F.C.C. 75-1426

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

NOTICE OF INQUIRY

(Adopted: December 22, 1975; Released: January 19, 1976)

BY THE COMMISSION: CHAIRMAN WILEY ISSUING A SEPARATE STATEMENT; COMMISSIONERS HOOKS AND ROBINSON CONCURRING AND ISSUING STATEMENTS.

1. The Commission has under consideration its policies and practices with respect to changes in the entertainment formats of broadcast stations.

2. The need for this proceeding arises in view of the rulings in several recent entertainment format change cases, including *Citizens Committee To Save WEFM, Inc.* v. *Federal Communications Commission*, 506 F.2d 246 (1974). This case arose out of an application by Zenith Radio Corporation, licensee of Station WEFM, Chicago, Illinois, to assign its broadcast license to GCC Communications of Chicago, Inc. [hereinafter GCC] pursuant to 47 U.S.C. 310(d), and the accompanying proposal by GCC to change the format of the station from classical music to popular, or rock and roll.

3. In response to a petition to deny the application, filed pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309 (d), the Commission found that since there were two other stations serving the Chicago area with a classical music program format, the public interest in diversity of broadcast entertainment formats was not sufficient to override the legitimate protections accorded broadcast licensees by the Communications Act and the First Amendment from Government intrustions into their program content judgments. *Zenith Radio Corporation*, 38 FCC 2d 838, *reconsideration denied* 40 FCC 2d 223 (1973). Appended to the Commission's decision on reconsideration approving the assignment applications was a separate opinion, entitled "Additional Views of Chairman Burch," which was joined by all but one Commissioner. These "Additional Views" explained the underlying analysis on which the Commission's decision was based.

4. Specifically, the six Commissioners pointed to the Supreme Court's decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940), that "[t]he regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard

provided in the Communications Act, on the other." The Commissioners went on:

> The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs. [footnote omitted] In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces. As the Commission stated in its *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preference of his area and fill whatever void is left by the programming of other stations."

5. The Commissioners also stated that this discretion allowed broadcasters by the Commission's policy permitted experimentation in program formats that would be seriously inhibited by a policy of further Government intrusion into programming judgments which would have the undesirable effect of "locking" broadcasters to the present formats. "[I]nhibiting licensee discretion to change or modify unsuccessful program formats appealing to minority tastes will have . . . the effect of lessening the likelihood that such programming will be attempted in the first place." However, it was emphasized by the Commission that the discretion accorded broadcasters was not "unbridled," but must be exercised in a manner consistent with the licensee's public obligations. The Commission therefore resolved to 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 was further explained that whenever facts "indicate that the [proposed new] format is not reasonably attuned to community tastes or that the format change will eliminate a service to the public not otherwise available, a survey of entertainment tastes or a hearing may be required."

6. In applying this considered policy to the proposed change of WEFM's format, the Commission found that since there was no substantial dispute as to either the existence of classical music programming on other stations serving the area, or that the proposed new format would be reasonably attuned to community tastes, a hearing would serve no useful purpose and that grant of the application to assign the station's license would serve the public interest. The Court of Appeals *en banc*, however, set aside the Commission's orders.

7. The court, after reviewing the cases, beginning in 1970, in which it had considered format changes,[1] summarized the teaching of these earlier decisions as follows:

> There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a

[1] See *Citizens Committee to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973); *Lakewood Broadcasting Service, Inc.* v. *FCC*, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973), *Hartford Communications Committee* v. *FCC*, 151 U.S. App. D.C. 354, 467 F.2d 408 (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*, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970).

specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

8. The question of changes in the entertainment formats of broadcast stations presents two important questions, namely:

(1) Whether the public interest standard of the Communications Act of 1934, as amended, requires close scrutiny of broadcast entertainment formats to assure an appropriate diversity? and,
(2) Whether the First Amendment to the Constitution permits the close scrutiny of broadcast program content judgments suggested by the Court of Appeals?

9. We are deeply concerned that, by rejecting the programming choices of individual broadcasters in favor of a system of pervasive governmental regulation, the Commission would embark on a course which may have serious adverse consequences for the public interest. At the same time, we are concerned that such a course may involve an overly optimistic view of what can realistically be achieved through government regulation.

10. The Court, in *WEFM*, holds that there is "no longer any room for doubt that, if the FCC is to pursue the public interest, it may not at the same time be able to pursue a policy of free competition." By way of explanation, the Court added:

> There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers.

11. The Commission acknowledges the force of the Court's point, that it would be factually erroneous to assert that the market forces which operate on radio stations are identical with the forces which produce the preference hierarchies of the members of the community of license. But implicit in that observation is the notion that the Commission, if it tries hard enough, can come up with a meter of collective welfare which is superior to the advertisers' marketplace. There are excellent reasons for supposing, however, that the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise. See, generally, K. Arrow, *Social Choice and Individual Values* (1951).

12. *Broadcast Yearbook* lists upwards of eighty entertainment formats used by American radio stations. Excluding those with a small number of listed stations, there appear to be about a dozen principal formats: black ("soul"), country and western, classical, easy listening, educational, middle-of-the-road, progressive, religious (gospel), rock, spanish, top-40, talk, variety. These principal formats, together with a

soupchon of minority formats, form the entertainment programming for the two dozen or so aural services that may be audited in a medium-large market. Under the Court's mandate, a problem could arise in determining whether an identified format, such as classical music, may have clearly delineated "sub-formats."[2] Moreover, the labeling of formats is a subjective matter and similarly labeled ones may in fact differ, while differently labeled ones may in fact substantially overlap. Distinctions in this field are extremely hazy and subjective. The definition and identification of formats requires a composite analysis of the various elements of program service and listener perceptions of the station's overall programming. We question therefore whether it is appropriate or productive for an administrative agency to enter this quagmire in the absence of a compelling public interest need.

13. Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that licensees frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. Frequently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format. This view has been borne out in two previous format change cases in which the "gap" left by Commission approval of a change of format was quickly filled by another station serving the same area. See *Lakewood Broadcasting Service* v. *FCC*, 156 U.S. App. D.C. 9, 14n.10, 478 F.2d 919, 924 n.10 (1973), *Citizens Committee to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 22n.16, 478 F.2d 926, 932n.16 (1973). We do not pretend that such an approach results in a perfect accommodation of "all major aspects of contemporary culture" (*WGKA*, *supra* at 269). It has, however, in our view, resulted in a wide diversity of entertainment formats. See, e.g., Appendix A.

14. A contrary policy may well disserve the public interest. Its most logical and probable result may be, we believe, to discourage broadcasters from selecting an entertainment programming which is "unique or otherwise serves a specialized audience that would feel its loss." Such broadcasters would fear themselves "locked in" to a format. Unable to extricate themselves from the unsuccessful format without facing the prospect of a costly and time-consuming hearing, broadcasters may not try new and innovative programming. This set of circumstances may have a tendency to result in conformity. Rather than attempting innovative programming, with the prospect of costly hearings and/or appellate review proceedings, and with a valuable fran-

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[2] In the court's view, the Commission may have to go so far as to consider that, "[o]ne station might not, for example, play music composed in this century, while another might concentrate on twentieth century works." In his dissent, Judge MacKinnon pointed out his concern (as well as ours) with the danger of Government intrusion "when we are forced to draw a distinction based on differences between 'classical' music. . . ." As stated in *Times Film Corp.* v. *Chicago*, 5 L. Ed. 403, 425-26 (1961), "[i]t is not for the government to pick and choose according to the standards of any religious, political or philosophical group." A line between these extremes and one requiring the Commission to involve itself in determining musical formats—or the differences in such formats—is a difficult one to draw.

chise in jeopardy, the average broadcaster will stand pat. This inhibition of licensee discretion to change or modify formats to appeal to minority taste may well diminish rather than expand diversity.

