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WNCN Listeners Guild
*and Citizens Communications Center v. FCC**

I. Introduction

During the past decade, the District of Columbia Circuit Court of Appeals and the Federal Communications Commission (FCC) have been entangled in controversy over whether the FCC should be required to hold evidentiary hearings when a radio program format is changed. The dispute arises from the fact that the airwaves are a public resource to be used for the benefit of all the people of the United States.[1] To promote this end, the FCC has been charged with the duty to protect the "public interest" in broadcasting,[2] which the District of Columbia Circuit has interpreted to include an interest in diversity of program formats.[3] In determining the best method to achieve this diversity, the court and Commission have come into conflict. The FCC has insisted that evidentiary hearings are not necessary since the public interest in diversity of formats is adequately protected by free market forces. The court has held, however, that if a significant sector of the listening public protests the loss of an economically viable and unique format, an evidentiary hearing must be held to determine if the format change would be in the public interest.

In *WNCN Listeners Guild and Citizens Communications Center v. FCC (Listeners Guild),*[4] the United States Court of Appeals for the District of Columbia Circuit reviewed an order of the Commission which, in spite of the court's previous decisions, abolished a regulatory scheme in favor of a free market determination of formats. The court, sitting *en banc,* was put in the difficult position of demonstrating both that their plan better protects the public interest and that the decision was one which the judiciary, not the administrative agency, should make. In deciding to affirm their own plan, the court demonstrated a disregard for the facts of this case as well as for the limits of judicial authority.

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* 610 F.2d 838 (D.C. Cir. 1979) (en banc), *cert. granted,* 48 U.S.L.W. 3568 (1980) (No. 79-824).

1 NBC v. United States, 319 U.S. 190, 217 (1943).

2 47 U.S.C. § 309(a) (1976) provides in relevant part: "[T]he Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application. . . ."

3 Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 262 (D.C. Cir. 1974); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 928 (D.C. Cir. 1973); Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC, 436 F.2d 263, 269 (D.C. Cir. 1970).

4 610 F.2d 838 (D.C. Cir. 1979) (en banc), *cert. granted, 48* U.S.L.W. 3568 (1980) (No. 79-824).

II. Statement of Facts

A. *The Petition to Deny*

The *Listeners Guild* fact pattern is substantially identical to the previous format cases.[5] The prior cases arose from the sale of a radio station[6] with the owner seeking approval from the Commission to assign the broadcast license to the new owner.[7] When the new owner proposed a change in the program format of the station, a citizens' group organized to prevent the assignment and thereby protect the previous format. The citizens' group filed a petition to deny,[8] seeking a hearing before the FCC to determine if the proposed format change would be in the public interest.[9] In the past, the Commission has, in every instance, denied these requests and granted the assignment of the license, relying on the "invisible hand" of the free market to insure program diversity. From the Commission's denial, the petitioners' only remaining option was an appeal to the circuit court.[10]

B. *History of the Format Decisions*

A body of law on broadcasting, as well as a substantial conflict between the court and Commission, has developed from the appeals of these cases. In the first modern format case, *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC,*[11] the court ruled that the petitioners, Atlanta citizens organized to save a classical format, had raised substantial and material questions of fact and were entitled to a hearing before the Commission. No hearing was held, however, because the parties settled the matter among themselves.[12] Three years later in *Citizens Committee to Keep Progressive Rock v. FCC,*[13] and *Lakewood*

5 *See* note 3 *supra. See also* Lakewood Broadcasting Serv. Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973); Hartford Communications Comm'n v. FCC, 467 F.2d 408 (D.C. Cir. 1972).

The format cases are discussed in the following materials: Note, *Program Diversity in the Broadcast Media,* 17 B.C. INDUS. & COM. L. REV. 25 (1975); Note, *Development of New Public Interest Standards, the Format Change Cases,* 25 CATH. U. L. REV. 364 (1976); Note, *Federal Regulation of Radio Broadcasting,* 28 RUTGERS L. REV. 966 (1975); Note, *Listener's Rights: Public Intervention in Radio Format Changes,* 49 ST. JOHN'S L. REV. 714 (1975); Note, *Developing Standards for Diversification of Broadcasting Formats,* 52 TEX. L. REV. 558 (1974); Comment, 9 GA. L. REV. 479 (1975).

