VII. DISPUTES OVER STATION FORMAT CHANGES

	Page
Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263, 20 R.R.2d 2026 (D.C. Cir. 1970)	VII-1
Lakewood Broadcasting Service, Inc. v. FCC, 27 R.R.2d 543 (D.C. Cir. 1973)	VII-13
Citizens Committee to Keep Progressive Rock v. FCC, 27 R.R.2d 463 (D.C. Cir. 1973)	VII-22
Citizens Committee to Save WEFM v. FCC, 28 R.R.2d 1251 (D.C. Cir. 1973)	VII-34

VI-90

words used are used in such circumstances and of such a nature as to create a clear and present danger that they will bring about * * * substantive evils.'" The Court continued: "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." This view has been followed in many Supreme and lower court decisions and, to my knowledge, never reversed. See, *e.g.*, *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 364 (1947); *Baltimore Radio Show* v. *State*, 67 A. 2d 507 (1949) (involving radio stations); *State* v. *Morris*, 75 N.M. 475, 406 P. 2d 349 (1965). In light of this body of precedent, I simply do not understand ABC's legal position. Like Commissioner Cox, I would have appreciated some substantiation from ABC. Unlike Commissioner Cox, however, I do not believe it is necessary at this time for this Commission to request a transcript of Miss Collins' remarks—at least until the law in this area is reviewed.

Corporate censorship by television networks is a problem in this country. The most appropriate response from the Congress, the courts and the Commission is not clear. I believe the FCC ought to get on with the job of working out the standards. This would have been a useful case in which to begin. I regret the Commission majority chose not to do so.

of the labor controversy. Accordingly, there was no occasion to invoke the Fairness Doctrine to assure that the Union's side would be heard.

The theory of the majority would extend to the store's advertisements the rule applied by the Commission in the case of cigarette advertising. In the Matter of Television Station WCBS-TV, New York, New York (Applicability of Fairness Doctrine to cigarette advertising) 9 FCC 2d 921 [11 RR 2d 1901] (1967). As the Commission in its opinion emphasized, however, "cigarette advertising presents a unique situation". (9 FCC 2d at 942, 943.) I cannot agree that the principle of that decision ought to be applied to the commercial advertising of a department store simply because the store at the moment is involved in a labor dispute.

CITIZENS COMMITTEE v. FEDERAL COMMUNICATIONS COMMISSION

STRAUSS B/CASTING CO. OF ATLANTA, Intervenor

U. S. Court of Appeals, District of Columbia Circuit, October 30, 1970

No. 23,515

[¶10:405] Effect of failure of Commission to act on petition for reconsideration within 90 days.

Where a petition for reconsideration of a Commission order granting an application without hearing was not acted on within 90 days of the filing of the petition, an order denying the petition was not invalid and petitioner's request for a hearing was not to be taken as granted. Both parties had sought the opportunity to file additional pleadings, and the Commission had been advised that negotiations were in progress to resolve the controversy. Under such circumstances the Commission was entitled to think that the statutory time requirement had been waived. Citizens Committee v. FCC, 20 RR 2d 2026 [US App DC, 1970].

[¶10:309(A)(11), ¶10:310, ¶53:24(R), ¶53:24(Z)(7)] Right to hearing on assignment application.

Where the transferee of Atlanta, Georgia, AM and FM stations proposed to change the programming format from classical music to a blending of popular favorites, broadway hits,, musical standards and light classical music, based on a program preference survey which showed that only 16% of the people interviewed preferred the

classical music format, the Commission erred in granting the application without a hearing as requested by a citizens committee which sought retention of the classical music format. The Commission relied on the unprofitability of the present operation, but the figures relied on may not have been a fair measure of profitability, since allegedly there were substantial capital expenditures for improvement of the facilities during the period involved. There was a substantial controversy as to whether summaries of interviews with 13 community leaders were accurate accounts of what had been said. Another important issue in dispute was the degree to which daytime listeners in Atlanta were provided with classical music from a non-Atlanta source. While the Commission may not arbitrarily dictate programming content, it is not devoid of any responsibility whatsoever for programming, and its concern does not stop whenever 51% of the people in the area are shown to favor a particular format. Citizens Committee v. FCC, 20 RR 2d 2026 [US App DC, 1970].

On Appeal from an Order of the Federal Communications Commission [14 RR 2d 104; 17 RR 2d 39].

Mr. Henry Angel for appellant.

Mr. D. Biard MacGuineas, Counsel, Federal Communications Commission, with whom Messrs. Henry Geller, General Counsel, and John H. Conlin, Associate General Counsel, and Mrs. Lenore G. Ehrig, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Reed Miller, with whom Mrs. Anne W. Branscomb was on the brief, for intervenor.

Before McGowan, Tamm and Robb, Circuit Judges.

McGowan, Circuit Judge: This proceeding to review an order of the Federal Communications Commission was initiated by a voluntary association of citizens of Atlanta, Georgia. Their concern is with a substantial alteration in the program format incident to a change in ownership of a licensee – a concern which they requested the Commission to explore in an evidentiary hearing before giving its final approval to the transfer. The Commission denied that request, and it is the propriety of that action alone which is presently before us. For the reasons hereinafter appearing, we do not think the omission of a hearing in this instance was compatible with the applicable statutory standards.

I

On March 5, 1968, the intervenor, Strauss Broadcasting Company of Atlanta, a subsidiary of a Texas organization with radio stations in Dallas and Tucson, filed with the Commission an application for transfer of the operating rights of the Atlanta Stations WGKA-AM and WGKA-FM. The application was founded upon a proposed 100% transfer of the stock ownership of the licensee stations to Strauss from Glenkaren Associates, Inc. Under Glenkaren, the stations had for many years maintained a classical music format, 1/ duplicating FM transmissions on AM during the AM daytime operating period. Strauss proposed a format comprised of a "blend of popular favorites, Broadway hits, musical standards, and light classics." With the exception of news broadcasts, there was to be no duplication of AM and FM transmissions under the changed format.

Publication of notice of the transfer application provoked a public outcry against the change in format, including adverse comment in the columns of a leading Atlanta newspaper. More than 2000 persons, by individual letters and group petitions, informally protested the change to the Commission. Subsequently, Strauss filed two amendments to its transfer application. The first, on April 22, 1968, dealt largely with the "newspaper campaign," which was alleged to be responsible for the protests addressed to the Commission. In addition, a detailed explanation of the proposed format was included. Although there was a denial of any purpose to use "rock and roll," "race," "religious," or "country and western" music, there was a reaffirmation that "what we seek to achieve is a pleasant blending of popular favorites, broadway hits, musical standards and light classical music," and the amendment went on to say:

> "We recognize, of course, that we will be changing the stations from a classical music format. No doubt there is a small (but obviously vocal) segment of the population in Atlanta interested in classical music, but . . . there has not been any general acceptance by the public or commercial advertisers of classical music . . . ." (Emphasis supplied).