15. Over the years, the Commission has sought to avoid dubious intrusions into the broadcaster's programming judgments. As a matter of policy, the Commission has permitted musical entertainment format changes as the marketplace might dictate. Now, however, the policy suggested by the Court of Appeals seems to require a much closer scrutiny of proposed changes in the programming decisions of broadcasters. We seriously question whether, under the Act's public interest standard, such close scrutiny is necessary or appropriate. In short, we are concerned that the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public interest than) that favored by the marketplace. For this reason, we are instituting this inquiry to examine whether the Commission should play any role in dictating the selection of entertainment formats. Parties who favor some degree of government involvement are asked to address the following questions:

(a) When should the Commission become involved in format changes—i.e., in all cases or only those where there is a significant public outcry? See *Citizens Committee to Keep Progressive Rock*, *supra* at 934. Also, how do you determine significant public outcry?

(b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?

(c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?

(d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?

(e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (e.g., AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

(f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?

(g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?

(h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertain-

ment formats necessarily result in the maximization of consumer satisfaction?

16. Additionally, we invite interested parties to address the First Amendment ramifications of the policy suggested by the Court of Appeals. While the Supreme Court has approved some FCC oversight of programming, it is evident that our authority in this area is not unlimited. Indeed, as noted in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969), some regulations, such as a "refusal to permit the broadcaster to carry a particular program," would raise serious First Amendment issues.

17. It is, of course, difficult to contest the proposition that the "disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first preference level," as stated in *WEFM*. As suggested in *United States* v. *CIO*, 335 U.S. 106 (1948), however, any administrative regulation or policy tending to constrain an applicant from selecting programming of its choice "must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions."

18. The First Amendment, of all areas of constitutional law, is an area where intrusions are most assiduously to be avoided. For over 40 years, therefore, broadcast applicants have been free to select their own programming formats. Obviously the broadcaster's determination as to whether to select one format over another is based on its own evaluation of the market. As noted elsewhere herein, leaving such choices to the applicant has nonetheless resulted in a wide diversity of entertainment formats. In the present controversy, we are being called upon to substitute our judgment for that of the applicant on the most subjective grounds imaginable without any clear danger to the public interest. In his concurring opinion in *WEFM*, Judge Bazelon stated his concern—and ours—with the fact that the Court had set a "broad view of the Commission's authority in the delicate area of programming with nary a syllable spoken to the First Amendment implications of its decision." We believe that this issue warrants a prompt and thorough review and, accordingly, such comments are requested. Specifically, would any system of Commission intervention in, or selection of, licensee entertainment formats violate the First Amendment?

19. This action is taken pursuant to Section 403 of the Communications Act of 1934, as amended. Interested parties responding to this Notice of Inquiry may file comments on or before February 19, 1976. Reply comments may be filed on or before March 3, 1976. An original and eleven copies of each formal response must be filed in accordance with the provisions of Sections 1.49 and 1.51 of the Commission's Rules. However, in an effort to obtain the widest possible response to this proceeding from licensees and members of the public, informal comments (without extra copies) will be accepted. Copies of all pleadings filed in this matter will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

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

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APPENDIX A

FORMAT TYPE	MARKETS			
	New York	Los Angeles	Chicago	Total
1. Agriculture & Farm	0	0	0	0
2. Beautiful Music	1	5	8	14 (8%)
3. Black	3	6	5	14 (8%)
4. Classical	3	2	2	7 (4%)
5. Contemporary	5	9	6	20 (12%)
6. Country & Western	1	5	5	11 (7%)
7. Ethnic/Foreign Language (Except Spanish)	1	1	4	6 (4%)
8. Golden Oldies	1	2	1	4 (2%)
9. Middle-of-the-Road	9	11	15	35 (21%)
10. News	2	2	3	7 (4%)
11. Progressive (Rock)	2	1	5	8 (5%)
12. Public Affairs	2	0	0	2 (1%)
13. Religious	2	4	0	6 (4%)
14. Rock	2	2	3	7 (4%)
15. Spanish	2	2	2	6 (4%)
16. Talk	3	2	0	5 (3%)
17. Top 40	2	3	0	5 (3%)
18. Varied	2	1	5	8 (5%)
19. Other	0	1	0	1 (1%)
Total Stations	43	59	64	166 (100%)
Number of Separate Formats	17	17	13	

SEPARATE STATEMENT OF CHAIRMAN RICHARD E. WILEY

In Re

Notice of Inquiry in the Entertainment Formats of Broadcast Stations
(Docket 20682)

The Court of Appeals, in *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 46 (D.C. Cir. 1974), states that the public interest cannot be served adequately by a policy of free competition in the selection of entertainment formats. The Court, it appears, believes that FCC Commissioners are capable of doing a better job of distributing formats than that presently performed by the marketplace. While I appreciate this judicial vote of confidence in our ability and expertise, I cannot honestly say that I share the Court's optimism. Indeed, I am concerned that FCC involvement in this area will result in extensive regulatory delay and will inhibit innovation and flexibility in the development of formats. Even 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.

Based on the arguments I have heard to date, I do not believe that there is any objective or principled ground for agency decision-making in the format area. The Court of Appeals recognized the subjectivity involved in identifying a "unique" format, but seems to suggest that we should "know it when [we hear] it." *Citizens Committee to Preserve WGKA*, v. *FCC*, 436 F. 2d 263, 265 n. 1 (D.C. Cir. 1970). I find it

difficult to square this standard with the usual requirement that agencies have a reasoned explanation for their decisions—and with the time-honored principle that the broadcast licensee has "both initial responsibility and primary responsibility" in programming matters and that "it has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion." *National Broadcasting Co.* v. *FCC*, 516 F. 2d 1101, 1118 (D.C. Cir. 1974 (opinion of Judge Leventhal).

It would be reasonable, of course, to state that every station is unique in the literal sense of that term: each provides a particular attraction to the people who prefer it to other stations and each contributes in some measure to format diversity. If we were to deal with the problem only in this literal fashion, we would never have occasion to bar a change of format—for the loss to diversity caused by the change would be offset by a corresponding gain (represented by the new format). But, while the Court asks us to draw fine distinctions among similar entertainment services (even to the point of distinguishing classical stations specializing in "twentieth century works" from those concentrating on the older classics), I do not understand it to be emphasizing the unique format in this strict sense. It appears, therefore, that we are called upon to judge whether an existing format contributes *more* to diversity than a proposed format would. While we are not offered any yardstick by which to measure degrees of diversity, it seems that we are expected to use our best efforts to discourage stations from competing with each other in catering to popular tastes.

