Constitution First Amendment, see also Free Speech
Programming Format Change
Programming, Licensee Control of

Policy of non-intervention in broadcast station entertainment format changes adopted. Such intervention found to be in derogation of licensee programming discretion; contrary to Congressional intent expressed in Communications Act, administratively unmanageable, and constitutionally chilling. See also 57 FCC 2d 580.

F.C.C. 76-744

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
DEVELOPMENT OF POLICY RE: CHANGES IN THE ENTERTAINMENT FORMATS OF BROADCAST STATIONS	Docket No. 20682

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1976; Released: July 30, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT; COMMISSIONER ROBINSON ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration its *Notice of Inquiry* in Docket No. 20682, 41 Fed. Reg. 2859, 57 FCC 2d 580 (1976), concerning its policies and practices with respect to changes in the entertainment formats of broadcast stations. Also before the Commission for its consideration are the various comments and reply comments filed in response to the *Notice of Inquiry*. These comments are summarized in Appendix A.

2. This *Inquiry* grows out of the opinion of the Court of Appeals, *en banc*, in *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974), the latest in a line of cases[1] which hold that when an application for the sale of a radio station license is before the Commission, and in connection with that sale the purchaser intends to discontinue the station's existing entertainment format, if there has been expressed a significant amount of public protest to the effect that this change of format, if completed, would deprive the public of an entertainment format not otherwise available in the market, then the Commission must hold a hearing pursuant to Section 309 of the Communications Act, as amended, to determine whether the public interest would be served by a grant of the application. The Commission issued

[1] *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Committee* v. *FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Citizens Committee to Preserve the Present Programming of WONO(FM)* v. *FCC*, No. 71-1336 (D.C. Cir.) (Order, May 13, 1971); *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM)* v. *FCC*, 436 F. 2d 263 (D.C. Cir. 1970).

the *Notice* in this Docket to solicit public comments on the nature of the obligations imposed by these cases and whether the Commission could proceed to implement those obligations harmoniously with the Communications Act and the Constitution.[2]

3. We believe this important question must be examined within the framework of our basic legislative mandate. The Communications Act makes a fundamental distinction between common carrier and broadcast regulation, and, as the Court of Appeals has recognized, there is a degree of mutual exclusivity between them. See, *Hawaiian Telephone* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974); *Cf. Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 (1975). Before the Communications Act was adopted, Congress debated carefully whether and to what extent the obligation of common carriage ought to be imposed on radio broadcast licensees.[3] It concluded, in the end, that the domains of radio broadcasting and common carriage ought to be kept distinct, and it enacted Section 3(h) of the statute to express this conclusion. Section 3(h) reads: " 'Common carrier' or 'carrier' means any person who is engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

4. Thus the Congress intentionally refrained from extending the full range of regulatory tools deemed appropriate for common carrier regulation to the field of broadcast regulation. While the Communications Act of 1934 created a public right to have access to any common carrier ". . . communications service upon reasonable request . . . ," 47 U.S.C. 201(a), Congress expressly rejected proposals to establish an analogous public right of access to the broadcast airwaves. Similarly, while the Act requires that common carriers receive Commission authority to commence or discontinue communications services, 47 U.S.C. 214, Congress did not enact an analogous requirement that broadcasters receive Commission authority to commence or discontinue programming, including program format services, offered to the public.

5. Notwithstanding this manifestation of Congressional intent, the Court of Appeals has in recent years attempted to impose various common carrier-like obligations on broadcast licensees, either by reading the Constitution to require it, or by interpreting the "public interest" language of the Communications Act to contain it. In *Business Executives Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), the Court held that a broadcast licensee's policy of refusing to accept any paid announcements concerning controversial matters of public importance violated both the public interest mandate of the Communications Act and the First Amendment. The Court rejected the proposition that the policies of broadcasters, as essentially private

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[2] Several of the commenting parties, in addition to responding to the merits of this *Inquiry*, questioned the propriety if not the legality of conducting this proceeding at all. In the opinion of these parties, the opinion of the United States Court of Appeals in *Citizens Committee to Save WEFM, Inc.* v. *Federal Communications Commission*, 506 F.2d 246 (D.C. Cir. 1974), decides as a matter of law what policies may be pursued by this agency when a radio station seeks to modify an entertainment format despite wide-spread listener opposition to the proposed change. We reject this contention, for the reasons set forth in our Memorandum Opinion and Order of March 9, 1976, 58 FCC 2d 617 (1976).

[3] This background is set out in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-109 (1973).

businesses, did not engage the obligations of "state action," and held that, since the station opened its doors to ordinary commercial messages, it could not be heard to assert that advertising, *per se*, was inherently disruptive of the proper functioning of the station. Having found the broadcasters' conduct to be constrained by the policies of the First Amendment, the Court of Appeals went on to hold that "The content of the idea which the excluded speakers wish to promote is—emphatically—*not* permitted as a distinguishing factor in itself." 450 F.2d at 660 (emphasis in original).

6. The Supreme Court, in reversing this decision, took account of Congress' manifest "desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 109 (1973), and noted that "The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claim under the umbrella of the First Amendment." 412 U.S. at 103.

7. The format change cases are closely related to the access issue presented in the *CBS* case. At issue in each situation is basically a conflict between the Commission and the Court of Appeals concerning the appropriate way to implement the policies of Congress under the Communications Act. As in the *CBS* case, the Court of Appeals here has sought to impose a common-carrier like obligation on radio broadcasters pursuant to its understanding of the public interest language—in this case, Section 309—of the Communications Act. In *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204, 214 (D.C. Cir. 1960), the Court of Appeals observed that a common carrier has "a special legal status and obligations. . . . This includes an obligation, deeply embedded in law, to continue service." The Court of Appeals went on to note that abandonment of service could not be lightly granted: if the carrier "Wants to abandon service because it must now share [the] market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if the 'public convenience or necessity' permit."

8. In contradistinction to the "obligation, deeply embedded in law, to continue service" which common carriers must bear, the Communications Act "recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). The Court goes on to explain:

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

The implication of this holding for entertainment formats is not open to doubt: broadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take. It was through this regime of competition that Congress "aim[ed] . . . to secure the maximum benefits of radio to all the people of the United States," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217

(1943).[4] The Court of Appeals all but concedes the inconsistency of its views with those expressed by the Supreme Court in *Sanders Brothers* by suggesting that more recent cases, such as *FCC* v. *RCA Communications Inc.*, 346 U.S. 86 (1953), or *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771, 776–777 (D.C. Cir. 1974), have placed in doubt the notion that competition was indeed Congress' plan for the broadcast industry under the Communications Act. But neither of these cases concerned the broadcasting industry. On the contrary, these are common carrier cases, whose relevance to the holding in *Sanders Brothers* is open to very serious question.

9. The record in this Docket bears out the factual correctness of the underlying legislative assumption of competition to which the Supreme Court in *Sanders Brothers* refers. The Commission's study of program diversity in major markets, whose findings are summarized in Appendix B, decisively shows how effective the tool of competition has been in carrying out Congress' plan for entertainment programming. We find that reliance on this tool will produce program diversity of a sort, and in a form, that equates both to the welfare of radio listeners and to the public interest generally. In addition, there exist practical considerations with constitutional overtones which supplement the issues of statutory interpretation in bringing us to the conclusion that 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. These considerations are explained more fully herein.

10. The *WEFM* decision has far-reaching ramifications for our entire scheme of radio broadcast licensing. Although this case, like the other entertainment format cases which the Court of Appeals has seen, arose in the context of an application for assignment, Section 309 deals not merely with transfers, but, more broadly, with all written applications which it is the Commission's duty to grant or deny under Title III of the Act. The public interest finding that the Commission is required to make before granting an assignment application is in no respect different from the public interest finding that must be made before a renewal application may be granted; accordingly, nothing which the Commission is obliged to do in order to find that the public interest would be served by the grant of an assignment may properly be omitted in the much more common situation of an application for renewal.

