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## Program Diversity in the Broadcast Media and the FCC: The Section 310(b) Labyrinth -- A Delicate Balance

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# PROGRAM DIVERSITY IN THE BROADCAST MEDIA AND THE FCC: THE SECTION 310(b) LABYRINTH—A DELICATE BALANCE

## INTRODUCTION

The Freedom of Speech and Press Clause of the federal Constitution<sup>1</sup> was designed to eliminate the threat of federal censorship.<sup>2</sup> Consequently, the primary goal of the First Amendment historically has been considered to be the maintenance of a "marketplace of ideas" from which the truth will emerge, if all facts and viewpoints are allowed to compete for acceptance.<sup>3</sup> In recent years a new avenue to achievement of this primary goal has opened up. It has been suggested that freedom of expression<sup>4</sup> should serve as a means by which to guarantee access to the mass media for minority groups

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<sup>1</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

<sup>2</sup> Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963).

<sup>3</sup> As eloquently stated by Judge Learned Hand, "[the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); *accord*, *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 272 (D.C. Cir. 1974) (Bazelon, J., concurring).

Two other major goals are inherent in the First Amendment. First, a citizen must be kept fully informed for democracy to function through an informed electorate. This interpretation of the First Amendment originated in the writing of Professor Alexander Meiklejohn. See A. MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960). In an earlier work Meiklejohn stated, "The welfare of the community requires that those who decide issues shall understand them." A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948). Meiklejohn's view of the First Amendment was accepted by the Warren Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 209, 221.

Second, the freedom of expression protected by the First Amendment allows the personal fulfillment necessary for a healthy society. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970), applied in part in *Banzhaf v. FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 655 (D.C. Cir. 1971), *rev'd sub nom.* *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See also Emerson, *supra* note 2, at 877. The Supreme Court has not given its imprimatur to Professor Emerson's interpretation of the First Amendment as it has to that of Professor Meiklejohn.

<sup>4</sup> Although the courts continue to use the traditional language of the First Amendment, in practical application freedom of speech and press has expanded into a broader concept of "freedom of expression," so that the hybrid media born of technological advancement may be logically embraced within its fundamental protection. *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867 (1972) (hereinafter cited as *Media and the First Amendment*). Due to the unique nature of electronic media, application of the traditional language, "speech" and "press," is strained; modern media are neither pure speech nor strictly press. *Id.* at 882-83.

within American society, in order to insure that the communications needs of minority audiences are met by broadcasters.<sup>5</sup> If fully implemented, the "right of access" theory would insure that minority interests in transmitting messages would be effectuated through the mass media, which is arguably the most effective way of reaching a mass audience.<sup>6</sup> Alternatively, if the members of the minority group had no message to convey, the right of access would satisfy their desires, as listeners, to receive a range of ideas and experiences by imposing a duty on broadcasters to structure their programming to accommodate the group's needs.<sup>7</sup>

The right of access is predicated upon the unique nature of the electronic media—its ability to quickly and conveniently convey a message—and the physical limitation placed on its availability by the existence of a finite number of broadcast frequencies.<sup>8</sup> Indeed, the physical characteristics of the electronic media have in the past provided the rationale for substantial government regulation of the broadcast industry,<sup>9</sup> to a degree far more extensive than is permissible with regard to the printed press.<sup>10</sup> As early as 1934, Congress recognized the unique difficulties of the broadcast industry. In that

<sup>5</sup> The most prominent scholar advancing the right of access is Jerome Barron. See Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31, 38 (1964). See also Barron, *The Attainment of Balanced Program Service in Television*, 52 U. VA. L. REV. 633 (1966).

<sup>6</sup> This aspect of the "right of access" theory is affirmative in nature and is an extension of free speech. See Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 498-502; Barron, *Access to the Press - A New First Amendment Right*, *supra* note 5, at 1656-66.

<sup>7</sup> This passive right of access, termed the "right to hear," is the reciprocal of freedom of speech. Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970). This "right to hear" is broader than the affirmative right of access because it insures that listeners will receive desired programming both from the broadcaster and from speakers who have obtained use of the media through the affirmative right of access. *Id.* at 868.

<sup>8</sup> See Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, *supra* note 5, at 38; Comment, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933, 935 (1972) (hereinafter cited as *The Public Interest in Balanced Programming Content*); Comment, 1970 L. & SOCIAL ORDER 424, 428 (1970).

<sup>9</sup> This "scarcity rationale" has been subjected to strong criticism in recent years. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 158-60 (1973) (Douglas, J., concurring); *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002, 1018-20 (7th Cir. 1968), *rev'd sub nom. Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

<sup>10</sup> For example, the power of a privately owned newspaper to print its own views on a variety of matters cannot be subjected to government regulation. In contrast, broadcasters are required to act as "public trustees," and in discharging this responsibility may be compelled to program other than what they might prefer to do as private entrepreneurs. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-18 (1973).

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year, through enactment of the Communications Act,<sup>11</sup> Congress lodged the power to grant and revise station licenses—without which broadcasters could not legally operate their stations<sup>12</sup>—in the Federal Communications Commission.<sup>13</sup> The Supreme Court has also demonstrated an acute awareness of these hybrid and unique characteristics of the media and, in upholding certain broadcasting regulations promulgated by the Commission, the Court has accepted the scarcity rationale as a legitimate reason for government regulation of broadcasters.<sup>14</sup>

In order to effectuate the right of access, affirmative regulation by the government through the FCC is required. It is an asserted economic fact of life that the marketplace does not operate to afford adequate access to minority segments of society.<sup>15</sup> The Supreme Court has twice been asked to consider the validity of FCC regulation and the concomitant question of the constitutionality of the controversial and conceptually problematic right of access. In *Red Lion Broadcasting Co. v. FCC*<sup>16</sup> and in *Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>17</sup> the Court suggested that an affirmative right of access to the electronic media would be consistent with the First Amendment,<sup>18</sup> but that no such right of access is constitutionally

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<sup>11</sup> 47 U.S.C. §§ 151-609 (1970).

<sup>12</sup> *Id.* § 301.

<sup>13</sup> *Id.* § 151.

<sup>14</sup> *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 210-13, 226 (1943). This case upheld the constitutionality of the FCC's chain broadcasting rules. 47 C.F.R. § 73.658 (1973). These rules had been promulgated to ensure diversity of ownership in the broadcast industry and thereby promote the desired "multitude of tongues." *National Broadcasting, supra* at 218.

To date, the Court has not abandoned the scarcity rationale and, in fact, has relied upon it to uphold the constitutionality of the Commission's personal attack and reply rules (47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1973)), which require a broadcaster to provide time to reply to any citizen who has been the subject of an aired attack on the station. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396-400 (1969).

<sup>15</sup> *Media and the First Amendment, supra* note 4, at 959-61.

<sup>16</sup> 395 U.S. 367 (1969).

<sup>17</sup> 412 U.S. 94 (1973).

<sup>18</sup> In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court had said, "It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that government was without power to protect that freedom." *Id.* at 19-20. In *Red Lion*, the Court upheld the personal attack and reply rules of the Commission which required the broadcaster to provide reply time to a person who had been maligned on a Pennsylvania radio station. 395 U.S. at 371. Broad dictum in that case lends support to the proposition that government action designed to multiply the voices presented to the public will not abridge the First Amendment: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

*Red Lion* has been heralded as the case which could make the right to access a legal reality. Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L. J. 89, 131-32; *The Public Interest in Balanced Programming Content, supra* note 8, at 936-37 (1972); Note, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 947, 1003 (1970); Comment, 1970 L. & SOCIAL ORDER 424, 432 (1970); Comment, 19 N.Y.L.F. 639, 642 (1974); Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 865 (1970).

guaranteed to the public.<sup>19</sup> The Court has been fearful of freezing "this necessarily dynamic process into a constitutional holding."<sup>20</sup> Thus, the ultimate limit on the FCC's power to implement a right of access has yet to be judicially determined.<sup>21</sup>

This comment will examine the statutory procedure by which radio and television licenses are transferred in order to decide whether, within the existing statutory scheme, a right of the public to have access to the electronic media can be advanced which is consonant with the evolving First Amendment guarantee of freedom of expression. The expressed interest of segments of the public to receive certain desired entertainment programs will be the particular focus of the comment.<sup>22</sup> Specifically, a succession of "format change" cases will be analyzed. These cases involve the loss of a particular program format in a broadcasting community, upon transfer of a broadcasting license. In responding to the actions brought by citizens, the Commission and the courts have focused on each of the various interests at stake. The public, as consumer of entertainment programming, has an interest in receiving a full spectrum and choice of entertainment programs. The broadcaster has an interest in being able to transfer his station in accordance with the statutory procedure established therefor.<sup>23</sup> The transferee has an interest in obtaining the station without infringement of his own rights of expression by a requirement that he take the station subject to continuation of a prior format. The government has not only its own specific interest in simplifying and ordering the transfer procedure, it also has its general in-

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<sup>19</sup> In *Columbia Broadcasting*, the Supreme Court refused to accept the Democratic National Committee's contention that licensees must sell political advertising time to anyone who seeks to purchase the time in order to facilitate the asserted First Amendment rights of the potential advertiser. 412 U.S. at 121-31. The Court recognized that should the advertiser's right to speak be enforced, the FCC would be required to "oversee far more of the day-to-day operations of broadcasters' conduct" and would necessarily and impermissibly be engaged in the very editing process that licensees now perform as to regular programming. *Id.* at 127. Such involvement would be fraught with the spectre of government censorship. *Id.* Yet the Court noted in dicta that the Congress or the FCC could conceivably fashion a limited right of access that would be practicable, desirable and consistent with the First Amendment. *Id.* at 131. See also Comment, *A Proposed Statutory Right to Respond to Environmental Advertisements: Access to the Airwaves After CBS v. Democratic National Committee*, 69 Nw. U.L. REV. 234 (1974).

