Judicial Intervention for the Hearing Impaired: An Uneasy Partnership between the Federal Communications Commission and the United States Court of Appeals for the District of Columbia Circuit

Robert L. Corn

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NOTES

JUDICIAL INTERVENTION FOR THE HEARING IMPAIRED: AN UNEASY PARTNERSHIP BETWEEN THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Communications Act of 1934\(^1\) was adopted to secure the maximum benefits of broadcasting for the American people.\(^2\) To carry out this promise, the Federal Communications Commission (FCC) was created to regulate the new medium and to grant broadcast licenses for the "public interest, convenience, and necessity."\(^3\) This public interest standard is quite general and is not defined in the Act itself.\(^4\) Rather, the standard was intended as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."\(^5\)

The Commission's public interest determinations are appealable to the United States Court of Appeals for the District of Columbia Circuit under section 402 of the Communications Act.\(^6\) The scope of judicial review is governed by section 10(e) of the Administrative Procedure Act (APA).\(^7\)

4. See FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-94 (1981). See also 47 U.S.C. §§ 151, 307(b) (1976) (identifying certain components of adequate broadcasting service, including rapid and efficient communication service for all citizens so far as is possible, adequate facilities at reasonable charges, a provision for national defense and safety of life and property, and a fair, efficient and equitable distribution of radio service to each of the states and communities). Beyond these general pronouncements the Act is silent as to the meaning of "public interest, convenience and necessity." The terms are not included in the definitional section of the Act. 47 U.S.C. § 153 (1976).
7. Section 10(e) is codified at 5 U.S.C. § 706 (1976). Reviewing courts shall "hear and
which allows the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The dual responsibility of the FCC and the court to interpret the Communication Act's public interest mandate has been labelled "a 'partnership' in furtherance of the public interest" among "'collaborative instrumentalities' of justice" by the United States Court of Appeals for the District of Columbia Circuit.

A question facing the "partners" is whether, as a matter of law, national policies embodied in statutes other than the Communications Act must be incorporated into the public interest standard. More specifically, the question is whether the public interest standard encompasses section 504 of the Rehabilitation Act of 1973.

Recently, in Gottfried v. FCC, the United States Court of Appeals for the District of Columbia Circuit addressed the issue whether section 504 requires public broadcasters, by virtue of their federal subsidy, to serve the

determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act." 47 U.S.C. § 402(g) (1976).
9. The "partnership doctrine" was first articulated by the District of Columbia Circuit in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Within this framework it is the Commission's responsibility to find facts, make judgments, and select policies in the public interest, while the court must determine the outer limits of the Communications Act. Id. The District of Columbia Circuit described the division of labor between the judicial and administrative partners as follows:

This court has neither the expertise nor the constitutional 'authority' to make policy as that word is commonly understood . . . . That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the 'law' the final word is constitutionally committed to the judiciary.

Id.

No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

11. 655 F.2d 297 (D.C. Cir. 1981), cert. granted, 102 S. Ct. 998 (U.S. Jan. 11, 1982) (Nos. 81-298, 81-799) (the Supreme Court consolidated the petitions of two parties, the Federal Communications Commission (No. 81-799) and Community Television of Southern California KCET-TV (No. 81-298), but denied the joint petition of Sue Gottfried and the Greater Los Angeles Council on Deafness, Inc. (No. 81-651)). 102 S. Ct. at 1004.

Gottfried and the Greater Los Angeles Council on Deafness (GLAD) are involved in another initiative to secure television services for the hearing impaired. They filed suit in Greater Los Angeles Council on Deafness, Inc., v. Community Television, No. CV 78-4715R (C.D. Cal. Nov. 17, 1981), stayed, No. 81-5952 (9th Cir. Dec. 29, 1981) in which the United States District Court for the Central District of California recently ordered federal executive departments to cut off funds to public television stations that did not provide open captioning for the deaf. For an explanation of various captioning types see infra note 105.
needs of the hearing impaired in their viewing areas, and whether the FCC must enforce this obligation through the public interest standard.\textsuperscript{12} The court reversed an FCC ruling that the Commission was not the appropriate agency for enforcement of section 504 since that task had been delegated to the funding agencies.\textsuperscript{13} Additionally, the court ordered the FCC to schedule hearings to determine if renewal of the license of KCET-TV, the noncommercial station involved in the proceeding, would be in the public interest.\textsuperscript{14} The case arose when Sue Gottfried, a hearing impaired individual, and the Greater Los Angeles Council on Deafness, Inc. (GLAD) petitioned the FCC to deny the 1977 license renewal applications of seven commercial and one noncommercial television station in Los Angeles, California.\textsuperscript{15} The petition alleged that the licensees had failed to ascertain the needs of their hearing impaired audience,\textsuperscript{16} and that programming for this group had been generally deficient, thus constituting unlawful discrimination against the handicapped.\textsuperscript{17} The Commission denied the petitions ini-

\textsuperscript{12} Gottfried, \textit{655 F.2d} at 317.
\textsuperscript{13} \textit{Id.} at 304-06.
\textsuperscript{14} \textit{Id.} at 310. The Court of Appeals stayed issuance of its order pending disposition of petitions for writ of certiorari. \textit{See} Petition for Writ of Certiorari of KCET-TV, No. 81-298, Gottfried v. FCC, \textit{655 F.2d} 297 (D.C. Cir. 1981), \textit{cert} granted, 102 S. Ct. 998 (U.S. Jan. 11, 1982). KCET-TV was one of three petitioners for certiorari. \textit{See supra} note 11.
\textsuperscript{15} 655 F.2d at 300 n.1, 304-05. GLAD is an umbrella organization that represents approximately 40 organizations serving the hearing impaired in the Los Angeles area. The Commission denied standing to GLAD in this proceeding because of lack of a formal demonstration that its constituent members supported the petition. License Renewal Applications, 69 F.C.C.2d 451, 453 n.5 (1978), \textit{reconsideration} denied, 72 F.C.C.2d 273, 280 (1979). Although Gottfried was, therefore, the only party officially recognized as a petitioner by the FCC, \textit{id.}, on appeal the District of Columbia Circuit court formally recognized GLAD as an appellant. \textit{Gottfried}, \textit{655 F.2d} at 304-05 n.32.

Broadcasters are licensed under the Communications Act. 47 U.S.C. \textsection{307(d)} (1976). At the end of each term, licensees must apply to the Commission for renewal. 47 U.S.C. \textsection{308} (1976). \textsection{Section} 309(d)(1) provides:

\begin{quote}
Any party in interest may file with the Commission a petition to deny any application . . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with . . . [the public interest, convenience and necessity].
\end{quote}

It is well established that members of the broadcast audience are interested parties within the meaning of this section. \textit{E.g.}, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

\textsuperscript{16} FCC procedures require television broadcasters to ascertain the interests and needs of their audience through two mechanisms, a general public survey and a community leader survey. \textit{See} Renewal Primer, 57 F.C.C.2d 418 (1976). Licensees must inquire into the service needs of their listeners, considering 19 specific categories. \textit{Id.} at 447, App. D. There is, however, no requirement that broadcasters ascertain the needs of the hearing impaired. \textit{See} License Renewal Applications, 69 F.C.C.2d at 456.

\textsuperscript{17} License Renewal Applications, 69 F.C.C.2d at 452. Gottfried alleged that the televi-
tially, and again on rehearing, for failure to raise a "substantial or material question" of fact. On appeal, the District of Columbia Circuit reversed with respect to noncommercial station KCET-TV and ordered an evidentiary hearing on the petition to deny its license.

Petitioner reasoned that § 504 of the Rehabilitation Act applied to broadcast licensees, and that failure to meet the programming needs of the hearing impaired constituted a violation of the public interest standard. The claim was based on two grounds. First, petitioner argued that broadcast licenses themselves confer significant financial benefits on their holders and thus constitute "federal financial assistance" within the scope of § 504. Second, KCET-TV, as a public, noncommercial broadcaster received congressional appropriations through various federal agencies. 

20. Id. Under the Communications Act, the Commission is required to hold evidentiary hearings on a petition to deny a license only if a substantial or material question of fact is presented, or if the FCC finds, for any reason, that license renewal would not be in the public interest. 47 U.S.C. §§ 309(d)(2), 309(e) (1976). A petition to deny a license must contain allegations sufficient to uphold a determination that license renewal would be "prima facie inconsistent with the public interest." 47 U.S.C. § 308 (1976). See supra note 15. See also Stone v. FCC, 466 F.2d 316, 322 (D.C. Cir. 1972) (requiring a hearing only when a petition to deny makes substantial and specific allegations of fact which, if true, would indicate that granting the application would be prima facie inconsistent with the public interest); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 (D.C. Cir. 1976) (hearing not required when facts are undisputed or when the case turns on inferences to be drawn from facts already known and legal conclusions to be derived from those facts). In Gottfried, the FCC had concluded that no substantial question of fact had been raised. The licensees merely failed "to do something that we have not required them to do." License Renewal Applications, 72 F.C.C.2d at 280. See also Gottfried, 655 F.2d at 305.
21. Gottfried, 655 F.2d at 316. The Commission's decision with respect to the seven commercial stations was upheld. Id. Because the court found that § 504 was not intended to apply to commercial stations as a "specific statutory [obligation]" it did not require the FCC to schedule hearings. Id. at 315. Nevertheless, the court determined that licensees have an obligation to meet the needs of the hearing impaired due to the general national policy of the Rehabilitation Act, as incorporated through the public interest standard of the Communications Act. Id. at 314-15.