Under this system, a station which was permitted to continue a successful format would benefit considerably from what would be, in effect, a government-managed cartel. This station, being protected against competitive entry, might enjoy profits considerably in excess of those it could earn in an open market. I seriously doubt, however, that the many citizens who listen to this format would share the station's enthusiasm for the FCC's benevolent regulation. Unless we have abandoned all faith in a free economy, we must assume that the public will benefit from a competitive struggle and even from the potential competition made possible by a policy of open entry.

I do not imagine that a competitive system will achieve perfection or accommodate every possible minority taste. However, it seems to be the only means of preserving an essential flexibility in radio broadcasting and it will free the FCC from the fruitless task of adjudicating endless and bitter disputes among broadcasters (who would otherwise be forced to turn to the government, rather than the public, in their quest for business advantages).

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Changes in Entertainment Formats of Broadcast Stations

The matter of Commission intercession in entertainment program formats is, indeed, vexatious. Our indisposition to issue programming directives out of Washington is bred by our historic alignment with the ideal of a media free of government influence. With respect to the broadcast media, a publicly regulated resource, the line between "say-

ing too much and saying too little"[1] is not solid; it is mostly amorphous and pursues a rambling road.

Ever since the *Voice of the Arts* case[2] where we were instructed by the court to look into any abandonment of a unique format which was opposed by significant numbers in the community, the Commission has uncomfortably juggled this problem. To date, we have no comprehensive policy with which to map our approach, progress, or final destination. The Commission, therefore, has wisely instituted this proceeding to explore the territory.

I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices.[3] But, after reading again the decisions in the so-called "format cases,"[4] and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here.

Moreover, tangential involvement in program categories would not be wholly precedential. In our 1960 *En Banc Programming Inquiry*, 20 P&F Radio Reg. 1901 (1960), we set forth fourteen specific categories of programming we deemed essential to satisfy the public's varied interests. We have long held that minorities must be served. And, more recently, we have decreed the need for a special programming effort to serve children, going so far as to declare that a station must provide "a reasonable amount of programming which is designed to educate and inform—and not simply to entertain."[5]

With specific reference to format categories, I have stated:

> [A]s a regulator, I must be equally aware that the Commission's statutory duty to ensure that licensees operate in the public interest carries with it an obligation to see that substantial segments of the community are not subject to a total blackout of programming attuned to their special needs and interests. To permit a situation in which, hypothetically, every station in a given locale could program identically so as to optimize audience size—whether the preferred programming be all-classical, middle-of-the-road, two-way talk, etc.—would be to countenance the same kind of improper exclusion that minorities suffered during the earlier days of the media, of which unfortunate vestiges remain today.[6]

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[1] "[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most cases it has resolved this dilemma by imposing only general affirmative duties—e.g., to strike a balance between various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties. . . . Given its long-established authority to consider program content, this approach probably minimizes the dangers of censorship or pervasive supervision."
Banzhaf v. *FCC*, 405 F. 2d 1082, 1095 (D.C. Cir. 1968), cert. denied *sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969).

[2] *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, 436 F. 2d 263 (D.C. Cir. 1970).

[3] *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973). Even there, however, we noted:
> 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.

Id. at 231.

[4] *See Majority Order*, at p. 3, n. 1.

[5] *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 6 (1974). In that same *Report* we repeated: "As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities. . . ."

Id. at 5.

[6] *Dissenting Statement of Comr Hooks*, Assignment of WQFM-FM, Milwaukee, Wisconsin, Report No. 11420, April 3, 1973.

I remain of that mind and hope that, rather than ducking, we use this proceeding to meet the problem of blanket deprivation head on.

Without intending oversimplification, the issue here settles neither on free speech nor on a free market.[7] The issue is whether the rights of minority audiences are subordinate to the entrepreneurial quest for profit maximization.[8] We are not naive enough to suppose that formats are changed for any altruistic purpose.

While I enthusiastically endorse the right of a conscientious broadcaster to reap all due economic rewards, the primary function of a license is service to the public—not service to the licensee. Once a licensee has used the spectrum to promote a particular format and snared a loyal following, the desertion of that format for the sheer sake of enlarged profits, and without regard to the public interest, deserves some scrutiny.

Chillingly boundless are the number of hypothetical extremes to which the court's doctrine could be taken if extrapolated to logical absurdities. Further, as Justice Holmes remarked: "The life of the law is not logic, it is experience." In the real world, some of the possibilities portended become unlikely. I, too, would throw up my hands in helplessness if I believed the courts expected an intricate policy of format allocation on a grand scale and a system of intimate monitoring.

However, I believe a common sense interpretation of the judicial edicts is preferable. To determine whether a format is unique in the community, I would use only a threshold test of conspicuous generic equivalance: I would not seek identicality through minute analyses. To determine whether there is "significant grumbling" about a proposed format change, I would compare the magnitude of the protest to the magnitude of the service area using a zone of reasonableness concept. I would interpret economic feasibility as consistent with a profit comparable to the average station in the market (or like market) since I don't believe the court expects anybody to labor for less than fair recompense.

Using the above guidelines, and under the circumstances likely to occur, the trade-off between government obtrusion and economically-inspired exclusion becomes reasonable. Our energies would be best spent, I believe, in devising tenable standards to apply rather than battling speculative aberrations.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

Among the many public controversies in which we have been ensnared lately, the matter of radio program format changes is not

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[7] With respect to free speech, the First Amendment—which relates to abridgement of speech and the press—was not intended as a defense *against* media diversity. In broadcasting law, the First Amendment rights enure primarily to the listening public and the Constitutional standards have been applied to coincide with this country's scheme of privileged trusteeship for the electronic media. See *Red Lion Broadcasting Co. v. FCC*, 359 U.S. 367 (1968).

As to the free market arguments, I contend inapposition. Absolute free market theorems suggest a condition of free market entry which clearly lets out broadcast licenses. And, there can be no unrestricted financial exploitation of a communal resource where the property rights repose in the public. A licensee is not a landlord with an unlimited right to alter the premises for commercial advantage; a licensee is merely a spectral tenant with caretaking responsibilities.

[8] Profit maximization is not necessarily coextensive with audience maximization as Commissioner Robinson suggests in his discussion of demographics. The game is the capture of mass affluence, not merely the mass. The demise of Lawrence Welk from network TV was based on its appeal to a relatively impecunious senior citizenry.

prominent. Indeed, I venture to say that most of the broadcast industry itself perceives, dimly if at all, that there is any problem here that merits more than passing attention. This evident lack of concern even by the industry is perhaps understandable in light of the general public preoccupation with television, but it is myopic. The issues which we seek to resolve in this inquiry have far-reaching ramifications not merely for radio but for the entire broadcast industry. In particular, the First Amendment questions are as subtly difficult as have been encountered anywhere—a fact that neither the industry nor, I daresay, the Court of Appeals, has fully appreciated. While I agree with what the Commission says in the accompanying Notice, I think some additional comments on this vexing problem are appropriate.