6 A discussion of the legal problems encountered in buying a radio station is presented in Rubiner, *Primer for Purchase of a Radio Station,* 53 MICH. ST. B.J. 398 (1974).

7 Assignments or transfers which involve substantial changes in ownership or control of the broadcasting license are subject to the same standards and treated in the same manner as the initial application. 47 U.S.C. § 310(b) (1976).

8 47 U.S.C. § 309(d)(1) (1976) provides in relevant part:

> Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended). . . . The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegation of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

9 *See* note 2 *supra.*

10 Appeals from Commission decisions to deny or grant a station license must be taken to the United States Court of Appeals for the District of Columbia Circuit 47 U.S.C. § 402(b)(1), (b)(6) (1976).

11 436 F.2d 263 (D.C. Cir. 1970).

12 610 F.2d at 848. The assignment of the license was later granted by the FCC. Strauss Broadcasting, 31 FCC2d 550 (1971).

13 478 F.2d 926 (D.C. Cir. 1973).

Broadcasting Service, Inc. v. FCC,[14] the court had the opportunity to review the Commission's handling of the *Voice of Arts* decision. The court found that the Commission's actions indicated a policy of limiting the precedential effect of that decision to such an extent that it would apply only to cases involving classical music stations in the Atlanta area.[15] Although deferring to the "expertise" of the FCC to establish needed administrative standards,[16] the court made clear that when public grumbling reaches significant proportions and issues of fact are in dispute, the format change becomes an issue requiring a hearing. The failure to hold this hearing or to render a reasoned decision in it was declared to be reversible error.[17]

The FCC, however, was not dissuaded from its position. Avoiding what it labeled an administrative nightmare,[18] the Commission continued to deny the required hearings. It reasserted that abandonment of a non-unique format is not a matter affecting the public interest, but rather is a business judgment within the licensee's discretion.[19] Thus, a broadcaster's choice of format would not be questioned.

Faced with a regulatory agency which was reluctant to implement its decision, the circuit court of appeals sat *en banc* in *Citizens Committee to Save WEFM v. FCC (WEFM).*[20] After reasserting that the FCC was required to hold these hearings, the majority explained that the Commission was not free to pursue a policy of free competition if it was to fulfill its statutory duty of protecting the public interest.[21]

The Commission, upon receiving the remanded *WEFM* case, however, continued their policy of denying hearings. At the same time, they undertook a staff study of the problem and solicited public opinion on whether the required regulatory scheme was wise public "policy."[22] This effort resulted in the issuance of a Memorandum Opinion and Order[23] repudiating *WEFM* on four principal grounds. First, the Commission found that *WEFM* imposed "common carrier-like" obligations on a broadcaster in spite of the congressional intent that there be free competition in broadcasting. Second, the FCC found that free market competition was highly effective in providing format diversity. Third, the FCC felt that implementation of *WEFM* would be too burdensome a task. Finally, the Commission feared that *WEFM* would "chill" a broadcaster's choice of format and, therefore, improperly invade first amendment rights.

The enforcement of the FCC order was not to become effective until the final disposition of any judicial review.[24] In *Listeners Guild,* the court again sat *en banc* to review their *WEFM* decision in light of the new FCC challenge.

14 478 F.2d 919 (D.C. Cir. 1973).
15 478 F.2d at 930.
16 478 F.2d at 925 n.14.
17 478 F.2d at 934.
18 Changes in the Entertainment Formats of Broadcast Stations, 60 FCC2d 858, 865 (1976).
19 Zenith Radio Corp., 38 FCC2d 838, 845-46 (1972).
20 506 F.2d 246 (D.C. Cir. 1974) (en banc).
21 *Id.* at 267.
22 Changes in the Entertainment Formats of Broadcast Stations, 57 FCC2d 580, 585 (1976).
23 60 FCC2d 858 (1976).
24 *Id.* at 866.