The court stated:

[We] recognize that the Commission's statutory obligation to pursue the public interest requires it to protect the interests of the hard of hearing in having meaningful access to commercial broadcasting. . . . Radio has been available to the general public for over half a century. . . . But millions of Americans have lived and died during that time without being able to enjoy radio and television simply because their hearing was impaired. It is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now.

Id. at 301. In the case of the commercial licensees the court deferred to the Commission's discretion in determining the best method of serving the deaf. Id. at 315-16. But the court
In reaching its decision, the District of Columbia Circuit acknowledged
the Commission's leading role in determining broadcast policy. Nonetheless, the court saw the public interest as an "irreducible element of law" which it must apply as part of its "inescapable judicial role." The Gottfried decision did not require the Commission to adjudicate violations of section 504, but rather, "to effectuate the underlying national policy" of the Rehabilitation Act by incorporating it into the public interest standard. To support its holding, the court cited examples of other national policies, such as antitrust and antidiscrimination, that had been incorporated into the public interest standard. Judge McGowan dissented from

warned that "judicial action might become appropriate at a later date" if the FCC failed to implement the policy of the Rehabilitation Act. It at 316. The Supreme Court refused to review the court's ruling with respect to the commercial stations. Petition for Writ of Certiorari of Sue Gottfried and GLAD, No. 81-651, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1004 (U.S. Jan 11, 1982). See supra note 11.

22. Id. at 307-08. "In construing this standard we must of course accord substantial deference to the Commission's judgments."

23. Id. at 308. The court cited National Broadcasting Co. v. United States, 319 U.S. 190, 224-26 (1943) for the proposition that the public interest standard contains an irreducible element of law. The Supreme Court in National Broadcasting Co. held that the public interest standard is not impermissibly vague and that the Commission has primary responsibility for its interpretation. Id. at 224.

24. Gottfried, 655 F.2d at 311. Although the District of Columbia Circuit denied that its ruling would require the FCC to enforce violations of § 504, it pointed out that the Commission would be able to incorporate its policy into the public interest standard regardless of whether the funding agencies assessed violations against the stations. The Supreme Court has agreed to hear argument, on whether the FCC may enforce laws that are committed to the charge of other agencies. See Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981), cert. granted 102 S. Ct. 998 (U.S. Jan. 11, 1982) (petition of the FCC, No. 81-799). See supra note 11.

25. Gottfried, 655 F.2d at 308-10. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 224-26 (1943) and Johnson Broadcasting Co. v. FCC, 175 F.2d 351, 357 (D.C. Cir. 1949), both of which allowed the FCC to take antitrust policies into account when defining the public interest.

With respect to antidiscrimination statutes, the court cited instances in which the Commission has applied policies from statutes other than the Communications Act, National Org. For Women v. FCC, 555 F.2d 1002, 1017 (D.C. Cir. 1977) (FCC considers employment discrimination to the extent it affects licensees' ability to program for all listeners and to the extent such practices raise questions about the licensee's character); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 222 (1976); Nondiscrimination in Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968), and instances in which the District of Columbia Circuit has ordered enforcement of nondiscrimination policies. Black Broadcasting Coalition v. FCC, 556 F.2d 59 (D.C. Cir. 1977) (FCC ordered to enforce antidiscrimination policies); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (FCC required to enforce fairness policies to end discriminatory practices by a licensee). To support the proposition that the Rehabilitation Act falls within the public interest standard of the Communications Act, the court principally relied upon NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976).
the ruling with respect to the noncommercial station, arguing that FCC action should not take place until those agencies charged with section 504 enforcement responsibilities had developed compliance guidelines. 26

This Note will examine the extent to which the Federal Communications Commission is required under the public interest standard to incorporate the mandates of other national policies, and whether this is consistent with the level of agency discretion espoused by the "partnership doctrine." It will also analyze the logical consistency of the Gottfried opinion, which set different public interest requirements for commercial and noncommercial broadcasters.

I. THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY: THE FCC'S DOMAIN

The Federal Communications Commission has primary authority for regulating broadcasting in the United States, including the duty to grant or deny station licenses, assign frequencies, establish hours of operation and power levels, and establish general broadcasting policies. 27 The Commission has a statutory mandate to promote the "public interest, convenience, and necessity." 28 The standard is quite general, and the FCC has historically defined it through decisions on specific licenses and through issuance of policy guidelines. 29 The Commission's current practice is dominated by

26. Gottfried, 655 F.2d at 316-17.
28. Id. See generally B. MEZINES, J. STEIN & J. GRUFF, 5 ADMINISTRATIVE LAW § 41.02 (1981) (discussion of use of the public interest standard in licensing decisions) [hereinafter cited as ADMINISTRATIVE LAW].
29. The agency's practice of issuing policy pronouncements in the course of individual license renewal proceedings began with the FCC's predecessor agency, the Federal Radio Commission. See Great Lakes Broadcasting Co. (FRC Docket No. 4900) 3 F.R.C. ANN. REP. 32 (1929). The FCC has continued this practice. See generally W. EMERY, BROADCASTING AND GOVERNMENT 354-67 (1971). The FCC made its first comprehensive attempt to set guidelines for the public interest through issuance of a report called the "Blue Book." FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (Mar. 7, 1946), reprinted in F. KAHN, DOCUMENTS OF AMERICAN BROADCASTING 151 (1973). Although the report did not have the force of law, the Commission used the criteria it established to evaluate the performance of licensees when they sought renewal. Named by station owners for the color of its binding, the Blue Book concentrated on four indices of the public interest: (1) carrying sustaining programs, (2) carrying local live programming, (3) carrying programs devoted to public discussions, and (4) eliminating commercial advertising excesses. In a discussion of these issues the report concluded: "It has long been established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which listeners have from time to time." Id. at 180. The public interest served by meeting the needs of minorities set forth in the Blue Book was predicated on promoting diversity in programming, not providing a service to discrete minority populations.
the use of rules which it promulgates to define the public interest obligations of licensees. The same rules apply to both commercial and noncommercial broadcasters almost without exception. To ensure conformity with the statutory mandate, FCC public interest determinations, whether made in a licensing decision or through the use of rules, are subject to judicial review pursuant to section 706 of the APA.

A. Judicial Involvement in the Regulatory Process

The scope of review of agency actions, such as those taken by the FCC, depends on whether the action in question is based on legal or factual

30. Rules are quasi-legislative pronouncements that pertain to all licensees of the class being regulated. Rules have a prospective effect only, and cannot be applied to the past practices of those being regulated. Authority for the FCC to promulgate rules is granted in 47 U.S.C. § 303(r) (1976):

Except as otherwise provided in...[the Communication's Act of 1934], the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of...[the Communications Act of 1934]. . . .

The FCC rulemaking process is an informal one and does not require the use of formal adjudicatory proceedings. Such procedures are prescribed by the Administrative Procedure Act, 5 U.S.C. § 553 (1976) (notice and comment rulemaking). For a general discussion of the process of administrative rulemaking, especially within the FCC, see ADMINISTRATIVE LAW, supra note 28, at § 41.06.

The use of rules to define the public interest is known as the Storer doctrine. The practice was first approved by the Supreme Court in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (upholding FCC rules limiting the number of broadcast outlets which could be owned by a single licensee). Because rulemaking avoids costly and time-consuming hearings and effectively resolves matters of industry-wide importance with uniformity, it is preferred by both the Commission and the courts. See, e.g., National Org. For Women v. FCC, 555 F.2d 1002, 1011 (D.C. Cir. 1977) (individual license renewals denied because the matter was one of industry-wide importance and more appropriately addressed through rulemaking); Hale v. FCC, 425 F.2d 556, 560 (D.C. Cir. 1970) (basic changes in policy are better and more fairly examined in rulemaking proceedings than in licensing actions).

31. Community-Service Broadcasting v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (striking down a requirement that public stations, but not commercial stations, retain recordings of public affairs programs). Commercial licensees are no less public trustees of the airwaves than noncommercial licensees, id. at 1121, and both are subject to exactly the same fairness requirements. Id. at 1123. Georgia State Bd. of Educ., 70 F.C.C.2d 948, reconsideration denied, 71 F.C.C.2d 227 (1979), aff'd mem., No. 79-1431 (D.C. Cir. June 21, 1980) (the FCC has always imposed the same general programming obligations on both commercial and noncommercial licensees).

One difference between public interest policies for commercial and noncommercial stations is that noncommercial stations are prohibited by law from editorializing, 47 U.S.C. § 399(a) (1976). See also Note, Freeing Public Broadcasting from Unconstitutional Restraints, 89 YALE L.J. 719, 730 n.78 (1980).

issues. Under the APA, courts generally are allowed to substitute their judgment for that of regulatory agencies on matters of law, while an agency's resolution of factual issues must be upheld unless it is "arbitrary, capricious or an abuse of discretion."