A second amendment was filed June 3, 1968. It transmitted summaries of interviews with 13 prominent citizens which purported to reflect favorable views of the proposed new format. One such interview with the Sheriff of Fulton County was described in this way:

> "Knew nothing about the station, had never heard it and was not aware that there was such a station in Atlanta.

1/ At the oral argument, both the Commission and the intervenor suggested the imprecision of the term "classical music." While an exact verbal definition may be somewhat elusive, this is perhaps a subject matter of which it can also be said that we at least "know it when [we hear] it." See Jacobellis v. Ohio, 378 US 184, 197 (Stewart, J. concurring). We note that the Commission, in its initial memorandum opinion approving the transfer, had no apparent difficulty in characterizing WGKA-AM and FM as "the only stations in Atlanta devoting their entire time to the broadcast of serious classical music." (Emphasis supplied).

"Very sports minded and listens to sports regularly and could not see where anything could be added . . .

". . . Does not like classical music and prefers old standards and easy moving popular. In his opinion a music format such as we are proposing would be well accepted."

Another community leader interviewed was the executive vice-president of an advertising agency. His views were summarized as follows:

"WGKA has an extremely good image in the market, but actually only appeals to a very small segment of people so that it is no real factor in the market from an advertising standpoint. The station has put itself in this small niche, but he believes if the programming were broadened, it would have appeal for more people."

A third interview, this time with a savings and loan executive, appeared to recognize some merit in WKGA but concluded on this unmistakably dissonant note:

"He stated that WGKA regularly carried a fine arts activity schedule, but that was about the extent of their community involvement. WGKA had done live direct broadcasts of symphonies and certain other programs, but always dealing with classical artists. "2/

On September 4, 1968, the Commission, without a hearing, granted the transfer application. The Commission recited as a fact that the necessity for the transfer was that the existing owner could not supply adequate capital for needed improvements. It also noted that opposition to the change was provoked by the newspaper comments, whereas interviews with community leaders had apparently evoked "nothing but support" for Strauss' proposals. The Commission concluded that the proposed programming was established by the surveys to be one that served the public interest, and that the "informal objections" raised no substantial question requiring a hearing. Commissioner Cox dissented without opinion.

On September 25, 1968, appellant filed a petition for reconsideration, which urged a stay of the September 4 ruling pending the holding of a hearing. Appellant challenged the significance of Strauss' surveys of 13 community leaders, questioning the representative nature of this sampling, and comparing it with the large number of protests actually received by the Commission before its approval order was entered. Perhaps the greatest stress was laid

---

2/ The remaining interviewees were the Chief of Police, the County Commissioner, the County Superintendent of Schools, the President of the Chamber of Commerce, the pastor of the First Methodist Church (who was said to interpret classical music "as music that threatens to develop into a tune – but never does"), the chancellor of the Catholic Archdiocese, the rabbi of the Jewish Temple, the City Attorney and Board Chairman of Emory University, a Civil Court Judge, and the president of the Rotary Club.

on the fact that of Atlanta's many AM and FM stations, only one (WGKA) was classical.

Strauss countered, on October 9, 1968, with an opposition to the petition, alleging lack of standing on appellant's part, but also renewing its laments about the hostility of the Atlanta newspapers and emphasizing its interviews with the 13 community leaders. In the closing pages of this document, however, Strauss said that "[r]ecognizing the expressed interest of the some 2000 persons who advocated retention of the classical music format, Strauss will, at the outset, emphasize such music on WGKA-FM, particularly during evening hours, while still providing a mix of popular favorites and Broadway hits . . ."

In subsequent months voluminous papers were filed by both sides. 3/ Appellant's first amendment to its petition alleged that intervenor had misrepresented to the Commission the views expressed by the interviewees, and submitted affidavits from six of them which were said to contradict the earlier summaries. Intervenor came back with letters from, or summaries of second interviews with, the interviewees which were said to reaffirm the original summaries.

On March 4, 1969, the Commission requested Strauss to "undertake further efforts to ascertain by a more comprehensive survey" the tastes and needs of the community. In response, Strauss filed on April 30, 1969 a statistical survey of "program preferences" in Atlanta prepared by Marketing and Research Consultants of Dallas. As the Commission describes the matter in its opinion, the key question in this survey was framed in this way:

3/ a. Citizens Committee – Amendment to Petition for Reconsideration – October 21, 1968.

b. Citizens Committee – Request for Stay – Oct. 21, 1968.

c. Strauss – Opposition to Request for Stay – Oct. 25, 1968.

d. Strauss – Motion to Strike Amendment – Oct. 31, 1968.

e. Citizens Committee – Opposition to Motion to Strike Amendment – Nov. 14, 1968.

f. Citizens Committee – Request for Leave to Amend – Nov. 22, 1968.

g. Strauss – Reply to Opposition to Motion to Strike – Nov. 25, 1968.

h. Citizens Committee – Request for Leave to Amend and Second Amendment to Petition – Dec. 9, 1968.

i. Strauss – Motion to Strike Second Amendment – Dec. 10, 1968.

j. Strauss – Opposition to Request for Leave to Amend – Dec. 10, 1968.

"Which of these two formats would you prefer to listen to daily?

a. A blend of Broadway Show tunes like 'Mame' and 'Cabaret', movie themes like 'Dr. Zhivago' or 'Born Free' and standards like 'Moonglow' and 'Stardust' plus hourly newscasts.

b. A blend of Opera Symphonic pieces like 'The Emperor Concerto' or 'The New World Symphony' and Ballets such as 'Petrouchka' and 'Swan Lake' plus news approximately every hour."

Out of 640 people asked, 73% preferred the first format, and 16% preferred the second. Four percent no reply, and the remainder preferred neither. Appellant, on May 22, 1969, attacked in detail this submission by Strauss.

At this point, another factor entered the controversy, namely, the existence of a daytime-only 500 watt AM classical station in Decatur, Georgia, (WOMN), some 10 miles from Atlanta. Strauss asserted that this station adequately served the daytime needs of WGKA's former audience. Appellant responded that WOMN's signal reached few Atlanta listeners at an acceptable level of signal quality.

