the development of high fidelity equipment. It broadcast on a noncommercial basis from 1940 until the the late 1960's, when it started to incur losses. When an attempt to develop limited commercial advertising failed to generate the necessary income, the licensee contracted to sell the station and to assign its license. The assignee's subsequent decision to adopt a contemporary music format brought strong opposition from the community.[52] Thereafter, a

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tion. Whatever standards are set must remain flexible and open to new information and new understanding.

Id. at 925 n.14.

50. 478 F.2d at 930. The court stated:

When we say that a format change is of public interest proportions we mean that it must be considered by the Commission in its ultimate determination of public interest, and thus will be an element scrutinized by this court when called upon to exercise its review.

Id.

51. 38 F.C.C.2d 838 (1972), *reconsideration denied*, 40 F.C.C.2d 223, *vacated and remanded sub nom.* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974). *See generally* Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401 (1975); 9 Ga. L. Rev. 479 (1975).

52. The citizens' committee asserted that it had received hundreds of letters in opposition to the sale and that the FCC had received over a thousand such letters. *See* 506 F.2d at 254.

formal petition to deny was filed with the FCC by a citizens' committee organized to oppose the proposed assignment.

The committee asserted that the public interest required that WEFM maintain a classical music format.[53] While there were two other stations with classical music formats, the committee nevertheless argued that there was a material and substantial question of fact concerning the extent to which the other classical music stations covered WEFM's listening audience in the entire metropolitan area of Chicago.[54] As a result, the committee argued, an evidentiary hearing was required. Other issues raised by the committee included WEFM's financial losses[55] and the allegedly inadequate notice of proposed format change.[56] Additionally, the committee argued that the immense public interest issues inherent in the abandonment of an entertainment format could not be resolved without a public hearing.[57]

The FCC denied the request for a hearing, finding that there existed no substantial and material questions of fact.[58] The FCC further found that

53. 38 F.C.C.2d at 840. The committee contended that it would demonstrate in a public hearing "the public's continued right at this time, if not indefinitely, to the use of WEFM channel for its classical music format." *Id.*

54. *Id.* at 839. The committee asserted that there were three classical music stations in Chicago: WEFM, WFMT and WNIB. The assignee had agreed to relinquish to WNIB the call letters "WEFM-FM," to make a gift to WNIB of its classical music library and its transmitter, and to provide WNIB with legal and engineering assistance to obtain FCC consent to increase WNIB power. The assignee's position was that WNIB would become an adequate alternative to WEFM's listeners. *Id.* at 843. The committee, however, asserted that WNIB's power was not sufficient to reach all of WEFM's listening audience in the Chicago metropolitan area and consequently was not a viable alternative. WFMT's coverage included the entire WEFM listening audience. The issue of WFMT's coverage was ignored in the first decision by the FCC. Upon petition for reconsideration, the FCC found that WFMT was an appropriate substitute. Zenith Radio Corp., 40 F.C.C.2d 223, 225 (1973). On appeal, the committee argued for the first time that WFMT was not an appropriate substitute because its format was "*unique fine arts*," not classical. 506 F.2d at 264. The court found that there was a substantial and material question of fact as to what type of music format WFMT had, and included this question as part of its remand to the FCC. *Id.* at 265.

55. 38 F.C.C.2d at 844. *See* note 41 *supra.*

56. *Id.* at 846. The committee alleged that although Zenith had complied with the FCC's rule regarding notice to the listening audience as to the assignment of license, it had failed to provide sufficient notice of the format change to pass muster under the due process clause of the fifth amendment. The FCC summarily dismissed this argument, stating that the FCC's notice rules did not require a licensee to give its audience notice of a proposed change in format. *Id.* at 846. *See* 47 C.F.R. §§ 1.580(d), 1.580 (f) (1974). The court did not reach this question because it reversed the FCC on other grounds. However, it strongly implied that the FCC should change its requirements of notice. 506 F.2d at 268 n.35.

57. 38 F.C.C.2d at 844.