I. *Background*

A short background sketch of the problem is useful to explain how we got into this predicament.[1] More or less it started with *Citizens Committee to Preserve the Voice of Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970). The Commission there granted an assignment application where the assignee proposed to abandon a classical music format in favor of another format, one which it expected to make more money, a "blend of popular favorites, Broadway hits, musical standards and light classics." An *ad hoc* Atlanta citizens' group filed a petition for review and the Court of Appeals reversed. Section 310(b) of the Communications Act, said the Court, requires the Commission affirmatively to find, before approving it, that a proposed assignment will serve the public interest; section 309(e) requires that disputed substantial and material questions of fact must be resolved at a formal hearing; and that, in view of Congress' undoubted intention that "all major aspects of contemporary culture . . . be accommodated by the commonly-owned public resources whenever that is technically and economically feasible," 436 F.2d at 269, the proposed abandonment of a format "unique" in a market could not be approved without the Commission considering the public interest implications of abandonment at a hearing.

Lakewood Broadcasting Service, Inc. v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973) and *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973), decided by different divisions of the Court of Appeals on the same day, modified *Voice of Arts* in one respect, and introduced some new wrinkles of their own. *Lakewood* concerned the proposed abandonment of an all-news format in favor of country and western music in metropolitan Denver; *Progressive Rock* concerned a proposed switch from rock music to a middle-of-the-road format in the Toledo, Ohio, market. The former case, the Court found, the Commission had decided rightly: a close reading of the record indicated that there was no dispute over questions of fact but only over the legal conclusions to be drawn therefrom. In *Progressive Rock*, however, the Court brushed aside the submission that Toledo's other aural services furnished at least some progressive rock music to that genre's enthusiasts: "We deal here with format, not the occasional duplication of selections." 478 F.2d at 932.

[1] For a useful review of the problem in the general context of regulating program diversity, see Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401 (1975).

In one respect, at least, *Progressive Rock* trimmed the breadth of *Voice of Arts:* rather than apparently requiring a hearing whenever a proposed format change would apparently lessen diversity in a particular market, a hearing would be required only "when public grumbling reaches significant proportions." 478 F.2d at 934. But at the same time, the Court made it clear that with respect to the law of format changes, it had no sympathy for the Commission's desire "for as limiting an interpretation as possible." 478 F.2d at 930. And it went on to suggest that the decisive question respecting whether an assertedly "unique" format might be abandoned was not whether it had been profitable in the past or was currently profitable, but rather whether it was "economically feasible." 478 F.2d at 932.

Citizens Committee to Save WEFM v. *FCC*, 506 F.2d 46 (D.C. Cir. 1974) capped this series of cases, and in two respects completed it. First, as the decision of an *en banc* court, *WEFM* is, of course, "the law of the circuit," and binding on all subsequent divisions of the Court until modified either by the Court *en banc* or by the Supreme Court.[2] Second, *WEFM* spelled out more explicitly the reason for the rule. Rather than merely asserting, as the prior cases had, more or less cryptically, that there is a public interest in format diversity, the Court made clear the unacceptability of the Commission's aversion to deciding which among several proposed entertainment formats would best serve the public interest. The Court concluded that the Commission's reliance on market forces to allocate formats properly was unreasonable. Such comparisons of protected speech—weighing one protected speech against another to determine which is more in the public interest—is something the Commission has tried to avoid. In *WEFM*, the Commission was told, this policy is illegal.

> "[T]here is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition. . . . There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers. Broadcasters therefore find it in their interest to appeal . . . to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type . . . then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public. This is inherently inconsistent with 'securing the maximum benefits of radio to all the people of the United States' and not a situation that we can square with the statute as construed by the Supreme Court."

506 F.2d at 267, 268 (citations omitted; emphasis in original). The Court called into question whether *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), is still good law and indicated that while it was prepared in the ordinary case to defer to the Commission's judgment concerning what policies would maximize the benefits of radio broadcasting to the public, it was not prepared to accept proposed format abandonments as ordinary cases.

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[2] Judges Robb and McKinnon dissented. Judge Bazelon specially concurred in a thoughtful opinion which suggests a basically different approach to the problem than that of the Court's opinion. While I vastly prefer Judge Bazelon's approach to that of the Court, I think it is not without difficulties, some of which I shall note below.

II. *The Marketplace and Program Choices*

WEFM's challenge to the prevelant assumption about the effectiveness of the marketplace in satisfying the public's programming tastes and interests raises an issue of fundamental importance to the entire regulatory scheme. This is not an occasion for debating with the Court as to the economics of broadcasting. However, with all due respect, I think two points should be made in response to the Court's dicta on this issue.

The fact that in an advertiser-supported system the audience does not choose programming by *direct* market "votes" is simply not a decisive objection. The relevant and important question is whether programming reasonably corresponds to audience preference. I believe it does. Advertisers can scarcely be indifferent to listener choices. Rational advertisers will not buy time on stations that do not attract an audience, and a station does not attract an audience unless it provides listeners with programming they want to hear. The incentives of rival stations to offer competitive programming alternatives in order to attract audience, in order to increase their attractiveness to advertisers, are not essentially different from those that would apply if stations sought support directly from listeners.

I agree with the common criticism that the present system is biased in favor of majoritarian interests and that those of the minority sometimes suffer in consequence. I assume this is the thrust of the Court's point about advertisers seeking to reach only those persons with desirable demographic characteristics ("demographics," in the slang of the trade). Demographics are not irrelevant to advertisers, but their influence should not be exaggerated. In any event, the economic logic that drives this tendency toward mass audience appeal is basically a function of the number of competitive outlets and the size of the market. See my dissenting opinion in *Prime Time Access Rule*, 50 FCC 2d 829, 889, 894 (1975); Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Quar. J. Econ. 194 (1952). By the same token, an entirely different system of marketing—such as a pay system—might well yield programming more responsive to minority tastes, as it would give people a better opportunity to express the intensity of their preferences and would avoid any advertiser bias. See my opinion in *Subscription TV Program Rules*, 52 FCC 2d 1, 72, 73 fn. 5 (1975); Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. Law & Econ. 71 (1964). On the other hand, it is not at all clear that in the radio format change situations that are of concern to the Court, such a "pure market" system would yield results materially differing from those the present system produces. Would classical music afficionados pay more to hear broadcasts of their favorite programming than other, competing, listeners? (In considering this one would, of course, have to consider the widespread availability of tapes and disks.)[3]

[3] The Court ignores the availability of other, competitive sources of consumer satisfaction as these might bear on the public interest-diversity question. It is a serious mistake, however, to think about the uses of radio and television without also considering the context in which the electronic media are used. A part of the context relates to the uses of other media of information and entertainment. I would make more of this shortcoming if the Commission did not itself display it so frequently.

We can, it seems to me, reasonably, even intelligently, guess that the existing system of program distribution is a satisfactory way to do the job, even though all segments of the "listening public" (as distinguished from the "purchasing public") may not be represented. Whatever may be the imperfections of the market in responding to viewer choice, the important, relevant question for us is whether administrative fiat is better. It has always been a centerpiece of broadcast policy that broadcasting is essentially a private enterprise albeit one that is heavily regulated. As the Supreme Court stressed in *FCC* v. *Sanders Bros.* 309 U.S. 470, 475 (1940), the Communications Act does not confer on the FCC "supervisory control of the programs, or business management or of policy." Though the Court in *WEFM* suggests that *Sanders Bros.* is an anachronism, I must respectfully but insistently reply that it is not, either as a matter of wise policy or as a matter of law. As to the latter, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) seems to me dispositive.[4] Whether *Sanders Bros.* still makes sense as normative social policy can be divided into two questions: first, as a practical matter, can the FCC effectively do what the Court seems to envision; second, what are the likely consequences—in particular what are the constitutional implications—of seeking to do so?