<sup>20</sup> *Columbia Broadcasting*, 412 U.S. at 132.

<sup>21</sup> See Barron, *The Attainment of Balanced Program Service in Television*, *supra* note 5, at 652.

<sup>22</sup> The dissemination of entertainment programming is protected by the First Amendment to the same degree as is purely informational or political programming. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499-502 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948).

Purely commercial speech is without First Amendment protection. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Commercial speech is speech which does no more than propose a commercial transaction and which does not, in transmitting the commercial message, communicate non-commercial information. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 384-85 (1973).

<sup>23</sup> 47 U.S.C. § 310(b) (1970).

terest in protecting the rights of all of its citizens, an interest which draws it directly into the center of the conflicting public and private interests at stake.<sup>24</sup> The position developed in these cases will be contrasted with the stance of the Federal Communications Commission regarding the First Amendment issue of a public right to receive certain entertainment programs. Finally, an attempt will be made to present a method for striking the proper balance between the competing public and private First Amendment interests.<sup>25</sup>

### I. THE STATUTORY SCHEME

In 1934, Congress enacted the Communications Act<sup>26</sup> to remedy the chaotic situation which had prevailed due to broadcast signal interference among stations in the absence of federal regulation.<sup>27</sup> Under this Act, the airwaves, a valuable and scarce resource, remain in the public domain.<sup>28</sup> However, this vital resource is allocated to private entrepreneurs by the FCC in the course of licensing broadcasters to use the airwaves.<sup>29</sup> The Commission's mandate from Congress is to allocate the airwaves and regulate broadcasters in the "public convenience, interest or necessity."<sup>30</sup> Thus, only if the Commission makes a finding that the public interest will be met thereby can a license be issued to an applicant<sup>31</sup> or renewed by a renewal applicant.<sup>32</sup>

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<sup>24</sup> These five separate interests have been identified in *Media and the First Amendment*, *supra* note 4, at 887-88.

<sup>25</sup> Many commentators have expressed their views as to how competing First Amendment interests of the public, the broadcasters and the government should be balanced. For a helpful catalogue of law review references, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 2 n.5 (1973).

<sup>26</sup> 47 U.S.C. §§ 151-609 (1970).

<sup>27</sup> See W. JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION (1962), reprinted in *Hearings on Federal Communications Commission, Part I, Before Subcomm. No. 6 of House Select Comm. on Small Business*, 89th Cong., 2d Sess. A87 (1966); Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use*, 4 DUQUESNE L. REV. 1, 3-14 (1965).

<sup>28</sup> 47 U.S.C. §§ 301, 303, 307 (1970).

<sup>29</sup> 47 U.S.C. § 307 (1970). It is the purpose of the Act to maintain control over all channels of radio transmission, to provide for the use of such channels, "but not the ownership thereof," by means of licenses which shall not "create any right, beyond the terms, conditions, and periods of the license." *Id.* at § 301.

The denial of ownership rights in the licensee by Congress was upheld as constitutional in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). Although the licensee gets no unlimited and indefeasible property right in his license, the right granted by a license is greater than a mere privilege or gratuity. *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948). A license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. *Id.* The most valuable right granted to the licensee is the right to freely compete with other licensees for advertising revenues and for audience support. *FCC v. Sanders Bros. Radio Station*, *supra* at 474-76. Thus, the license gives the broadcaster standing to sue through interest in competition worthy of protection.

<sup>30</sup> 47 U.S.C. § 307(a) (1970).

<sup>31</sup> *Id.*

The public interest standard, which is not susceptible of precise or comprehensive definition,<sup>33</sup> lodges extraordinary power in the Commission. For example, when a new license is to be granted, each applicant for the license must first establish its legal, financial, and technical qualification to operate a station.<sup>34</sup> If two or more qualified applicants are vying for the license of a particular station, then the FCC conducts a comparative hearing to evaluate the relative merits of each applicant so that the Commission can assure itself that the public interest will be met by the grant of the license.<sup>35</sup> In such a comparative hearing, the applicants and "all other parties in interest," including representative members of the listening and viewing public, are allowed to participate and to introduce evidence on the factual and policy issues pending in the case in order to aid the Commission in effectively representing listener interests.<sup>36</sup> Proposed program formats of the competing applicants are major factors in determining the public interest in a comparative hearing.<sup>37</sup> In addition, the Commission's

<sup>32</sup> *Id.* § 307(d).

<sup>33</sup> The Supreme Court has not articulated a definition of the public interest standard. However, the Court has held that the standard is not too indefinite a standard for fair enforcement. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). Although it has been observed that the Act's "public interest" standard might not be able to survive the modern First Amendment notions of "chilling effect" or "breathing space," *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 281-82 (D.C. Cir. 1974) (concurring opinion) this argument has not yet been accepted by the courts. In fact, the courts have affirmed Commission authority to act under the "public interest" standard in sweeping terms. *Id.* at 282.

<sup>34</sup> 47 C.F.R. § 73.24 (1973).

<sup>35</sup> 47 U.S.C. § 309(e) (1970). See note 66 *infra* for a fuller discussion of the nature of a comparative hearing. A comparative hearing may also be held when the license is sought to be renewed at the end of each three year term. *Id.* at § 307(a). In practice, the process by which renewal applications are approved has been inadequate to assure that each individual station operates in the public interest. Renewals are approved by delegated authority and granted to all stations in one state at the same time. Very few applications—only those regarding which specific complaints are pending or involving a broadcaster who broadcasts an excessive number of commercials—are given more than routine approval. *The Public Interest in Balanced Programming Content*, *supra* note 8, at 953. As a result, a renewal application is rarely subjected to the crucible of a comparative hearing. FCC, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1, 24-25 (1968) (statement by Commissioners Cox and Johnson).

<sup>36</sup> 47 U.S.C. § 309(e) (1970). The Communications Act requires the FCC to designate an application for hearing if a substantial and material question of fact is presented or if the Commission is unable "for any reason" to find that the public interest would be served by granting the application. See *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000-006 (D.C. Cir. 1966).

<sup>37</sup> Note, 77 HARV. L. REV. 701, 702 (1964). The factors considered by the Commission in determining a license grant in a comparative proceeding are: (1) diversification of control of the media of mass communications, (2) full-time participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of frequency, (6) character of licensee, and (7) miscellaneous factors to be considered on an ad hoc basis. FCC, *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). These various factors do not have absolute values and one factor may be of greater or lesser importance in any given factual situation. *Id.* at 393.

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guideline for broadcasters, that certain types of formats be developed for airing,<sup>38</sup> and its additional requirement that a licensee ascertain the needs of his community before he formulates his programming,<sup>39</sup> are each designed to insure the public's right to receive a "market-place of ideas."<sup>40</sup>

Although the public interest standard leaves wide discretion in the Commission, it does not confer unlimited power.<sup>41</sup> Two important limitations are imposed on the Commission's power to regulate by the Communications Act. First, Congress has determined that the principle of free competition is to continue untrammelled in the broadcasting industry.<sup>42</sup> Thus, the Commission cannot act in the public interest and simultaneously encourage or condone anti-competitive policies.<sup>43</sup>

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<sup>38</sup> FCC, Network Programming Inquiry: Report and Statement of Policy, 25 Fed. Reg. 7291 (1960) (en banc). The major elements usually necessary to meet the public interest, needs and desires of a community have included: (1) opportunity for local expression, (2) development and use of local talent, (3) programs for children, (4) religious programming, (5) educational programming, (6) public affairs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports, (13) service to minority groups and (14) entertainment programming. *Id.* at 7295.

The Commission denies any intent on its part to qualitatively evaluate program content. *Id.* at 7293. However, the suggestion has been advanced by at least one commentator that qualitative standards be adopted by the Commission to regulate program content. Comment, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, *supra* note 18, at 1002-03.

From one point of view these quantitative standards are an insistence on an adherence to balanced programming. *The Public Interest In Balanced Programming Content*, *supra* note 8, at 940-41; Note, 77 HARV. L. REV. 701, 704 (1964). Yet the program types enumerated as usually necessary to service the public, far from serving the needs of the Commission, reflect the basic programming interests of the public as observed by licensees before the adoption of program types. Cox, *The FCC, the Constitution, and Religious Broadcast Programming*, 34 GEO. WASH. L. REV. 196, 199-201 (1965).

<sup>39</sup> FCC, Network Programming Inquiry: Report and Statement of Policy, 25 Fed. Reg. 7291, 7295 (1960) (en banc). See also *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962); *KSAN, Inc.*, 30 F.C.C.2d 907 (1971); *City of Camden*, 18 F.C.C.2d 412 (1969). Yet the Commission has consistently refused to embrace entertainment programming within the needs of the community to be ascertained by the licensee. FCC, *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 656 (1971).

<sup>40</sup> Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 280 (D.C. Cir. 1974) (concurring opinion). *But see Media and the First Amendment*, *supra* note 4, at 992.

<sup>41</sup> *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 219 (D.C. Cir. 1939).