Although reviewing courts are granted wide latitude to resolve legal issues, certain factors cause judges to accord greater deference to statutory interpretations made by regulatory agencies. Where Congress has delegated the authority to administer the subject matter covered by the statute as well as the power to make policy, reviewing courts are more reluctant to substitute their judgment for that of the agency. This is especially true when the subject matter of the regulation is complex or technical and requires the judgment of an expert agency.

### B. Regulatory Partnership of the FCC and the United States Court of Appeals for the District of Columbia Circuit

The relationship between the FCC and the District of Columbia Circuit

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33. Questions of law involve interpretation of constitutional or statutory provisions and determination of the meaning or applicability of the terms of an agency action. See 5 U.S.C. § 706 (1976). Questions of fact involve findings about the parties involved in the regulatory action. For example, determining whether a given party is in compliance with a statutory mandate involves questions of both law and fact. The requirement imposed by the statute is an issue of law, while determining whether the party's actions conform to the law is a factual issue. See Brown, Fact and Law in Judicial Review, 56 HARV. L. REV. 899, 899 (1943). The distinction between a question of law and one of fact is not always easy to discern, and no definite criteria facilitate such a task. Id. (citing REP. ATT'Y GEN. COMM. AD. PROC. 88 (1941)).

34. International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 556 n.20 (1979) (judicial deference to agency determinations must be constrained by the clear meaning of the enabling statute); see ADMINISTRATIVE LAW, supra note 28 at § 51.01 (general discussion of the scope of judicial review).

35. 5 U.S.C. § 706(2)(A) (1976). See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) ("[t]he court is not empowered to substitute its judgment for that of the agency."). Where there is a rational basis for the agency finding, it cannot be set aside by a reviewing court as arbitrary, capricious, or an abuse of discretion. Only those conclusions without basis in fact may be reversed by the reviewing court. An agency decision cannot be set aside simply because the court disagrees. Id. See ADMINISTRATIVE LAW, supra note 28, at § 51.03 (general discussion of judicial review under the arbitrary and capricious standard).

36. See Udall v. Tallman, 380 U.S. 1, 16 (1965) ("[t]his Court shows great deference to the interpretation given the statute by the ... agency charged with its administration."); FTC v. Mandel Bros., 359 U.S. 385, 391 (1959) (agency's longstanding interpretation of its enabling statute is to be given great deference by reviewing courts).

37. FPC Transcontinental Gas Pipeline Corp., 365 U.S. 1, 29 (1961) ("a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency"); but see Public Serv. Comm'n v. FERC, 589 F.2d 542, 553 n.49 (D.C. Cir. 1978) (deference to an agency's public interest projections diminishes as courts and agencies became more familiar with the new regulatory scheme).
is typical of the relationship between an agency and a court prescribed in the Administrative Procedure Act. In *Greater Boston Television Corp. v. FCC* the District of Columbia Circuit described the relationship as a “partnership” in furtherance of the public interest.\(^{38}\) Within this framework, the Commission is empowered to “find facts and to make judgments” and also to “select policies deemed in the public interest.”\(^{39}\) It is the function of the court to ensure that the agency has given reasoned consideration to all material facts and issues and that the decision conforms with the requirements of the Communications Act.\(^{40}\) Although consistent with the APA, the basic question which has confronted the Commission and the court is the amount of discretion the FCC should be granted when interpreting the public interest requirements of the law.\(^{41}\)

This question was addressed in a series of decisions known as the “format cases,” in which the District of Columbia Circuit attempted to order the FCC to hold hearings whenever a license transfer involved a change in entertainment formats\(^ {42}\) to which the audience objected.\(^ {43}\) After the Dis-

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38. *Greater Boston Television Corp.*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). See administrative law, supra note 28, at § 51.01 & n.27; see also supra note 7.


40. Id.

41. Although one Commissioner has expressed the view that the agency is “junior partner” in the relationship, Development of Policy, 60 F.C.C.2d 858, 882-83 (1976) (separate statement of Comm’r Robinson), the District of Columbia Circuit has characterized itself and the Commission as equals. Action for Children’s Television v. FCC, 564 F.2d 458, 482 (D.C. Cir. 1977) (“[i]f our relationship with the Commission . . . is to remain a partnership, we must not succumb to the temptation of casting ourselves in the unsuited role of primus inter pares.”).

42. The entertainment format of a broadcast outlet is the type of programming that dominates its offerings to the public. Typical radio formats include, for example, “top 40,” “country and western,” “religious,” “MOR” (middle of the road), “classical,” or “progressive rock.” A format change occurs when a station alters its predominant program structure. See Note, *District of Columbia Circuit Vacates FCC Decision Not to Promulgate Rules Which Would Require a Hearing When Assignee of Broadcast License Proposes Change in Entertainment Programming Format of Station*, 53 Temp. L.Q. 362, 362 n.3 (1980).

43. See Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc) (FCC decision not to order hearings reversed); Citizen’s Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973) (FCC decision not to hold hearings reversed with respect to proposed change from progressive rock to middle of the road format); Lake-wood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973) (station’s change from all news to country and western format without hearings upheld); Citizen’s Comm. to Preserve the Voice of the Arts v. FCC, 436 F.2d 263 (D.C. Cir. 1970) (FCC ordered to conduct hearings on proposed change from classical music to popular favorites format).

The format cases typically involved the transfer of a broadcast license, a decision by the assignee to adopt a new format, and an FCC decision to grant the application for license assignment despite public protest. These decisions raised the question whether the District of Columbia Circuit could require as a matter of law the use of hearings by the FCC for a license transfer when a significant portion of the audience objected to a proposed format.
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The district of Columbia Circuit ordered the Commission to hold hearings on a proposed format change in *Citizen's Committee to Save WEFM v. FCC*,44 the FCC issued a policy statement45 rejecting the court’s reading of the Communications Act with the conclusion: “We must refrain from the detailed supervision of entertainment formats which the court of appeals holds to be a part of the Commission’s statutory responsibilities.”46 Basing its authority to reach a contrary finding on the “partnership doctrine” articulated by the District of Columbia Circuit in *Greater Boston Television*,47 the Commission concluded that allowing free rein to market forces would best achieve the goal of programming diversity.48

The court reasserted its position vis a vis the Commission by vacating the policy statement in *WNCN Listeners Guild v. FCC*.49 The District of Columbia Circuit maintained that the decision was also sanctioned by the partnership doctrine because mandating hearings in format cases was required by law and was a proper exercise of judicial authority.50 The court denied that it was attempting to make policy, which it conceded was the province of the Commission.51 On review, the Supreme Court reversed the District of Columbia Circuit and specifically upheld the Commission’s policy statement.52 In so doing, the Court reaffirmed the proposition that judicial review of FCC public interest determinations is quite narrow, calling the public interest standard “a supple instrument for the exercise of discre-

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44. 506 F.2d 246 (D.C. Cir. 1973).
46. Development of Policy, 60 F.C.C.2d at 861.
47. *Greater Boston Television Corp.*, 444 F.2d 841 (D.C. Cir. 1970); Development of Policy, 60 F.C.C.2d at 865-66 (“[w]hen such ‘partners’ come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive.”).
48. Development of Policy, 60 F.C.C.2d at 861.
50. Id. at 857.
51. Id. The court stated that it had neither the expertise nor the constitutional authority to make policy. See supra note 9.
tion by the expert body which Congress has charged to carry out its legislative policy."\textsuperscript{53}

The \textit{WNCN Listeners Guild} decision is consistent with a long line of holdings by both the Supreme Court and the District of Columbia Circuit which have accorded substantial deference to the FCC's statutory interpretations.\textsuperscript{54} To be consistent with the statutory mandate, courts have ruled that the FCC need only make a reasonable interpretation of the Communications Act. The Commission is not bound to adopt the \textit{most} reasonable, or the \textit{only} reasonable interpretation.\textsuperscript{55}

Deference to FCC interpretations of the Communications Act and public interest requirements stems from the unique characteristics of the agency and the subject matter of regulation. The Commission has been involved since its inception with interpretation of the Act.\textsuperscript{56} Broadcasting is a complex technical field, subject to rapid innovation and the Commission is imbued with the requisite flexibility and technical expertise to cope with the demands of regulating this dynamic phenomenon.\textsuperscript{57} Courts have traditionally shown great deference to the interpretations of agencies possessing these qualities.\textsuperscript{58}

Whenever the Commission makes a public interest determination, whether in a licensing or a rulemaking action, the agency must apply its

\textsuperscript{53} \textit{Id.} at 593 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

\textsuperscript{54} \textit{See} FCC v. National Citizen's Comm. for Broadcasting, 436 U.S. 775, 803 (1978) (reviewing court is not empowered to substitute its judgment for that of the FCC); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (construction of a statute by those charged with its execution should be followed absent compelling indications the agency was wrong); FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946) ("[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license."); Action for Children's Television v. FCC, 564 F.2d 458, 481-82 (D.C. Cir. 1977) (FCC has leading role in formulating broadcast policy, not reviewing courts); Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519, 524 n.19 (D.C. Cir. 1972) ("[A]n appellate court should not substitute its own judgment of what is in the public interest without substantial guidance from extrinsic sources that the Commission's judgment is incorrect.").