III. The Rationale of *Listeners Guild*

A. *The Plan Established by the Court in the Format Cases*

The plan which the court reviewed in *Listeners Guild* was premised on the court's finding that the public has an interest in format diversity.[25] Pursuant to the Commission's duty to protect the public interest,[26] the FCC must insure that license assignments do not improperly interfere with format diversity. The court has repeatedly stated that when a public interest issue arises and substantial and material questions of fact exist, the FCC must hold an evidentiary hearing to decide if the assignment is in the public interest.[27]

No hearing is required when conditions exist which indicate that no public interest issue arises. Four such conditions have been enumerated by the court: (1) when the public does not protest the assignment of the license;[28] (2) when the protesting group is less than a "significant sector of the community";[29] (3) when there is an adequate substitute for the changed format;[30] or (4) when the old format is not economically feasible.[31]

B. *The Court's Answers to the Commission's Challenge*

The court, when challenged by the FCC, defended its regulatory design by first listing and then answering the FCC's four objections to the rules established in the format cases.[32] Responding to the charge of imposing common carrier-like obligations on broadcasters, the court emphasized the narrowness of their decision. Noting that *WEFM* would require a hearing only when there was already evidence that the market had failed, the court stated that their rules were not an imposition of a full regulatory scheme on broad-

25 *See* note 3 *supra.*

26 *See* note 2 *supra.*

27 *See* note 3 *supra.*

28 The "public" whose interest is considered in a format change is the public in that service area, which can include more than just the city of license. 506 F.2d at 263. This does not, however, include members of the public in an area which receives a distant station due to unusual circumstances or physical phenomena. *Id.* at 263 n. 23.

The use of public response as a measure of the public interest is criticized in Volner, *Broadcast Regulation: Is There Too Much "Public" in the Public Interest?,* 43 U. CIN. L. REV. 267 (1974).

29 The District of Columbia Circuit has cautioned that each situation is different and, therefore, no quantitative minimum as to what constitutes a significant minority should be established. 478 F.2d at 929 n.7. Examples of what the court considers significant, however, do exist.

In *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC,* the court ruled that 16% of the listeners in a service area with 20 stations constituted a significant sector of the community. 436 F.2d at 269. When 11,000 signatures on a petition to save a Toledo, Ohio, station were presented, the court found that this was a significant minority. 478 F.2d at 928. In *WEFM,* the FCC received "over one thousand" letters of protest from a service area of 7,500,000. The court found that this was a significant minority. 506 F.2d at 254, 268.

30 In *WEFM,* the court considered whether a station which reached 20% of the disputed format's listeners was an adequate substitute. 506 F.2d at 263 n. 22. The court concluded:

> In considering the availability *vel non* of an alternative source for a particular format, reliance on an alternative that reaches less than a substantial portion of the area served by the station to be assigned gives disproportionate weight to the interests of one portion of the public, and none at all to those of another. Unless the Commission has considered this effect, and reasonably determined that the overall public interest is, on balance, better served by this arrangement, we cannot say that it has discharged its obligation to assess and act in the public interest.

Id. at 263-64.

31 It is not sufficient justification for approving the application when the assignor merely asserts financial loss from operation of the station. The losses must be attributable to the format itself. *Id.* at 262.

32 610 F.2d at 844-54. *See* text accompanying note 23 *supra.*

casters, but merely a strictly limited protection of the public.[33] Beyond this, the court stressed that the Commission has limited remedial powers to deal with the format change. Because the FCC has no authorization either to impose a new format or to force retention of the old, it may view format diversity as only one consideration in the decision of whether to allow the assignment of a license. Thus, the court concluded that only through stretching *WEFM* beyond recognition could it be said that common carrier obligations were being imposed.[34]

Second, the FCC alleged their staff study had shown free competition to provide an "almost bewildering array" of formats[35], while imposed regulation would deter innovative programming.[36] The court's answer to this charge was not to deny the findings of the study, but rather to attack its impartiality. Because of the Commission's failure to release the study prior to the decision, the court believed the accuracy of the study was questionable. Furthermore, it found the failure to release the study and allow public comment may have violated procedural fairness to the opposing parties. The study was thus dismissed without any of its findings being refuted.