<sup>42</sup> 47 U.S.C. §§ 313, 314 (1970). Under the Communications Act, common carriers are granted monopoly status because competition in the areas of telephone, telegraph and transoceanic cable services would be wasteful. See Barron, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 694 (1975). Yet Congress has declared that station licensees are not common carriers. 47 U.S.C. § 153(h) (1970). By applying the antitrust laws to broadcasting, Congress has also determined that free competition was to be promoted in the broadcast industry and that no monopoly interest was being created in any station licensee.

<sup>43</sup> For example, the Commission's policy with respect to maintaining diversity of ownership of stations is directed to ensuring perpetuation of healthy competition in the



Second, section 326 of the Act prohibits any form of censorship or interference with free speech by the FCC.<sup>44</sup> This section was originally designed to meet the possibility that government might directly infringe on a broadcaster's freedom of expression by compelling or censoring certain political broadcasting.<sup>45</sup> Although section 326 was not intended to address the Commission's potential for regulating the specific content of non-political programs, the section does exist as a buttress to the First Amendment against this kind of abusive government interference.<sup>46</sup>

The Act also establishes a separate procedure governing transfers of station licenses.<sup>47</sup> A transfer application is submitted to the Commission whenever a licensed broadcaster wishes to sell or give his interest in the license to another who will continue program service on the channel assigned to the licensee. As with grants or renewals, the Commission is to approve transfers only if it finds that the "public convenience, interest or necessity will be served thereby."<sup>48</sup>

Prior to 1952, the Commission effectuated the public interest by considering proposed transfers in the context of a comparative hearing.<sup>49</sup> In these comparative hearings, persons other than the

market place. See *Joseph v. FCC*, 404 F.2d 207, 212 (D.C. Cir. 1968).

<sup>44</sup> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, 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.  
47 U.S.C. § 326 (1970).

<sup>45</sup> See 67 Cong. Rec. 12,356 (1926) (remarks of Senator Dill).

<sup>46</sup> Exemplary of the inherent dangers in government regulation of program content are those enunciated by Justice Douglas in his concurring opinion in *Columbia Broadcasting*, 412 U.S. at 148-70. Direct review by the Commission of program content would make broadcasters less willing to experiment with such content out of fear of jeopardizing their licenses. *Id.* at 164. Also, the licensee would be made "an easy victim of political pressures." *Id.* Deception in government might go unearched if the government could regulate program content. *Id.* at 165. Indirectly, the liberty of the citizenry would be undermined. *Id.* at 167.

<sup>47</sup> 47 U.S.C. § 310(b) (1970) provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(Emphasis supplied).

<sup>48</sup> See unemphasized portion at note 47 *supra*.

<sup>49</sup> See Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 151 (1953) (hereinafter cited as *Communications Act Amendments*).

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licensee's proposed transferee could bid on and be awarded the license for the station proposed to be transferred.<sup>50</sup> In 1952 the scope of the Commission's evaluation of the public interest was severely curtailed by an amendment to section 310(b) of the Act which turned the transfer proceeding from a comparative to a non-comparative one. The distinguishing factor between the two procedures is that in such non-comparative proceedings, third parties cannot be considered by the Commission.<sup>51</sup> In commenting on the amendment before its adoption by Congress, the FCC protested the proposed change on the ground that it would permit a person to obtain a valuable broadcast license and then auction it off to the highest bidder.<sup>52</sup> In the words of then FCC Chairman Coy, the amendment would make "a mockery of comparative proceedings in which that person has prevailed, upon findings of superior qualifications, over competing applicants for facilities in a given community."<sup>53</sup> The Commission feared that it would be unable to fully effectuate its policy that the public receive a multitude of voices if it were limited to an evaluation of the programming proposal of the proposed transferee in a non-comparative proceeding.<sup>54</sup> However, in debate on the pro-

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<sup>50</sup> The former subsection (b) read:

The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest and shall give its consent in writing.

Act of June 19, 1934, ch. 652, Title III, Part 1, § 310, 48 Stat. 1086, as amended 47 U.S.C. § 310(b) (1970). The statute did not directly authorize a comparative hearing, but neither did it foreclose the possibility of one. No legislative history on the enactment of the former section 310(b) explains why Congress initially allowed the potential for a comparative proceeding in a transfer situation. However, it appears that Congress did not recognize that it had incorporated the possibility of such a hearing until the Commission began operating the transfer as a comparative proceeding in the late thirties. *Communications Act Amendments*, *supra* note 49, at 151.

<sup>51</sup> 47 U.S.C. § 310(b) (1970), formerly Act of July 16, 1952, ch. 879, § 8, 66 Stat. 716. See emphasized portion of statute in note 47 *supra*.

<sup>52</sup> Statement by Hon. Wayne Coy, FCC, *Hearings before the House Comm. on Interstate and Foreign Commerce on S. 658 (Amending Communications Act of 1934)*, 82d Cong., 1st Sess. 73 (1951).

<sup>53</sup> *Id.* The Commission objected to the amendment on the grounds that by limiting its consideration of a proposed transfer solely to the qualifications of the transferee, the amendment would deprive the Commission of its control over trafficking in radio licenses. *Id.* Trafficking is the act of obtaining licenses for sale rather than service and is condemned because "a government license granted in reliance on an applicant's stated intention to operate should not, instead, be bartered away for profit." *Crowder v. FCC*, 399 F.2d 569, 571 (D.C. Cir. 1968), quoting WMIE-TV, 11 R.R. 1091, 1098 (1955). Subsequent to 1952, the Commission enacted regulations directly addressed to the problem of trafficking, 47 C.F.R. § 1.597 (1974).

<sup>54</sup> Statement by Hon. Wayne Coy, then Chairman, FCC *Hearings before the House Comm. on Interstate and Foreign Commerce on S. 658 (Amending Communications Act of 1934)*, 82d Cong., 1st Sess. 73, 74 (1951).

posed amendment, certain Congressmen argued that employment by the Commission of the comparative procedure constituted "an unwise invasion by a Government agency into private business practice."<sup>55</sup> As a result, under the amended section 310(b), the FCC must now limit its consideration of the public interest as though the proposed transferee were the sole person interested in securing the license.

## II. THE "LOSS OF FORMAT" CASES

The 1952 amendment of section 310(b) into a non-comparative hearing procedure and the 1966 landmark decision of *Office of Communication of United Church of Christ v. FCC*,<sup>56</sup> in which representative members of the listening public were recognized to have standing to challenge orders of the FCC and to participate in a comparative hearing conducted by the Commission,<sup>57</sup> have combined to produce a flurry of litigation in which the right of access has been asserted and developed. In particular, the Court of Appeals for the District of Columbia Circuit has faced a series of challenges by citizens groups to transfers under section 310(b) which would cause the loss of a unique or distinctive format.<sup>58</sup> These challenges reflect a demand for diversity in broadcast entertainment formats. In response to these listeners' actions, the court has accepted the proposition that there is a public interest in a diversity of broadcast entertainment formats.<sup>59</sup> Each significant section 310(b) case decided by the District of Columbia Circuit in the last seven years will be reviewed to determine the import and effect of current judicial thought in this complex area where statutory interpretation, administrative responsibilities and constitutionally protected interests coalesce.

In *Joseph v. FCC*<sup>60</sup> the Court of Appeals for the District of Columbia was presented with a challenge to an order of the FCC issued under section 310(b) approving the transfer of WFMT(FM), a fine arts radio station in Chicago. The issue in *Joseph*, raised by fifteen individual listeners and a Citizens' Committee to Save WFMT (FM) (Chicago Citizens' Committee), was whether the Commission could approve the assignment without holding a comparative hearing on the question of diversity of control of communication power which was raised by the proposed transfer.<sup>61</sup> The court held that where the

<sup>55</sup>SEN. REP. NO. 44, 82d Cong., 1st Sess. 8 (1951).

<sup>56</sup>359 F.2d 994 (D.C. Cir. 1966).

<sup>57</sup>*Id.* at 1005.

<sup>58</sup>The Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals from Commission licensing decisions. 47 U.S.C. § 402(b) (1970).

<sup>59</sup>See text accompanying note 74 *infra*.

<sup>60</sup>404 F.2d 207 (D.C. Cir. 1968).

<sup>61</sup>Despite the fact that the Tribune Company, a large Chicago newspaper, operated through subsidiaries an AM radio station and a television station in Chicago, published two widely circulated Chicago newspapers, and had other substantial broadcasting interests outside of Chicago, the FCC approved the assignment without the benefit of an evidentiary hearing as to whether the transfer would serve the "public interest,

Commission does not state the facts upon which it relies for its finding that the public interest will be vindicated by the proposed transfer, such a finding cannot be inferred without an evidentiary hearing.<sup>62</sup> The court reasoned that the Commission is required by the transfer proceeding established in section 310(b) to find that the transfer is in "the public interest, convenience and necessity."<sup>63</sup> Since the public has an interest in the Commission's providing the "widest possible dissemination of information from diverse and antagonistic sources",<sup>64</sup> the FCC must consider the diminution of sources and the effect thereof on the welfare of the public.<sup>65</sup> Under section 309(e)—the section which provides for a comparative hearing, if a "substantial and material question of fact is presented" or if the FCC is for any reason unable to make the prescribed finding—"it shall formally designate the application for a hearing."<sup>66</sup> Thus, *Joseph* established that the public interest finding imposed on the Commission by section 310(b) necessitates a comparative evidentiary hearing—in which representative members of the public would have a voice—where the Commission cannot support by its own findings its decision to approve the transfer of a station.