\textsuperscript{55} \textit{National Citizen's Comm. for Broadcasting}, 436 U.S. at 796 (FCC regulations need only be a reasonable means of achieving policy goals); Office of Communication of the United Church of Christ v. FCC, 590 F.2d 1062, 1068 (D.C. Cir. 1978) (statutory interpretation with reasonable basis in law should be sustained, even if it is not the only reasonable interpretation).

\textsuperscript{56} \textit{See National Broadcasting Co.}, 319 U.S. at 224 (1943).

\textsuperscript{57} National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 638 n.37 (1976) ("The substantial discretion generally allowed the FCC in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, it 'gave the Commission not . . . niggardly but expansive powers.'").

\textsuperscript{58} \textit{See supra} notes 36 & 37.
expertise to more than statutory construction. Four distinct questions must be addressed by the FCC before taking any action. As has been discussed, the FCC must first determine the public interest requirements imposed by the Communications Act.\footnote{See supra note 54.} Second, the FCC must make a factual finding, either from applications and petitions in licensing proceedings\footnote{Procedures for license applications and petitions to deny licenses are governed by 47 U.S.C. §§ 308, 309 (1976). See supra note 15.} or notice and comment procedures in rulemaking,\footnote{See supra note 30.} to determine whether action is warranted under the circumstances. Third, the Commission must weigh the competing interests and fashion a policy which, in the agency's estimation, will most effectively promote the public interest.\footnote{FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981); FCC v. National Citizen's Comm. for Broadcasting, 436 U.S. 775, 803-05, 810 (1978).} Finally, the FCC must choose from a range of procedural options, deciding which regulatory tool most appropriately addresses the interest involved.\footnote{For issues of industry-wide impact, the Commission usually relies on rulemaking, which governs all licensees. See supra note 36. In licensing actions, the FCC has a great deal of flexibility. It may grant a license for a temporary period instead of a full term, it may approve a license subject to such conditions as the agency may prescribe, or the FCC may modify the terms of a license. 47 U.S.C. §§ 303, 309, 316 (1976). For a general discussion of licensing options, see ADMINISTRATIVE LAW, supra note 28, at § 41.02.}

When the FCC chooses among competing policies, it considers the effect of its action on the broadcasting system as a whole.\footnote{The Commission is concerned with a generalized notion of the public interest. Network Project v. FCC, 511 F.2d 786, 793 (D.C. Cir. 1975) ("[t]he Commission should consider whether the new service will create a net benefit to the communications system as a whole . . . ").} This balancing process necessarily involves tradeoffs between interests which are recognized as valid public interest concerns. Faced with this choice, the FCC is obliged to seek a utilitarian balance to secure the greatest good for the greatest number of listeners. In \textit{WNCN Listeners Guild}, the Commission had to weigh the competing values of programming diversity and format innovation.\footnote{450 U.S. at 587-88.} Although diversity was acknowledged as an established public interest goal, the FCC concluded that requiring hearings on format changes when licenses are transferred would intrude on licensee discretion and reduce innovation in radio programming.\footnote{Development of Policy, 60 F.C.C.2d 858 (1976).} The Supreme Court upheld this conclusion as a rational accommodation of competing public interest policies.\footnote{WNCN Listeners Guild, 450 U.S. at 596 ("[d]iversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's im-}
The FCC has employed this balancing process for other types of interests as well. In *FCC v. National Citizen's Committee for Broadcasting*, the Commission applied prospectively rules which would limit combined ownership of newspaper and broadcasting stations. The policy was based on the Commission's determination that strict application of divestiture rules would disrupt service and reduce local ownership. Again, the Court upheld the balance struck by the agency. These decisions reflect the partnership doctrine philosophy that policy choices are a matter of agency, not judicial concern.

Once the Commission has decided to implement a given policy, it has broad discretion to select the procedural remedy it considers to be most appropriate. However, there is a general presumption that when the matter under consideration is an industry-wide practice, the FCC should institute rulemaking proceedings and avoid time-consuming hearings. The legislative purpose of the Communications Act is to avoid time-consuming hearings whenever possible. The FCC's discretion to request more information from an applicant whose application is deficient rather than to

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70. *National Citizen's Comm. for Broadcasting*, 436 U.S. at 805 ("[W]e agree that diversification of ownership furthers statutory and constitutional policies, and, as the Commission recognized, separating existing newspaper-broadcast combinations would promote diversification. . . . [W]e are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances."). *Id.* at 810.

71. See supra note 9.

72. See *WNCN Listeners Guild*, 450 U.S. 582 (1981); Rogers Radio Communication Serv., Inc. v. FCC, 593 F.2d 1225, 1232 (D.C. Cir. 1978) ("[t]he decision whether to hold hearings 'is a matter in which the Commission's discretion . . . is paramount.' "); *National Ass'n for Better Broadcasting v. FCC*, 591 F.2d 812, 816 (D.C. Cir. 1978) (quoting Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (1974)) (FCC discretion is extensive in decision of whether to hold hearings).


74. *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621, 630 n.34 (D.C. Cir. 1978) ("A license renewal hearing where . . . there is no other applicant for the license, can be an unnecessarily costly and time-consuming procedure, and the Congressional purpose is to avoid such hearings whenever possible."). See supra note 30.
schedule hearings is well established.75 These practices constitute the process by which the Commission implements the public interest. But before the FCC can institute a given rule or make a licensing decision, it must first determine the direction in which the public interest lies.

C. To Incorporate or Not to Incorporate: What Does the Communications Act Require?

Agencies whose statutory mandate directs them to uphold the public interest often look to other national policies to discern that term's meaning.76 This is particularly true when the enabling statute includes directives that other policies be taken into account. For example, the Interstate Commerce Act77 allows the Interstate Commerce Commission to approve mergers of transportation companies only if it determines the transaction will be "consistent with the public interest and will . . . not unduly restrain competition."78 Where other policies are incorporated, regulatory agencies generally have substantial discretion in defining the public interest,79 and in weighing it against other policies promoted by the enabling statute.80 The general rule is that the agency does not have the authority to enforce the incorporated policy, but may use it to define the public interest to the extent—and only to the extent—that it supports the regulatory purpose of the agency's enabling statute.81

75. Bilingual Bicultural Coalition on Mass Media, 595 F.2d at 630 n.34. Nothing in 47 U.S.C. §§ 309(d)(2) & 309(e) requires the Commission to schedule hearings if an initial application fails to convince the FCC that granting the license would promote the public interest.

76. E.g., Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (1968) ("such laws are merely another tool which a regulatory agency employs ... to give understandable content to the broad statutory concept of the "public interest."" (quoting F.M.C. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968)).


79. E.g., McLean Trucking Co. v. United States, 321 U.S. 67 (1944) (ICC decision that a merger would serve the public interest despite potential antitrust implications approved based on that agency's broad discretion to make such determinations).

80. Northern Natural Gas Co., 399 F.2d at 961 ("[n]or are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social, and political considerations are found to be of overriding importance.").

81. NAACP v. FPC, 425 U.S. 662 (1976) (public interest mandate does not empower the FPC to regulate the employment practices of licensees; discrimination policy is irrelevant to agency's statutory mandate to provide plentiful supplies of energy at just prices, and the words "public interest" in the regulatory statute do not create a mandate to promote the general public welfare); McLean Trucking Co., 321 U.S. at 85 (although the Interstate Commerce Act envisions incorporation of antitrust policy, it is to be applied only to the extent that it helps achieve the goals of national transportation policy).
In a number of cases the FCC has been allowed to incorporate other national policies into the public interest requirements of the Communications Act. Decisions in such cases typically hold that the Commission is empowered to consider other national policies, but is not required to do so. In *National Broadcasting Co. v. United States*, networking regulations were challenged as an attempt to "bootstrap" antitrust regulations into the Communications Act. The Court held that it was permissible for the Commission to consider antitrust policies to the extent "network practices prevent the maximum utilization of radio facilities in the public interest."

The Court overruled the incorporation of antitrust policy in *FCC v. RCA Communications, Inc.* because the FCC failed to make the determination that such policies would serve the public interest in radio and telegraph services. The FCC had authorized the opening of two new overseas radio and telegraph circuits in areas already served by RCA on the theory that duplicate facilities would promote competition consistent with national economic policies. The Court remanded the case to the FCC, concluding that the Commission could not incorporate such policies absent a finding, based on the agency's expert judgment, that licensing would promote better radio service.

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83. *National Citizen's Comm. for Broadcasting*, 436 U.S. at 795; *National Broadcasting Co.*, 319 U.S. at 222-24; *Rogers Radio Communications Serv.*, 593 F.2d at 1233 (allegation of anticompetitive conduct does not automatically trigger license renewal hearings); *National Ass'n of Regulatory Util. Comm'rs*, 525 F.2d at 645-46 (although a Commission ruling sanctioned potential anticompetitive effects, court upheld it).