The court then addressed the Commission's allegation that implementing *WEFM* would create an "'administrative nightmare.'"[37] The majority concluded, after considering the history of format protest, that the Commission's "'administrative nightmare' turned out to be little more than a dream."[38] The perceived burdens of cost and time required for an evidentiary hearing were shown to be exaggerated since in the previous ten years only one format case had resulted in a hearing.[39] Additionally, the court found that the inherent limitations of *WEFM* would restrict the purported burdens which the FCC would have to endure. This decision required a hearing only when substantial questions of material fact existed concerning a commercially feasible, unique format whose loss was protested by a significant minority.[40] Given these restrictions,[41] only a small number of cases would ever require a hearing,[42] and although the administrative burdens in these cases were not to be minimized,

33 *Id.* at 856.
34 *Id.* at 851-52.
35 60 FCC2d at 863.
36 *Id.* at 865.
37 610 F.2d at 847-49.
38 *Id.* at 848.
39 *WEFM* resulted in a hearing in which the license was granted to the assignee. Zenith Radio Corp., 60 FCC2d 1109 (1976) (notation of Commission action). The Citizens Committee considered an appeal, but reached a settlement under which the assignee would donate WEFM's classical records to one classical station and donate equipment as well as underwrite a classical show on another. Further, the assignee paid $60,000 to the Citizens Committee for their legal expenses. Variety, Nov. 9, 1977, at 35, col. 3. The FCC approved this agreement. [1978] 42 RAD. REG. (P & F) 468.

The use and benefits of private agreements to settle format controversy are discussed at 52 TEX. L. REV., *supra* note 5, at 555-69.
40 506 F.2d at 260; 478 F.2d at 929, 934; 436 F.2d at 269, 271-72.
41 The majority also suggested that the FCC might further restrict the intrusiveness of *WEFM*. Specifically, the court stated that the Commission could set more rigorous standards for the establishment of a prima facie case by requiring high levels of public grumbling or establishing broad format classifications. 610 F.2d at 854.
42 Counsel for the FCC estimated that only six petitions to deny based on format changes were pending at the time *Listeners Guild* was being heard by the circuit court. The court speculated that few, if any, of these would result in a hearing. *Id.* at 849.

For a discussion of the reasons why so many petitions to deny are dismissed without a hearing, see Note, *Judicial Review of FCC Program Diversity Regulation,* 75 COLUM. L. REV. 401, 406-07 (1975).

neither should they be exaggerated. The "frenzied rhetorical excess"[43] with which the Commission made its argument, and its subsequent admission at oral argument that this characterization was exaggerated, resulted in the court viewing the staff study and its conclusions with "considerable suspicion."[44]

The final problem which the Commission anticipated *WEFM* would create concerned the sensitive first amendment implications which broadcasting regulation invokes. Answering this problem, the court simply noted that the Commission is allowed to develop rigorous standards for the establishment of a prima facie case for a petition to deny. The FCC, through the development of these standards, can limit any possible intrusiveness caused by *WEFM*. The court, however, cautioned that this did not suggest the Commission would be allowed to formulate policies which would render *WEFM* ineffective. It would still be the Commission's duty to protect the public interest in format diversity in those infrequent situations where the free market had failed.

C. *Implementing the Decision*

Having explained its reasoning behind the reaffirmation of *WEFM*, the court faced the more difficult problem: forcing the uncooperative Commission to implement its decision. Past attempts to achieve this end had met with little success. In one earlier format case, the court ordered the Commission to hold the evidentiary hearings, and stated that "[n]o more [will be] required, no less [will be] accepted."[45] Despite this warning, the FCC still did not hold the required hearings, a decision which resulted in the court spending a significant portion of the *WEFM* opinion to emphasize that "there is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition."[46] The FCC, however, did not find this conclusion to be as clear as the court had thought. Instead, the Commission issued a Memorandum Opinion and Order[47] challenging the court's regulatory program. The net result of this conflict between court and agency was that the Commission had yet to hold, through its own initiative, an evidentiary hearing on diversity.

In *Listeners Guild,* the court used a more direct approach to insure implementation of its decision. Recognizing that the Commission's disagreement stemmed from what the FCC saw as opposing policy viewpoints, the court declared that their decision was not one of policy, but, as a statutory interpretation of the Communications Act,[48] was the law.[49] It was, therefore, the court concluded, within the judiciary's constitutional authority to decide the case.[50] Regardless of the relative merits of free competition, as opposed to limited

43 610 F.2d at 849.
44 *Id.*
45 Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d at 934.
46 506 F.2d at 267.
47 Changes in the Entertainment Formats of Broadcast Stations, 60 FCC2d 858 (1976).
48 47 U.S.C. §§ 151-609 (1976).
49 610 F.2d at 854. Authority which finds it equally clear that this judgment is a type which Congress has entrusted to the FCC is presented in Tannenwald & Auchenthaler, *Changes in Radio Entertainment Formats,* 8 St. Louis U. L.J. 358, 365 (1977).
50 SEC v. Sloan, 436 U.S. 103, 118 (1978).

regulation, the FCC is obligated to follow the judicial interpretation of the Communications Act. Thus, the court has attempted to leave the FCC without a means by which it can further delay implementation of *WEFM*. No longer can the FCC treat the matter as a policy disagreement; the Commission must now either implement the court's ruling in good faith, thus fulfilling its statutory duty, or show that the judicial action was an infringement on the Commission's constitutional authority to make radio policy.