III. *Formats, Uniqueness and Diversity*

At the outset it is important to appreciate how difficult it has been even to define the problem. That there is a general public interest in diversity I accept without much difficulty. This is part of the time-honored catechism which FCC Commissioners are expected to recite immediately after taking the oath of office. The difficulty comes, as usual, with trying to apply this commandment to concrete cases.

Of the numerous questions posed by the Court's mandate to preserve unique formats, the first and most basic is, what is a "format"—or, more precisely, what is a particular station's format? Before one can know whether a unique format is being abandoned, it is necessary to know what the format is, and what makes it unique. The *WEFM* decision makes it clear that licensee labels are not controlling; the Commission is expected to make this determination for itself. For example, the *WEFM* opinion indicated that distinctions might have to be drawn within labeled formats—such as between 20th century "classical" music and classical music composed earlier. How is one to be certain, however, that the relevant format category is "classical"? And until we can answer that question, how shall we know when a change has occurred? Shall a station that bills itself as, say, a "fine arts"[5]

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[4] The Court's reliance in *WEFM* on *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) and *Hawaiian Tele. Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974) for the contrary proposition seems to me most dubious; both cases dealt with public utilities for which the statutory scheme is fundamentally different in regard to the role of competition. It should, however, be noted that even in the field of public utility regulation increasing recognition has been given to the importance of competitive marketplace process. See, *Washington Util. & Transp. Comm'n.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied sub nom., National Ass'n of Reg. Util. Comm'rs* v. *United States*, 423 U.S. 836 (1975). See generally, Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L.Rev. 548 (1969).

[5] The Court in *WEFM* seemed in doubt whether "classical" and "fine arts" denoted the same format. 506 F.2d at 264. For present, illustrative, purposes, I equate them. In doing so, I remember Humpty-Dumpty's edict that words mean what we want them to mean.

station be deemed to have altered its predominantly classical music format by playing Victor Herbert? One possible answer may be that Beverly Sills' rendition of a Victor Herbert tune is "fine arts" while Jeanette MacDonald, singing the same selection, is "easy listening" or "golden oldies." To be sure, no one expects the FCC to be concerned with occasional lapses of identity. As every dog gets at least one bite, so every station gets an occasional pass for deviations from the expected norm. But what is the expected norm? How many "bites" of John Philip Sousa do we permit a classical music station to take?[6]

The Court of Appeals' reply to such questions, in its seminal decision in *Voice of Arts*, is devastating in its open abandonment of workable guidelines: "While an exact verbal definition may be somewhat elusive, this is perhaps a subject matter of which it can also be said that we at least 'know it when [we hear] it.' See *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 . . . (Stewart, J. concurring)." 346 F.2d at 265, n. 1. With the greatest respect for Justice Stewart, I must protest that it is undesirable to annex yet more territory to the swamp of obscenity by transplanting his test for it into the present arena.[7]

Nor is much light shed on the problem by the "public grumbling" standard, suggested in *Progressive Rock* and reiterated in *WEFM*. Insofar as this standard is seen to go not only to the "substantiality" that is requisite to place an issue in hearing, 47 U.S.C. Section 309(e), but beyond, to characterize the nature of the interest that the public has in diversity, it raises more problems that it solves. Clearly such problems go beyond radio: when CBS cancelled *Beacon Hill* and "public grumbling" was heard, was the FCC expected to rush forth to measure the decibels to determine if the grumbling was "of significant proportions"? And if the Commission found it to be such, then what?

All of these indications point in the direction of ensnaring us in what Alexander Bickel once described as the "web of subjectivity," but which, in this particular case, might more accurately and evocatively be called a Sargasso of idiosyncracy. The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections (which I will address below) this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even 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 middle-of-the-road 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

[6] What about syncopated Bach (the official title of the theme music is "Play Bach Jazz") which Washington lovers of classical music will recognize to be the theme music of the Renee Channey show on "fine arts" station WGMS?

[7] One often overlooked fact concerning Justice Stewart's eye for obscenity in *Jacobellis* bears notice in this connection: he did not see it there, and he has not often seen it in subsequent cases either.

co-exist—and little economic likelihood that they would. 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.[8] It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved.[9] At that thought the mind swims and the heart sinks.

Lest the foregoing rendition of legal conundrums be thought of as so, much lawyers' fustian, I offer some real-world illustrations. Radio Station WGBH-FM, Boston, Massachusetts, whose application for renewal of its license is now under a petition to deny, has, for the past 25 years, featured what may be described as a sort of highbrow "magazine" format. The major component of this format, to judge from the station's submissions,[10] has been classical music, but with a substantial amount of jazz, non-Western music, poetry and drama, together with news, public affairs, literary readings and miscellaneous other selections. (Opposition to Petition to Deny, p. 2) Recently, the WGBH Educational Foundation (which is also the licensee of two educational TV stations) has allegedly been experiencing some financial difficulties, and, in response to this situation (and presumably others), the foundation apparently re-evaluated what the radio station ought to be doing. An internal memorandum to the station's staff prepared by WGBH Vice President Michael Rice in late November of 1974, has been submitted to the Commission by petitioners to deny, and sets out in some detail the views of management concerning the station's future.[11] A part of this evaluation required Mr. Rice critically to scrutinize the station's past performance and to discuss what its future ought to be like in light of changing listener attitudes toward radio. Mr. Rice observes:

> ". . . [I]n the days before television . . . radio schedules, like television's today, were fragmented into highly-varied, regularly scheduled daily and weekly shows . . . [;] people would search out the particular shows they wanted at particular times on particular stations. . . . [Today, the overwhelming number of persons] listen not to favorite particular programs, but to their favorite stations. These listeners favor a station when they know it can be counted on to offer a specific service they especially value *whenever* they tune it in. . . . It's my guess that the *consistency* in the specific kind of service a station offers is far more important to listener tune-in decisions than even the *quality* of the way that service is produced and presented. That sums up the present problem for us: much of what we do is of matchless quality, but altogether, it's bewilderingly inconsistent."

The memorandum goes on to argue that the mixed format is no longer a tenable way to run the station, and that, in order to flourish, WGBH-FM must have a more focused, narrowly-defined mission.

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[8] See, for example, the Appendix to this separate statement for a sustained illustration of the point.

[9] It remains to be explored whether this procedural problem might not be handled by placing on a format change protestant the burden of showing that the proposed new format would not be unique as the format proposed to be discontinued. As a rule, it seems to me unfortunate to adjudicate substantive matters by the manipulation of procedural rules, but occasionally there is no other choice.

[10] These submissions are not all uncontroverted, and may well have to be sifted in a hearing. For the present purpose of illustrating the general problem, however, I shall accept these representations as true.

[11] For the present purpose, I assume without deciding that this memorandum is authentic; the licensee has not, in its pleadings, made objection on this point.