In 1970 the court decided *Citizens Committee to Preserve the Voice of the Arts in Atlanta on WGKA-AM and FM v. FCC*<sup>67</sup> (*Atlanta*). A voluntary association of citizens (Atlanta Citizens' Committee) challenged FCC approval<sup>68</sup> of the transfer of WGKA in Atlanta, that city's only

convenience and necessity." FCC, Assignment of License and Transfer of Control, 12 F.C.C.2d 1023 (1968). The Commission decided the case directly contrary to its own proposed rule that the grant of a license to such a highly concentrated applicant would be, on its face, against public interest. 404 F.2d at 212. The diversity of ownership rules promulgated by the Commission are found in 47 C.F.R. §§ 73.240(a), 73.35(a), 73.636(a) (1973).

<sup>62</sup> 404 F.2d at 211-12. The court of appeals remanded the case for an evidentiary hearing by the FCC on the question of whether an assignment to such a concentrated transferee would be in the public interest. *Id.* The court noted that where Congress requires a finding as to the public interest, as it does in section 310(b), its instruction is not to be ignored or given only lip service. *Id.* at 211.

<sup>63</sup> See unemphasized portion at note 47 *supra*. The full import of *Joseph* did not become clear until two years later when the Court of Appeals for the District of Columbia Circuit decided *Citizens Committee to Preserve the Voice of the Arts in Atlanta on WGKA-AM and FM v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

<sup>64</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>65</sup> *Joseph*, 404 F.2d at 211.

<sup>66</sup> 47 U.S.C. § 309(e) (1970). The evidentiary hearing resembles a civil proceeding among litigants. The parties use such civil procedures as depositions, exchange of exhibits, and prehearing conferences. 47 U.S.C. § 409 (1970); 47 C.F.R. §§ 1.201-1.363 (1974). Without an evidentiary hearing, the Commission is acting similar to a court which disposes of a case on a directed verdict or a summary judgment. In an evidentiary hearing, however, the administrative action is more akin to a judicial case which is being tried by the trier of fact. For a more complete discussion of the formal elements of comparative hearings, see Schilz, *New Techniques for Expediting Hearings in FCC Proceedings*, 55 COLUM. L. REV. 830 (1955); cf. *Communications Act Amendments*, *supra* note 49, at 145-51.

<sup>67</sup> 436 F.2d 263 (D.C. Cir. 1970).

<sup>68</sup> *Glenkaren Associates, Inc.*, 19 F.C.C.2d 13 (1969).

classical music station, to a transferee who intended to offer a format comprised of a "blend of popular favorites, Broadway hits, musical standards, and light classics."<sup>69</sup> The issue in *Atlanta* was whether the Commission had to hold an evidentiary hearing before approving a transfer of the station which would result in the loss of a unique program format.<sup>70</sup>

In holding that an evidentiary hearing was required, the District of Columbia Circuit found that substantial and material questions of fact were raised by the Atlanta Citizens' Committee with respect to three matters: the financial necessity for the format change,<sup>71</sup> the accuracy of interviews with prominent citizens pertaining to the retention of the classical music format<sup>72</sup> and the extent to which daytime listeners in Atlanta were provided with classical music from a non-Atlanta source.<sup>73</sup> With respect to the first factual issue requiring a hearing, the court stated that the public interest requires "all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible."<sup>74</sup> If, on remand, the classical format was found to be "economically feasible" the Committee might prevail on this point in preventing the transfer unless it could be shown that adoption of another format would produce greater profits for the transferee.<sup>75</sup> In regard to the second factual issue, the Commission would have to determine whether there was any misrepresentation involved in the transferee's preference survey of community leaders.<sup>76</sup> Finally, in dealing with the third factual issue, the FCC would have to determine the scope of the coverage provided Atlanta citizens by a nearby station, which also broadcast classical music.<sup>77</sup>

The court in *Atlanta* also directed the Commission's attention to four factors which the Commission would have to consider in format

<sup>69</sup> 436 F.2d at 265. The Committee laid great stress on the fact that out of all of Atlanta's many AM and FM stations, only WGKA played classical music. *Id.* at 266. Also, a statistical survey of "program preferences" voluntarily undertaken by the transferee showed that 16% of the surveyed citizens of Atlanta were devoted to the classical format. *Id.* at 267.

<sup>70</sup> *Id.* at 265.

<sup>71</sup> The Commission had assumed that the transfer was necessary because the financial reports of the station showed that expenditures exceeded revenues by a net figure of \$20,635 for the six years preceding the proposed transfer. *Id.* at 269. The Committee maintained that these figures reflected a substantial capital expenditure in enlarging the physical plant of the station and was not a proper index of the operating profitability of the classical format. *Id.*

<sup>72</sup> *Id.* at 270-71.

<sup>73</sup> *Id.* at 271.

<sup>74</sup> *Id.* at 269.

<sup>75</sup> *Id.* at 270. Greater profitability in and of itself would not be dispositive of this issue. *Id.*

<sup>76</sup> *Id.* at 271.

<sup>77</sup> *Id.* The intimation was clear that if this station provided substantially the same service to Atlanta that WGKA provided, the Committee would fail in its challenge to the format change. *Id.*

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changes arising from transfer applications where a unique program format would be lost: (1) the length of time which the format has been broadcast on the station; (2) the availability of substantially similar programming in the community; (3) the percentage of the public preferring the endangered format; and (4) the economic feasibility of continuing the desired format.<sup>78</sup> However, *Atlanta* left several important questions unresolved. Particularly elusive was the court's "economic feasibility" standard. What is the minimum level of "profitability" which determines whether a license may be transferred? Also clouded was the future of ascertainment surveys. Would a preference study of community tastes by a transferee be required or was such a study merely evidence which a potential transferee could voluntarily offer? Finally, was the *Atlanta* decision a radical departure from the Commission policy<sup>79</sup> that entertainment programming should be left to the business judgment of the licensees? Or, had the decision only required remand because the Commission had not reviewed the record closely enough?

No guidelines were provided on these questions and none were forthcoming from the court until 1973.<sup>80</sup> In that year the District of Columbia Circuit decided two cases, *Lakewood Broadcasting Service, Inc. v. FCC*<sup>81</sup> and *Citizens Committee to Keep Progressive Rock v. FCC*<sup>82</sup>, which narrowed and clarified the impact of the *Atlanta* decision. The issue in each case again was whether the FCC was required to hold evidentiary hearings before approving a proposed transfer which would entail the loss of a unique program format.<sup>83</sup>

In *Lakewood*, the transfer of KBTR(AM), which would be changed from an "all news" format to a "country and western music"

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<sup>78</sup> *Id.* at 269-72. Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933, 952 (1972).

<sup>79</sup> Palmetto Broadcasting Co. (WDKD), 33 F.C.C. 250, 257 (1962), *reconsideration denied*, 34 F.C.C. 101 (1963), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

<sup>80</sup> One case decided in the intervening years added little by way of defining *Atlanta*. Sentinel Heights FM Broadcasters, Inc. (WONO-FM), 29 F.C.C.2d 83 (1971), entailed the transfer of a classical music station which had broadcast that format for seven years prior to the proposed transfer. The transferee proposed to reduce classical programming from twenty-four hours a day to six hours a day. *Id.* The case was substantially similar to *Atlanta*, and the court of appeals, in a per curiam order, remanded the case to the Commission for an evidentiary hearing citing *Atlanta*. *Citizens Comm. To Preserve Present Programming of WONO (FM) v. FCC*, No. 71-1336 (D.C. Cir., May 13, 1971).

<sup>81</sup> 478 F.2d 919 (D.C. Cir. 1973).

<sup>82</sup> 478 F.2d 926 (D.C. Cir. 1973).

<sup>83</sup> *Lakewood*, 478 F.2d at 921, *Progressive Rock*, 478 F.2d at 927. In each case, the court recognized that its scope of review was limited to determining whether the Commission's determination was arbitrary, capricious or unreasonable. *Lakewood*, 478 F.2d at 925; *Progressive Rock*, 478 F.2d at 934. In the area of the Commission's specialty, the court defers to the expertise and experience of the agency. *Progressive Rock*, 478 F.2d at 934 n.25.

format was challenged by a would-be competitor in the country and western market and a Denver citizens' committee.<sup>84</sup> In holding that no material and substantial questions of fact existed that would require an FCC evidentiary hearing,<sup>85</sup> the court rejected the challengers' attempt to bring their case within the decision in *Atlanta*.<sup>86</sup> The challengers argued that *Atlanta* stood for the proposition that no Commission determination of public interest could be made without a survey of community preferences. This rule was violated in the present case, the challengers contended, because the ascertainment survey of community problems conducted by the transferee was defective in that it did not also elicit programming preferences.<sup>87</sup> In rejecting this argument, the court distinguished *Atlanta*. There, the preference survey was material only because it included a misrepresentation which was intended to influence the FCC's decision on the transfer application.<sup>88</sup> Since the transferee is not required to submit program preferences, their omission in *Lakewood* was not a "material issue of fact" requiring an evidentiary hearing.<sup>89</sup> However, the court did hint that the Commission might reexamine its policy regarding the ascertainment requirement and require preference surveys.<sup>90</sup>

<sup>84</sup> 478 F.2d at 922.