11. The Commission's long and continuing reluctance to define and enforce the "public interest" in entertainment format preservation is based both on practical considerations and on our understanding of the structure and meaning of the Communications Act. The practical problems are simple to comprehend. To determine, in the context of a prospective format change, whether the public interest would be served by allowing it, we must ascertain: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that

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[4] The *NBC* case upheld the Commission's Chain Broadcasting regulations, the first in a series of regulatory efforts to preserve licensee discretion over program material and foster competition in local markets. In upholding the Prime Time Access Rule, a direct descendant of the Chain Broadcasting Rules, the Second Circuit noted: "It is clear that the Nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media." *National Association of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 256 (2d Cir. 1974).

format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail. Moreover, where a prospective purchaser alleged that its proposed new format would add as much program diversity to the communities in its service area as the abandonment of the old format would subtract, evidence would have to be heard on this issue as well.

12. In the renewal context, the Commission anticipates that the usual format abandonment protest would concern a *fait accompli, i.e.*, would involve a complaint that a licensee, with an obligation to operate his station in the public interest, had deprived its service areas of a unique format during the previous license term, for which, accordingly, a sanction would in principle lie. The Commission could then well be obliged to designate a hearing on the renewal. similar to that described in paragraph 11, *supra*, but more complex also, because it might include the question whether a format change had in fact actually occurred.

13. This last question presents an acute practical problem stressed in a number of the comments. How is the Commission to define what constitutes a particular entertainment format, and what demarks it from neighboring formats? The Court of Appeals has made it clear that it, for one, will not be satisfied by any Commission attempt to define formats broadly. Hence, "popular music" is not a sufficiently diacritical category to meet the Court of Appeals' conception of our public interest mandate; nor even, we infer, would be "rock music" or "classical music." Instead, the Commission is required to distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973); likewise, as the Court of Appeals suggests in the *WEFM* opinion, we may be obliged to distinguish between 19th Century and 20th Century classical music, 506 F.2d at 264 n.28, and to make, in the context of an application for renewal, very real consequences turn on such distinctions.

14. In practical terms, "format" means program material. As Commissioner Robinson has put it: "What makes one format unique makes all formats unique. . . . Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and alas, appellate judges) call format." 57 FCC 2d 580, 594, 595 (1976) (concurring statement).

15. The elusiveness of a format's definition has a practical consequence in addition to a vagueness that makes it impossible for a broadcaster to know prospectively what sort of entertainment programming the public interest standard requires it to present. The same uncertainty that plagues the licensee's decisionmaking in the first instance will plague our review of the licensee's discretion. The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is "unique" or, indeed, assuming that it is, whether it has been deviated from by a licensee. Furthermore, we have not been afforded any degree of latitude in summarily deciding whether the station's finances are probative of an untenable format,

even assuming it to be unique.[5] Accordingly, the Commission would be obliged in the typical case to hold a hearing on renewal.

16. The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs). The market allocation method is not, however, perfect. See Appendix B. We recognize that the market for radio advertisers is not a completely faithful mirror of the listening preferences of the public at large. But we are not required to measure any system of allocation against the standard of perfection; we find on the basis of the record before us that it is the best available means of producing the diversity to which the public is entitled. Appendix 2 of the filing of the National Association of Broadcasters, a description for the advertising trade of the radio stations in the New York and Washington, D.C. markets, shows that in large markets, with many aural services and intense competition, there appears an almost bewildering array of diversity. In New York, the menu includes all-news, classical music, rhythm and blues, Jewish ethnic, Greek ethnic, Spanish, country, modern country, country and gospel, talk, easy listening, middle of the road, show tunes, beautiful music, popular standard, and one which calls itself "mellow." How these various program themes differ from one another, and how each is faithful to its own conception, are questions we need not reach to observe the variety of choices available to radio listeners in the New York market.

17. Format allocation by market forces rather than by fiat has another advantage as well. It enables consumers to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different* formats. As Commissioner Robinson has observed, "with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of . . . formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would." 57 F.C.C. 580, 594-595 (1976).

18. A recent staff study of audience ratings for major market radio stations lends further credence to this observation. The results of that investigation indicate that audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music (*e.g.*, middle of the road) as they do for stations programming markedly different types (*e.g.*, progressive rock as opposed to classical). This finding strongly indicates that audiences carefully discriminate in selecting stations. Given this situation, Professor

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[5] In *WEFM* the Court was careful to note that the relevant financial inquiry was not whether the station *had been* financially profitable during the tenure of a particular format, because financial losses could proceed from a variety of causes (argued the Court) completely unrelated to the station's program menu. Rather, the relevant inquiry is whether the format *might have been* viable, 506 F.2d at 265-66. This is, we observe, an almost fantastically speculative point for inquiry, and one not subject to very satisfactory—and certainly not to incontestable—proof.

Bruce Owen of Stanford University has demonstrated that maximization of format diversity will not necessarily lead to increased listener satisfaction.[6] Indeed, Professor Owen shows that efforts to maximize format diversity through regulatory fiat could very well result in a *diminution* of consumer welfare: a format protected under the *WEFM* rationale may be of lesser value than the format which the broadcaster proposes to substitute. There is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format. It is impossible to determine whether consumers would be better off with an entirely new format without reference to the actual preferences of real people. In these circumstances, there is no reason to believe that government mandated restrictions on format changes would promote the welfare of the listening public. Indeed, in view of the administrative costs involved in such a program of regulation, and in view of the chilling effect such regulations would doubtlessly have on program innovation, there is every reason to believe that government supervision of formats would be injurious to the public interest. The record in this proceeding clearly points to the conclusion that such a program of regulation would not be compatible with our statutory duty to promote the public convenience, interest and necessity, and we so find.

19. Finally, allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate. In our society, public tastes are subject to rapid change. The people are entitled to expect that the broadcast industry will respond to these changing tastes—and the changing needs and aspirations which they mirror—without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency,[7] particularly after a full-scale evidentiary hearing. In this respect, it may not be widely appreciated what, precisely, is entailed in a hearing of the sort contemplated by Section 309 of our statute. It is not a brief or summary affair, but large-scale litigation which imposes enormous costs on the participants and the Commission alike. We do not know with any certainty the magnitude of the burdens imposed on broadcast licensees by hearing procedures of the sort contemplated by the Court of Appeals in *WEFM*, but it may be instructive to consider the costs to the Commission of the *WEFM* case, hearings on which have been proceeding pursuant to the Court's mandate on remand. The *WEFM* hearings may be considered fairly typical of format abandonment hearings; the administrative law judge is required to consider, basically, the issues mentioned in paragraph 11, *supra*, as well as a financial issue (see footnote 3, *supra*) and a misrepresentation issue. The ordinary case would generally be similar in complexity. And in this case, an administrative law judge held two pre-hearing conferences in Washington, D.C.; his preparation time was an additional eight hours. In addition,

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[6] See Comments of National Association of Broadcasters, Appendix 1.

[7] *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974) (opinion of Leventhal, J.), *vacated*, 516 F.2d 1180 (D.C. Cir. 1975, *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 96 S. Ct. 1105 (1976).

the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D.C., and on nine different dates in Chicago, from which a transcript of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision. As Chairman Wiley has observed, "[e]ven after all relevant facts have been fully explored in an evidentiary hearing, we would have no assurance that a decision finally reached by our agency would contribute more to listener satisfaction than the result favored by station management." 57 FCC 2d 580, 586 (1976).

20. These costs, and the uncertainties that impose them, have a constitutional dimension as well. Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. Several commenting parties mentioned this effect, and we regard it as of great importance. The existence of the obligation to continue service, we find, inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms.