IV. Critique

In discussing the *Listeners Guild* decision it is necessary to approach the court's action in two ways. First, it must be determined if the court's conclusion to affirm their regulatory scheme was justified by the facts. Second, the procedure which the court followed in imposing this plan on the Commission must be considered to determine if it was a proper exercise of judicial power.

A. *Substantive Analysis of the Court's Action*

In weighing the relative merits of the court's and the Commission's plans, it is necessary to view them in light of the market on which they will be imposed. Radio broadcasting does not have, as the FCC concedes,[51] a perfect market, a result to be expected when advertisers and not the public pay the broadcaster. Consequently, the radio market is more likely to reflect the demand for jeans, soft drinks, and acne lotions than the actual format preferences of the listening public. Regulation could be imposed to correct this situation, but the desirability of regulation must be balanced against the difficulties and hazards associated with regulatory control.

The Commission found four major problems with regulation.[52] The court attempted to respond to these by showing that the *WEFM* plan was neither too burdensome nor intrusive on the administrator or the broadcaster. In doing so, the court adequately demonstrated that their plan did impose "common carrier-like" obligations.[53] In light of the small number of cases which have raised the diversity question,[54] the restrictions placed on the use of a hearing,[55] and the limited sanctions which the FCC can impose,[56] the burden imposed on the broadcaster was confined to that which is necessary to insure protection of the public interest.

In contrast to the explanation on the limits of *WEFM,* the court gave a superficial treatment to the important first amendment question. The majority merely stated that they found no constitutional impediment to their decision, and if one did exist, that the Commission is capable of adopting stringent

51 60 FCC2d at 863.
52 *Id.* at 865. *See also* text accompanying note 23 *supra.*
53 *See* text accompanying note 33 *supra.*
54 *See* note 42 *supra.*
55 *See* text accompanying note 40 *supra. See also* note 41 *supra.*
56 *See* text accompanying note 34 *supra. See also* 47 U.S.C. § 326 (1976), which provides in relevant part:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

prima facie case requirements to limit any intrusiveness.[57] Although this approach to such a sensitive area of the law may seem unacceptable, it is reassuring to note that the Commission's contentions concerning the intrusiveness of *WEFM* were exaggerated. Under the court's ruling, the Commission may, when a petition to deny is filed, review the diversity of formats in the relevant broadcast area and thereafter deny the assignment of a license only when a particular format would otherwise be erased from that area. This process fosters diversity among the limited number of stations in a broadcast area; it does not authorize consideration of content beyond its uniqueness to that broadcast area. When uniqueness in an area is the subject of the inquiry, FCC authorization extends only to preserve the present variety. *WEFM* does not allow the FCC to compel change in an existing format. Further, *WEFM* does not alter the existing requirement that the FCC may not consider the political, economic, or social views of any applicant.[58] Since a decision must be made as to which applicant among many potential broadcasters will be allowed to utilize the scarce resource,[59] *WEFM* provides a method intended to allow as many different types of speech to reach the public as is practical.[60] Thus, although the majority did not discuss the first amendment problem, it appears that the court's conclusion was sound.