58. *Id.* at 846. The FCC held that the licensee had fully complied with its notice rules. *See* note 56 *supra.* In addition, it held that the committee had raised no substan-

there was adequate alternative classical music provided by at least one of the other Chicago classical music stations; since this service was available, the FCC held that *Citizens Committee to Preserve the Voice of the Arts* could be distinguished.[59] When it was shown that the listening audience would not be deprived of classical music, the FCC stated that its role of review in format changes was limited to a determination of whether the assignment application would serve the public interest.[60]

When a petition for reconsideration was denied,[61] six Commissioners commented further on the FCC's role in entertainment format changes.[62] To deny a licensee the right to change a format, they stated, would be a step toward dictating to each licensee what entertainment format it should use.[63] Finding that this approach was not contemplated by Congress,[64] and that such an approach could not be tolerated when the change in entertainment format did not deny the community its only source of a particular type of entertainment programming,[65] the Commissioners stressed the fact that "inhibiting licensee discretion to change or modify unsuccessful program formats appealing to minority tastes will have . . . the effect of lessening the likelihood that such programming will be attempted in the first place."[66] The

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tial or material questions of fact concerning the assignee's financial justification for changing WEFM's entertainment format.

59. *Id.* at 845.

60. *Id.* at 846. The FCC reiterated its main justification for allowing the format change based upon the broadcaster's business judgment. However, it added a new reason for declining to decide whether the public interest was served by the format change: "To hamper the licensee's discretion in this area with the ominous threat of a hearing in a case like this would only serve to discourage licensees from choosing or experimenting with a format . . . ." *Id.* at 846.

61. 40 F.C.C.2d 223 (1973).

62. *Id.* at 230 (additional views of Chm. Burch). Chairman Burch, writing for himself and five other Commissioners, viewed the change of WEFM's format as outside the *Citizens Committee* decision solely on the basis of the existing alternative sources of music.

63. *Id.*

64. *Id.*

65. *Id.* The Commissioners did express the view that the FCC would take an "extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." *Id.* at 231. Their position was that any format change not considered to deprive the community of a particular type of entertainment programming would not be reviewed even under a reasonableness criterion. *See id.* The Commissioners supported their view by stating that an assignee is not required to survey the community on its programming preferences. *Id. See also* Report and Order on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 682 (1970). *See also* note 28 *supra.*

66. 40 F.C.C.2d at 231. The Commissioners relied heavily on the rationale of Twin States Broadcasting Co., 35 F.C.C.2d 969, 971 (1972), which was later reversed in Citi-

result of such constraints, the Commissioners decided, would be to decrease diversity in broadcasting.

B. *The Appeals Court's Decision in WEFM*

The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed.[67] It found that there were substantial and material questions of fact necessitating a hearing before the FCC could determine whether the format change served the public interest[68] and summarized what it considered the FCC's role of review when an assignment application proposed a format change.[69] First, if a significant segment of the public lodged a protest,[70] the FCC would be required to determine whether the format to be abandoned was unique or "otherwise serve[d] a specialized audience which would feel its loss."[71] If the format were of this type, the FCC would then be required to determine whether the format change served the public interest. Second, if there were substantial questions of fact or inadequate data in the application, a hearing would be required to resolve these issues in order to assist the FCC in discerning the public interest.[72] The court chose to expand its previous decisions by holding that the geographic area of interest in a format change included the

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zens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973). *See* notes 39-50 & accompanying text *supra*.

67. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974). Initially, the appeals court affirmed the FCC in a decision written by Chief Judge Bazelon. The opinion noted that a hearing is not necessary when the format to be discontinued is not unique. *Id.* at 250. The court found that WFMT, another classical music station, served all of WEFM's listening audience, and that the FCC had sufficient evidence to support its finding that there was financial necessity for the format change. *Id.* *See* 52 TEXAS L. REV. 558 (1974). In rehearing the case en banc, the court stated that the proceedings involved important questions with respect to the utilization of the publicly-owned airwaves. 506 F.2d at 253.