21. The administrative process "combines judicial supervision with a salutory principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). When such "partners" come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive. This Docket is the occasion for the Commission to reconsider its policy on entertainment formats. We view the matter as one with very serious implications for the structure of the broadcasting industry, the administration of the Communications Act, and the meaning of the First Amendment. Our reflection, aided by extensive public comment on virtually every aspect of this matter, has fortified our conviction that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. Also, this entanglement would certainly result from the Commission placing restrictions on the entertainment programming that a broadcaster could offer, because "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed." *Lemon* v. *Kurtzman*, 401 U.S. 602, 619-20 (1971). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126-27 (1973). Any such regulatory scheme would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio pro-

gramming.[8] We are, of course, cognizant of our responsibility to implement the Court's mandate in the *WEFM* decision, 47 U.S.C. 403(h), and to that end a hearing on the WEFM assignment has been substantially completed. See Docket 20581, 40 F.R. 39549 (1975). Thus our statement here should not be viewed as a prejudgment of that proceeding, but rather as an expression of what, upon further serious reflection, we view to be an extremely unwise policy in which we and the Court have both become entangled. To emphasize our concern that the views we have set forth here will not be misinterpreted, the implementation of our new policy will be stayed for sixty days, and, if a petition for review is filed, until judicial review of this Order has been completed.

22. For the foregoing reasons, IT IS ORDERED, That the policy set forth above IS ADOPTED effective 60 days from the release date of this Order or, if any party seeks judicial review of this Order, upon final disposition of any such review proceeding. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[8] The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 FCC 2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners.

APPENDIX A

SUMMARY OF COMMENTS

1. The Commission received a variety of comments in response to its *Notice of Inquiry in Docket 20682* from both broadcasters and several citizen and public interest groups, students and other interested parties.[1] Not surprisingly, given the background of this proceeding, all broadcasters' comments were critical of any attempt by the Commission to regulate the content of broadcast entertainment programming, while citizen and public interest group comments solidly favored Commission intervention in station entertainment format selection. The comments of other interested parties were divided on the question. The arguments for and against Commission regulation of broadcast station entertainment formats centered generally around the Commission's authority and responsibility under the First Amendment, and the statutory guidelines and dictates of the Communications Act of 1934, as amended. This breakdown corresponds to the two important questions we raised in the *Notice* and the comments may appropriately be discussed in terms of these two considerations.

The Constitution

2. Critics and supporters of Commission regulation of entertainment formats agree that the First Amendment applies to broadcasting, *Associated Press* v. *United States*, 326 U.S. 1 (1944); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948), and that entertainment and music are included within the basic First Amendment protections, *Winters* v. *New York*, 333 U.S. 507 (1948). This, however, is the extent of agreement. Those who urge Commission regulation of entertainment formats on First Amendment grounds cite the following language in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*Red Lion*), as primary support for that position:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself

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[1] A list of parties filing comments is appended to this summary.

> or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *Red Lion, supra*, 395 U.S. at 390.

The National Organization of Women (NOW), who filed the most comprehensive constitutional argument in favor of regulation, states that this holding encompasses five existing elements within the fundamental First Amendment rights of listeners, to wit: (1) the right to receive ideas and information, (2) the right to diverse and antagonistic ideas, (3) the right of minority audiences to be protected by the FCC, (4) the right to be free from monopolistic domination of information sources, and (5) the right to pick and choose from competing entertainment formats and viewpoints. NOW believes that the public has a compelling First Amendment right to hear programming at its first preference level and that broadcasters' "somewhat undefined First Amendment rights" are subservient to the above enumerated rights of listeners.

3. Opponents of Commission format regulation argue that the American system of broadcasting has, from the beginning, been founded on the principle that decisions regarding program content should be left to station licensees and that the application of First Amendment guarantees to broadcasters protects and gives life to this principle. Although the broadcast medium presents special circumstances, such as the scarcity of frequency space, which permit certain forms of regulation that would not otherwise be constitutionally permissible, broadcasters unanimously agree that neither *Red Lion* nor any other constitutional argument can support the type of program regulation suggested by the Court of Appeals in *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*WEFM*). Since it is the *Red Lion* decision which provides much of the support for those who desire Commission regulation of formats on constitutional grounds, many broadcasters attempt to distinguish this case. The comments on *Red Lion* range from a charge of "constitutional misinterpretation" (National Association of Broadcasters, NAB), to "a shift in the First Amendment's traditional focus" (Cornhusker Television Corporation, *et al.*, hereinafter "Cornhusker"). It is argued by the National Radio Broadcasters Association (NRBA) that the decision in *Red Lion* was based on the Court's conclusion that the Fairness Doctrine, while departing from the letter of pre-existing First Amendment law, served the historical purpose of the Amendment to promote free and wide-ranging debate on public issues. This result is consistent, says NRBA, with constitutional decisions which permit the government to regulate the content of speech where such content regulation has a minimal impact on communication of ideas *and* is necessary to achieve a governmental interest of very great importance. NRBA makes the argument that access to different forms of entertainment formats is less compelling in constitutional importance than access to free debate on public issues and that the impact of format regulation on speech content would be far greater and more direct than that of the Fairness Doctrine. Cornhusker argues in its Comments that *Red Lion's* treatment of the Fairness Doctrine and personal attack rules was based on the long series of FCC rulings in the area, and reliance on Congressional approval of the Fairness Doctrine found in the legislative history of § 315 of the Communications Act. Cornhusker states that the decision dealt with questions concerning broadcaster obligations to present important public questions fairly and without bias, and notes that the Court strongly intimated that other questions related to the Commission's attempted oversight of program content would raise more serious First Amendment issues. *Red Lion, supra*, at 396. Accordingly, it is asserted that *Red Lion's* doctrine is not a broad mandate that applies with equal force to the wide range of broadcaster program discretion, including format selection. Broadcasters further argue that the subsequent Supreme Court decisions in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), have somewhat diluted the far reaching constitutional implications of *Red Lion*. Especially significant in this regard is the language in *DNC*, reaffirming the journalistic rights of broadcasters. NOW, on the other hand, finds distinctions in these decisions which make them inapplicable to the central issue under consideration herein.

4. Other constitutional theories were advanced in the comments by those parties who object to Commission regulation of entertainment formats. One of these, asserted by the National Broadcasting Company and many others, is that any attempt by the Commission to develop standards or guidelines to be applied in format regulation would be so vague as to be void under constitutional doctrine. This is so allegedly because broadcast formats contain many components, *i.e.*, music type, music selection and placement, announcers, personalities, number and quality of commercials, specialty features, news scheduling; and a change in any one or combination of such components could constitute a change in a station's program format. Another theory argued is that the action of

forbidding the broadcast of a particular format would be an unconstitutional prior restraint of free speech. The NAB claims that governmental application of a prior restraint bears a heavy presumption against validity, requiring for its justification compelling circumstance and procedural safeguards rarely demonstrated to the satisfaction of courts where protected speech is involved. Cornhusker advances yet another constitutional argument, that of the First Amendment doctrine of "Less Drastic Means." This doctrine, according to Cornhusker, limits congressional power to enforce requirements that impinge upon free speech activities and is described as follows:

> In a series of decisions [the Supreme Court] has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle governmental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. *Tucker*, 364 U.S. 479, 488 (1960).

Under this doctrine, to vindicate the *WEFM* requirement for Commission involvement in format selection, Cornhusker argues that it must be shown that the rights of listeners and viewers are unconstitutionally infringed without detailed oversight. It would have to be shown that a monopoly of the otherwise "uninhibited marketplace of ideas" prevail absent detailed FCC program scrutiny. Such a showing, Cornhusker alleges, is virtually impossible. There are "less drastic means" already available for program diversity; the combination of the commercial marketplace,[2] community ascertainment duties; and noncommercial educational radio and television to respond to programming incentives other than those of the commercial marketplace.