Of the four areas in which the FCC anticipated problems three have been shown to be harmless, but the fourth, the staff study, remains. This study demonstrated that free competition alone would do a better job of providing format diversity than *WEFM* could do. This problem differed from the others in that it did not question the feasibility of the court's plan, but instead addressed its wisdom. To have adequately answered this question, the court would had to have demonstrated that their plan was not inferior to free competition. Unfortunately, the court did not and could not satisfactorily supply an

57 *See* note 41 *supra.*

58 Johnson Broadcasting Co. v. FCC, 175 F.2d 351, 359 (1949).

59 Whether radio stations will long remain scarce resources is a question which Judge Bazelon has addressed in concurring opinions in both *Listeners Guild* and, as Chief Judge, in *WEFM.* The judge sees solving the scarcity problem as one way of eliminating the format diversity problem. 610 F.2d at 859 (Bazelon, J., concurring); 506 F.2d at 274 (Bazelon, C.J., concurring). *But see* Robinson, *The FCC and the First Amendment,* 52 MINN. L. REV. 67, 157-63 (1967), in which the author states that radio stations are already less scarce than daily newspapers, yet are subject to more regulation. Concluding that any barriers are economic, not technical, and that the situation is, therefore, similar to newspaper ownership, the author argues for less regulation of broadcasting.

One author's explanation for the difference in degree of regulation between broadcasters and newspaper owners is presented in Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 MICH. L. REV. 1, 36 (1976).

An indication of the advances in telecommunications technology which might make the judge's solution become a reality is presented in Baer, *Telecommunications Technology in the 1980's,* in COMMUNICATIONS FOR TOMORROW POLICY PERSPECTIVES FOR THE 1980's 61 (G. Robinson ed. 1978). The effect technology may have on program diversity is discussed in Lucas, *Telecommunication Technologies and Services,* in COMMUNICATIONS FOR TOMORROW POLICY PERSPECTIVES FOR THE 1980's 245, 256-59 (G. Robinson ed. 1978).

60 In Red Lion Broadcasting v. FCC, 395 U.S. 367, 388-89 (1969), the Supreme Court stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.
>
> . . . No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech."

In the same case, the court referred to a past decision in NBC v. United States, 319 U.S. 190 (1943), and concluded that this decision "unequivocally recogniz[ed] that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees." 395 U.S. at 395.

answer to this problem. The Commission's findings were tainted by the failure to release the study prior to reaching a decision. Thus, the court found that it did not have fair and impartial facts on which to base a decision.

Having spent considerable effort in showing the *WEFM* plan to be feasible, the court was unable to resolve the issue of which approach would better protect the public interest. The proper response to this difficulty should have been to remand the case for public comment on the study and thereby remove any taint.[61] In this way, the public would have had the opportunity to comment on which plan was preferable, and the court would have been presented with a study indicating which plan best served the public interest. The court, however, reaffirmed its own plan and concluded, without proof, that the *WEFM* plan did a better job of protecting the diversity interest than free competition.

B. *Procedural Analysis of the Court's Action*

Although the court's plan could conceivably provide better protection of the public interest than could the free market alone, the question remains as to whether the court overstepped judicial bounds by imposing their solution on the FCC. To answer this question, it must be determined whether the court's action was an interpretation of the Communications Act, or whether it was a policy determination to be made by the Commission under the power which Congress has delegated to them.

For nearly a decade, the Commission has concentrated its efforts on contesting which plan would better serve the public interest, a policy determination with which the Commission is familiar. In the Memorandum Opinion and Order,[62] which challenged *WEFM*, the FCC continued to address the problem as one of policy. Yet, if this decision is purely a policy determination, as the FCC has treated it, then the court has neither the expertise nor the constitutional authority to make the determination.[63]

The court, until *Listeners Guild,* had avoided making an affirmative declaration that their action was based on an interpretation of the Communications Act. Despite the inaction of the Commission in implementing *WEFM,* the court had preferred simply to demand that less than full compliance with their decision would not be accepted. In *Listeners Guild,* the court bluntly stated, without presenting their reasoning, that their action was based on an interpretation of the Communications Act.

The reason for the court's reluctance in taking this step becomes clear upon reviewing their handling of section 309 of the Communications Act.[64] Subsection (a) of this section contains the "public interest, convenience, and necessity" clause, which the court established as including an interest in for-

61 *See* 610 F.2d at 858 (Bazelon, J., concurring).
62 60 FCC2d 858 (1976).
63 *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 793-94 (1978); Citizens Comm. to Save WEFM v. FCC, 506 F.2d at 267-68; Marsh v. FCC, 436 F.2d 132, 136 (D.C. Cir. 1970).
64 47 U.S.C. § 309 (1976).

mat diversity.[65] This action was clearly justifiable as an interpretation of the legislative meaning behind the term "public interest."[66]

Having established the basic premise, the court then addressed section 309(d)(2) of the Act,[67] which sets forth the standard for the necessity of a hearing. This subsection requires a hearing when the Commission cannot determine if the assignment of the license would be in the public interest or if substantial and material questions of fact exist. The District of Columbia Circuit in applying the rule in format cases, however, has interpreted this as meaning that even when substantial and material questions of fact do exist, a hearing is unnecessary if no public interest issue arises.[68] This interpretation, although by no means clear from a literal reading of the statute, is in keeping with the apparent congressional intent of insuring that the public interest is protected. Thus, one thrust of the format decisions is that section 309(d)(2) requires a hearing only when it is not clear whether an assignment of the license would be in the public interest.