> "Now, then, what should that mission be? If we deal from our strength, and we'd be foolish not to, the answer must involve music. From the day of that first Boston Symphony Orchestra broadcast over 23 years ago—through all of the different radio managers and program ventures that have come and gone—until today, nothing has so prominently, so distinctively identified WGBH Radio as our concert broadcasts and other musical programs. And for good reasons. From the beginning, we've been almost a part of music performing and academic institutions of international rank. . . . I have no interest at all in the kind of service that might be described as classical juke-box. That might be lucrative in listener contributions. It would certainly be cheap to provide. But it would be cheap quality, too. Others might properly do it, but not WGBH. . . . Rather, the music programming that we provide must be infused by active intelligence, an informed commitment to the *cause* of music in the life of human society. . . ."

On its face a seemingly praiseworthy goal. But, now, for the other side.

> "On January 1, 1975, substantial and significant changes were made in the program service format of WGBH-FM, a non-commercial public radio station. . . . These changes were made unilaterally on the station's part without consultation or notification of the public whose donations and tax dollars support it. . . . In cancelling 90 percent of their jazz programming WGBH has effectively wiped out the most significant contribution the black man in America has made to the world of music."

Petition to Deny, filed by Committee for Community Access on March 3, 1975.

Few facts regarding the program format appear to be controverted—there has, clearly, been a "format change," and this change has, clearly, de-emphasized (among other things) jazz music at the expense of classical music. There have evidently been public grumblings of significant proportions concerning whether this change is in the public interest. How, assuming it wishes to perform its task exactly as required by law, should the Commission respond to this collision of values? If the Court means what *WEFM* says, there will apparently have to be a hearing. The controverted and unresolved "fact" concerns whether the former WGBH format was unique and whether the format change has diminished diversity or is otherwise inconsistent with the public interest. The fact that this is a renewal rather than an assignment is, of course, legally irrelevant. The Commission may not grant *any* application, whether for renewal or assignment, without first making a public interest finding—the very same finding in either case. Yet a hearing on an issue so ill-defined, as the Court must surely appreciate, could easily go on for weeks or months, costing in lawyers' fees a significant fraction of the station's entire annual budget.

One more illustration should suffice to make the point. In 1973, Kaiser Broadcasting Corp., licensee of WCAS, a small AM broadcast station in Cambridge, Massachusetts, attempted to assign the station to Family Stations, Inc., which proposed to change the WCAS format to highlight religious music and concerns. The WCAS format had been changed and adjusted several times during the 1960's; finally, the station settled on a format described as "folk-folk/rock," with which it stayed through several years. The assignment application was eventually granted, but, on petition for reconsideration, the Commission was flooded with letters and petitions—public grumblings of significant proportions. Family attempted to establish that "folk-folk/rock" was not a unique format in the Boston market—that indeed two other

stations regularly featured such music. In its *Amendment to Application for Assignment of License*, December 12, 1973, Family said:

> "While the precise mixture [of music] may not be duplicated in toto on some other individual basis, every musical component can be found on one or more other stations in the Boston areas."

Replied the Committee for Community Access:

> "It is quite simply an error in logical thinking to state that because the music presented on Format A is also part of Format B; then Format A equals or is available as Format B. This is a complete misstatement of musicological facts. One example that disproves the assertion is the simple fact that there is never loud, fast rock in the WCAS format while there is in those of WBCN and WNTN. This fact alone gives WCAS a unique sound which can never be offensive or jangling while any single hour on WNTN or WBCN can contain one or more decibel piercing, upbeat, rock or jazz selection."

Petition for Reconsideration, page 4. Or, as the Court of Appeals put it in *Progressive Rock*, "We deal here with format, not the occasional duplication of selections." 478 F.2d at 932.

This assignment application was dismissed just as our Broadcast Bureau was drafting a hearing order. But, although the case died, the principle being contested lives on: radio listeners identify in radio formats idiosyncracies which are too fleeting to be caught in the clumsy nets of legal formulations. This difficulty clearly aggravates the already grave First Amendment problem. Even assuming some regulation of radio formats can pass constitutional scrutiny, to make concrete legal obligations turn on criteria (what is an "offensive sound?" what is a "jangling" sound? what is an "upbeat" sound?) which are so vague and so elusive that licensees cannot know what the law requires of them, seems to me a clear violation of due process, see, e.g., *Lanzetta* v. *New Jersey*, 306 U.S. 306 (1939) as well as an unconstitutional infringement of free speech, see, *e.g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). See generally, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

It is possible to continue almost indefinitely descrying ineffabilities. The existence of this legal swamp gas is only evidence of a marshiness in the underlying intellectual terrain: there is, I believe, no way for the Commission to allocate program formats in such a way as to maximize the welfare of radio listeners according to their own preferences. A simple illustrative model will make the point.

As noted in the Commission's opinion, there are upwards of 80 entertainment formats used by American radio stations, including Basque, Eskimo, Farm, Tagalog, Weather and Yugoslavian. Excluding those with a small number of listed stations, there appear to be about a dozen principal formats. Trying to decide which stations ought to carry which formats in order to maximize the welfare of the community of radio listeners in a typical large market is a project too difficult to undertake for heuristic purposes.[12] Instead, to get a flavor for the

[12] It is not, of course, safe to assume that "diversity," "the public interest," and "community welfare" necessarily correspond to the same underlying value. The Court of Appeals takes the position that "diversity" and "the public interest" equate as a matter of law. It is easy, however, to imagine a situation where mandating "diversity" seriously undermines "community welfare" by requiring the carriage of formats for which there was no great public demand, with the attendant implicit opportunity costs associated with this action.

character of the project, let us imagine a very small market, with only two available frequencies and three groups who are competing to get their preferred formats on the air. The three formats we are going to decide among are middle-of-the-road (MOR), country & western (C&W), and classical. One of the three group competitors has the following preference schedule among the above-mentioned formats:

1. middle-of-the-road
2. country & western
3. classical

The second group has a different preference schedule:

1. country & western
2. classical
3. middle-of-the-road

The third group feels like this:

1. classical
2. middle-of-the-road
3. country & western.

Let us assume that the members of each group are equally numerous, and that the preferences of each member of each group are entitled to exactly as much deference as the preferences of each other member of his own group and each member of each other group.[13] Now, let us see if we can allocate formats "rationally." Suppose we decide that we will have classical and middle-of-the-road. That will be "fair," in one sense: each of these choices is the first choice of at least one of the three contending groups. But what about the country & western fans? Two-thirds of the audience prefers C&W to classical: to be fair, then, we ought to promote country & western over classical. So our two choices are MOR and C&W. But that is not fair either. Two-thirds of the audience prefers classical to middle-of-the-road: it is only just, therefore, to replace MOR with classical, so that our two choices are classical and C&W.

But that is also wrong. Two-thirds of the audience prefers MOR to classical, so we ought to go back to where we started—with C&W and MOR.

Within the constraints of the model, I see no way to make allocations so as to maximize viewer satisfaction, and in the real world, which is much more complex than the model, "rational" allocation seems even more difficult. Cf., K. Arrow, *Social Choice and Individual Values* (1951).