<sup>85</sup> The challengers had claimed that two material questions of fact had to be resolved—those concerning the alternative sources of "all news" formats and the financial viability of such a format. *Id.* at 924. The Commission had found that twenty other Denver stations provided a total of 291 hours and 39 minutes of radio news per week. *Id.* In addition, two Denver stations had become "all news" stations in prime listening hours since the transfer had been approved. *Id.* n.10. On this record and with a "pains-takingly thorough decision" of the Commission on the petition to deny before it, the court concluded that substantial evidence supported the Commission's conclusion that the public interest would be served by the transfer. *Id.* at 922. Therefore, the court affirmed the FCC order. *Id.* at 925.

<sup>86</sup> *Id.* at 923-24.

<sup>87</sup> *Id.* at 924 n.12.

<sup>88</sup> *Id.* at 923-24.

<sup>89</sup> *Id.* The ascertainment procedure is meant to determine the problems of a community, e.g., drug abuse, pollution, race relations, crime, as opposed to the programming preferences of interviewees. *Id.* at 923. Charles A. Haskell, 36 F.C.C.2d 78, 84-85 (1972).

<sup>90</sup> While we have recognized that format changes may impair the public's paramount interest in diversified programming, we have never attempted to set out specific guidelines for achieving the marketplace ideal. The first, tentative steps into this complex area of regulation must be taken by the Commission. The Commission, and perhaps rightly so, appears loathe to lightly undertake a task which smacks of establishing it as the "national arbiter of taste." The law in this area, following the lead of [*Atlanta*], is in a state of transition. Whatever standards are set must remain flexible and open to new information and new understanding.

So far we have only pointed out on a case by case basis those circumstances in which the Commission must *take a closer look* at the result achieved by the give and take of the market environment and the business judgment of the licensee—and must test this result against the public interest in accommodating "all major aspects of contemporary culture." We do not here intimate any views on how the balance of competing public,

In *Progressive Rock*, decided the same day as the *Lakewood* decision, the court further elaborated upon its decision in *Atlanta* and articulated guidelines for the Commission in determining whether a format change would be detrimental to the public interest. The proposed transfer in *Progressive Rock* was of radio station WGLN (FM) in Sylvania, Ohio, which operated a "progressive rock" format at the time of the FCC approval order, but had operated unprofitably under two previous formats.<sup>91</sup> The transferee proposed "middle of the road music", including "some contemporary, folk and jazz, similar to what [WGLN was then] programming."<sup>92</sup> After the Commission granted the assignment in February, 1972, the Rock Citizens' Committee unsuccessfully sought reconsideration by the FCC and a permanent denial of the proposed transfer in order to preserve the progressive rock format. An appeal was then brought in the circuit court.<sup>93</sup>

In reviewing the FCC's action,<sup>94</sup> the court in *Progressive Rock* found that the Rock Citizens' Committee had raised substantial and material issues of fact regarding two of the three issues cited in *Atlanta*: (1) the economic feasibility of the progressive rock format and (2) the availability of alternative listening sources.<sup>95</sup> With regard to the economic feasibility issue, the court stated that the financial losses of WGLN under the prior formats were only of minimal relevance: "the question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the format is so economically unfeasible that an assignment encompassing a format change should be granted."<sup>96</sup> In discussing the second issue, the Commission argued in support of its refusal to insure the maintenance of the specialized format that "the fewer the radio sources, the more the tastes of the majority must be recognized . . ."<sup>97</sup> However, in considering this "greatest good" the court stated that the Commission must also consider "the multitude of non-Sylvania stations serving the Sylvania residents."<sup>98</sup>

and public and private, interests should be struck.

478 F.2d at 925 n.14.

<sup>91</sup> *Id.* at 928.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972).

<sup>95</sup> 478 F.2d at 931-92.

<sup>96</sup> *Id.* at 931.

<sup>97</sup> *Id.* at 933. The Commission attempted to support its argument by reference to the fact that WGLN was the only station licensed in Sylvania, Ohio, and that the court had stated in *Atlanta* that "if there were only one radio channel available to Atlanta" the result might be different. 436 F.2d at 269. As the court observed in *Progressive Rock*: "We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations." 478 F.2d at 930.

<sup>98</sup> Sylvania, a suburb of Toledo, Ohio, was serviced by a multitude of Toledo stations. 478 F.2d at 933. At oral argument of the case, mention was made of a new "progressive rock" station servicing the Toledo metropolitan area. This fact would have



*Lakewood* and *Progressive Rock* provide several of the answers which had been missing in *Atlanta*. First, the "financial viability" standard was clarified. A factor in determining the economic feasibility of the format would be the length of time that the format had been on the air.<sup>99</sup> Second, the availability of alternative sources criterion was more particularly defined—the decision must be based on realistic, and not technical, alternatives.<sup>100</sup> Finally, the court made clear that if no objection were raised to a format change by a significant amount of public protest, the Commission could properly approve the contemplated transfer on the assumption that the proposed format is acceptable to the community.<sup>101</sup>

The two cases appear to negate *Atlanta's* potential for serving as the basis of a meaningful court-created First Amendment right of access in the public to hear certain forms of entertainment. The court refused to thrust upon the Commission the complex task of determining the entertainment preferences of a community, choosing instead to merely intimate that the FCC should reconsider how the balance should be struck between the competing public and private interests at stake. It is thus apparent that under these decisions, the Commission, and not the court, would have to initiate any policy or procedure to realize the right of access by the public to a specialized entertainment format. Without such agency initiation, in the absence of the abandonment of a unique format, the choice of program format would be left to the discretion of the licensee.<sup>102</sup>

This restrictive approach was abandoned, however, in 1974, in *Citizens Committee to Save WEFM v. FCC*<sup>103</sup> (*WEFM*), where the District of Columbia Circuit, in an en banc decision, expansively applied *Atlanta* and broadened its potential impact.<sup>104</sup> *WEFM*, an FM radio station in Chicago, had continuously broadcast classical music since the original FCC license grant was made to Zenith Radio Corporation in 1940.<sup>105</sup> However, since 1966, when Zenith had changed the operation of *WEFM* from a non-commercial to a commercial basis, advertising revenue had failed to cover the costs of operating the station.<sup>106</sup> As a result, in 1972, Zenith contracted to sell the station to GCC

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to be taken into consideration by the FCC in the evidentiary hearing that the court ordered. *Id.* at 932 n.16.

<sup>99</sup> *Id.* at 933 n.22. See *WCAB, Inc.*, 27 F.C.C.2d 743, 746 n.7 (1971).

<sup>100</sup> 478 F.2d at 932-33.

<sup>101</sup> *Id.* at 933 n.22 & 934.

<sup>102</sup> See text accompanying notes 130-32 *infra*.

<sup>103</sup> 506 F.2d 246 (D.C. Cir. 1974).

<sup>104</sup> Prior to the court of appeals decision in *WEFM*, only ex-Commissioner Johnson proposed an expansion of the *Atlanta* decision to cover a situation where the effect of the proposed format change would lessen the diversity of radio service though not necessarily totally eliminate a particular format. *Zenith Radio Corp.*, 38 F.C.C.2d 838, 848 (1972) (dissenting opinion); *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969, 973 (1972) (dissenting opinion).

<sup>105</sup> 506 F.2d at 253.

<sup>106</sup> *Id.* at 254.

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Communications of Chicago, Inc. who proposed a format of "contemporary" music which, in reality, would be rock music.<sup>107</sup> A group of Chicago area residents organized to contest the assignment and the attendant format change and filed a petition with the Commission to deny the transfer.<sup>108</sup> The Commission refused to grant the petition, however, and in doing so determined that no hearing was required on the public interest issue since two classical stations, WNIB(FM) and WFMT(FM),<sup>109</sup> continued to serve the Chicago area and since WEFM had previously been suffering continuous operating losses under its old format.<sup>110</sup> After a petition for reconsideration was denied by the Commission,<sup>111</sup> the Committee appealed to the court of appeals.<sup>112</sup> The original panel of three circuit judges voted to sustain the Commission's action.<sup>113</sup> In a rehearing en banc, however, the court set aside the FCC order and remanded the case for a hearing on the substantial and material issues of fact which the court found had been raised.<sup>114</sup>

The three factual issues in dispute in the prior cases again coalesce in the *WEFM* case. With respect to the issue of "financial viability", the court summarized the teaching of its prior section 310(b) decisions, stating that "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."<sup>115</sup> Furthermore, the court stated that it would be fundamentally unfair to put the burden of disproving the causal relationship between the non-viability of the format and the financial losses of the transferor on the citizens because there is no procedural means for them to gain access to the confidential financial reports of

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<sup>107</sup> *Id.* at 254 n.4.

<sup>108</sup> *Id.* at 253. It is unclear on the record how the Committee discovered the proposed format change. Although 47 C.F.R. § 1.580(d) (1974) requires that a proposed assignment be broadcast over the station and published in one of the daily newspapers in the community in which the station is located, no announcement need be made that the proposed assignment involves a change in format. 47 C.F.R. § 1.580(f) (1974). The Committee had also challenged the sufficiency of the Commission's notice requirements regarding a proposed format change. The court, deciding the case on other grounds, did not reach this issue. However, the court intimated that the Commission would do well to reevaluate its present notice requirements. *Id.* at 268 n.35.

<sup>109</sup> WFMT was the station involved in *Joseph v. FCC*, 404 F.2d 207 (1968). See text at note 60 *supra*.

<sup>110</sup> *Zenith Radio Corp.*, 38 F.C.C.2d 838, 848 (1972).

<sup>111</sup> *Zenith Radio Corp.*, 40 F.C.C.2d 223 (1973).