On August 25, 1969, the Commission entered a Memorandum Opinion and Order. The Commission reviewed its previous opinion and intervening events, and concluded that "[t]he case here comes down to a choice of program formats – a choice which in the circumstances is one for the judgment of the licensee." Inter alia, the Commission accepted Strauss' surveys, and stated as a fact that WOMN served "a large portion of the City of Atlants."4/

In dissent, Commissioner Cox asserted that a hearing was required. He noted that the WGKA stations had been providing classical music for ten years, and had thereby afforded some measure of balance in the musical fare available to Atlanta listeners from the 20 existing aural facilities – a balance which was being destroyed, particularly for daytime listeners. He also noted that by intervenor's own surveys (which he also questioned) one-sixth of the Atlanta market, or about 100,000 people, would not be served despite the existence of multiple radio channels. He characterized the transaction as one promoting only the private interests of the transferor and transferee. Since classical music stations are less profitable than popular stations, Strauss could enter the popular market more cheaply by this means than by purchasing a popular station, and Glenkaren could sell at a higher price than if it were to sell to one intending to continue the classical format. Contrary to the Commission's initial finding, the dissenter characterized the Glenkaren operation as profitable, and said that no change of program format was

---

4/ This latter circumstance was thought by the Commission to mitigate significantly Strauss' conceded abandonment of classical music in the daytime and its restriction of its classical offerings to the evening hours on FM. Intervenor began operating the stations on the new format on November 10, 1968; and the record indicates that there is controversy as to how faithfully it has adhered to this stated purpose for the FM channel.

necessary for financial reasons. He did not see how the requisite public interest finding could be made short of the illumination afforded by a hearing.

II

In this court appellant advances a number of grounds as invalidating the Commission's action. We think the substantial issue presented is that of the necessity for a hearing. 5/ In addressing that question, we look to the statutory context from whence it arises. The Federal Communications Act provides that no license may be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 USC §310(b). An application of this kind is directed to be disposed of as if the transferees were making application for the license under Section 308 of the Act, which covers applications for licenses in the first instance, and modifications or renewals of existing licenses. Section 309(c) of the Act provides that if, in the case of any such application, "a substantial and material question of fact is presented," or the Commission is for any reason unable to make the prescribed finding, "it shall formally designate the application for hearing. . ."

To justify the omission of a hearing in this case, therefore, it is necessary to demonstrate that there were no "material and substantial questions of fact" bearing significantly upon the exercise of the Commission's judgment. In this court, counsel for the Commission has asserted principally the proposition that the Commission has a discretion in these matters which is not to be disturbed unless it is palpably abused. This is, of course, a general truth which needs no demonstration. Its bare assertion does not, however, answer the question of whether that discretion in this particular case was required, prior to its exercise, to be informed as accurately as possible by reliable facts relevant to that exercise. It is in this respect that we query the Commission's conformity with the statutory prescription for the provision of hearings.

The Commission's point of departure seems to be that, if the programming contemplated by intervenor is shown to be favored by a significant number of the residents of Atlanta, then a determination to use that format is a judgment for the broadcaster to make, and not the Commission. Thus, so the

---

5/ Appellant asserts that, because the Commission's order under review was not issued within 90 days of the filing of the petition for reconsideration, see 47 USC §405, the order was invalid; and appellant's request for hearing should, accordingly, be taken as granted. We find no merit in this point since it appears that both parties sought, and were given, the opportunity to file additional pleadings, and the Commission was advised that negotiations were in progress seeking a resolution of the controversy by agreement. Under these circumstances the Commission was entitled to think that the statutory time requirement had been waived. Neither do we think that the Commission proceeded improperly in requesting intervenor to supplement its application with additional surveys of community interest.

argument proceeds, since only some 16% of the residents of Atlanta appear to prefer classical music, there can be no question that the public interest is served if the much larger number remaining are given what they say they like best.

In a democracy like ours this might, of course, make perfect sense if there were only one radio channel available to Atlanta. Its rationality becomes less plain when it is remembered that there are some 20 such channels, all owned by the people as a whole, classics lovers and rock enthusiasts alike. The "public interest, convenience, and necessity" can be served in the one case in a way that it cannot be in the other, since it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible.

We do not doubt that, at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right, for Atlanta as well as other American cities, although Atlanta's devotion to the arts has not only survived the test of shattering adversity but has appeared to grow stronger as well. In Atlanta that 16% still represents a large number of people, and one which may well grow larger under the influence of the efforts and achievements of many distinguished local musical institutions and organizations. But, whether it grows or not, it is a not insignificant portion of the people who make up Atlanta; and their minority position does not exclude them from consideration in such matters as the allocation of radio channels for the greatest good of the greatest number. The Commission's judgmental function does not end simply upon a showing that a numerical majority prefer the Beatles to Beethoven, impressive as that fact may be in the eyes of the advertisers.

The Commission's response in this instance to the 16% figure was to abdicate. The slenderness of that figure was the fact it thought to be conclusive; and, since that fact alone was not seriously disputed by appellant, the Commission appeared to believe that no other disputes of fact justified a hearing. We find that approach untenable, and we turn to the circumstances which, in our view, brought into play the Congressional requirement of a hearing.

In the first place, there is the key assumption by the Commission that transfer of the station licenses was made necessary by the financial necessities of Glenkaren arising from the unprofitability of the existing operation. This assumption appears in the Commission's initial order of approval, without any supporting factual references. In its brief in this court, the Commission refers only to the circumstance that the financial reports of WGKA-AM and FM show that station expenditures exceeded revenues by a net figure of $20,635 for the six years preceding the proposed transfer.

Appellant asserts, however, that this figure is no fair measure of profitability of operations, since it reflects what are said to have been very substantial capital expenditures in 1967 for the enlargement and improvement of the station's plant. Certainly no accountant would accept this figure alone as an index to operating profitability, and this is presumably what underlies the

dissenting Commissioner's observation that the "stations were profitable, so it cannot be said that a change of format was necessary to keep them alive." The prospect that a change in programming might increase profits does not, as we have suggested above, conclude of its own force the question of who should be the licensee. We, of course, do not presume to know what a hearing might ultimately reveal with respect to Glenkaren's financial situation, but the Commission's flat assumptions about it need a closer look than they have yet had.