5. A recurring theme running through much of the broadcaster comments in the constitutional area is the recognition that the Commission does have the authority to exercise its powers in a way that affects the content of broadcast programming, but that in no instance has this authority been interpreted, by the Commission or the courts, to allow the Commission to override a licensee's discretion as to one type of legally permissible programming and order that a specific type of programming content either be retained, or if it has been removed, reinstated. Moreover, the NAB notes that although some limited FCC intrusions into programming have been approved by the courts,[3] and that other decisions have upheld the Commission's refusal to intrude,[4] no court decisions have *compelled* the FCC to invade the area of licensee discretion except those dealing with format change. It is argued that such direct and affirmative intervention in broadcast station programming is violative of First Amendment principles. Proponents of Commission intervention, however, argue that intrusion into entertainment format selection is no different, or not radically different, in terms of content control, from the non-entertainment areas where the Commission has intervened in the past, *i.e*, Fairness Doctrine, political broadcasting, obscenity. Moreover, NOW argues that the Commission already has taken an affirmative role in monitoring and reviewing entertainment programming. Examples of such activity are identified as: (1) the Commission's Prime Time Access Rule which prohibits the use of certain types of feature films and network programs during specific time periods; (2) the comparison of entertainment programming when a "specialized-service" station is competing with a "general-service" station for a license, *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 397 (1965); and (3) the examination of program policies and proposals if there are significant differences in the program plans of comparative license applicants. *Id.* at 398. Opponents, however, raise several points in distinguishing Commission involvement in non-entertainment programming. Evening Star states that because of the vital role non-entertainment programs play in informing the public of current news and public affairs, there is a clear and logical public interest in the Commission taking a role in ensuring that such programming addresses the needs and problems of the community of each licensee. Entertainment programming, on the other hand, does not assume the same importance to community needs. Moreover, news and public affairs are not matters of public taste or preference, but rather are of universal interest and concern to the public. Rollins Broadcasting of Delaware, Inc., claims that the "scarcity of frequencies" argument used in *Red Lion* to support, in part, the need for "government imposed" diversity of viewpoints on

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[2] It is repeatedly alleged in the comments that the present commercial marketplace provides a wide, albeit not perfect, diversity of formats.

[3] *E.g., Red Lion, supra*, 395 U.S. 367; *National Broadcasting Company* v. *FCC*, 319 U.S. 190 (1943); *National Association of Independent Television Producers and Distributors* v. *F.C.C.*, 516 F.2d 526 (2nd Cir. 1975).

[4] *E.g., DNC, supra*, 412 U.S. 94; *Public Interest Research Group* v. *FCC*, 522 F.2d 1060 (1st Cir. 1975).

controversial issue programming is inapplicable to entertainment programming. This is so because radio station entertainment is basically music provided by records, tapes, and cassettes, each of which is easily available to the public. WNCN Listeners Guild (WNCN) criticizes this reasoning, claiming that reliance on non-radio alternatives would mean that the airwaves no longer belong to the listeners. The NAB claims that the Commission's differing treatment of non-entertainment programming reflects Commission recognition that a station's entertainment format is its primary means of competition, and that competition alone would not result in sufficient news and public affairs programming.

Statutory

6. The comments filed by supporters of format regulation advance little statutory basis for their position other than the general directive of Congress that the Commission regulate in the public interest. It is upon the public benefit that such regulation would allegedly promote, though, that supporters primarily base their case. This benefit is asserted to be a greater diversity of entertainment formats in individual markets, thereby satisfying the programming tastes of more individuals than achieved by non-regulation, *i.e.*, the competitive marketplace. The premise that the widest diversity in entertainment formats satisfies the widest number of listeners, thus promoting the public interest, is not only the belief of format regulation supporters; but also the motivation of the Court of Appeals in directing the Commission to regulate formats to "[secure] the maximum benefits of radio to all the people of the United States." *WEFM*, *supra* at 268. Critics of entertainment format regulation not only challenge this premise, but claim that such regulation is contrary to the Act.

7. In commenting upon the Commission's responsibility and authority under the Act, many critics of Commission regulation looked for guidance to the legislative intent of Congress. It is argued that examination of the statute itself, together with previous court interpretation, clearly demonstrates no congressional intent for the Commission to become involved in entertainment format regulation. Metromedia and Doubleday Broadcasting Company, Inc. suggest that Congress' inclusion of Section 326 in the Act proscribing censorship is virtually dispositive of the question. Other comments take a less truncated view, but claim that Congress' intent is clear from other indications. For example, although the Supreme Court, as noted in *WEFM*, has declared that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States," there is no mention in the Act of formats, the nature of format diversity or the way in which such diversity is to be determined. In this connection, it should also be noted that no provision of the Act expressly grants the Commission even so much as general supervisory authority over programming content. Another indication of Congress' alleged intent to preclude the Commission from regulating program content was its desire to create a broadcasting system based on competition. Format regulation opponents claim the *WEFM* court's statement that "there is no longer room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition" is inconsistent with the intent expressed in the Act and prior judicial interpretation. Congress' intent to create a competitive broadcasting system is said to be evident from its explicit rejection of broadcasters as common carriers (47 U.S.C. 3 (h)). Additionally, the Supreme Court recognized this intent of Congress in *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), when it stated:

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public. *Id.* at 475.

Also cited is the D.C. Circuit's language in *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), stating:

> . . . Congress apparently believed that once the clear dangers of combinations in restraint of trade were removed, competition among those providing broadcasting services in a given area would best protect the public interest. *Id.* at 203.

Since format is all a broadcast station has to compete with, it is argued that government dictation of format content will destroy competitive broadcasting.

8. The NAB strongly argues that the intent of Congress is further demonstrated by its inclusion in the Act of Section 310(d). This section basically declares that, in passing upon assignment and transfer applications, the Commission may only consider the qualifications of the applicant before it, rather than determining whether some other applicant may be better qualified. The NAB cites several passages from the Section 310(d)

legislative history, and contends that said language clearly indicates the section was intended to prohibit not only comparisons between the proposed purchaser of a broadcast station and some third party, but comparisons between the qualifications of the seller and the purchaser as well. The NAB notes that in *Wichita-Hutchinson Co.*, 20 FCC 2d 584 (1969), the Commission held that Section 310(d) did permit comparisons between a seller and buyer, but maintains that such a holding is in error and should be reversed. Accordingly, the NAB concludes that the Commission is precluded from determining whether a proposed licensee's program format serves the public interest as well, or better than, an existing licensee's program format and that this section cannot serve as a basis for format consideration. NOW disagrees with this interpretation of Section 310(d), claiming that the clear language of the statute only prohibits comparing the programming of a seller to the programming of any individual other than the proposed purchaser; and that the statute certainly cannot be read to prohibit the Commission from considering format changes.

9. Where the differences between proponents and opponents of Commission format regulation sharply come into focus is over the question of the extent to which such regulation will "serve the public interest." Proponents contend that the increasing number of protests against proposed format changes demonstrates that programming diversity in many markets is not as broad as it should be. WNCN alleges that broadcast licensees, rather than providing diversity, are moving more and more toward a bland uniformity of programming. This belief is based, in part, on the claimed increasing trend toward syndicated radio programming and the effects of a broadcast marketplace controlled by advertising rating systems. Opponents, on the other hand, argue that the present system of leaving the choice of program format to the discretion of the licensee has produced an extremely diverse, although not perfect, selection of programming, and any attempt by the government to intervene in this process would have severe adverse public interest consequences. In support of this assertion, ABC submitted a report prepared by Robert E. Henabery (hereinafter referred to as the Henabery Report), a consultant on radio positioning, programming and operations and a specialist in new radio format development. The Henabery Report states that broadcast programming, determined by competition, has produced a wide diversity in formats, particularly in the last decade. It is claimed that in the last decade, radio stations have gone from general service programming, *i.e.*, all things for all people, to specialized programming, *i.e.*, one particular program spread throughout the broadcast day. This transition has caused broadcasters to develop programming designed to appeal to specific categories of listeners, spurring a diversity in broadcast fare. In further support of the diversity achieved by operation of the marketplace, the Henabery Report submits the results of a study conducted in Washington, D.C. and Tulsa, Oklahoma. The report concludes that Washington, D.C. is a highly specialized and, because of its particular ethnic and cultural life, individualized radio market. Tulsa, a smaller market, is beginning to take on more specialization than ever before. The report also concludes that "the greater the number of stations the greater the specialization." The NAB, in Appendix 2 to its Comments, submits a breakdown of format content in New York City and Washington, D.C., and asserts that these formats cater to almost every conceivable taste. Another oft repeated negative public interest result of regulation is that licensees forced to operate with only marginally profitable stations will economize on news, public affairs and other forms of non-entertainment programming.