<sup>112</sup> 506 F.2d at 249.

<sup>113</sup> *Id.*

<sup>114</sup> In an order issued recently, the FCC designated for hearing the issues specified in the court's decision. *Zenith Radio Corp.*, 75 F.C.C. No. 971 (Aug. 22, 1975). The evidentiary hearing took place in Washington, D.C. on December 2, 1975. *Zenith Radio Corp.*, 75 F.C.C. No. 1630 (Sept. 25, 1975).

<sup>115</sup> *Id.* at 262.

the transferor on file with the Commission.<sup>116</sup> The issue would thus have to be determined in a hearing with the burden of proof on the transferor.<sup>117</sup>

The recurring issue regarding the availability of alternative sources for the endangered format provided the court with an opportunity to solidify an aspect of *Progressive Rock* into a holding.<sup>118</sup> The court held that "the public interest implicated in a format change is the interest of the public in the service area, not just the city of license."<sup>119</sup> Thus, unless the Commission has considered that the alternative station reaches less than a substantial portion of the area, and reasonably determined that the overall public interest is, on balance, better served by the transfer,<sup>120</sup> it has not discharged its obligation to act in the public interest.<sup>121</sup>

Finally, the *WEFM* court addressed the problematic issue raised

<sup>116</sup> Annual, monthly, and related financial reports are required to be filed with the Commission by 47 C.F.R. §§ 1.611, 1.785, 1.788 (1974). Congress has provided that such financial data is privileged and confidential and is therefore exempted from compulsory disclosure. 5 U.S.C. § 552(b)(4) (1970); 18 U.S.C. § 1905 (1970). Discretion for the disclosure of financial information has been reposed with the Commission and the Commission has provided that financial information shall be made available upon request only under certain limited circumstances. 47 C.F.R. § 0.461 (1974). The seeker of the data must show that the information sought "is a necessary link in a chain of evidence that will resolve the public-interest issue." *Sioux Empire Broadcasting Co.*, 10 F.C.C.2d 132, 134 (1967). Such a showing is reasonable in order to continue to protect the confidentiality of the reports. However, it is apparent that it would be unusual for a citizens' group to be able to make the "persuasive showing" required by the Commission. *KSAN, Inc.*, 30 F.C.C.2d 907, 911-12 (1971); *KOWE, Inc.*, 24 F.C.C.2d 305, 306 (1970). In practice, the FCC has adhered to very strict standards and denied requests that were legitimate and would not have undermined the congressional intent to maintain the confidentiality in the discretion of the administrative agency. See *KSAN, Inc.*, *supra*. The *WEFM* court has diminished the harshness of the FCC's position by switching the burden of proof on the substantive issue to the party whose financial reports are privileged. 506 F.2d at 266.

<sup>117</sup> 506 F.2d at 266.

<sup>118</sup> See text at notes 97-98 *supra*.

<sup>119</sup> 506 F.2d at 263.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 263. On the record presented in *WEFM*, the court found that neither WNIB nor WFMT were necessarily adequate or reasonable substitutes for the endangered format. *Id.* at 255. WNIB, the Committee alleged, reached at most only 15% of the area served by *WEFM*. *Id.* Without further elaboration, the Commission was unable to find that WNIB would ultimately serve substantially the same area served by *WEFM*. *Id.* at 263. As to whether WFMT was a substitute for *WEFM*, the court disagreed that its programming was classical in nature since the station refers to itself as "an award-winning fine arts station." *Id.* at 264. See *Joseph*, 404 F.2d at 208. Against this background, the Commission had to insure that the proponents of the transfer established that WFMT is in fact a reasonable substitute for *WEFM* before it relied on the affirmative of that proposition to avoid the necessity of weighing the public interest. 506 F.2d at 265. The court noted that the substitutability of WFMT's "fine arts" programming for *WEFM*'s classical format might be demonstrated without an evidentiary hearing. The Commission retains a great deal of discretion with respect to its ability to make reasonable categorical determinations. *Id.*

by a challenge to the veracity of the survey of community leaders.<sup>122</sup> As declared in *Atlanta*,<sup>123</sup> clarified in *Lakewood*,<sup>124</sup> and now restated in *WEFM*,<sup>125</sup> any misrepresentation made by the transferee in regard to its voluntary ascertainment survey must result in a denial by the FCC of the application.<sup>126</sup>

Read narrowly, the *WEFM* case accomplishes no more than did *Atlanta*. In both cases, material and substantial factual questions precluding a Commission finding on the public interest mandated a remand for an evidentiary hearing. Arguably, *WEFM* did not expand the "unique format" doctrine since, if WNIB and WFMT were not reasonable substitutes for *WEFM*, the loss of *WEFM* would have constituted the loss of a unique format. Yet it is probably that *WEFM* did expand the unique format doctrine to cases where the loss of a "distinctive format" is involved.<sup>127</sup> A "distinctive format"—one whose loss would be felt by a specialized audience<sup>128</sup>—is obviously broader than a unique format since the former would not necessarily be the *only* format of that sort available to the community.<sup>129</sup> In this sense, it is arguable that *WEFM* did expand *Atlanta*.

A liberal construction of the *WEFM* opinion also indicates that the District of Columbia Circuit is forcing the Commission into a position where it must impose on the licensee the duty to encompass entertainment programming preferences within the presently imposed requirement of ascertaining the needs of a community.<sup>130</sup> This intimation by the court stems, in large part, from the court's apparent difficulty in reconciling the Commission's requirement that the needs of the community must be ascertained with respect to news and public affairs coverage<sup>131</sup> with the Commission's policy that entertainment

<sup>122</sup> The Chicago Citizens Committee alleged that the FCC had deliberately misled the community leaders it interviewed about its intention to change *WEFM*'s format. 506 F.2d at 266.

<sup>123</sup> 436 F.2d at 270-71.

<sup>124</sup> 478 F.2d at 923-24.

<sup>125</sup> 506 F.2d at 266.

<sup>126</sup> *Id.* In its petition for rehearing before the en banc court of appeals, GCC, the proposed transferee, sought to introduce additional data to support the veracity of its ascertainment survey. In the denial of the petition for rehearing, Chief Judge Bazelon stated that the additional information might persuade the Commission that a hearing was not necessary on this issue. *Id.* at 286.

On remand, the Commission denied GCC's petition for a Request For A Ruling Concerning Its Community Leader Survey on the submission of affidavits alone. Zenith Radio Corp., 75 F.C.C. No. 971 (Aug. 22, 1975) at 5. The Commission felt that no useful purpose would be served by attempting to resolve this issue outside of the hearing which would be held in any case. *Id.*

<sup>127</sup> Recent Decisions, 9 GA. L. REV. 479, 493 (1975).

<sup>128</sup> 506 F.2d at 262. This is the same view which was proposed by Commissioner Johnson in his dissent from the Commission's order in the *WEFM* case. Zenith Radio Corp., 38 F.C.C. 2d 838, 848 (1972).

<sup>129</sup> 506 F.2d at 262.

<sup>130</sup> *Id.* at 262, 267-68.

<sup>131</sup> Zenith Radio Corp., 40 F.C.C.2d 223, 230 (1973); FCC, Network Programming Inquiry: Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) (en banc).

programming be left strictly to the exigencies of the marketplace<sup>132</sup> since "[a]s a matter of public acceptance and economic necessity [the licensee] will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations."<sup>132</sup> The court's position is in direct contradiction to the stance previously taken in *Lakewood* that any right of the public to hear specialized entertainment programs would have to be initiated by the FCC.<sup>134</sup> Although the *WEFM* court disclaimed that it was sitting to make radio policy,<sup>135</sup> fundamental disapproval of the Commission's policy of leaving entertainment program format decisions to the discretion of the transferee is apparent in the decision. It is thus obvious from the opinion that the court is pushing the Commission to abandon its laissez-faire policy with respect to entertainment programming.<sup>136</sup>

### III. THE FIRST AMENDMENT CONSIDERATIONS

In accommodating the right of a segment of the listening public to receive a particular, desired format and in trying to remedy the inadequacies of section 310(b), the court of appeals has raised a basic and problematic issue with respect to the First Amendment interests of the licensee-transferor and his proposed transferee. Most troublesome in terms of traditional First Amendment concepts is the suggestion in broad dictum in *WEFM* 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."<sup>137</sup> A departure from free competition to serve the public interest has two distinct ramifications for the licensee-transferor and his proposed transferee under *WEFM*. First, the transfer of the license will be denied if the endangered format is "unique" or "distinctive" and is "financially viable."<sup>138</sup> Therefore, the licensee-transferor may be forced to continue broadcasting, at least until it is no longer economically feasible for him to do so, despite his desire to withdraw from an economically unattractive situation.<sup>139</sup> Secondly, if the station is granted to a transferee whose proposed programming would not continue the desired format, he may be required to undertake a survey to discover the program preferences of the community in order to support his proposed programming.<sup>140</sup> Application of

<sup>132</sup> 506 F.2d at 267.

<sup>133</sup> The *WEFM* court found it unnecessary to "wade into [the] deep waters" of the First Amendment issues which its position raised, saying that "familiar First Amendment concepts would, if anything, indicate a lesser—not a greater—governmental role in matters affecting news, public affairs, and religious programming." 506 F.2d at 267.

<sup>134</sup> See note 90 *supra*.

<sup>135</sup> 506 F.2d at 267-68.

<sup>136</sup> *Id.* at 267.