A second area of factual inquiry clamoring for the clarifying influence of direct testimony subject to cross-examination is that of the interviews of prominent citizens. When it entered its original order of approval, the Commission had before it, as evidence of community attitudes, only the summaries by the intervenor of its interviews with 13 community leaders. A substantial controversy later developed as to whether these summaries were accurate accounts of what had been said. Appellant, as a supplement to its petition for reconsideration, filed the affidavits of a number of the interviewees, which give a different picture of their position than do the summaries prepared by intervenor. This in turn prompted intervenor to secure and file unsworn letters from the original interviewees which purported to adopt the summaries as correct.

But these last do not in all instances resolve the ambiguities inevitable in this way of trying to establish what a witness said and what his position really was. For example, Mr. Mitchell, the Commissioner of Roads and Revenues of Fulton County, was described in the summary as having said that he did not listen to radio much except for news and sports, but that "WGKA was his wife's favorite station because it had so little commercial." The last paragraph of the summary, however, carries a strong intimation that the Commissioner would like to see the music format changed:

> "As to his music preference – His favorite was Lawrence Welk and others that played similar styles. He said he might listen more to a station that played this type of music . . ."

In his affidavit, Mr. Mitchell says that he was called on the telephone by someone representing Strauss; that he and his wife "have been avid fans for several years of WGKA's classical music programming"; that he did not remember being told of any purpose by Strauss to change the format; and that, if he had been, he would "have stated that he felt it was in the public's interest to continue the classical music format since it is the only such format in this area which is flooded by popular music stations."

In the letter solicited by intervenor, the Commissioner says that the summary is correct as far as he can remember, except for the last paragraph. Mr. Mitchell's last word in this record is:

> "As I remember it, you asked me my favorite program and I named Lawrence Welk. If I remember further correctly, I also told you I did not think many of the stations played this type of music. I think I also told you that I would prefer no change being made in the type of music played by Station WGKA." (Emphasis supplied).

This final formulation may suggest that this particular admirer of Lawrence Welk was hardly the "avid fan" of serious classical music referred to in the affidavit, and that it is Mrs. Mitchell who is in charge of the musical interests of this family. But it is certainly far from clear that Mr. Mitchell, although apparently not having much interest in music at all, "champagne" or otherwise, is to be counted as welcoming intervenor's advent in Atlanta.

The Superintendent of the Fulton County Schools was another interviewee who was described in the summary as feeling "that the programming proposed would be well received by Atlantans as there is nothing exactly like that now being done." In his affidavit, however, the Superintendent states that "[s]ome conniving individual or individuals has or have desecrated my name . . . ," and that there "is nothing else in our area which is more uplifting or more needed than is the present programming of 'The Voice of the Arts in Atlanta - WGKA, AM and FM.'" Although solicited by intervenor for a further statement, none was forthcoming.

Rabbi Rothschild was characterized in the summary as saying that he did not listen to the station, but that "his wife listens to it all the time in her car and at home"; and further that "he enjoys popular music and indicated that our proposed format would be well accepted in Atlanta and there was definitely a place for such a station." In his affidavit, the rabbi says that he understood the interview to be of a purely social nature and not directed towards the expression of endorsement or opinion as to the program format; and that it is his opinion that "the community has and would continue to benefit by the existence of WGKA's classical format." In his letter of response to intervenor's later solicitation, he asserts that he had not been acquainted with the purposes of the original interview, and finds nothing in the summary which was intended by him to be an approval of the change in programming. 6/

Appellant urges that discrepancies of this nature demonstrate actual misrepresentation on intervenor's part which disqualifies it from being a licensee. We are not disposed, at least on this record, to attribute such a purpose to intervenor, or to permit appellant's allegations in this regard to play a part in the conclusion we reach as to the proper disposition of this appeal. Confusion, conflict, misunderstanding, obscurity – all are inherent in a process in which the statements and opinions of one individual are sought to be determined from what two adversary parties say that he said or thinks; and the inherent weaknesses of affidavits are demonstrated amply in this record.

6/ Mr. Bowden, the City Attorney and Emory University Board Chairman, is described in the summary as saying that WGKA "had a good image, but had very limited appeal and a lighter type of music would certainly have more listeners and would be a better useage [sic] of the broadcast channel . . ." He said in his affidavit, however, that he hoped WGKA's classical music format will be preserved since "he deems it vital to this public's interest;" and that any contrary representation of his opinion would be "misleading and untrue." In the subsequent letter solicited by intervenor, he appears finally to have taken shelter within the generous confines of the proposition that a "radio station should have the right to play any type of music or any type of entertainment it wishes . . ."

The truth is most likely to be refined and discovered in the crucible of an evidentiary hearing; and it is precisely a situation like the one revealed by this record which motivated the Congress to stress the availability to the Commission of the hearing procedure. The controversy that developed in this case is one that characteristically continues to be blurred until it is subjected to the adversary process – inside the hearing room, and not out.

A third important issue which appears to be in dispute is the degree to which daytime listeners in Atlanta are provided with classical music from a non-Atlanta source. This is the question of the scope of the coverage of Atlanta by WOMN, the station located in Decatur, Georgia. The Commission disposed of this matter by saying in a footnote that "a large portion" of the City of Atlanta is reached by this station. Commissioner Cox in his dissent refers to WOMN as providing Atlanta with "some service." Appellant, however, in one of its representations to the Commission, asserted that WOMN, broadcasting only on daytime AM and with a weak frequency, reaches effectively only "a small portion of the Atlanta area." At the oral argument before us no one appeared to be familiar with the contour charts which would be highly relevant to a reasoned disposition of this question. Since the Commission appears to justify its action in some considerable part by the asserted availability to Atlanta listeners of at least a daytime classical format, it is obviously important that this dispute of fact be explored and resolved.