But if our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, as the *Voice of Arts* line of cases says, then it seems to me unthinkable that we should allow the consequences of that holding to fall asymmetrically on licensees who are seeking assignment authoriza-

[13] For purposes of this exercise, another constraint should be mentioned—that the scarcity is genuine—that in fact, there will be no "hybrid" formats and, accordingly, that some group will necessarily be disappointed. For the reasons advanced by Michael Rice, *supra*, there are very few hybrid radio program formats in radio today (using "formats" here in the broad sense of a consciously stylized type of programming). The Commission could, of course, mandate hybrid formats, and, in part, this may be the practical content of the format-diversity dispute. Whether this would increase community welfare, of course, is another question entirely. See fn. 12, *supra*.

tion. 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. Seen in this light, the Court's concern in *WEFM* about the financial status of the licensee proposing the change is irrelevant: the relevant question is not whether the station can sustain itself on its "unique" format but whether there is any basis for requiring *it* to do so rather than spreading the presumed [14] financial burden on all licensees. The answer to this question must be negative. In short, 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 [15] 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." That it would require us to take stock in what Judge Leventhal has characterized as "the evils of communications controlled by a nerve center of government," *National Broadcasting Co., Inc.* v. *FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974), is simply one of the costs that would have to be endured.

IV. *Constitutional Dimensions of Format Regulation*

I assume without discussion that the First Amendment protects entertainment programs, see, *e.g.*, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *WEFM*, 506 F.2d 246, 261, 271, n.9 (Bazelon, C.J., concurring), even those which apparently lack redeeming literary, artistic (musical) or social value. Freedom of speech in broadcasting differs considerably, of course, from freedom of speech conventionally considered. Compare *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 262 (1974) with *Red Lion Broadcasting Co.* v. *FCC*,

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[14] I presume the diversity obligation is a burden because it seems improbable that licensees would seek to trade "unique" formats for others that are less profitable. To the extent of that difference in profitability, the unique format is a "burden."

[15] There are a number of ways the Commission could apportion the diversity obligations of licensees in a particular market, but all of them would have at least one administrative chore connected with them—the necessity of the Commission ascertaining what the public interest required by way of format diversity in each market or at least the 100 or so largest markets. Undoubtedly, we would find that the demand for, say, eastern European language broadcasting was greater in Pittsburgh and Cleveland than in Phoenix and Atlanta, and that all-news programming was much more in demand in Washington, D.C. than in Walla Walla, Washington: but how we should apportion the obligation to carry a certain amount of twentieth century classical music, other classical music, progressive rock music, country & western music, non-western music, non-music, and all the other possible formats is a matter that would have to be studied in great detail at a later date.

One way the diversity obligation could be pursued, of course, would be to make all station formats essentially hybrids. A 24-hour class-B station, for example, could be required to carry 50 percent classical music and 50 percent soul music. Norms would obviously have to be evolved, however, to prevent the station management from relegating one or the other format to undesirable hours: probably, the most equitable system would require that different formats alternate hours or days throughout the license term. No matter what approach were adopted, however, there is no escaping the magnitude of the administrative burden, nor the great amount of government stultification of private speech that would evolve from a faithful pursuit of the Court of Appeals' current mandate.

395 U.S. 367 (1969).[16] Accordingly, the blackletter rule that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972), may not apply with full force to broadcasting but rather may be counterbalanced to a degree by the notion that nothing in the First Amendment prevents a licensee from being required "to share his frequency with others and to conduct himself as a proxy or fiduciary" for his community. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 389. At the same time, however, no court has gone so far as to authorize the Commission to forbid a broadcaster to carry a particular program (see 395 U.S. at 396) or to dictate to licensees "what they may broadcast or what they may not broadcast." *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 480 (2d Cir. 1971). Whatever it is that makes broadcast communications "special," however, cannot make irrelevant the concern that government not become too deeply involved in the content choice of essentially private communications concerns. The First Amendment cannot merely mean that government should refrain from "bad" interventions in speech: if it is to have any vitality at all, the constitution must constrain—it must especially constrain—well-intended inverventions also. As Mr. Justice Brandeis memorably put it: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are benificent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928).[17] But if we go forward with the *Voice of Arts* version of the public interest, we shall obviously have to interrupt that tradition, for the obligation to carry one format necessarily entails the obligation to refrain from presenting another. It may be, at the center, that a middle-of-the-road format can safely play any sort of music, so long as it does not specialize: but for a progressive rock format to dally with Mozart or a classical format with the Beatles would clearly have to be a sort of civil *malum prohibitum*, for which our rules and regulations would have to prescribe a remedy. If the Commission is to pursue this route, of course, it will have "to oversee far more of the day-to-day operations of broadcasters' conduct" than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126 (1973).

The constitutional issue here is clear enough, and need not be labored. The point which requires emphasis is that we are not here concerned with the conventional slippery slope, the line-drawing problem of the sort that clutters the legal landscape and fills the days of

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[16] For extensive elaboration of this point, Chief Judge Bazelon's concurring opinion in *WEFM* offers an impressive place to begin. In earlier days, I explored the whole subject in *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 Minn. L. Rev. 167 (1967).

[17] Equally apt is the warning of Laocoon at the siege of Troy when the Greeks offered their celebrated horse as a peace offering: "I fear the Greeks even when bearing gifts." Laocoon was, of course, strangled by serpents for his efforts. I shall apparently meet a more comfortable fate, because, even if I should be discomfited in this effort to dislodge what I believe an unjust and unwise rule of law, at least I shall be able to soothe myself in defeat with the classical music of my favorite composers.

lawyers on both sides of the bench. For, if we are to avoid the unthinkable choices of, (1) ignoring the Court's mandate entirely or, (2) allowing the full weight of its doctrine capriciously and differentially to fall on an occasional applicant, we shall have to pitch ourselves headfirst off of the slippery slope into the hitherto untrespassed-upon valley of comprehensive control.[18] In candor it should be acknowledged that the Commission does not plead the First Amendment with hands that are altogether clean. In view of its efforts in other areas to regulate broadcast programming, directly or indirectly, some critics will no doubt view its defense of free speech here as coming with poor grace. Poor grace or not, it comes with good sense and good sense is not to be despised for lack of precedent. Perhaps the Commission would have greater credibility had it always stood firm for righteous principle, but I hope we have not forfeited our standing to assert a position consistent with our most fundamental and valuable principles. Considering the deferential respect paid even to the most fanatical and unpopular views of private persons pleading the First Amendment in their own self-interest, see, *e.g.*, *Redrup* v. *New York*, 386 U.S. 767 (1967), it would be an anomaly—would indeed be a crushing defeat for liberty—if the government itself could not plead the constitution without embarrassment and apology.

APPENDIX

Memorandum of Terry P. Hourigan, Program Manager, to the staff of WMAL-FM, Washington, D.C., reproduced from R. Hilliard, *Radio Broadcasting* 119-122 (1974).

Basic Objective

WMAL-FM has as its basic programming objective the achievement of the largest 18 to 34 year old audience in the Metropolitan Washington area. This will, in turn, allow us to accomplish two essential goals; making our station a dominant force on the FM band and increasing our contribution as a profit center in the Evening Star Broadcasting Company.