<sup>137</sup> *Id.* at 267.

<sup>138</sup> *Id.* at 262.

<sup>139</sup> *Id.* at 283-84.

<sup>140</sup> *Id.* at 262, 266.

both the "financial viability" standard and the requirement of the preference survey as suggested by *WEFM*<sup>141</sup> will be examined in order to focus on the First Amendment issues posed and the advisability of continuing to adjudge these complex issues on a case-by-case basis.

Application of the "financial viability" standard may have the potential of severely undermining the independence of the licensee.<sup>142</sup> In those cases where the continuation of programming for a minority audience with specialized program preferences would not produce as much advertising revenue as a format aimed at a majority audience, the standard effectively imposes a ceiling on the profits that a licensee can expect to make if he or his predecessors ever begin broadcasting a specialized format. To that extent, the standard contravenes the legislative choice that a licensee is not a common carrier and that free competition should thus prevail in the broadcast industry.<sup>143</sup> Furthermore, the "financial viability" test allows a vocal and organized segment of the public to dictate, at least for the time being, what the programming of the licensee will be despite the licensee's legitimate economic interest in increased profits. These consequences are nevertheless justified, the *WEFM* court implied, by the community's interest in a specialized format.<sup>144</sup> However, as Chief Judge Bazelon recognizes in his concurring opinion, if *WEFM* is not transferred, Zenith could elect to abandon the classical format in favor of a more profitable one and this modification of programming during the license term would probably not be reviewed by the Commission.<sup>145</sup> Therefore, at best, the promise held out to the citizens if the transfer is denied is only that Zenith will continue operating *WEFM*. There is no assurance that their preferred classical music will continue to be broadcast on *WEFM*. If the court is earnestly concerned with the continuation of specialized formats where community support has been evidenced, the "financial viability" standard may be an ineffectual and inappropriate means to achieve that goal.

The imposition of an ascertainment survey which would include the discovery of the community's program preferences is ostensibly no more than a means to stimulate diversity of programming. However, the duty may also have the effect of inhibiting the licensee from experimenting with innovative formats because the licensee's discretion would be inhibited, with respect to adopting minority programming,

<sup>141</sup> See text at notes 115-17 and 127-33 *supra*.

<sup>142</sup> DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975).

<sup>143</sup> 47 U.S.C. § 153(h) (1970). See note 42 *supra*.

<sup>144</sup> 506 F.2d at 267-68.

<sup>145</sup> *Id.* at 283 (concurring opinion). See Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933, 939 (1972) (hereinafter cited as *The Public Interest in Balanced Programming Content*). Although the Commission has the authority to consider modification of programming every three years when the station license is sought to be renewed, as a practical and usual matter the Commission does not do so. See note 36 *supra*.

by the preferences so expressed.<sup>146</sup> A point of even greater concern is that the imposition of the survey by the Commission could chill the First Amendment rights of transferees. The Commission would have the means at its disposal to require a preference survey without the crucible of an evidentiary hearing except in those cases where substantial and material issues of fact are challenged by a citizens' group dissatisfied with the factual conclusions of the ascertainment survey.

It should also be noted that the supervision of any preference surveys would involve the Commission in an administrative predicament.<sup>147</sup> There are only two alternative means available to the Commission by which to evaluate the data compiled from preference surveys: qualitative means and quantitative means. If the Commission adopts qualitative standards, it would be indirectly examining individual program content and adjudging certain programming to be superior to other programming. Such an approach would impermissibly enthrone the Commission as the "national arbiter of taste."<sup>148</sup> It could also lead to violations of the censorship section of the Act<sup>149</sup> and interference with First Amendment rights of the surveyor. A similar predicament would arise if the Commission adopts quantitative standards under which certain percentages of airtime for an individual broadcaster or of formats for a service area could be required by the Commission and allocated on the basis of the percentage preferences indicated in the survey.<sup>150</sup> This approach would also involve the Commission in a supervisory role in the day-to-day operation of a licensee's conduct because the Commission would be deciding on a case-by-case basis what the licensee should broadcast.<sup>151</sup> Such an ascertainment requirement would not only inhibit the licensee from being innovative in its choice of broadcast formats but it would also with-

<sup>146</sup> See *Zenith Radio Corp.*, 40 F.C.C.2d 223, 230, 231 (1973).

<sup>147</sup> A vivid illustration of a classic problem was present in the record of the *Atlanta* case. The sheriff of Fulton County, Georgia was interviewed as a community leader. He was asked his opinion regarding the proposed change on WGKA—FM from classical music to a popular favorites format. His response indicated that he was very sports minded and indifferent to the change since he regularly listened to sports programs. He did note, however, that in his opinion the proposed music format would be well accepted. 436 F.2d at 266. The weight to be given to such imprecise input from such interviews would make any administrative decision based on the preference study extremely difficult. *But see The Public Interest in Balanced Programming Content*, *supra* note 146.

<sup>148</sup> 506 F.2d at 260.

<sup>149</sup> 47 U.S.C. § 326 (1970). See text at note 44 *supra*.

<sup>150</sup> In 1971 the Commission proposed regulations establishing percentages of television broadcast time and prime time relating to local programming "designed to contribute to an informed electorate." FCC, Formulation of Policies Relating to Broadcast Renewal Applicant, Stemming from Comparative Hearing Process, 27 F.C.C.2d 580, 581 (1971). These controversial regulations, which have not yet been adopted or implemented, are more fully discussed in Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 137, 170-78 (1975).

<sup>151</sup> *Columbia Broadcasting*, 472 U.S. at 127.

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draw economic decisions from the licensee's discretion.<sup>152</sup> Withdrawal of such licensee decisions would be the effective equivalent of an unconstitutional intrusion into the very editing process that licensees alone perform as to their programming.<sup>153</sup>

Chief Judge Bazelon, author of the original panel decision affirming the Commission order in *WEFM*, specially concurred in the remand by the en banc court.<sup>154</sup> His concurrence contains a ventilation of the underlying First Amendment issues inherent in the court's decision.<sup>155</sup> The premise for his opinion is that the scarcity of broadcast frequencies is the accepted rationale for permitting government regulation of broadcasters.<sup>156</sup> He recognizes that the Commission must evaluate the nature of programming presented by competing applicants in a comparative licensing proceeding because the important decision of how to allocate the scarce resource of the airwaves cannot be made of "content neutral" standards "when the *raison d'être* of the grant of a license is the nature of the programming."<sup>157</sup> However, he would not require the licensee to air certain political views or entertainment formats where a petition to deny transfer of the license is submitted by citizens' groups, since the factual predicate for FCC intrusion into programming decisions—competing applications—is lacking in the present section 310(b) transfer proceeding.<sup>158</sup> Bazelon found it possible to join in the remand only because he was able, by rather tortuous construction, to view the section 310(b) proceeding as a comparative one in that the assignee and the assignor are compared.<sup>159</sup>

### IV. SUGGESTED STATUTORY AMENDMENT

It is submitted that the court of appeal's imposition of restrictions on the transferor and the transferee is neither consonant with the existing statutory framework nor tolerable in light of the important First Amendment considerations involved. The statute is based on the theory that the *laissez-faire* operation of the marketplace is suf-

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<sup>152</sup> *Zenith Radio Corp.*, 40 F.C.C.2d 223, 230 (1973).

<sup>153</sup> *Columbia Broadcasting*, 472 U.S. at 126-27.

<sup>154</sup> *Id.* at 268.

<sup>155</sup> *Id.* at 270-83.

<sup>156</sup> *Id.* at 270-78; Recent Decisions, 9 GA. L. REV. 479, 495 (1975). See text at note 9 *supra*.

<sup>157</sup> As Chief Judge Bazelon states: "To attempt to make the license choice on the basis of content-neutral factors, if any exist, is analogous to choosing a relief pitcher on the basis of his criminal record and off-season earnings." 506 F.2d at 279-80.

<sup>158</sup> 506 F.2d at 278. The distinction drawn by Chief Judge Bazelon between comparative and non-comparative proceedings in this context is not altogether clear, although he apparently believes that supervision of programming in a non-comparative proceeding would constitute an unconstitutional interference with the broadcaster's First Amendment rights.

<sup>159</sup> *Id.* at 283. Chief Judge Bazelon finds the suggestion for this construction in the *Atlanta* case. *Id.*



ficient to protect the public's interest in diversified programming.<sup>160</sup> If it is time to depart from this theory, the direction to be taken in attaining the delicate balance between the competing First Amendment values at stake in the programming issue is a policy decision to be made by the legislature, rather than by the judiciary.<sup>161</sup> As the original panel in the *WEFM* case admitted, "at present [the courts] simply do not know how to ideally resolve the conflict between diversity and freedom from regulation."<sup>162</sup>

As Chief Judge Bazelon noted in *WEFM*, section 310(b) is a "very unwise statute."<sup>163</sup> The inadequacy of section 310(b) lies in its failure to allow the FCC to consider alternatives. The presently required non-comparative hearing prohibits the Commission from taking into account other potential buyers of the station and the possibility that a third party's proposed programming might obviate the loss of a desired format. For example, assume that in the *WEFM* case a corporation had been created, sponsored and funded by the citizens' group which had expressed a willingness and ability to pay the contract price for the station and to continue the desired classical format. The Commission would be precluded, under the present statute, from even considering such a happy solution to the problem raised by the format disappearance. Similarly, the Commission would be foreclosed from considering a third party, unaffiliated with the citizens' group, who desired to continue the endangered format. Such a party might be able to operate the station more profitably than the prior owner. Or, the party might be perfectly willing to operate the station for the limited profits that the format would generate. Indeed, he might even be willing to operate at a loss.