It is, of course, true that a licensee has considerable latitude in the matter of programming; and it is not for the Commission arbitrarily to dictate what the programming content shall be. See FCC v. Sanders Brothers, 309 US 470, 475 [9 RR 2008] (1940). But it is not true that the Commission is devoid of any responsibility whatsoever for programming, or that its concern with it stops whenever 51% of the people in the area are shown to favor a particular format. 7/ Had Glenkaren remained the licensee, it could have altered its programming format without the permission of the Commission during the license term, but it would have done so knowing that the change would have been a factor to be weighed when its application for renewal was filed. See United Church of Christ v. FCC, 123 US App DC 328, 359 F2d 994 [7 RR 2d 2001] (1966). The change proposed to be made by a transferee is similarly relevant to the consideration of a transfer application submitted during the

---

7/ The Commission refers in its brief to a number of pronouncements by it and by the courts of its incapacity to be a "national arbiter of taste." Palmetto Broadcasting Co (WDKD), 33 FCC 250, 257 [23 RR 2d 483], (1962), reconsideration denied, 34 FCC 101 (1963), affirmed sub nom. Robinson v. FCC, 118 US App DC 144, 334 F2d 534 [2 RR 2d 2001] (1964); and see Buckley Jaeger Broadcasting Corp. v. FCC, 130 US App DC 90, 93, 397 F2d 651, 654 [12 RR 2d 2152] (1968). But, as the Commission goes on quickly to acknowledge in these words, "[T]his is not to say that a transferee may make wholly indiscriminate program changes." The question is, as here, what are the community needs and will they be properly served by the proposed transfer? The Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification.

license term. We hold that, in the posture which this record shows the matter to have stood before the Commission, the grant of this application without hearing fell outside the contemplation of the Act.

The order denying reconsideration is vacated and the matter is remanded for an evidentiary hearing.

It is so ordered

SPRINGFIELD TELEVISION, INC., et al. v. CITY OF SPRINGFIELD, MO., et al.

U. S. Court of Appeals, Eighth Circuit, June 23, 1970

428 F2d 1375

[¶116] Federal court jurisdiction over claim involving validity of CATV franchise ordinance.

Federal district court had jurisdiction over a suit alleging that certain provisions of a city ordinance, granting a CATV system franchise and setting forth in detail terms and conditions accompanying the grant, conflicted with specific regulations promulgated by the FCC. At least some of the provisions of the ordinances conflicted with FCC regulations regarding nonduplication and non-importation of distant signals. The district court also had jurisdiction to explore fully claims of federal preemption of the field and deprivation of rights protected by the Constitution. Springfield Television, Inc. v. City of Springfield, Mo., 20 RR 2d 2037 [CA 8th, 1970].

Before Matthes, Mehaffy and Lay, Circuit Judges.

Matthes, Circuit Judge.

This appeal is from the order of the United States District Court for the Western District of Missouri dismissing appellants' complaint for lack of jurisdiction over the subject matter. We hold that the district court possessed jurisdiction and accordingly reverse for further proceedings.

The salient facts in this controversy are set forth in appellants' complaint. For the purpose of the motion to dismiss, we are obliged to regard as admitted all well-pleaded facts contained therein. McCleneghan v. Union Stock Yards Co. of Omaha, 298 F2d 659, 662 (8th Cir, 1962); Creswell-Keith, Inc. v. Willingham, 264 F2d 76, 81 (8th Cir, 1959).

The complaint shows that the appellants are three Missouri corporations and five individual taxpayers residing in the City of Springfield, Missouri.

13. It is further ordered, that the petition for leave to file supplement to opposition to petitions to enlarge issues, filed February 20, 1973, by Sun Sand and Sea, Inc., is denied.

LAKEWOOD B/CASTING SERVICE, INC. v. FEDERAL COMMUNICATIONS COMMISSION

COLORADO CITIZENS FOR B/CASTING, et al. v. FEDERAL COMMUNICATIONS COMMISSION

KBTR, Inc. and Mission Denver Co., Intervenors

U.S. Court of Appeals, District of Columbia Circuit, May 4, 1973

Nos. 72-1757, 72-1758

[¶10:309(I)(1), ¶10:309(I)(4), ¶53:24(R), ¶53:24(Z)(7)]
Requirement for evidentiary hearing on change of program format.

Where a significant minority of those whom a station is obligated to serve voice discontent over a proposed entertainment format change, the change becomes an issue to be dealt with by the Commission in its Section 309(a) determination that an assignment of license comports with public interest, convenience and necessity. Consequently, factual disputes surrounding the change are material, and if substantial become subject to the 309(e) hearing requirement. Where news is the entertainment substance of the format, the same principle applies. Lakewood B/casting Service, Inc. v. FCC, 27 RR 2d 543 [US App DC, 1973].

[¶10:309(I)(1), ¶10:309(I)(4), ¶53:24(Y), ¶53:24(Z)(7)]
Ascertainment of needs; program preferences.

An assignee's ascertainment of needs efforts did not raise substantial or material questions of fact requiring a Section 309 evidentiary hearing because the interview summaries failed to recite that many civic leaders interviewed preferred retention of the assignor's "all news" format or because some interviewees were not informed of a proposed change in the format. Ascertainment procedures are meant to determine community problems, not program preferences. The absence of any references to program preference in the ascertainment survey cannot be considered a misrepresentation. Lakewood B/casting Service, Inc. v. FCC, 27 RR 2d 543 [US App DC, 1973].

[¶10:309(I)(1), ¶10:309(I)(4), ¶53:24(R), ¶53:24(Y), ¶53:24(Z)(7)] Change in program format.

Where the record showed that what was being challenged, in connection with an assignee's proposal to change the "all news" format of a station, was not the authenticity of community surveys or the financial results of the "all news" format, but rather the inferences to be drawn from facts already known and the legal conclusions to be derived from those facts, the Commission could draw the inferences and derive the conclusions without the necessity of an evidentiary hearing. The case for allowing the format change, in view of financial considerations, alternative sources for news, and the broadcasting record of the assignee was strong. A survey to determine the exact degree of support for the old format was not required. Lakewood B/casting Service, Inc. v. FCC, 27 RR 2d 543 [US App DC, 1973].

Appeals from an Order of the Federal Communications Commission [25 RR 2d 73]

Aloysius B. McCabe with whom John C. Quale was on the brief for appellant in No. 72-1757.

Thomas R. Asher for appellant in No. 72-1758.

R. Michael Senkowski, Counsel, Federal Communications Commission, with whom John W. Pettit, General Counsel and Joseph A. Marino, Associate General Counsel, Federal Communications Commission, were on the brief for appellee.

Harry M. Plotkin with whom Gene A. Bechtel, Eric L. Bernthal and Charles J. McKerns were on the brief, for intervenors. Ralph W. Hardy, Jr., also entered an appearance for intervenor KBTR, Inc.

Before Bazelon, Chief Judge, Tamm, Circuit Judge and Harrison Winter,* Circuit Judge for the Fourth Circuit.