10. Another basic area of disagreement between regulation critics and supporters is the role competition plays in creating program content diversity. In the competitive marketplace, NOW claims that the factor motivating broadcast programming is a desire to maximize profits through advertising revenue; and in seeking this end, broadcasters rely on the "demographics," rather than the "size," of a particular audience in choosing a program format. NOW states that the concept behind "demographics" is that there are certain audience groups which advertisers desire to reach because these groups are the most likely to spend money for the advertisers' products. It is crucial to the advertiser that the commercial reach as many people as possible who are likely to buy the product, but it is not crucial that the advertisement reach the maximum number of listeners because the advertiser has little interest in reaching individuals unlikely to purchase the product. Accordingly, broadcasters will appeal, through their entertainment programming, to the particular audience that will enable them to maximize advertising revenues. At the same time, broadcasters will shirk program formats which appeal to those audience groups whom advertisers do not wish to reach. Thus, listeners will not receive the type of programming they prefer unless the listener happens to belong to a "demographically" desirable group.

11. Broadcasters basically contend that the forces of competition create a wide diversity of program formats, some of which serve minority tastes, since all stations cannot

utilize the same general format and economically survive. If there are 20 stations in the market, the point is very quickly reached where a minority-taste audience would be larger than a station's probable share of a majoritarian-taste audience. Thus, where there are many stations in the market, as there are in most urban markets, minority tastes will be served through the normal market mechanism. There is no dispute that broadcasters program to meet the tastes of particular demographic groups. It is claimed, though, that there is no evidence that radio advertisers, as a group, favor any particular demographic segment of the audience to the exclusion of others. (See Appendix 4, NAB Comments—Analysis of Requests From National Radio Advertisers.) NOW questions the validity of this explanation of marketplace behavior, arguing that the demographics of certain minority taste audiences may not be desired by advertisers. Under these circumstances, no programming will be directed to those minority tastes and the listeners in such groups will be deprived of the benefits of radio at their first preference level. WNCN rejects the Commission's position that regulation may not produce better results in the marketplace than competition, and opines that it could do no worse.

12. Regulation critics further allege that government regulation of formats will stifle innovation and experimentation in broadcast programming; resulting in less, not more, diversity. It is claimed that broadcasters will hesitate to try new programming if they fear being compelled to continue it against their better judgment. Comments from some parties indicate that such reluctance to experiment or change formats has already occurred since the Court's and Commission's recent treatment of "format cases" (Henabery Report, p. 39; Doubleday Broadcasting Company, Inc.). WNCN claims this is a faulty "assumption," and asserts that until a careful and unbiased study of all format changes in major markets over a meaningful period of time is conducted neither it nor the Commission will know for sure whether this assumption is correct.

13. Another common argument against regulation is that it would result in an administrative quagmire and extensive oversight. The principal problem in any scheme of format regulation is alleged to be the categorization of programming content. As noted above in this summary, it is claimed that a broadcast station's program format consists of many components, of which entertainment is only one, and that in this sense, all formats are "unique." The components of a radio format are described in the Henabery Report as material, structure and style. Material being what is broadcast by the station, *i.e.*, music, personality comments, news, interviews, contests, weather and traffic bulletins, etc.; structure being the length of the material and its position in the hour relative to other material; and style being the personality of the material and the overall personality of the structure which houses the material, *i.e.*, tempo and familiarity of songs, the mixing of the music, use of logos and jingles, tone of the newscaster. Alteration of any of these elements could produce either a format modification or a format change and, according to Henabery, the line between the two is often difficult to draw. A further problem in categorizing formats is the repeated contention in the comments that the same format may be perceived differently by different people. This conclusion was reached by Entertainment Response Analysts, a broadcast programming research company, after conducting tests on individuals who were exposed to programming believed by the testers to be extremely similar (see Metromedia Comments, Attachment 5). The regulation of formats would also have the Commission examining the day-to-day programming decisions of broadcasters on a constant basis to determine programming shifts; a task alleged to be an administrative nightmare. In addition to these practical problems of regulation, broadcasters question the fairness of regulations which would saddle one broadcaster with only a marginally profitable format, while others who declined to innovate were rewarded with profitable operations. Another question raised is why should the Commission favor one minority taste over another simply because one was tried and one was not. A survey could very well show that an untried format had more of a demand than a tried one that is "unique" and changing. WNCN claims, however, that the regulation required by the *WEFM* decision is hardly so pervasive as that in other areas, such as obscenity, prime time access, and family viewing. WNCN asserts that "to say adjudication of listeners' challenges to the loss of unique formats constitutes pervasive regulation of licensee speech is like saying that the availability of courts for libel actions involves pervasive regulation of speech and press—neither is true, both are absurd."

14. Finally, it is argued by several opponents of format regulation that the *WEFM* decision, and the argument of regulation supporters, is based on the questionable assumption that the public interest is furthered by the greatest diversity in program formats. It is the opinion of Mr. Bruce M. Owen, an assistant professor of economics at Stanford University (see NAB comments, Appendix 1), that there is no necessary relation between diversity and consumer satisfaction. This conclusion is premised on the

basis that consumers can and do have preferences among stations with similar formats. It could well be that the addition of a format already in a community would be more efficient in terms of consumer satisfaction.

Parties Filing Comments and Reply Comments

Alpha Epsilon Rho National Honorary Broadcasting Society (Central Michigan University Chapter)
American Broadcasting Company, Inc.
American Women in Radio and Television, Inc.
Annapolis Broadcasting Corporation
Belden, E. S.
Belo Broadcasting Corporation
Bloomington Broadcasting Corporation
Broadcast Interest Group
Citizens Committee to Save WEFM
Colorado Broadcasters Association
Columbia Broadcasting System
Communico Broadcasting
Conroy, Tamara B.
Coulborn, Lewis R.
Doubleday Broadcasting Company, Inc.
Dow, Lohnes & Albertson on behalf of Cornhusker Television Corporation and 17 Other Licensees
Dzurick, David
Earnest, David
The Evening Star Broadcasting Company
GCC Communications of Chicago, Inc.
Gsell, Charles
KBOA, Inc.
KEZY Radio, Inc.
KMAM/KMOE-FM Radio
Mazzella, Dr. Anthony J.
Merrill, Charles E.
Metromedia, Inc.
Moore, Barbara
National Association of Broadcasters
National Broadcasting Company, Inc.
National Organization of Women
National Radio Broadcasters Association
Nebraska Broadcasters Association
Nichols, Stephen
960 Radio, Inc.
Normandy Broadcasting Corporation
O'Malley-Kieffer Communications Company
Papp, Laszlo
Pennsylvania Association of Broadcasters
Powell, Richard E.
RKO General, Inc.
Rollins Broadcasting of Delaware, Inc.
Rounsaville, Robert W.
Ryan, Regina
Scripps-Howard Broadcasting Company
Shutkin, Thomas
Turner Communications Corporation
Voorhees, John
Wallace, Robert Pope
WEBC, Inc.
WNCN Listeners Guild

APPENDIX B

Upon receipt of the comments in Docket 20682, the Office of Plans and Policy undertook an evaluation of the economic arguments raised in those submissions as well as an empirical investigation of radio format diversity in the 25 largest metropolitan markets.

The subsequent discussion will set forth our finding regarding the regulation of format changes.

The comments of Professor Bruce Owen of Stanford University merit particularly close attention.[1] Professor Owen presents an excellent analysis of the economic issues surrounding the radio format change cases as well as a convincing demonstration that federally imposed restrictions on format change may actually result in a dimunition of consumer welfare. We are particularly concerned with this latter proposition given that our own empirical investigation tends to support Owen's analysis and subsequent conclusion.

In its format change decisions, the Court of Appeals has always assumed the existence of a necessary relationship between the number of different program formats available in a given market and the welfare of consumers of radio programming. At first glance, this line of reasoning would appear to be sound. If formats belonging to the category are close substitutes, then it follows that format duplication is wasteful. Those who prefer to listen to a particular type of programming gain little through duplication, while other people are deprived of additional listening opportunities. Under these circumstances it would appear that a policy designed to encourage format diversity would serve the public interest.