The Commission has accepted these definitions of the Communications Act and has attempted to formulate a policy in accordance with them. In

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65 *See* note 3 *supra.*

66 Diversity of programming, through diversity of ownership, had previously been recognized as an element of the public interest. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 394-95. The Supreme Court approvingly stated in this case that the Commission, in applying the public interest standard, has for 40 years been choosing licensees based, in part, on their program proposals. Moreover, the Court noted that the public interest standard was an instrument to effect the congressional desire to allay fears of monopolistic control of broadcasting, and, therefore, the Commission could involve itself with program formats. *Id.*

67 47 U.S.C. § 309(d)(2) (1976) provides:

> If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

68 *WEFM* was the first case in which the second situation, the public interest, was raised as cause for a hearing. 506 F.2d at 259. The District of Columbia Circuit noted that the two grounds for hearings are "intimately related" in format change cases. *Id.* Indeed, while the court has recognized the two separate routes to an evidentiary hearing, they have, in format cases, effectively changed the two separate routes into two requirements necessary before a hearing will be held. This can be best understood by observing that petitions to deny can be placed in one of three categories.

In the first category, the petition raises substantial and material questions of fact *which concern the public interest.* In these cases the court has ruled that an evidentiary hearing is required. *See* 610 F.2d at 843; 506 F.2d at 262.

In the second category, there is no public interest concern, but substantial and material questions of fact otherwise exist. While a literal reading of § 309(d)(2) indicates that a hearing is required in these instances, the court has held that no hearing is necessary. In *Listeners Guild,* the court stated that even when the record presents substantial fact issues, a hearing is unnecessary if the facts show that no public interest issue exists. 610 F.2d at 843.

In the third category, public interest issues exist but there are no substantial and material questions of fact. In these cases, it would appear logical that no hearing is necessary since there are no material questions of fact to be resolved. This position seems to have been adopted by the circuit court. *See* 610 F.2d at 843; 478 F.2d at 930-31. The best illustration of this category is Lakewood Broadcasting Serv., Inc. v. FCC, 478 F.2d 919 (1973), in which the court found a public interest issue existed but no hearing was necessary since no substantial and material questions of fact were present. *Id.* at 922-23. In Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (1974), however, the court hinted that less than substantial questions of fact may be sufficient to trigger the hearing requirement. A mere need for more information may be enough to necessitate a hearing. *Id.* at 259, 262.

Although the District of Columbia Circuit has not definitively stated when § 309 requires a hearing on format diversity, the rule which they appear to be utilizing was stated in a nonformat case. "*Only* where the *public interest* cannot be determined without a resolution of *disputed facts* has Congress dictated that the Commission must conduct a hearing. That is the clear meaning of section 309 of the Act." Marsh v. FCC, 436 F.2d at 136 (emphasis added). It seems, therefore, that the District of Columbia Circuit will require evidentiary hearings only when substantial and material questions concerning a public interest issue exist.

establishing this policy, the FCC must consider not only these interpretations, but also other established "public interest" considerations. Included among these other considerations is the interest in free competition among broadcasters.[69] Attempting to carry out their mandate, the FCC conducted a study which concluded that diversity could be protected through free competition. The Commission, therefore, determined that a hearing would never be necessary to protect the public interest in diversity. Both the interest in free competition and the diversity interest could be adequately protected by normal market forces. If other public interest issues were in doubt, however, the Commission would still hold a hearing.