Tamm, Circuit Judge: These consolidated appeals are taken from a Memorandum Opinion and Order of the Federal Communications Commission [hereinafter "Commission"] granting an application for assignment of the license of radio Station KBTR (AM), Denver, Colorado, and the contemporaneous denial of the appellants' Petitions to Deny the assignment. The Commission opinion is reported as Charles A. Haskell, 36 FCC 2d 78 [25 RR 2d 73] (1972). The sole issue propounded in both appeals is identical to that which was before the court in Hartford Communications Committee v. FCC, 467 F2d 408, 410 [24 RR 2d 2160] (DC Cir. 1972): "[W]hether the Commission could reasonably conclude that appellants had not raised substantial and

* Sitting by designation pursuant to 28 USC §291(a) (1970).

material questions of fact which would make a prima facie showing that Commission approval of the license assignment would not be in the public interest. Put more succinctly the issue is whether an evidentiary hearing was necessary." See 47 USC §309(d) (1970). We find that no hearing was required.

I

KBTR (AM), wholly owned by the late John C. Mullins since 1961, is a five kilowatt station providing twenty-four hour radio service to the Denver metropolitan area. Following several unsuccessful attempts at alternative formats the station in 1967 adopted an "all news" format, becoming the sole station in the Denver area to do so. 1/ The "all news" format received heavy television promotion over a Mullins owned television Station, KBTV, and considerable print media promotion through utilization of a Mullins owned billboard company. KBTR (AM) nonetheless suffered considerable financial losses totaling nearly a half-millins dollars, 2/ and not long after Mr. Mullins' demise the executors of his estate entered into a contract to sell the station to Mission Denver Company. 3/

Mission Denver's proposal in its assignment application before the Commission to alter KBTR (AM)'s format to "country and western" music engendered Petitions to Deny from Lakewood Broadcasting Service, Inc., the would-be primary competitor of KBTR (AM) in the Denver "country and western" market,

---

1/ The other stations in the Denver area provide, inter alia, "top forty," "middle of the road," "classical," "easy listening," "rhythm and blues," "religious," and "country and western" formats. See Joint Brief of Intervenors at 22-23.

2/ The cash flow figures relied upon by the Commission, 36 FCC 2d at 79-80, and supported by an affidavit of the vice-president of Mullins Broadcasting Co., Jt. App. at 204-07, reflect net operating losses of $338,986 for 1967, $136,063 for 1968, $120,972 for 1969, and net operating profits of $46,435 for 1970, and $20,997 for the first nine months of 1971. This results in a cumulative net operating loss of $528,589 while operating under the "all news" format.

3/ A desire to liquidate the estate's assets, a need for cash to pay taxes and debts, and the co-executors' alleged realization that "their duties and fiscal responsibilities in their fiduciary capacity required them to manage the business in an extremely conservative fashion, sometimes in a manner almost contrary to their inclinations as businessmen," brought about the contract for sale. Jt. App. at 2-3.

Mission Denver Co. is a newly formed corporation. Its parent corporation, Mission Broadcasting Co., has a forty-five year record in the broadcasting business. Jt. App. at 164.

and Colorado Citizens for Broadcasting, 4/ a citizens association whose activities are "directed to scrutinizing the performance of the broadcast media in Colorado to assure maximum public service and accountability." 5/ The petitioners jointly sought a hearing on the public interest ramifications of abandoning the unique "all news" format, citing Citizens Committee v. FCC, 436 F2d 263 [20 RR 2d 2026] (DC Cir. 1970), and Lakewood additionally challenged the financial qualifications of Mission Denver. The Commission, in a painstakingly thorough decision, rejected the contention that a hearing was required and adjudged that the public interest would best be served by granting the assignment application.

II

1. Format Change

In Citizens Committee to Keep Progressive Rock v. FCC, No 72-1675 (DC Cir. May 4, 1973), also issued today, we have analyzed at some length the ramifications of the Citizens Committee decision. Where a "significant minority" of those whom a station is obligated to serve voice discontent over a proposed entertainment format change, the format change becomes an issue to be dealt with by the Commission in its 47 USC §309(a) (1970) determination that the assignment comports with public interest, convenience, and necessity. Consequently, factual disputes surrounding the format change are material, and if substantial become subject to the 47 USC §309(e) (1970) hearing requirement. In Progressive Rock we also noted, however, the limited scope of review we exercise over the Commission's hearing determination, quoting from West Michigan Telecasters, Inc. v. FCC, 396 F2d 688, 691 [13 RR 2d 2039] (DC Cir. 1968):

> "Admittedly, the scope of our review is quite narrow; we defer to the expertise and experience of the Commission within its field of specialty and would reverse only where the Commission's position is arbitrary, capricious or unreasonable. And it is clear that the decision of when hearings are necessary or desirable to clarify issues is one which lies in the first instance with the Commission." (Citations omitted.)

Progressive Rock, supra, slip op. at 17 n. 25.

4/ Colorado Citizens for Broadcasting was joined in its petition by several individuals, and by organizations such as the Denver Area Association of the Blind, Colorado Springs Council of the Blind, Colorado Media Project, Inc., and the National Organization for Women.

5/ Jt. App. at 38.

All of our "format" decisions to date have involved entertainment formats. 6/ In light of the special public interest in news sources, see City of Camden, 18 FCC 2d 412, 423 [16 RR 2d 555] (1969), and the analogy to the entertainment decisions in this unusual situation where news is the "entertainment" substance of the format, we feel that the logic of Citizens Committee and Progressive Rock most certainly applies to the case at hand. A close analysis of the record reveals, however, that no substantial and material facts are at issue, and therefore that the Commission could rightly make its public interest determination as to the format change without an evidentiary hearing.

Appellants claim that interview summaries submitted to the Commission – in compliance with the requirement that the applicant consult with community leaders, evaluate community problems based on those consultations, and program accordingly 7/ – were defective in that they failed to recite that many of the civic leaders interviewed favored retention of the "all news" format. Appellants additionally allege that in some instances the interviewees were not informed of the proposed format change. 8/ These actions, appellants claim, raise factual questions concerning the adequacy and accuracy of the community survey which can only be resolved in an evidentiary hearing.

The Commission found appellant's assertion to be based on a persistent "misreading of the purpose of ascertainment procedures," and stated that "the purpose of interviewing community leaders is to discover community problems, not to elicit program preferences." 36 FCC 2d at 84-85. We must agree. Clearly the Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 682 (1971), elucidates that the ascertainment procedures are meant to determine the problems of the community, e.g., drug abuse, pollution, race relations, crime, as opposed to the programming preferences of the interviewees.

6/ See Citizens Committee to Keep Progressive Rock v. FCC, No. 72-1675 (DC Cir. May 4, 1973) (progressive rock); Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC, No. 71-1336 (DC Cir. May 13, 1971) (classical music); Citizens Committee v. FCC, 436 F2d 263 [20 RR 2d 2026] (DC Cir. 1970) (classical music).