But this conclusion suffers from a decisive flaw. Stations programming apparently similar formats may not be regarded as close substitutes by listeners. If so, then we can no longer be certain that maximization of diversity among apparently distinct formats would necessarily tend toward maximizing the satisfaction of radio listeners. Listeners may prefer to have more variety of a given type of music than the opportunity to hear a distinctly different type of fare. To illustrate, suppose a station currently programming classical music proposes to change its format to progressive rock. Further suppose that members of the listening public who prefer classical music object on the ground that another station is already devoting most of its broadcast day to rock music. Should the licensee be permitted to change his format?

The answer to this question is not immediately obvious. In theory preference should be given to that format which is of greater value to the consumers. Unfortunately, the Commission will find it impossible to measure the relative values of different formats because there exists no litmus or *a priori* way of measuring how much particular formats are worth to the audiences. All that can be known is simply how many people listen to available programs.

Unfortunately, the size of a station's audience is not necessarily an appropriate measuring stick of the degree of satisfaction which listeners derive from its programming. That is, two different formats which attract audiences of equal size may not be of equal value. Preferences expressed by the audience of one format may be much stronger than preferences for the other, in which case the former should be the more valuable. In order to ascertain which format is the more valuable, one would have to know the intensity of demand for each. Again, there exists no acceptable, reliable way of measuring aspects of these consumer preferences because consumers are not required to pay for the opportunity to listen to radio. Nor does a willingness by a group of listeners to contest a format change by litigation adequately express a cognizable intensity of preference for the format that they desire to have retained (or recovered). In every case, an intensity value could be assigned only after obtaining some information about the economic resources of the protestants and the opportunity costs associated with their protest. Given the legal complexities and expenses that characterize format change litigation, one would expect that a willingness to go forward with such cases would be especially typical of persons of higher educational attainment and socio-economic status. If this assumption is so, then it follows that rewarding the format preference of protestants would *by definition* discriminate against the effect on less well-off listeners who might be the beneficiaries of a licensee's proposed new programming plans.

In sum, there exists no economically rational basis for deciding which broadcasters should be allowed to change their formats and which should not. Nor, it may be added, is there any basis on which to conclude that Commission interference in the absence of such information would accord with any plausible version of the public interest. Even in the largest markets, the number of radio stations is insufficient to assure that every radio listener will have access to his first preference of entertainment programming. This is simply an indication not so much of the imperfections of our advertiser-supported radio industry as it is of the pluralistic nature of our society. However unfortunate, broadcasters will inevitably cater to some tastes at the expense of others, regardless of

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[1] See Bruce M. Owen, "Radio Station Format Changes, Diversity, and Consumer Welfare," Appendix 1 of the Comments of the National Association of Broadcasters in Docket 20682.

what institution—whether the free market or the federal government—must bear the responsibility for determining the types of formats that will be made available.

Traditionally, we have relied on competition to make these choices. Admittedly, this is not a perfect mechanism of format selection since those decisions will, for the most part, be made on the basis of which format promises to maximize the size of the audience. Again this may lead to selection of certain formats which are actually of lesser value to consumers than are others which broadcasters could feasibly provide. Whatever the shortcomings of this allocative mechanism, it is highly unlikely that the Commission hearings will improve on it. In the absence of any information on the value which consumers place on particular formats, we simply cannot make a rational judgment as to which formats warrant protection and which do not.

This conclusion is further evidenced by an empirical investigation of format diversity in the 25 largest metropolitan markets. Table 1 summarizes an assessment of the availability of 18 logical groupings of format types in these markets as defined in the 1975 edition of *Broadcasting Yearbook*.[2] The categorization is, of course, somewhat subjective. For example, the "Black" format category consists of "jazz," "rhythm and blues," "soul" or any combination of the above. The "Classical Music" format, on the other hand, encompasses everything from the baroque oratorios of Handel to P.D.Q. Bach or Leonard Bernstein's "Mass." Afficianados may, of course, object strongly to the suggestion that these composers and their works belong to the same pigeon-hole; this indicates that any effort to classify formats will be arbitrary. We therefore hasten to add that Table 1 is meant to provide only a rough indication of format diversity in the 25 largest markets. Moreover, as should be evident from the number and type of sub-categories which make up each of the major groupings (see Table 2), the figures in Table 1 by no means fully reflect the breadth and variety of programming available to listeners in these geographic areas.

In spite of this qualification, the figures indicate a variety of formats are rather evenly distributed across all stations, particularly those operating in the 10 largest markets, not a surprising finding given the rather high degree of competition which characterizes the radio industry in these areas of the country. Financial success is generally determined by the broadcaster's ability to program a format which is both popular and distinct enough to attract a relatively large, loyal audience.

An effort was also made to evaluate the relationship between the type of format programmed by a station and its share of the audience[3] as a rough measure of the degree to which stations programming the same format are considered by consumers to be close substitutes for one another. This is an extremely important point since the notion that format duplication is wasteful rests on the assumption that listeners are no better off when they are furnished with a choice between two stations programming the same type of music than they would be if only one of those stations were available. If this assumption proves to be false, then it is simply fallacious to conclude that seemingly similar program types are in fact duplicative and consequently wasteful. Indeed, preference for one station over another clearly indicates that each is offering a distinctly different type of service. If they are perceived as being different, then we again face the dilemma of deciding which format is the more valuable and worth protecting, knowing full well that restrictions on format change will deprive some other group of a format which they would prefer to listen to if given the opportunity.

The degree of substitution between stations programming the same type of format is very much less than might at first be supposed. We performed a statistical analysis of the relationship between audience shares and the type of programming presented by individual stations in order to test the hypothesis that format type has no effect on audience ratings. If this hypothesis is true, then it follows that our format categories do not realistically indicate how much format diversity is available in these markets. It would also suggest that those stations programming seemingly similar types of formats are perceived by listeners to be quite different and accordingly are not close substitutes for one another.

The results of this analysis are reported in Table 3. They show that while the type of format did have a significant impact on audience, the magnitude of that impact is relatively small. Specifically, differences in formats accounted for only 6.6 percent of the variation in audience shares. Moreover, the results show that the variation in audience shares within given format types is nearly as large as the variation between different

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[2] *Broadcasting Yearbook 1975*, Washington; Broadcasting Publications Inc., 1975.

[3] The share of the audience simply reflects the percentage of all listeners who are listening to radio at a given time which are tuned into a particular station. For example, if station WXYZ has a share of 3 between 7 and 9 a.m., then we know that approximately 3 percent of the audience listening to radio during that period were tuned into WXYZ.

types. Again, this indicates that formats of the same type (as defined in Table 1) are not close substitutes for one another.

There are any number of possible explanations for this phenomenon. As mentioned previously, listeners may perceive distinct differences in the types of programming common to a single format category. To the extent that categories do not capture whatever it is about the station's programming that consumers perceive as "special," they are analytically meaningless and accordingly, do not afford an appropriate basis on which to judge whether a station's programming is "unique."

This problem could be ameliorated to some extent by increasing the number of descriptive categories of formats, but this procedure would further complicate an already difficult hearing process inasmuch as administrative law judges will find it increasingly difficult to assess the extent of format duplication. Consequently, their decisions will likely become ever more arbitrary and less intelligible thereby increasing the probability that such decisions will run counter to the public interest. Nevertheless, this is precisely what must be done if the Commission is to follow the procedures applicable to format change protests outlined by the Court of Appeals.

In conclusion, we believe that format regulation is unnecessary and may very well impose costs on the general public. We recognize the shortcomings of the marketplace in allocating formats. However, given the difficulties in defining a meaningful format classification coupled with a total lack of information on the relative values associated with different types of programs, we are convinced that Commission decisions in this matter will automatically lack a rational underpinning. In short, they will simply reflect the subjective and necessarily arbitrary opinions of administrative law judges. We fail to see how this process will result in a more efficient allocation of entertainment formats than would be obtained if programming decisions were left in the hands of broadcast licensees, who are, after all, far more familiar with listeners' tastes.