The FCC had found, in effect, that the public interest is not adversely affected by format changes because, in these situations, the public interest is protected by other means. In keeping with the court's interpretation of section 309(d)(2),[70] this would indicate that the Communications Act does not require hearings on format diversity.[71] Moreover, the court admitted that the Commission's plan did an adequate job of protecting diversity.[72] Thus, the Commission's plan was neither arbitrary, capricious, nor unreasonable.[73] Since the FCC policy was within the judicial guidelines, the court should have been consistent with its previous interpretations of the Communications Act, and upheld the Commission's judgment. By overruling the FCC plan in favor of a plan which they feel does a better job of protecting the diversity interest, the court has usurped the policy-making role of the Commission.[74]

The court has chosen *Listeners Guild* to be the case in which they declare their action to be a statutory interpretation, thus precluding the FCC from further attacking the merits of *WEFM*. The clarity with which the court states that their action is law, however, does not alter the fact that it is beyond the court's authority to dictate the policy by which the FCC must achieve its ends.

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69 Metropolitan Television Co. v. FCC, 289 F.2d 874, 876 (D.C. Cir. 1961).

70 *See* note 67 *supra*. *See also* note 68 *supra*.

71 This judgment, that the public interest is already being served, is within the power of the Commission to make. "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served." FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946). *See also* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 863 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

72 610 F.2d at 851.

73 The Administrative Procedure Act allows a reviewing court to invalidate a regulation of an administrative agency if it is unreasonable or not based on a consideration of the relevant factors. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. at 790-92.

The Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

74 In FCC v. National Citizens Comm. for Broadcasting, 436 U.S. at 793, the Supreme Court stated that "it is now well established that this general rulemaking authority supplies a statutory basis for the Commission to enact regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable." The courts' inquiry into these rules should be searching and careful, but the court may not substitute its judgment for that of the agency. *Id.* at 803, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

See also Tannenwald & Auchenthaler, *supra* note 49, at 365, in which the authors review *Listeners Guild* before a decision was made by the circuit court, and conclude that the Commission's policy should be affirmed as it is of the type which Congress has entrusted to the agency.

V. Conclusion

The *WEFM* plan of limited regulation to promote the public interest in diversity may be a better proposal than the free market policy which the Commission advocates. This issue should have been decided by a fair, impartial study conducted by the FCC. The Commission had the opportunity to conduct this study, but tainted its findings by its obvious distaste for *WEFM*. The court's response to this impartiality was equally improper. If a fair decision was to have been reached in *Listeners Guild,* the case should have been remanded for a determination of which plan would better protect the public interest.

The more serious problem in *Listeners Guild* is that the court should never have been involved in making this decision. The District of Columbia Circuit Court should have exercised proper judicial restraint in its dealings with the FCC,[75] thereby avoiding this protracted dispute between the court and agency.[76]

Daniel T. Sherlock

75 The Supreme Court has cautioned the District of Columbia Circuit many times in regard to overstepping judicial bounds, most notably in Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 543-49 (1978). The District of Columbia Circuit, however, has been reluctant to loosen its grip on the agencies. "[The District of Columbia Circuit] has countermanded the Federal Communications Commission so often that even top FCC lawyers concede that the agency commonly surrenders its decision-making duties to the D.C. judges." NEWSWEEK, Dec. 17, 1979, at 99.

76 There has been much effort in Congress to reform the Communications Act. Some of the proposed bills would make moot the problems addressed in *Listeners Guild. See* H.R. 3333, 96th Cong., 1st Sess. 125 CONG. REC. H1853 (daily ed. Mar. 29, 1979) (abolishing the FCC and immediately deregulating radio broadcasting); S. 622, 96th Cong., 1st Sess., 125 CONG. REC. S2525 (daily ed. Mar. 12, 1979) (prohibiting the FCC from requiring a licensee to adhere to a particular format); S. 611, 96th Cong., 1st Sess., 125 CONG. REC. S2501 (daily ed. Mar. 12, 1979) (allowing licensees to hold licenses for indefinite periods).

The House Communications Subcommittee, however, due to a lack of consensus among its members, has abandoned present plans for a rewrite of the Communications Act. 48 U.S.L.W. 2067 (1979). The Carter administration, meanwhile, has announced that passage of regulatory reform legislation for the communications area, including improvement in the way frequencies are assigned, is a high priority. 48 U.S.L.W. 2498 (1980).

A critique of the various reform bills is presented in Note, *The Proposed Communications Act Rewrite: Potomac Deregulatory Fever v. The Public Interest,* 48 U. CIN. L. REV. 476 (1979).