7/ See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 683-87 [21 RR 2d 1507] questions #11 through 36 (1971).

8/ Appellants allege that out of the sixty community leaders resurveyed, twenty-nine stated they had not been told by Mission of the intended format change, and only fifteen were certain they had been told. Twenty-four of the sixty allegedly "expressed views about the need to continue KBTR's format." Jt. App. at 52-53. Appellees challenge not only the relevancy of such a finding but also the methodology of the resurvey. Joint Brief of Intervenors at 36 n. 49.

In Citizens Committee we remanded for a hearing to resolve alleged discrepancies in the summaries of interviews with thirteen community leaders, and thus to determine if misrepresentation was more than just an allegation. The summaries at issue were submitted by the applicant-assignee to reflect favorable views toward the proposed new entertainment format, in an effort to offset mounting pressure being applied by citizens seeking to retain the old. To the extent that the summaries did not truly reflect the affiants' views regarding programming preferences – precisely the issue they were represented to influence – misrepresentation and appendant denial of the application were in issue. In the situation sub judice, however, statements of preference simply are not relevant to the ascertainment survey as presently constituted, and so the Commission's conclusion that the alleged misrepresentations regarding format preferences do not raise material issues of fact cannot be faulted. We adopt the Commission logic, 36 FCC 2d at 86:

> [S]ince the Primer is not concerned with community leaders' views on program preferences, there is no basis for concluding Mission tried to mislead the Commission by not including interviewee comments on format choices in the consultation reports filed with the application. Given the Primer requirements, any factual questions raised by Mission's alleged failure to inform interviewees of the format change or to include their comments on such proposal are not substantial questions, and certainly not the material questions which are required before a hearing is needed. 9/

9/ In the Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 679-80 (1971), the Commission points out that it was specifically "exclud[ing] a question recommended . . . relating to the showing that must be made in cases where a station proposes to change its format." It did recognize, however, that Citizens Committee v. FCC, 436 F2d 263 [20 RR 2d 2026] (DC Cir. 1970), necessitated "that any application involving a substantial change in program format . . . be scrutinized" and that "applicants should be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other stations." See Citizens Committee to Keep Progressive Rock v. FCC, No. 72-1675, slip op. at 7 (DC Cir. May 4, 1973).

The ascertainment survey is concerned with problems, not preferences, and need not be the vehicle for supporting evidence regarding a program format alteration. This is especially true in light of the fact that unless a significant minority voices opposition to the format change "the Commission assumes – and properly so – that the new format is acceptable." Twin States Broadcasting, Inc., 35 FCC 2d 969, 974 [24 RR 2d 766] (1972) (Commissioner Johnson, dissenting). See Progressive Rock, supra, slip op. at 16 n. 23. Thus the absence of any references to preference in the ascertainment survey cannot be considered a

[Footnote continued on following page]

Appellants additionally complain that there exist material and substantial questions of fact concerning alternative sources of the "all news" format 10/ and the financial viability of the "all news" format. 11/ It is enough to respond (without entering into a lengthy enumeration of facts and figures) that our study of the record shows that what really is being challenged is not the authenticity or accuracy of the surveys, composites, or economic reports, but rather the inferences which the Commission may draw therefrom. Certainly the "inferences to be drawn from facts already known and the legal conclusions to be derived from those facts" may be made by the Commission without an

---

9/ [Footnote continued from preceding page]

misrepresentation. If the format change does become a public interest issue, however, and surveys et al. are submitted by the applicant "to support [its] proposals to change formats," misrepresentations contained therein certainly become material. See Citizens Committee, supra. Also, should an applicant anticipate opposition and include references to program preferences in its ascertainment survey in an effort to supply evidentiary support for its proposed change, then if format change becomes a public interest issue any misrepresentations will become material. We are presented with neither of those situations.

10/ The Commission found, 36 FCC 2d at 86, that the twenty other Denver area radio stations would provide a total of 291 hours and 39 minutes of radio news per week. See Jt. App. at 209-10. Two Denver area stations altered their formats to provide "all news" in prime listening hours and have increased their news staffs and news gathering facilities. The Commission concluded, 36 FCC 2d at 87:

"[T]he plethora of news services available in Denver, the prime time 'all news' services recently made available by Stations KGMC and KOA-AM, and the alternative balanced program format proposed by Mission all justify the format change at KBTR. In making this judgment, we do not pretend that every demonstrated listener need or interest in Denver will be perfectly met. But as suggested before, we cannot guarantee that every broadcast need will be instantly gratified on a fixed frequency, twenty-four hours per day. It is unreasonable to expect this, and the Communications Act neither requires nor authorizes such a result."

11/ In addition to the financial losses experienced over the past five years, see note 2 supra, increased operating expenses as a result of the disaffiliation with KBTV (sold to another buyer in compliance with the Commission's "one-to-the-market" policy), were a distinct possibility. See Jt. App. at 203.

evidentiary hearing. Anti-Defamation League of B'nai B'rith v. FCC, 403 F2d 169, 171 [14 RR 2d 2051] (DC Cir. 1968), cert. denied, 394 US 930 (1969). 12/

2. The Financial Qualifications of Mission Denver

Appellant Lakewood challenges the financial qualifications of Mission Denver, citing the "staleness" and "speculative nature" of its financial submission. The applicable standard established by the Commission in Ultravision Broadcasting Co., 1 FCC 2d 544, 546-47 [5 RR 2d 343] (1965), places the burden on the applicant to show that it has the financial strength to withstand the costs of purchase and the first year of operation. The Commission estimated that some $2,079,900 would thus be needed, an estimate that is unchallenged. The Commission additionally estimated that $2,224,705 (some $180,000 less than applicant-assignee's estimate) would be available from the following sources: (1) a $2,000,000 loan, the existence of which is also unchallenged; (2) $192,087 in excess of current assets over current liabilities as shown on the consolidated balance sheet of Mission Broadcasting Company, Mission Denver's parent corporation; and (3) $46,435 in estimated profit from the first year of operation of KBTR (AM). 36 FCC 2d at 87-88. We find, notwithstanding the fact that the figures relied upon by the Commission in its extrapolations were several months old at the time of the decision, 13/ that the Commission's determinations were sound and reasonable,

---

12/ There have been advanced glimmerings of an argument that no Commission determination of the public interest can be made absent a survey of community preferences on the issue, similar to that conducted in Citizens Committee. Certainly the extent of community support is an element to be considered by the Commission, but the exact proportions or degree of such support need not always be known prior to a reasoned determination. Here the case for allowing the format change, in view of financial considerations, alternative sources, and the broadcasting record of the assignee, was strong. The Commission had to consider the public interest, but that does not in all situations require a survey to determine the exact degree of support for the old format.