84. 319 U.S. 190 (1943).

85. *Id.* at 222-24. Petitioner maintained that § 311 of the Communications Act, which allows the Commission to deny a license to any applicant convicted of an antitrust violation, could not be applied to parties who might be violating antitrust policy but were unconvicted. Any attempt to do so, it was argued, was either an attempt to exceed the statutory authority granted the Commission, or an effort to usurp the function of the Attorney General to enforce antitrust laws. The Court concluded that the Commission had no authority to enforce the antitrust laws, but that it could consider the national policy against economic concentration to the extent challenged practices affected the delivery of radio services. *Id.*


87. 346 U.S. 86 (1953).

88. *Id.* at 91.

89. *Id.* at 88-89.

90. *Id.* at 98. The court stated that the FCC could not give controlling weight to a generalized expression by Congress that competition is in the public interest. Rather, the Commission was directed to apply its expertise to determine the public interest consistent with national economic policies.
Courts have held consistently that the FCC is not empowered to enforce the laws it incorporates into the public interest standard, nor is it bound by rulings of other federal agencies that are entrusted with enforcement. Rather, the FCC must make its own determination of the licensee's compliance with the incorporated policy, and apply it only so far as the policy is relevant to the Commission's statutory mandate.

Courts have taken the same approach to incorporation of antidis- crimination statutes, allowing the FCC to analyze the employment practices of licensees "only to the extent those practices affect the obligation of the licensee to provide programming that 'fairly reflects the tastes and the viewpoints of minority groups,' and to the extent those practices raise questions about the character qualifications of the licensee." Unlike the agencies charged with enforcing antidiscrimination laws, the FCC is usually concerned with prospective remedies since its primary concern is to improve the overall structure of broadcasting. Because of its forward-looking approach, the FCC does not often conduct hearings on license renewal applications because of allegations of discriminatory practices.

Generally, the FCC has been accorded substantial discretion by reviewing courts in making public interest determinations. The Commission has been allowed, but not required, to incorporate other national policies into its interpretation of the public interest. But in taking this approach, the Supreme Court made clear in *RCA Communications* that the agency may not abdicate its responsibility to define the public interest in the name of

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91. See, e.g., *National Citizen's Comm. for Broadcasting*, 436 U.S. at 795 ("the Commission does not have the power to enforce the antitrust laws as such . . ."); *National Broadcasting Co.*, 319 U.S. at 223-24 (FCC is not empowered to enforce the Sherman Act); *Bilingual Bicultural Coalition on Mass Media*, 595 F.2d at 628 ("the FCC is not the Equal Employment Opportunity Commission (EEOC), and a license renewal proceeding is not a Title VI suit."); *National Org. For Women*, 555 F.2d at 1016-18 (FCC does not enforce equal employment laws per se, and is not bound by rulings of the EEOC).


The requirement that minority tastes and needs be met dates back to the Blue Book and is based on the overall programming diversity goal. The policy was developed to promote a "well balanced programming structure" and did not apply, at least initially, to minorities in an ethnic sense. See supra note 29.

94. See *Bilingual Bicultural Coalition on Mass Media*, 595 F.2d at 628.

95. Id.; see *National Org. For Women*, 555 F.2d at 1016-17. It is not sufficient for one challenging a license to merely allege discriminatory conduct on the part of the licensee. There must be proof that license renewal would be prima facie inconsistent with the public interest. *National Org. For Women*, 555 F.2d at 1005. See also *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (1976); *Stone v. FCC*, 466 F.2d 316, 322 (1972).
other congressional pronouncements, but must make its own public interest determination.96

II. THE PUBLIC INTEREST AND THE HEARING IMPAIRED

It has been estimated that at least thirteen million people in the United States suffer some hearing loss,97 and that of this number, approximately two million are profoundly deaf.98 Aware of the needs of this special population, the FCC over the last decade has been developing experimental programs that serve the deaf.99

A. FCC Efforts for the Hearing Impaired

Except for a rule requiring television stations to caption emergency broadcasts,100 there are no formal requirements for the hearing impaired imposed on licensees by the FCC.101 The Commission considered but specifically rejected a requirement that the handicapped be among those consulted during ascertainment procedures.102 The agency proposed, however, that broadcasters have the option under the “other” category of the community leader checklist, to consult groups that are not listed, such as the hearing impaired.103

Although the Commission has not taken formal steps to provide programming guidelines for the hearing impaired, it has granted all requests from individual broadcasters seeking to innovate in this area.104 In 1972, the FCC granted authority to the Public Broadcasting System (PBS) to conduct experiments with “closed” captioning, a system that would allow hearing impaired individuals to receive visual information with their tele-

96. 346 U.S. at 91-98. See supra note 90 and accompanying text.
98. Id. at 389.
99. See infra notes 100-14 and accompanying text.
100. Captioning of Emergency Messages, 61 F.C.C.2d 18 (1976), reconsideration denied,
Hearing, 26 F.C.C.2d 917 (1970) (suggestion by FCC that television broadcasters should,
whenever possible, employ newscasters that enable listeners to lip read, and use visual an-
nouncements and materials).
101. See Captioning for the Deaf, 63 F.C.C.2d at 389.
102. Amendment of the Primer on Ascertainment of Community Problems, (Docket No.
78-237) FCC 80-134, (released April 4, 1980).
103. Id. The community leader checklist includes those groups whose views must be
ascertained in Commission decisionmaking. See supra note 16 and accompanying text.
104. See, e.g., Gottfried, 655 F.2d at 301; Captioning for the Deaf, 63 F.C.C.2d at 380
(Commission has frequently encouraged licensees to use procedures that make information
available to the hearing impaired).
vision programs. Based on this experiment, PBS filed a petition for rulemaking requesting that certain portions of the broadcast signal be reserved exclusively for captioning. Due to a number of technical and economic uncertainties, the Commission declined to make such an exclusive reservation. But it did adopt rules allowing further use of "closed" captions, thus clearing the way for full-scale development. Based on this policy, PBS and two of the commercial networks, beginning in March 1980, embarked on a project to provide up to twenty hours per week of captioned programming. The third commercial network—Columbia Broadcasting System (CBS)—is experimenting with an alternative form of presenting visual information.

The FCC has not confined itself only to

105. License Renewal Applications, 69 F.C.C.2d at 454. "Closed" captioning involves use of an encoder that sends program captions with the television signal using line 21 of the vertical blanking space. Special decoding machines are then attached to the television sets of the hearing impaired, allowing them to receive a visual display of the aural message. While those without such devices receive a normal picture. "Open" captioning superimposes captions on all viewers' screens and is currently employed in rebroadcasts of the ABC Evening News by PBS. Id.


107. Id. at 389. Despite PBS experience with captioning, a number of questions remain unanswered. For example, can other services be provided to television audiences on the part of the spectrum that PBS proposed be reserved exclusively for captions? Will exclusive use of the signal for closed captions preclude superior technologies, such as teletext? See infra note 110 and accompanying text. Should encoding devices be built in to television sets, or is it more effective to add them to the sets of the hearing impaired?

Economic questions also remain. Estimates of capital costs for captioning range from $25,000 to over $500,000. And the cost of captioning a single program runs anywhere between $1,000 and $7,600. See Captioning for the Deaf, 63 F.C.C.2d at 384-85. The Commission weighed the potential benefits of captioning against the possible loss of service from making an exclusive reservation of a portion of the broadcast signal and chose not to require captioning. Id. at 388.

108. "By today's action we have taken captioning-for-the-deaf out of the realm of experimentation and given it a green light to develop as a permanent service." Id. at 392 (separate statement of Comm'r Washburn).

109. See License Renewal Applications, 72 F.C.C.2d 273, 281 (1979). The project resulted from a cooperative effort between PBS and the National Bureau of Standards with funding from the Department of Health, Education and Welfare to develop captioning technology. HEW helped fund and establish the National Captioning Institute, which prepares captions for the programs. As another part of the project, Sears, Roebuck & Co. agreed to market decoding devices to the hearing impaired on a nonprofit basis. In addition to PBS, commercial networks involved in the project included NBC and ABC. Id. at 281.

Nine programs on commercial networks and fifteen PBS series were captioned during the Fall 1980 television season. Gottfried, 655 F.2d at 303 n.18. Recently, however, NBC has indicated its hesitancy to remain in the captioning program because far fewer decoders have been sold than expected (23,000 against a projected figure of 100,000) and because captioning is costing the network $1 million per year. Carmody, The TV Column, The Washington Post, Mar. 8, 1982, at B 10, col. 2.