We approach this task with a very positive outlook. The timing is right, the goal is realistic and our approach is sound. Our plan of attack centers around the market key to this 18 to 34 year old audience, the 25 year old, highly educated young professional. He or she is our specific target. If we can attract the 25 year old we have zeroed in on the person of highest influence in our demographic group. Persons on the younger end of the spectrum all wish to be thought of as being "really adult," while many of those over that age are clinging to the "with it" image of the younger man or woman.

These people all coalesce in their radio listening desires. Brought up on a steady diet of top-40 and hard rock music, they have grown accustomed to its rapid pace and brevity of expression, but have been educated past the point of being able to accept the banality of top-40 or the non-musical noise of hard rock radio. There exists, therefore, a potentially huge market of untapped listeners waiting to be claimed—waiting for a station or sound they can call their own. The station is WMAL-FM. The sound is "*The Soft Explosion.*" What follows is our game plan.

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[18] An intermediate possibility, of making such judgments only when faced with a comparative choice between two applicants, is suggested in Chief Judge Bazelon's concurring opinion in *WEFM*. This route would, in my view, be preferable to that of the Court. But not even Judge Bazelon's approach resolves the tenacious practical difficulties that belong to making objective administrative judgments in this area. Hence, this approach does not eliminate, although it does ameliorate, the First Amendment objections. It is not enough, I think, simply to note the necessity of choice under conditions of scarcity. "Scarcity" is a relative (and subjective) term, subordinate in the overall table of constitutional values to many other interests. "Scarcity" may thrust upon us certain necessitous matters we would rather avoid; but it is hardly permission to run rough-shod over free speech interests. Harry Kalven expressed the point exactly:

> "The traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so-to-speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest. Rather, it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license."

Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. of L. & Econ. 15, 37 (1967).

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The Market

Washington, D.C. is a community dominated by relatively affluent young professionals. The metropolitan area is experiencing an explosive growth in population. Rapidly expanding Federal Government facilities continue to attract highly educated younger families to move into expensive homes in the metro area where an extremely high percentage of the more affluent families are located. The following facts make Washington unique among the nation's 10 largest cities. Washington metro area has an average median age of 24.1 years, with 34.7% of the population under 18 years of age and only 6.0% over age 64—youngest by far in the country.

The average household income is $12,477 annually, the *largest* in the United States:

Washington ranks #1 in household income.
Washington ranks #1 in population increase.
Washington ranks #3 in value of homes.
Washington ranks #2 in annual purchase of FM sets.
Washington has 431,300 metro area men 18-34.
Washington has 468,800 metro area women 18-34.
Washington is the nation's youngest, fastest growing market.

Personalities

Our on-the-air personalities are now, and will continue to be, aware of the unique opportunity they have to help mold the thinking and tastes of the 18 to 34 year old audience, and of the corresponding burden of responsibility this entails. They have uppermost in their minds the thought of projecting a positive, warm image—the thought that the station cares very much that the listener has chosen to listen to us. We feel, as broadcaster Chuck Blore said, "If you're programming a radio station and someone tunes into your frequency, they've given you everything they have to offer, their ears and their minds. And if you're *programming* that radio station, you have to give them something in return, and we try to give them reward after reward after reward for tuning to our place on the dial."

We believe our personalities can do just that. Their job is to communicate with the audience, to project the image that they are happy in their work, that it is truly pleasurable to present our programming, that the listener deserves the very best we have to offer and that the very best is exactly what he or she is getting.

Music

A most essential ingredient in programming for the 18-34 listener is music. While very careful control must be exercised over the selection and presentation of music, it must not sound too structured. Our morning show has been used for the past four months as a testing place, a proving ground for our new music mix. It has proven successful beyond our fondest hopes. Our audience growth in this period of tightened programming control has been 60% over the last two rating books, and our demographics almost entirely 18-34. The music formula has been devised for simplicity of implementation. This simplicity adds to our control, making more effective our ability to hold control of our music in the face of changing audience tastes. In effect, it makes us "fad-proof."

We play a mix composed of three ingredients:

1. *Contemporary Hits.* Those of the current contemporary best-sellers which fall within the parameters of the taste of our 25 year old; no "bubble gum," no non-musical noise, only good solid hits, songs which have achieved mass favor with young-adult listeners.

2. *New Album Cuts.* These songs are selected by our music director as the best efforts of the best contemporary artists, only the best one or two tracks in the best of the new albums. (This keeps us ahead of the "hit" game. In recent years the former music industry trend has been reversed and today albums are released months ahead of the singles.)

3. *FM Oldies.* These are simply hits by groups which have become the "standards" of modern rock music. Included are people like The Beatles, The Byrds, Blood, Sweat & Tears, Carole King, etc. These are chosen carefully and mixed for best maximum effect.

These three ingredients, carefully selected, imaginatively showcased, are the entirety of our music formula. Nothing gets on the air which has not met these established criteria.

News and Public Affairs

1973 will be a year of departure from the previously accepted standard of formal, "structured" newscasts. Our air personalities will integrate news items, with particular

emphasis given to the local news, throughout the entire hour. There will be no "aside" comments by the announcers, no personal opinions about the news stories, just a good, brief, positive delivery of information, as smoothly integrated into the overall program flow as a commercial.

WMAL-FM will continue its effort to broadcast programs in the public interest, but they must take a new form. The line uppermost in our minds must be *"Eliminate Turnoffs!"* We feel a line of demarcation must be drawn between informing and educating the listener, and boring him or her. "Mini-specials" will be the order of the day, with all our personalities brought into the effort. These mini-specials will always be attempting to accomplish something positive—getting our audience personally involved in the areas we explore. Ours is the most socially-conscious audience in the history of radio and we would not be living up to our responsibility as broadcasters if we failed to stimulate this force to the best of our ability.

Public Service and Special Programming

Our increased commercial success has not lessened our commitment in the area of public service. We retain on our staff the position of public service director and have a continual dialog with a wide number of community groups and interests, resulting in their knowledge that WMAL-FM knows their problems and is ready to give almost instant help in informing the community. We have also undertaken major campaigns designed to help combat drug abuse, fight the growing VD epidemic and inform the public about sickle cell disease. We have participated in three-station campaigns on behalf of the United Givers Fund, The Black United Fund and the Salvation Army.

Washington Redskins. WMAL-FM is the Redskins station on FM. Our involvement with and promotion of the Skins great championship drive, our daily talk show with Jerry Smith, daily conversations on the air with Steve Gilmartin. "The Voice of the Redskins," have made us the leading FM sports station in Washington.

In Concert. Our broadcasts of these 90-minute rock specials, simulcast with WMAL-TV, has created an enormous audience for late night weekend programming. The acceptance by our audience of this, the most innovative new idea in entertainment programming in recent years, has opened the way for alternate week specials as well. The Music Festival, with John Lyon, is a locally produced 90-minute rock special featuring major artists recorded in concert settings.

Other Specials. Black Gold ran in April, 1973, as a 12-hour special featuring the greatest black musicians in pop music of the past 20 years. A cooperative venture informing the public about Howard University's Center for Sickle Cell Disease research, *Black Gold* was underwritten by Safeway Foods. *Beatles '72* was a five hour concert exploring the influence in music and life style of the most dominant force in the history of rock music. *Tommy* was a specially showcased presentation of the rock opera.