68. The court found that nothing in *Citizens Committee to Preserve the Voice of the Arts* was meant to impose upon the FCC a requirement to hold a hearing when there were no substantial questions material to a public interest determination. 506 F.2d at 261. The court found, however, that the FCC must hold an evidentiary hearing to determine whether Zenith's losses were attributable to the classical music format or to the operation of the station. *Id.* at 266. *See* note 41 *supra*. In addition, the court held that an evidentiary hearing was required to determine whether the assignee had deliberately misled the FCC about its intentions to change WEFM's format. *Id.* at 266. The court further held that a determination on the extent of WFMT's coverage of WEFM's listening audience and the question of whether WFMT was in fact a classical music station might be capable of demonstration without a hearing. *Id.* at 265.

69. *Id.* at 262.

70. The court reaffirmed the "public grumbling" test of *Progressive Rock*. *Id.* at 261.

71. *Id.* at 262.

72. *Id.*

entire service area of the station, not merely the city of license.[73]

The court's primary concern focused on the elimination of a particular entertainment format which would result in a decrease in the diversity of programming available to the public. The court rejected the FCC's view that broadcasters should be allowed to change formats freely because such broadcasters would naturally meet the preferences of the community, filling whatever void was left by the programming of other stations, and thus increase diversity. It stated that this view gave too much deference to broadcasters' freedom to compete.[74] Ruling that the FCC could not pursue a policy of free competition at the expense of decreasing diversification of programming, the court further stated that the FCC's "mechanistic" deference to freedom of competition with respect to format changes ignored the important public interest question in maintaining diversity of programming.[75] The court concluded that "there is no longer any room for doubt that if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition."[76]

III. Potential Ramifications of *WEFM*

A. New Definition of Entertainment Format

The primary significance of the holding in *WEFM* lies in the court's expansion of the definition of threatened entertainment formats to include any format that is unique or otherwise serves a specialized audience which

73. *Id.* at 263. The FCC had argued that WNIB's service area covered all of the city of Chicago, its city of license, and was therefore an adequate alternative for WEFM's listeners. 38 F.C.C.2d at 845. The Commission included a coverage map showing WEFM's, WFMT's and WNIB's signal. 40 F.C.C.2d at 228. The court found that "[m]ere inspection of the map indicates that either this statement or the map is not entirely accurate." 506 F.2d at 262 n.20. WNIB's coverage became irrelevant, however, when the court defined the relevant area as the entire service area, not merely the city of license.

74. 506 F.2d at 267-68. The majority issued a statement of additional views which explained that allowing broadcasters discretion to select entertainment formats was fully consistent with the Supreme Court's analysis of free competition in broadcasting in *Sanders Brothers*. 40 F.C.C.2d at 230. *See* note 10 *supra*. The court disagreed with the FCC that the Supreme Court in *Sanders Brothers* had construed the Communications Act as permitting broadcasters complete freedom of competition. The court quoted from another Supreme Court decision, FCC v. RCA Communications, Inc., 346 U.S. 86, 93 (1953): " 'The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.' " 506 F.2d at 267.

75. 506 F.2d at 268. The court found that it could not ignore the question of whether the diverse interests of all the people were being served to the maximum extent possible.

76. *Id.* at 267.

would feel its loss. As a practical matter, any group meeting the "public grumbling" test of *Progressive Rock* could challenge an assignee's proposed format change as a specialized audience which would feel the loss of an entertainment format. The court's broad definition of entertainment format permits this interpretation notwithstanding the court's comment in *Progressive Rock* that the majority of format changes do not diminish the diversity of programming available to a community.[77] The court's broad definition serves as a mandate to the FCC to recognize that its statutory duty to discern the public interest of a format change is triggered by an outpouring of protest. The clear implication of *WEFM* is that the FCC may not avoid its statutory duty by deferring either to a broadcaster's business discretion or to the programming preferences of the majority.[78]

B. Will All Format Changes Be Subject to FCC Inquiry?

The court in *WEFM* carefully limited its holding to FCC review of assignment applications in which the assignee proposes a format change. The underlying rationale of protecting diversity in programming, however, should logically apply to a decision by any broadcaster to change its entertainment format as defined by *WEFM*. Presently, a broadcaster's decision to change an entertainment format in mid-license term[79] is subject to FCC review only when the license must be renewed.[80] The timeliness of a protest is obviously extremely important to the protesting group since there can be serious doubt as to the effectiveness of such a protest at the end of a licensee's term.