110. CBS is presently involved in the development of teletext, a system that would allow the transmission of letters, numbers, or other characters to television sets equipped with
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supporting the deaf. The Commission has also helped handicapped persons find jobs with broadcasters.111

The thrust of the FCC policy of licensee responsibility for the hearing impaired has been to encourage service, but not to require it.112 The decision as to how the deaf would best be served is a matter of licensee discretion.113 However, the Commission has plainly stated that if experimental programs fall short of meeting the needs of the hearing impaired, it will consider adopting rules to compel such service.114

B. Section 504 and Public Television

The Rehabilitation Act of 1973 was enacted to secure social services and employment opportunities for handicapped individuals.115 Section 504 is a miscellaneous provision that prohibits recipients of federal financial assistance from discriminating against otherwise qualified handicapped persons.116 The Department of Health, Education and Welfare adopted expansive definitions which included federal licensees among those grants that would bring a recipient within the mandate of section 504.117 However, the Justice Department, which has the responsibility of coordinating Rehabilitation Act enforcement efforts, has interpreted federal financial assistance to exclude licensees.118

special decoders. Teletext differs from captioning because it can provide services for the general public, as well as for the deaf, including weather reports, news, comparative shopping prices and community bulletins. Notice of Proposed Rulemaking, FCC 81-493, at 2 (released Nov. 27, 1981). The FCC has proposed rules to allow the transmission of teletext based on petitions of CBS and the United Kingdom Teletext Industry Group. Id. at 1. The National Captioning Institute has expressed concern that teletext will interfere with existing services for the hearing impaired, while others urge that development of teletext will result in far superior service for the deaf. Id. at App. B.

111. The FCC's program consists of a clearinghouse that provides information to broadcasters to assist them in employing handicapped individuals. See Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395, FCC 80-62 (released Mar. 6, 1980).
112. See Captioning for the Deaf, 63 F.C.C.2d at 389.
113. Id.
114. License Application Renewal, 72 F.C.C.2d at 281.
We expect that the closed captioning project will be a success. However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

Id.
117. 45 C.F.R. § 84.81 (1981). The responsibility for the guidelines was later shifted to the Department of Education. See supra note 13.
Noncommercial broadcast licensees, however, are direct recipients of federal funds.\(^{119}\) It is the monetary grant that creates potential liability under section 504, making unnecessary an inquiry into the extent to which licenses themselves trigger the statute. Based on this reasoning, the Department of Health, Education and Welfare, determined in late 1979 that section 504 applies to public broadcasters and began to develop compliance guidelines.\(^{120}\) The Department was reorganized before the task was accomplished, and the responsibility shifted to the Department of Education (DOE).\(^{121}\) Finally, in January 1981, under a federal court order, DOE issued a notice of intent to develop regulations for enforcement of Section 504 on public television stations.\(^{122}\)

Before the DOE developed section 504 guidelines, the District of Columbia Circuit, in *Gotfried v. FCC*,\(^{123}\) imposed an obligation on public television stations to provide programming for the hearing impaired. This decision was reached despite the FCC's determination that the public interest would be better served by voluntary programs for the deaf.\(^{124}\)

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120. *Gotfried*, 655 F.2d at 306-07 & 307 n.41.


123. 655 F.2d at 297.

124. *Id*. 
III. THE DISTRICT OF COLUMBIA CIRCUIT AS AGENCY PARTNER:
FIRST AMONG EQUALS

A. A "Mandatory Incorporation" Doctrine

Despite the recent decision in WNCN Listeners Guild, in which the Supreme Court championed FCC discretionary authority, the District of Columbia Circuit in Gottfried ruled that the mandate of section 504 must be incorporated into the Communications Act public interest requirements for public television licenses. The court also ruled that the Commission must incorporate the national policy of nondiscrimination embodied in the Rehabilitation Act with respect to commercial licensees, but left the agency free to determine the most appropriate method of implementing this policy. The court's position can be termed a "mandatory incorporation" doctrine.

The ruling, in effect, made mandatory what before had been left to the agency's discretion and is therefore inconsistent with prior law in at least two ways. First, Gottfried seized from the Commission the authority to define the contours of the public interest, an issue which seemingly had been settled by the Supreme Court in WNCN Listeners Guild less than a month before Gottfried was decided. Second, it sanctioned a view of

126. 655 F.2d at 307 ("[T]he FCC is obligated to take account of a public broadcaster's legal duties under Section 504 in making its public interest determinations.").
127. Id. at 315-16. The court based its reluctance to require renewal hearings for the seven commercial stations on the fact that the policy expressed by the Rehabilitation Act was general while the nondiscrimination provision of § 504, which applied to public stations, was specific. See supra note 21. The court deferred to the expert judgment of the agency to find the most effective means of encouraging commercial stations to program for the hearing impaired. "Recognizing that the Commission possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace, we defer today to its judgment." Id. at 315-16. The court offered no explanation of how technological or economic factors would differ for public stations, or why the Commission deserves a lower standard of deference on public interest decisions involving such stations.
128. Incorporation of other national policies had previously been left to agency discretion. See supra notes 82-83 and accompanying text. By deciding as a matter of law that service to the hearing impaired is required by the public interest standard, the District of Columbia Circuit deprived the FCC of the discretion to address the problem in its own way.
129. The Gottfried court ordered the FCC to incorporate the Rehabilitation Act into the public interest standard. 655 F.2d at 307. Incorporation of other national policies had previously been discretionary with the agency. See supra notes 82-83 and accompanying text.
130. See supra notes 82-83 and accompanying text.
131. For a decade, the court and the Commission struggled over whether, as a matter of law, the court could order hearings in format change cases. See supra notes 42-53 and accompanying text. The format cases were a source of tension between the agency and the District of Columbia Circuit, and resulted in the FCC's refusal to follow the court's guide-
the public interest which focused on the needs of one minority, seemingly to the exclusion of the tastes, needs or interests of the audience at large. 132 Although the needs of the hearing impaired audience are indisputably significant, to mandate programming for the deaf without considering the possible effects of the ruling on the industry and the total audience is inconsistent with the Commission’s statutory mandate to promote the effective use of broadcasting for the net benefit of the audience. 133

The Gottfried court attempted to clear up the apparent inconsistency by pointing to nondiscrimination policies that the Commission had adopted and which the court had ordered the FCC to enforce. 134 These policies, however, had been adopted by the Commission due to its own interpretation of the public interest, not as a result of a rigid incorporation requirement. 135 Furthermore, where the court had ordered enforcement of these policies, the FCC was merely required to enforce previously adopted guidelines—not to incorporate other national policies. 136 Moreover, adoption of policies prohibiting discrimination on the basis of race or sex was not a signal from the Commission that the public interest was directed toward serving minorities as an end in itself. Instead, service to minority groups was required as a means of implementing the established public interest goal of programming diversity. 137 The Supreme Court’s opinion in

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132. Prior holdings concentrated on the public interest as a whole, not on particularized segments. See supra note 64. The Gottfried opinion, on the other hand, contained no discussion of how broadcasting service would be improved overall by the decision. The opinion examined only the needs of the hearing impaired vis a vis the public interest.

133. See supra note 64.

134. 655 F.2d at 309-10.

135. See id. at 309 (FCC adopted equal employment policies based on its independent assessment of the public interest).

136. Id. Regarding antidiscrimination policies the court stated: “where the Commission has lagged in accepting its responsibility, this court has not hesitated to direct it to do so.” Id. In support of this proposition, however, the court cited two cases, neither of which involved the incorporation of other national policies. Rather, they were cases in which the FCC was ordered to comply with its preexisting guidelines. Black Broadcasting Coalition v. FCC, 556 F.2d 59 (D.C. Cir. 1977) (affirmative action regulations); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (fairness doctrine).

137. “This Court’s cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.” NAACP v. FPC, 425 U.S. 662, 669 (1976). See Bilingual Bicultural Coalition on Mass Media, 595 F.2d at 628 (service to minorities is part of the overall public interest in promoting programming diversity); supra note 93.
RCA Communications requires such an approach. The Commission cannot rely on congressional pronouncements of policy as an index of the public interest, but must make its own finding as to whether the policy will foster the purposes of the Communications Act. The holding in RCA Communications is flatly inconsistent with a mandatory incorporation approach. Applied to the facts of Gottfried, the RCA Communications holding means that the FCC should make its own assessment of the wisdom of sanctions against licensees, and should not rely solely upon a congressional policy requiring service for the deaf.

Even if previous antidiscrimination laws had been applied to the public interest standard, it does not necessarily follow that the Communications Act also encompasses the antidiscrimination provisions of the Rehabilitation Act. To require captioning for the deaf imposes technical and economic burdens on broadcasters and could potentially result in a disruption of service to the general audience. Although service to a hearing impaired minority might support the recognized programming diversity goal, the overall detrimental effect precludes a finding that incorporation of the Rehabilitation Act serves the public interest. This scenario contrasts sharply with antidiscrimination statutes based on race or sex. Compliance with such laws requires no technical or economic changes by broadcasters, nor does it disrupt overall program service. Therefore, even if antidiscrimination statutes were considered to be per se in the public interest, that would not necessarily mean that the Rehabilitation Act, as applied in Gottfried, requires broadcasters to adopt costly new technologies.

The Gottfried decision also raises the possibility that the FCC's ability to adjust to the changing needs of the broadcasting field will be sharply curtailed. To the extent other national policies are tied to the public interest standard, the more the Commission becomes locked in to policies adopted

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138. See supra note 90.