TABLE 1

COMMERCIAL RADIO FORMAT AVAILABILITY IN THE 25 LARGEST METROPOLITAN MARKETS

Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
1. Beautiful Music	1 (2.3)*	5 (8.5)	8 (12.5)	3 (8.1)	4 (11.4)	3 (9.1)	2 (5.1)	2 (5.0)	-	2 (5.3)	30 (7.4)
2. Black	3 (7.0)	6 (10.2)	5 (7.8)	3 (8.1)	3 (8.6)	1 (3.0)	2 (5.1)	4 (10.0)	1 (5.3)	2 (5.3)	30 (7.4)
3. Classical	2 (4.7)	2 (3.4)	2 (3.1)	2 (5.4)	-	1 (3.0)	3 (7.7)	2 (5.0)	-	1 (2.6)	15 (3.7)
4. Contemporary	5 (11.6)	10 (17.0)	6 (9.4)	3 (8.1)	3 (8.6)	7 (21.2)	8 (20.5)	9 (22.5)	6 (31.6)	6 (15.8)	63 (15.5)
5. Country & Western	1 (2.3)	5 (8.4)	5 (7.8)	3 (8.1)	2 (5.7)	2 (6.1)	-	7 (17.5)	1 (5.3)	9 (23.7)	35 (8.6)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)
Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
6. Ethnic/Foreign Language (except Spanish)	1 (2.3)	1 (1.7)	4 (6.3)	-	2 (5.7)	2 (6.1)	-	-	-	-	10 (2.5)
7. Golden Oldies	1 (2.3)	2 (3.3)	1 (1.6)	-	-	1 (3.0)	-	-	-	1 (2.6)	6 (1.5)
8. Middle of the Road	9 (20.9)	10 (17.0)	15 (23.4)	12 (32.4)	11 (31.4)	7 (21.2)	10 (25.6)	5 (12.5)	9 (47.4)	9 (23.7)	97 (23.8)
9. News	2 (4.7)	2 (3.4)	3 (4.7)	1 (2.7)	1 (2.9)	1 (3.0)	3 (7.7)	3 (7.5)	-	1 (2.6)	17 (4.2)
10. Progressive (Rock)	3 (7.0)	1 (1.7)	5 (7.8)	2 (5.4)	3 (8.6)	3 (9.1)	2 (5.1)	1 (2.5)	1 (5.3)	1 (2.6)	22 (5.4)
11. Public Affairs	2 (4.7)	-	-	-	-	-	-	-	-	-	2 (0.5)
12. Religious	2 (4.7)	4 (6.8)	-	2 (5.4)	3 (8.6)	1 (3.0)	2 (5.1)	3 (7.5)	-	3 (7.9)	20 (4.9)
13. Rock	2 (4.7)	2 (3.4)	3 (4.7)	2 (5.4)	-	1 (3.0)	1 (2.6)	2 (5.0)	-	2 (5.3)	15 (3.7)
14. Spanish	2 (4.7)	2 (3.4)	2 (3.1)	-	-	-	2 (5.1)	1 (2.5)	-	1 (2.6)	10 (2.5)
15. Talk	3 (7.0)	2 (3.4)	-	2 (5.4)	-	-	-	1 (2.5)	-	-	8 (2.0)
16. Top 40	2 (4.7)	3 (5.1)	-	1 (2.7)	-	-	2 (5.1)	-	-	-	8 (2.0)
17. Varied	2 (4.7)	1 (1.7)	5 (7.8)	1 (2.7)	1 (2.9)	3 (9.1)	-	-	1 (5.3)	-	14 (3.4)
18. Other	-	1 (1.7)	-	-	2 (5.7)	-	2 (5.1)	-	-	-	5 (1.2)
Total Stations	43	59	64	37	35	33	39	40	19	38	407
No. of Different Formats	17	17	13	13	11	13	12	13	6	12	

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
1. Beautiful Music	2 (5.3)	1 (2.9)	2 (6.3)	1 (3.1)	3 (13.0)	4 (12.9)	4 (12.5)	1 (2.9)	4 (16.7)	5 (21.7)	27 (8.9)
2. Black	1 (2.6)	2 (5.9)	2 (6.3)	4 (12.5)	3 (13.0)	1 (3.2)	2 (6.3)	4 (11.8)	-	1 (4.4)	20 (6.6)
3. Classical	-	-	1 (3.1)	2 (6.3)	1 (4.4)	1 (3.2)	2 (6.3)	1 (2.9)	1 (4.2)	1 (4.4)	10 (3.3)
4. Contemporary	13 (32.2)	6 (17.7)	5 (15.6)	4 (12.5)	1 (4.4)	4 (12.9)	4 (12.5)	5 (14.7)	6 (25.0)	4 (17.4)	52 (17.2)
5. Country & Western	2 (5.3)	7 (20.6)	7 (21.9)	5 (15.6)	3 (13.0)	4 (12.9)	3 (9.4)	8 (23.5)	2 (8.3)	2 (8.7)	43 (14.2)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	2 (8.7)	-	-	-	-	1 (4.4)	3 (1.0)
7. Golden Oldies	-	-	-	-	1 (4.4)	1 (3.2)	-	1 (2.9)	-	-	3 (1.0)
8. Middle of the Road	11 (29.0)	11 (32.4)	7 (21.9)	9 (28.1)	6 (26.1)	12 (38.7)	7 (21.9)	5 (14.7)	6 (25.0)	3 (13.0)	77 (25.4)
9. News	-	1 (2.9)	-	-	-	1 (3.2)	-	2 (5.9)	1 (4.2)	-	5 (1.7)
10. Progressive (Rock)	2 (5.3)	2 (5.9)	3 (9.4)	-	-	2 (6.5)	3 (9.4)	-	1 (4.2)	1 (4.4)	14 (4.6)
11. Public Affairs	-	-	-	-	-	-	-	-	-	-	-
12. Religious	4 (10.5)	1 (2.9)	1 (3.1)	3 (9.4)	-	-	3 (9.4)	2 (5.9)	1 (4.2)	1 (4.4)	16 (5.3)
13. Rock	-	-	-	3 (9.4)	2 (8.7)	-	1 (3.1)	1 (2.9)	2 (8.3)	-	9 (3.0)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
14. Spanish	-	-	1 (3.1)	-	-	-	-	-	-	3 (13.0)	4 (1.3)
15. Talk	-	-	1 (3.1)	-	1 (4.4)	-	2 (6.3)	-	-	1 (4.4)	5 (1.7)
16. Top 40	-	2 (5.9)	-	1 (3.1)	-	-	-	2 (5.9)	-	-	5 (1.7)
17. Varied	2 (5.3)	1 (2.9)	2 (6.3)	-	-	1 (3.2)	1 (3.1)	2 (5.9)	-	-	9 (3.0)
18. Other	1 (2.6)	-	-	-	-	-	-	-	-	-	1 (0.3)
Total Stations	38	34	32	32	23	31	32	34	24	23	303
No. of Different Formats	9	10	11	9	10	10	11	12	9	11	

Number of Stations Programming Specified Format

FORMAT TYPE	Tampa-St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total—Top 25 Markets
1. Beautiful Music	4 (13.3)	1 (3.7)	2 (6.5)	2 (11.8)	2 (9.1)	11 (8.7)	68 (8.1)
2. Black	1 (3.3)	3 (11.1)	1 (3.2)	1 (5.9)	2 (9.1)	8 (6.3)	58 (6.9)
3. Classical	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	27 (3.2)
4. Contemporary	4 (13.3)	7 (25.9)	4 (12.9)	4 (23.5)	4 (18.2)	23 (18.1)	138 (16.5)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (*Continued*)