There is, however, the potential for changing a section 310(b) procedure into one more conducive to accommodating the public's interest in receiving a spectrum of entertainment programs, by reamending the section so that the transfer procedure is once again comparative.<sup>164</sup> The current owner need not suffer a loss under this procedure, however. At the time of seeking a transfer of the station, the licensee's interest is no longer in his right of expression under the First Amendment, but rather is in his property right in the station and in his ability to dispose of it at the marketprice that he sought

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<sup>160</sup> See note 43 *supra*. Justice Douglas remains a strong proponent of the laissez-faire market in broadcasting. See *Columbia Broadcasting*, 412 U.S. at 148 (Douglas, J., concurring). See also note 174 *infra*.

<sup>161</sup> It was Justice Black who articulated opposition to the expansion of judicial power through the creation of new rights in the sensitive First Amendment area. *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (concurring opinion). His notion was that judicially-created rights are often hard to give up, and may lead over time to an undermining of the independence of broadcasters and to an ultimate erosion of freedom of speech and press. *Id.* at 399-400.

<sup>162</sup> 506 F.2d at 252.

<sup>163</sup> *Id.* at 283.

<sup>164</sup> See text at notes 49-55 *supra*.

from his original contractual party. If this property right is met by a statutory amendment which merely substitutes one purchasing party for another, the licensee's property right is accorded full protection. The rights of the contemplated assignee would also be safeguarded under the proposed section 310(b) amendment. There would be no possibility that his independence would be undermined by requiring him to continue a format which could place a ceiling on his profits.<sup>165</sup> His proposed programming would merely subject him to the same full comparative proceeding that he would have undergone if he had sought an initial grant of the license from the Commission.<sup>166</sup>

It would also be unnecessary, under a proposed statutory amendment to require any potential transferee to ascertain the listening preferences of the community. Thus, the Commission would not be placed in the impossible position of having to supervise a preference survey in the community.<sup>167</sup> If a community were serviced by numerous channels and a significant portion of the people in the community<sup>168</sup> were actively opposed to the loss of a unique or distinctive format,<sup>169</sup> the transfer would be awarded to the competing transferee whose programming would add more to the diversity of programming in the "service area."<sup>170</sup> Also, if this party proposed a format change that would introduce "a new format for a larger segment of the public that [was] not presently being served"<sup>171</sup> he would prevail over the group seeking to continue the presently desired format. For example, if a classical format had a devoted following of 6 percent of the listeners in a service area, the party who planned to program for a larger percentage of listeners whose entertainment desires were not presently being broadcast would be awarded the license. The decision of whether to undertake a preference survey would remain a voluntary business decision of the transferee. Pragmatically, however, the applicant will probably utilize such a survey to estimate the potential success and profitability of his contemplated format to insure himself the best return on his investment.

Finally, the harshness of the laissez-faire marketplace—that other stations in the broadcast area may not program for minority entertainment preferences if it is more financially attractive to program for majority tastes—would be undercut by a statutory amendment allowing third parties to compete for the transferred station. Citizens' groups which need not be concerned with the amount of profits that

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<sup>165</sup> Any requirement which materially affects the profit margin of the licensee could have a chilling effect on the functional viability of the press and thus run afoul of the First Amendment. See DeVore & Nelson, *supra* note 142, at 746.

<sup>166</sup> See note 66 *supra* for a fuller discussion of the nature of the comparative hearing.

<sup>167</sup> See text at notes 147-51 *supra*.

<sup>168</sup> See *Atlanta*, 436 F.2d at 269.

<sup>169</sup> See *WEFM*, 506 F.2d at 262.

<sup>170</sup> See *id.* at 263-64.

<sup>171</sup> See *id.* at 260.

a particular format generates could organize non-profit organizations to vie for the opportunity to run the station. Alternatively, citizens might be able to interest certain broadcasters or other parties who could afford to operate a certain desired format at a lower profit, or at a loss, in competing for the transfer of the license and continuing the format.

It is therefore suggested that the public's interest in receiving a diversity of entertainment programming would be effectuated best by reamending section 310(b) so that it would once again be a fully comparative proceeding. However, to revert to the former statutory language providing for a comparative hearing in all cases would put too great a strain on the administrative resources of the Commission, which in 1971 had to process well over one thousand requests for transfer.<sup>172</sup> Thus, in consideration of this administrative problem, the statute should be amended to reinstitute a full comparative proceeding only when the loss of a unique or distinctive format is threatened.

This proposal raises a First Amendment question as to why the amendment should concern only the loss of those formats which are unique or distinctive. It should first be noted that most format changes do not diminish the diversity of programming available.<sup>173</sup> Second, although broadcasters may be primarily motivated to program for majority audiences which will generate large advertising revenues, there exists a market phenomenon whereby the remaining licensees in a listening area will shift and modify their programming to service the loyal but "disenfranchised" segment of the public and to capture its potential appeal to advertisers.<sup>174</sup> Thus, allowing the licen-

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<sup>172</sup> In 1971, 1,091 requests for applications of transfer were approved by the Commission. FCC, 37TH ANNUAL REPORT/FISCAL YEAR 1971 50 (1971). The administrative burdens entailed in processing the applications led the FCC to abandon the procedure of giving third parties the opportunity to bid for any station proposed to be sold before section 310(b) was amended in 1952. Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 151 n.57 (1953).

<sup>173</sup> 506 F.2d at 261.

<sup>174</sup> Because the broadcasting industry is dependent on advertising revenue to support its programming, broadcasters seek to program for the largest possible audience in order to attract the advertising dollar. Programs of interest to substantial minority interests are therefore not generally developed or broadcast. See Barrow, *The Attainment of Balanced Program Service in Television*, 52 U. VA. L. REV. 633, 635 (1966). But this premise of the economic imbalance of the industry cannot be accepted uncritically. In 1965, the Office of Network Study, a subdivision of the FCC, found in a study that some advertisers had become aware of the fact that failure to reach minority audiences with quality programming was contrary to their own economic interests. FCC, SECOND INTERIM REPORT, TELEVISION NETWORK PROGRAM PROCUREMENT—PART II 26 (1965). Numerous advertisers had expressed interest in sponsoring programs designed to reach a limited audience. *Id.* at 32.

It has been the experience of the Commission that when a unique format with a devoted following is abandoned by a station after a transfer of control, other stations in the area often shift and modify their entertainment formats to fill the void. Zenith Radio Corp., 40 F.C.C.2d 223, 231 n.4 (1973). For example, following FCC approval of plans to discontinue the "all news" format on KBTR(AM) involved in *Lakewood* and the progressive rock format on WGLN(FM) involved in *Progressive Rock*, other area stations

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sees to make decisions based on their own understanding of, and expectations from, the marketplace will vindicate the listener's asserted "right to hear" under most format changes following transfers of licenses.

Under the proposed amendment it is only a limited right of access that is granted to the public, because their right to direct the continuation of certain programming exists only in the rare instance<sup>175</sup> where a unique or distinctive format would be lost through the transfer of a station license. Thus, the proposed amendment of section 310(b) is also in accord with the suggestion made by the Supreme Court in *CBS v. Democratic National Committee*<sup>176</sup> that a limited right of access can be devised by Congress that is both practicable and desirable.<sup>177</sup>

### V. CONCLUSION

Under the First Amendment, there are several competing interests which have to be recognized and protected with regard to license transfers that result in the loss of a unique or distinctive entertainment format: the interest of the listening public in receiving a full spectrum and choice of entertainment programs, the interest of the broadcast licensee in making decisions as to formats without infringement of his own freedom of expression, and the interest of the government in providing a feasible method to transfer station licenses and to promote the interests of all of its citizens. These competing interests unquestionably give rise to "tight rope aspects" in any government regulation of the broadcast media.<sup>178</sup> However, the importance of the First Amendment rights involved and the unique nature of the broadcast industry demand that the tightrope be walked and appropriate government regulation be imposed. Although Congress has attempted to strike a balance with regard to these competing interests through the transfer procedure, the proceeding currently established by section 310(b) of the Communications Act is ineffective in that it fails to give adequate consideration to the interest of the listening public. To insure that the public interest in receiving a broad spectrum of entertainment formats is effectively implemented, the Communications Act must be amended to provide a comparative hearing in all transfer proceedings where the loss of a unique or distinctive entertainment format is threatened by a proposed transfer. According proper priorities to each of the competing First Amendment interests, as Chief Judge Bazelon has noted, "is a process which makes skeptics of us all,"<sup>179</sup> but before the courts drown in self-doubt, Congress

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adopted these respective formats. *Id.*

<sup>175</sup> 506 F.2d at 261.

<sup>176</sup> 412 U.S. 94 (1973).

<sup>177</sup> *Id.* at 131.

<sup>178</sup> *Id.* at 105.

<sup>179</sup> 506 F.2d at 283.

should create this limited right of access in the public by amending the procedure whereby licenses are transferred.

BARBARA E. BRUCE

*Editor's note:* As this issue was going to press, the FCC released a Notice of Inquiry prompted by the decision in *WEFM* for the purpose of examining "whether the Commission should play any role in dictating the selection of entertainment formats." Notice of Inquiry, FCC 75-1426 (Dkt. No. 20682) (Dec. 22, 1975), released January 19, 1976.