139. A number of technical and economic questions about captioning remain unanswered. See supra note 107. Public broadcasters claim that a captioning requirement would significantly increase programming costs and result in a reduction in service. It would also cause production delays in programs and would limit the number and types of programs that could be made available. Also, captioning could interfere with the visual content of programming. See Motion for Leave to File Brief and Brief Amici Curiae of Corporation for Public Broadcasting, Public Broadcasting Service, and National Association of Public Television Stations in Support of Petitions for Writ of Certiorari, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981), cert. granted, 102 S. Ct. 998 (U.S. Jan. 11, 1982). See supra note 11.

140. The public interest is based on overall broadcasting service and involves weighing competing policies. See supra note 64 and accompanying text.

141. Eliminating programming that reflects a racial or sexual bias merely involves adjusting broadcast schedules. Such alterations are minor compared to a requirement that broadcasters install costly captioning technology.
by Congress that bear little or no relation to broadcasting. Following the court's reasoning to its logical conclusion, the FCC has expressed concern that other less closely related legislation will be incorporated into the public interest mandate. Laws banning discrimination based on age or sex by recipients of federal funds would be among the first that would have to be included under the Gottfried standard. Others would follow as Congress discovered new important national policies. Such a result plainly contradicts the Supreme Court holding in WNCN Listeners Guild that government supervision of a licensee's programming choices is not in the public interest. It threatens to transform the public interest standard from "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy" into a mechanistic formula, its meaning preordained by a variety of legislative enactments having little relevance to broadcasting.

B. The FCC's Role in the Regulatory Framework: Demoted to "Junior Partner?"

Beyond the determination that the public interest standard requires incorporation of the Rehabilitation Act, the Gottfried court reached several other conclusions to justify the decision to order license renewal hearings. In reaching its decision, the District of Columbia Circuit found implicitly that noncommercial station KCET-TV had not met the needs of the deaf, that implementation of licensing sanctions to aid the hearing impaired outweighed other public interest needs and that enforcement through individ-

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143. See 42 U.S.C. § 6102 (1976) which provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."

144. Existing FCC policies prohibit discrimination in the employment practices of licensees based on sex. A provision similar to § 504, but directed toward gender-based discrimination exists in 20 U.S.C. § 1681(a) (1976). It provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." This requirement could presumably be incorporated into the public interest standard to apply to licensees' programming.


147. Id. at 593.(quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).
ual licensing proceedings would be the most appropriate course of action. Such decisions are the essence of policymaking, and had previously been committed to agency discretion. In effect, the court in Gottfried demoted the Commission to the status of "junior partner" in the regulatory relationship.

Although the court failed to articulate specific findings beyond its determination that section 504 must be incorporated, hearings would not have been required absent the factual conclusion that license renewal for KCET-TV was "prima facie inconsistent with the public interest." In WNCN Listeners Guild, the Supreme Court upheld the Commission's policy that evidentiary hearings should be ordered only upon finding that the licensee had been acting "unreasonably or in bad faith." Since the Commission made no such finding with respect to station KCET, the District of Columbia Circuit apparently made an independent factual determination. Had the court limited its role to resolving the issue of law, it would have decided the requirements of the public interest standard only, and remanded the case to the FCC to evaluate the licensee's performance. Instead, the court assumed the Commission's role, thus depriving the agency of the level of discretionary authority contemplated in the partner-

148. See supra notes 66-70 and accompanying text for a discussion of issues which must be resolved before hearings are ordered.
149. See supra note 80.
151. 452 U.S. at 602 (quoting Mississippi Authority for Educ. TV, 71 F.C.C.2d 1296, 1308 (1969)).
152. See License Renewal Applications, 69 F.C.C.2d 451; License Renewal Applications, 72 F.C.C.2d 273 (1979), denying reconsideration of 69 F.C.C.2d 451 (1978). Few facts in the record support a finding of unreasonable action by KCET-TV. Despite the fact that ascertainment regulations did not require the station to seek out members of the hearing impaired community, KCET-TV consulted with several GLAD officers. 69 F.C.C.2d at 457 n.7. While the only specific allegation levelled at KCET in the petition to deny the license was that the station refused to air broadcasts of the Captioned ABC News, that situation had been corrected by May 23, 1977. Id. at 457-58 n.8. During the license period in question, KCET-TV aired more than 960 programs for the hearing impaired, or about six such shows per week. Petition for Writ of Certiorari of KCET-TV, No. 81-298, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981), cert. granted, 102 S. Ct. 998 (U.S. Jan. 11, 1982). See supra note 11. Also, by 1980, PBS, which supplies programming to KCET-TV, had significantly expanded its offerings for the hearing impaired. See supra note 109.
153. The Gottfried opinion contained no reference to the performance of KCET-TV during the challenged license period. However, the court's decision to order renewal hearings indicates an assumption that a substantial or material question of fact had been raised on the issue of the station's performance.
154. The general presumption is to avoid hearings whenever possible. See supra note 72. In license renewal proceedings, the Commission will usually seek additional information on matters that are unresolved rather than order hearings. See Bilingual Bicultural Coalition on Mass Media, 595 F.2d at 630 n.34.
ship doctrine 155 and prior case law. 156

The court also usurped the FCC's function of weighing competing public interest policies. The Commission has always tempered its enforcement of particular public interest concerns with a recognition that the purpose of the Communications Act is to promote quality service in the broadcasting system as a whole. 157 This balancing approach was applied by the Commission to the problems of the hearing impaired, and the potential benefits to the specialized population were weighed against the possible detrimental effects on overall service. 158 The FCC chose not to mandate the use of experimental captioning technologies, and concluded that the public interest did not call for requirements to be placed on individual licensees. 159 The Gottfried court upset this balance by imposing an immediate requirement of service for the hearing impaired to be enforced through licensing procedures. 160 The holding not only disregarded prior decisions that allocated the choice of competing policies to the Commission, 161 but it thwarted the agency's public interest concerns in its approach to the problems of the hearing impaired.

The Gottfried decision will require licensees to choose immediately a method of serving the deaf or risk losing their license, which could stifle the development of captioning technology. The Commission declined adoption of an exclusive reservation of a portion of the television signal for closed captioning because it was convinced that such a rule would hamper innovation in the field. 162 The agency also concluded that awaiting the perfection of systems such as teletext, which provides service to hearing audiences as well as the deaf, would ultimately make captioning more accessible to the hearing impaired by driving down the cost of decoding devices. 163 But the Gottfried ruling will force licensees to choose currently available methods of serving the deaf, making it unlikely that there will be substantial capital outlays made in the future to replace the old systems

155. The partnership doctrine places the fact finding function in the regulatory agency—not the court. See supra note 9.
156. E.g., RCA Communications, 346 U.S. at 91 (“Ours is not the duty of reviewing determinations of ‘fact’ in the narrow, colloquial scope of that concept.”).
157. See supra note 64.
158. See supra note 106.
159. Id.
160. “It is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now.” 655 F.2d at 301.
161. See supra notes 106-07.
162. Captioning for the Deaf, 63 F.C.C.2d at 388. See supra note 106.
163. Captioning for the Deaf, 63 F.C.C.2d at 388. See supra note 110.
with improved ones. Consequently, abandonment of the Commission's policy of promoting experimentation and development of alternative captioning systems, in favor of an immediate requirement of service for the deaf, could result in the installation of inferior systems to serve the hearing impaired.

The Gottfried decision also frustrates the FCC policy of fundamental fairness toward its licensees by making KCET-TV accountable for failing to satisfy requirements that did not exist during the license term under consideration. Although renewal was predicated on the station's performance from 1974 to 1977, the court relied on a 1979 Department of Health, Education and Welfare determination that for the first time held section 504 applicable to public television stations. Retroactive application of section 504 must have been a surprise to the station management of KCET-TV, since the FCC, during the 1974-77 license term, had expressly rejected requirements that licensees air programs for the deaf, and because guidelines still do not exist for enforcement of section 504 in public television. Not only was the Gottfried decision unfair to the particular station involved, it also undermined a basic premise of the public interest standard that was reaffirmed by the Supreme Court in National Citizen's Committee for Broadcasting—that uncertainty, unfairness and disruption of licensees should be avoided.

Another effect of Gottfried was to place a more stringent burden on public compared to commercial broadcasters by holding the former immediately accountable for compliance with section 504, while allowing the latter to demonstrate future good faith efforts to meet the general national policy embodied in the Rehabilitation Act. The ruling contradicts the existing FCC policy of treating commercial and noncommercial broadcasters alike. It also conflicts with a basic premise of public broadcasting, that federal funds should not be used as a lever to control programming.