Following the rationale of *WEFM*, it can be argued that any time a broadcaster operates a format within the *WEFM* definition it will be required to maintain that format. *WEFM* applies solely to assignees

77. 478 F.2d at 929.

78. Throughout all the format change decisions, the court would not accept the FCC's decision when it was clear that the Commission had avoided its statutory duty. *See* Citizens Comm. to Preserve the Voice of the Arts v. FCC, 436 F.2d 263, 268 (D.C. Cir. 1972); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 261 (D.C. Cir. 1974). However, there is no doubt that upon remand, the FCC could resolve the factual disputes and make a public interest finding which would bind the appeals court unless the FCC's determination had been arbitrary, capricious or unreasonable. *See* West Michigan Telecasters, Inc. v. FCC, 396 F.2d 688 (D.C. Cir. 1968).

79. A broadcast license is granted by the FCC for a period of three years. It is then subject to renewal procedures as provided in 47 U.S.C. § 307(d) (1970).

80. 436 F.2d at 272. One citizens' committee challenging a licensee's proposed format change has been denied a "stay of change of format." Starr WNCN, Inc., 48 F.C.C.2d 1221 (1974). The FCC had held that it would not intervene in the licensee's decision to change its format during its license term. The court affirmed on the basis of lack of finality. WNCN Listeners' Guild v. FCC, Civil No. 74-1925 (D.C. Cir., Oct. 25, 1974).

who have not commenced operation of a new entertainment format. However, the decision does leave open the possibility of the imposition of different standards as between assignees who are subject to the holding and licensees who are not. This is clearly an arbitrary result, based on the time a broadcaster chooses to change an entertainment format. The public interest considerations of changes in entertainment formats are the same regardless of when the change occurs. The *WEFM* result should be extended to any broadcaster's decision to change an entertainment format which falls within the definition of *WEFM*—regardless of when that decision is made.

C. In Pursuit of Diversity of Programming

The *WEFM* court premised its holding on the presumption that diversity of programming serves the public interest. The issue, as framed by the appeals court, concerned the protection of a source of entertainment programming for minority segments of the community. This is a far better analysis of the problem than the FCC's strict adherence to majority tastes and preferences. Blind pursuit of diversity of programming, however, is not the only method by which the public interest is served. Chief Judge Bazelon's concurring opinion explored the role of the government and the court in achieving true diversification of programming and ideas.[81] He questioned whether pursuit of total diversity of programming would produce a concomitant result of true diversity of ideas.[82] The court's approach that diversity of entertainment programming is consistent with the public interest standard is acceptable in the limited area of format changes only when there is a significant threat to diversity of entertainment. Judge Bazelon's point, however, was that blind pursuit of diversification of programming, without more, may produce only a "broadcast supermarket."[83] The question thus remains whether the courts and the FCC are willing to undertake a reassessment of policy to ensure that quality, rather than mere quantity, is the ultimate goal to be achieved.[84]

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81. 506 F.2d at 268 (Bazelon, J., concurring).

82. *Id.* at 274.

83. *Id.* at 277.

84. The FCC has decided to initiate an inquiry into its role in format change cases. FCC Report No. 11469 (December 24, 1975). In its report, the Commission stated that it was "deeply concerned that by rejecting the programming choices of individual broadcasters in favor of a system of pervasive governmental regulation, the Court of Appeals has adopted [*sic*] for a course which may have serious adverse consequences for the public interest." *Id.* at 2. Consequently, the FCC has invited the communications bar to respond to specific questions as to whether the close scrutiny of proposed changes in entertainment formats is either necessary or appropriate under the public interest standard of the Communications Act.

IV. CONCLUSION

The *Format Change Cases* represent a significant departure from the traditional deference the court has afforded the FCC in the area of licensing in the public interest. The importance of these cases lies in the assurances which the court has given to minority broadcast audiences that the broadcaster's business discretion will not overshadow the public interest standards of the Communications Act. The court's insistence that the FCC should perform its statutory duty when faced with such decisions is a positive indication that ultimately the goal of developing strong public interest standards will be achieved.

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