Number of Stations Programming Specified Format

FORMAT TYPE	Tampa-St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total—Top 25 Markets
5. Country & Western	8 (26.7)	4 (14.8)	2 (6.5)	3 (17.6)	3 (13.6)	20 (15.7)	98 (11.7)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	-	-	13 (1.6)
7. Golden Oldies	-	-	-	-	1 (4.5)	1 (0.8)	10 (1.2)
8. Middle of the Road	6 (20.0)	6 (22.2)	9 (29.0)	2 (11.8)	4 (18.2)	27 (21.3)	201 (24.0)
9. News	-	-	1 (3.2)	-	-	1 (0.8)	23 (2.8)
10. Progressive (Rock)	1 (3.3)	2 (7.4)	4 (12.9)	1 (5.9)	2 (9.1)	10 (7.9)	46 (5.5)
11. Public Affairs	-	-	-	-	-	-	2 (0.2)
12. Religious	3 (10.0)	1 (3.7)	2 (6.5)	3 (17.6)	1 (4.5)	10 (7.9)	46 (5.5)
13. Rock	2 (6.7)	1 (3.7)	2 (6.5)	-	-	5 (3.9)	29 (3.5)
14. Spanish	-	-	1 (3.2)	-	-	1 (0.8)	15 (1.8)
15. Talk	-	-	1 (3.2)	-	-	1 (0.8)	14 (1.7)
16. Top 40	1 (3.3)	-	-	1 (5.9)	3 (13.6)	5 (3.9)	18 (2.2)
17. Varied	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	25 (3.0)
18. Other	-	-	-	-	-	-	6 (0.7)
Total Stations	30	27	31	17	22	127	837
No. of Different Formats	9	10	13	8	9		

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 2

Program Subcategories Belonging To
Major Format Classifications

MAJOR FORMAT CLASSIFICATION	SUBCATEGORIES
Beautiful Music	Good Music Instrumental
Black	Jazz Rhythm and Blues Soul
Classical	Concert Fine Music Semi-classical Serious Music
Contemporary	Popular Request
Country and Western	Country Blue Grass Countrypolitan Contemporary Country Modern Country
Ethnic/Foreign Language	
Golden Oldies	Nostalgia Old Gold Solid Gold Classic Gold Solid Gold Rock
Middle of the Road	Adult Adult Contemporary Bright Up-Tempo Good or Easy Listening Standards Entertainment Conservative
All News	
Progressive	Underground Hard Rock Folk Alternative Free Form Progressive Rock
Public Affairs	
Religious	Gospel Sacred Christian Inspirational

Source: *Broadcasting Yearbook 1975*
Note: Stations which did not list their format in the *Yearbook* were contacted by telephone and asked to provide the information.

TABLE 2 (*Continued*)

Rock	
Spanish	
Talk	Discussion Interview Personality Informational
Top 40	
Varied	
Other	

TABLE 3

Results of the Analysis of the Relationship
Between Audience Ratings and Entertainment Formats
of Radio Stations Licensed to the 25 Largest Metropolitan Markets

Multiple R = .25738
R^2 = .06624
Std. Error = 3.7008

Analysis of Variance of		Sum Sq.	Mean Sq.	F
Regression	17	744.27	43.780	3.197*
Residual	766	10491.10	13.696	

Variables in the Equation

Format	Coefficient	Std. Error	F
Beautiful Music	1.3445	.87884	2.340
Black	.5324	.8878	.360
Classical	- 1.1122	1.0580	1.106
Contemporary	.6465	.80625	.643
Country & Western	- .85232	.8387	1.033
Ethnic/For. Lang.	- 1.765	1.2354	2.042
Golden Oldies	- .8898	1.3390	.442
Middle of the Road	- .12685	.7871	.026
News	2.9056	1.0818	7.214*
Progressive	- .4836	.9391	.265
Public Affairs	- 2.158	2.7195	.630
Religious	- 1.8628	.93484	3.970*
Spanish	- .5247	1.2997	.163
Talk	1.3920	1.2655	1.210
Top 40	1.0170	1.1102	.839
Varied	.1587	1.0955	.021
Other	- 1.5080	1.6824	.803
Rock (Constant)	2.408		

* Indicates that the equation or variable was significant at a .05 level of confidence.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Changes in Entertainment Formats (Docket No. 20682)

I do not dissent because I disagree that our concern for the loss of unique program formats must be restrained to some extent by the anti-gravitational energy of the First Amendment.[1] Nor do I disagree

[1] But see *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) where the Supreme Court indicated that the First Amendment is not abridged by the Commission "in interesting itself in *general program format* and the kinds of programs broadcast by licensees." (Emphasis added). See also my recent dissent in Docket No. 20203 (*Use of "Re-Run" Material in Prime Time*), —— FCC 2d ——, FCC 76-639, July 19, 1976 (outlining authority for FCC program interest).

that government review of format selection—if not tempered—has the potential to impress us into a Section 326 minefield which no civil libertarian would countenance. Nor, again, do I disagree that the "marketplace" abhors an unfilled commercial need and that enterprise generally will hasten to satisfy unmet demands sufficiently identified and sufficiently lucrative.

I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commission's role in the commercial regulatory structure is well defined.[2]

I do not intend to imply a desire for the end of "format radio" or wish to impose a comprehensive duty on every station to proportionately serve every entertainment preference. Neither do I wish to impede program experimentation and creativity. But, equally, I stand by the *Separate Statement* of former Chairman Dean Burch in the *WEFM* case, which I joined, recognizing that extreme cases should compel our official attention. It was stated:[3]

> This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming.

It could be, in light of the majority's vigorous arguments herein, that the courts, upon re-evaluation, will find that the present case law with respect to agency format review is overly intrusive.[4] I can only say that, if they do, I strongly feel that guidance must be given as to other actions to ensure that the Commission has the flexibility to correct significant neglect of the tastes, needs and interests of substantial minority segments and to promote the diversity that is the linchpin of our regulation of public trustees. Thus, it is unquestionable that the Court of Appeals was correct in noting that a primary mission of this agency is to secure "the maximum benefits of radio to all the people of the United States," *Citizens Committee to Save WEFM, Inc.* v. *FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974), and that accomplishment of that goal must not be hindered materially by absolutist orthodoxies.

SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

My views on this subject were set forth in some detail in a statement accompanying the original notice of inquiry. They were, and are, completely in accord with the Commission's excellent opinion here. There is, however, one point that is omitted from the majority opinion that needs mention, the problem of uneven distribution of burdens

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[2] With respect to the regulatory role involving programming functions, see generally *Red Lion* ("[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas which is crucial . . . ," 395 U.S. at 390); *National Broadcasting Company* v. *FCC*, 319 U.S. 190 (1943); *N.A.I.T.P.D.* v. *FCC*, 516 F.2d 526 (2d Cir. 1975).

[3] *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973).

[4] In that connection, I suggested an approach to implementation of the judicially prescribed standards in my concurrence to the initiation of this Docket, 57 FCC 2d at 587, the attempted application of which I would have preferred. However, we have not fully experimented with those present standards ordained by the Court of Appeals or tried other criteria that might have been acceptable.

arising from the *WEFM* mandate. I addressed this problem in my earlier separate statement, 57 FCC 2d at 598-99; and, eschewing modesty, I think it's worth quoting here:

> [If] our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, . . . then it seems to me unthinkable that we should allow the consequences . . . to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary considerations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors . . . [If] the FCC's responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the "undoubted intention" of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market by market allocation proceedings which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the *Voice of Arts-Progressive Rock-WEFM* mandate) which, like Browning's Caliban on Setebos, lets "twenty pass and stone[s] the twenty-first/Loving not, hating not, just choosing so."

This consideration, of course, meshes with those that the Commission addresses and fortifies our conclusion that the regulation of formats is a business from which we should altogether abstain.

One final point: the Commission's opinion quotes a statement by the Court of Appeals that "agencies and courts together constitute a 'partnership' in furtherance of the public interest and are collaborative instrumentalities of justice." *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). This formulation of our relationship can be useful as a general, philosophical guide providing too much is not made of it. Just as the Court doubtless does not intend by this or any other expression to suggest that it has the responsibility for original formulation of communications policy or *de novo* review of Commission actions (as the Court itself makes clear in *Greater Boston*), so it should not be understood by our action here that we construe this partnership notion to give us the right to overrule the Court's mandate. While we draw on this partnership concept to support our firm expression of independent views on this matter contrary to those of the Court of Appeals, I trust all will recognize that we do so in the respectful posture of a junior partner who knows how to march once the marching orders have been authoritatively pronounced—once and for all.