164. See supra note 106.
165. Fidelity Television, Inc. v. FCC, 515 F.2d 684, 699-700 (D.C. Cir.), cert. denied, 423 U.S. 926 (1975) (licensing criteria should be known in advance); National Citizens Comm. for Broadcasting, 436 U.S. at 804 (Court upheld FCC divestiture policy designed to avoid uncertainty and unfairness toward licensees). In Gottfried, the Commission concluded that application of § 504 would violate its existing policy toward treatment of licensees, by placing retroactive licensing requirements on broadcasters and thwarting the notion of fundamental fairness. See License Application Renewal, 72 F.C.C.2d at 279.
166. Gottfried, 655 F.2d 303 n.22.
167. Captioning for the Deaf, 63 F.C.C.2d at 389.
168. See supra note 13.
170. Gottfried, 655 F.2d 297.
171. See supra note 31.
By ordering compliance with section 504, the Gottfried court ignored the balance of competing public interest policies set by the Commission, upset policies with respect to licensees, and threatened to institutionalize captioning systems that could result in poorer quality service to both the hearing impaired and the general audience. The decision also vitiates the partnership doctrine, under which such policy choices should be left to the Commission, not the court.173

A third way in which the Gottfried court usurped the agency’s function was by dictating the method by which the public interest mandate must be enforced. Although the court paid lip service to agency discretion in this area by noting the FCC’s choice of procedural options, it limited the Commission’s choice to licensing sanctions.174 Yet the Supreme Court recently affirmed in WNCN Listeners Guild the proposition that public interest pol-

172. Although it is beyond the scope of this Note, an interesting question posed by the Gottfried decision is the extent to which it can be reconciled with the legislative purpose of the Public Broadcasting Act, under which federal funds are provided to noncommercial broadcasters. One of the primary concerns expressed prior to the Act’s adoption was that federal funds should not involve the government in programming decisions. See Public Television Act of 1967: Hearings on S. 1160, Subcomm. on Communications, Senate Commerce Comm., 90 Cong., 1st Sess. 9 (1967) (statement of Sen. Pastore); Hearings on H.R. 6736, House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 105 (1967) (statement of Rep. Brown); S. REP. No. 222, 90th Cong., 1st Sess. 4, 11 (1967). See generally Note, Freeing Public Broadcasting from Unconstitutional Restraints, 89 YALE L.J. 719 (1980) (discussion of legislative history and validity of controls imposed through federal funds).

173. See supra note 9.

174. The court said the Commission could choose from among a variety of dispositional alternatives, including short-term or conditional license renewal as well as standard renewal or denial. 655 F.2d at 311.
licies need not be implemented through licensing sanctions.\textsuperscript{175} And it is well established by prior cases that industry-wide problems are more effectively handled through rulemaking than through individual hearings.\textsuperscript{176} The 	extit{Gottfried} opinion cannot be reconciled with these holdings, since it ordered the Commission to employ individual sanctions to remedy a pervasive social problem.

By limiting the Commission's discretion to choose from other dispositional alternatives to serve the hearing impaired, the 	extit{Gottfried} decision risks burdening a significant number of public stations with costly and time-consuming renewal hearings; a prospect that could lead to a reduction of service to the public, since resources would have to be diverted from programming to regulatory matters.\textsuperscript{177} Such a policy is ill-suited to solve the problems of the hearing impaired, since the technology involved in a captioning system must be adopted uniformly—as could be achieved through rulemaking.\textsuperscript{178}

\textbf{C. The Gotefried Decision: Was the FCC Required to Incorporate or Enforce Section 504?}

The District of Columbia Circuit characterized its 	extit{Gottfried} holding as requiring the FCC to incorporate section 504 into the public interest standard to "effectuate the underlying national policy" without simultaneously empowering the agency to adjudicate violations of the Rehabilitation Act.\textsuperscript{179} This statement of the holding, insofar as the agency is not empow-

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175. The court ruled it was not necessary for the Commission to supervise programming formats through licensing sanctions. 452 U.S. 482 (1981).
176. See supra note 30.
177. A license renewal hearing may in some cases, be as serious a sanction as denying the license, especially for small stations, many of which are noncommercial. A petition to deny a license, even if no hearings are ordered, may cost a station $50,000 in legal fees. If hearings are held, costs substantially increase. Thirteen years ago, license renewal proceedings for station WMAL cost $400,000. See B. Cole & M. Ottenger, THE RELUCTANT REGULATORS 213-14 (1978). Public broadcasters are currently facing "difficult financial stress," making the prospect of renewal hearings even more burdensome. Amici Curiae Brief of Corporation for Public Broadcasting, Public Broadcasting Service, and National Association of Public Television Stations in Support of Petitions for Writ of Certiorari, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 998 (U.S. Jan. 11, 1982). During 1982, approximately 90 of the nation's 300 public stations will apply for renewal, and all of them could be subjected to hearings as a result of the 	extit{Gottfried} decision. Id.; Petition of FCC, No. 81-799, supra note 145 at 21.
178. See Captioning for the Deaf, 63 F.C.C.2d at 388 (technical and economic questions still remain with respect to captioning, and certain types, such as open and closed captioning, may not be mutually compatible. The Commission has stated it will consider adoption of rules if the policy of licensee discretion is not successful. License Renewal Applications, 72 F.C.C.2d at 281.
179. "In pursuing the public policy represented by Section 504 it is not the function of
ered to enforce other national policies, is consistent with prior law.\textsuperscript{180} However, the result reached in \textit{Gottfried}, whereby the public station was required to undergo license renewal hearings which the commercial stations were not, indicates the inconsistency in the court’s reasoning.

KCET-TV, a public station, was held to a more stringent public interest standard because of the “specific statutory mandate” of section 504 as opposed to the more general nondiscrimination policy of the Rehabilitation Act.\textsuperscript{181} The Commission was ordered to impose this more exacting requirement even though the court acknowledged that other agencies were authorized to develop compliance guidelines.\textsuperscript{182} On the other hand, commercial stations were subjected to the general nondiscrimination policy of the Rehabilitation Act and were not required to undergo hearings.\textsuperscript{183}

The court’s reasoning is not wholly consistent. If, as the court maintained, other national policies are to be used by the Commission as a “tool by which [the] regulatory agency gives ‘understandable content to the broad statutory concept of the “public interest,”’”\textsuperscript{184} then the degree of specificity of the incorporated policy should be irrelevant to the Commission’s response. Once programming for the hearing impaired was determined to be a public interest component, hearings should have been required for commercial and noncommercial stations alike—or neither should have been subjected to hearings, given the Commission’s discretion to find facts, make policy, and select appropriate procedural mechanisms. But to hold that section 504 requires that only public stations face hearings saddles the FCC with a duty of enforcing that section of the Rehabilitation Act. In his dissent, Judge McGowan noted the inconsistent treatment of commercial and noncommercial licensees, and said that to the extent the public interest mandate extends to one, it should extend to both equally.\textsuperscript{185} He pointed out that executive agencies have the responsibility of developing section 504 compliance guidelines, and that until they are fashioned, station KCET-TV should be spared the time and expense of hearings.\textsuperscript{186} Otherwise, if both the FCC and the executive departments are to enforce

\begin{footnotes}
\textsuperscript{180} See \textit{supra} note 91.
\textsuperscript{181} 655 F.2d at 315.
\textsuperscript{182} \textit{Id.} at 310-11.
\textsuperscript{183} \textit{Id.} at 315-16.
\textsuperscript{184} \textit{Id.} at 308 (quoting Federal Maritime Comm’n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968)).
\textsuperscript{185} \textit{Id.} at 316-17 (McGowan, J., dissenting).
\textsuperscript{186} \textit{Id.}
\end{footnotes}
effectively section 504, those subject to the law will be faced with a variety of directives from various agencies, each with its own compliance standard. By adopting different compliance duties for commercial and non-commercial broadcasters, the Gottfried court creates the potential for this type of fragmented enforcement procedure. The decision requires the FCC to implement the specific sanction of section 504, and thus conflicts with prior decisions which prevent the agency from assessing law violations under incorporated policies.

IV. CONCLUSION

The District of Columbia Circuit in Gottfried v. FCC adopted what may be called a mandatory incorporation doctrine, under which regulatory agencies are required to incorporate other national policies that intersect their domain. This holding is unsupported by prior decisions which give the FCC wide latitude in deciding what is required by the Communications Act, and by decisions that incorporation of other policies is allowed, but not required, to define the public interest. But, even if the court had been correct in ordering incorporation of the Rehabilitation Act, it erred by denying to the Commission discretion to make factual findings, fashion policy based on competing public interest needs, and to select procedures other than licensing sanctions to fulfill the terms of the Communications Act. Finally, the Gottfried opinion is internally inconsistent; it recognized the enforcement obligation of departments other than the FCC, yet ordered the Commission to apply the specific statutory requirements of section 504 to public television stations. The net effect of the decision is to strip the Commission of its discretionary power to interpret and implement the public interest standard and to threaten development of captioning technology due to the premature institution of costly sanctions on public broadcasters. The Gottfried rationale emasculates the FCC, making a working partnership between the court and the agency difficult, if not impossible.

Robert L. Corn

187. A similar problem arose when the NAACP sought enforcement of affirmative action guidelines against licensees regulated by the Federal Power Commission. Rejecting the NAACP suit, Chief Justice Burger stated in his concurring opinion: "To the extent that the judiciary orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly." NAACP v. FPC, 425 U.S. 662, 674 (1976) (emphasis in original).