13/ The statement of consolidated and retained earnings of Mission Broadcasting Co. covered a period through July 31, 1971, Jt. App. at 11, while the "Statements of Income and Expense" of KBTR (AM) were through September 30, 1971. Jt. App. at 206. The assignment application was filed on August 27, 1971. FCC Form 314, Section III, item 2(a) requires that a "detailed balance sheet of assignee as of the close of a month within 90 days of the date of the application showing applicant's financial position" be filed with the assignment application. 47 CFR §1.65 requires that an amendment to the application be filed by the applicant whenever "the pending application is no longer substantially accurate and complete in all significant respects. . . ."

especially in light of the fact that only $79,000 was really in issue. Finding such, we are bound to affirm. See Hartford, supra, 467 F2d at 414.

The determination of the Commission that no material and substantial questions of fact existed, and so no evidentiary hearing was required, along with its conclusion that the public interest would be served by granting the application, is supported by substantial evidence in the record and is neither arbitrary, unreasonable, nor capricious. Accordingly, the order of the Commission granting the application for assignment of KBTR (AM) and denying appellants' Petitions to Deny is

Affirmed. 14/

14/ One further note of explanation regarding our decisions in the area of the law explored today in Progressive Rock and Lakewood Broadcasting is in order. 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 Citizens Committee, 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, and public and private, interests should be struck.

VII-22

CITIZENS COMMITTEE TO KEEP PROGRESSIVE ROCK v.
FEDERAL COMMUNICATIONS COMMISSION

MIDWESTERN B/CASTING CO., Intervenor

U. S. Court of Appeals, District of Columbia Circuit, May 4, 1973

No. 72-1675

[¶10:309(I)(1), ¶10:309(I)(4), ¶53:24(R), ¶53:24(Z)(7)] Program format change; necessity for evidentiary hearing.

The public has an interest in diversity of entertainment formats and therefore format changes can be detrimental to the public interest. Consequently, in compliance with its statutory mandate to approve only those assignment applications which it finds to serve the public interest, the Commission must consider format changes and their effect on the desired diversity. If there are factual disputes, a hearing must be held. Where the assignee of a station proposed to change the entertainment format to middle-of-the road music from progressive rock; the progressive rock format was rapidly approaching financial viability; there was no clear showing that an alternative source of progressive rock was available, whereas other stations in the area provided a middle-of-the road music format; and significant numbers of residents of the community of license, as well as many residents in the station's service area outside the community of license, petitioned for retention of the progressive rock format, the change of format was an issue which required an evidentiary hearing regarding alternative sources and economic feasibility. Citizens Committee to Keep Progressive Rock v. FCC, 27 RR 2d 463 [US App DC, 1973].

Appeal from an Order of the Federal Communications Commission [27 RR 2d 766]

Tracy A. Westen for appellant.

R. Michael Senkowski, Counsel, Federal Communications Commission, with whom John W. Pettit, General Counsel and Joseph A. Marino, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee.

Stanley B. Cohen with whom Ian D. Volner was on the brief for intervenor.

Before McGowan and Tamm, Circuit Judges, and William J. Jameson, */ Senior United States District Judge for the District of Montana.

Tamm, Circuit Judge: Appellant, a citizens committee organized to contest the assignment of radio Station WGLN (FM), Sylvania, Ohio, from Twin States Broadcasting, Inc., to Midwestern Broadcasting Corp., brings this appeal from an order of the Federal Communications Commission [hereinafter "Commission"] affirming a prior grant of the assignment application. The primary issue 1/ raised by appellant concerns the statutory requirement for a hearing whenever "substantial and material question[s] of fact" are raised regarding the application. 47 USC §309(e) (1970). Contrary to the Commission's determination we find that there are substantial and material factual questions at issue rendering a hearing necessary prior to resolution of the application. We reverse the order of the Commission and remand for such a hearing.

I.

WGLN (FM) began operation on November 29, 1968, as a "country and western" music station licensed to Twin States Broadcasting, Inc. Twin States' application for construction and license stated that "although the applicant proposes to principally serve Sylvania [a small Ohio 'bedroom' suburban community on the outskirts of Toledo], 2/ which has no other broadcast station licensed to serve it at the present time, the applicant believes that it also has the responsibility to serve the program needs of the remainder of its service area." Thus, although its primary service obligation was to its principal city of license, Sylvania, Twin States recognized a secondary responsibility to service the effective area of its signal, including other suburban communities and at minimum a significant portion of Toledo proper.

Following renewal of its license in 1970, 3/ in March of 1971 WGLN (FM) altered its programming to a commercialized format of "golden oldies."

---

*/ Sitting by designation pursuant to 28 USC §294(d) (1970).

1/ We reject appellant's argument that the Commission erred in refusing to order a hearing to determine whether the assignee of WGLN (FM) misrepresented its programming plans to its employees and the community of license in order to forestall protests.

2/ The channel applied for, 288A, was assigned to the city of Toledo. 47 CFR §73.202(b). It was available for use at Sylvania, however, pursuant to 47 CFR §73.203(b), the "25 mile rule." The "rule" was amended effective June 4, 1968. See 33 Fed. Reg. 6663 (May 1, 1968).

3/ The application for license renewal was filed on July 6, 1970, and stated at Exhibit 2A, in response to Part 1, Section IV(A), sentence (1)(A)(2) of the application: "The principal community served by the station is the community of Sylvania, Ohio (population 5,137), and the surrounding county of Lucas, Ohio (population 456,931), including the city of Toledo, Ohio (population 3[illegible]5,000)." Renewal was granted effective October 29, 1970 through October 1, 1973.

Finding neither format economically successful and and suffering significant losses in its investment, 4/ on August 12, 1971, Twin States sought Commission consent to assignment of the license to Midwestern Broadcasting Corp. The proposed assignee, which also owned a highly successful "top forty" music station licensed to Toledo, WOHO (AM), stated in the assignment application that it proposed to program "generally middle of the road music which may include some contemporary, folk and jazz, similar to what [the] station is currently programming." 5/ The assignee proposed the serve the city of license and other suburban communities in the greater Toledo metropolitan area.

On August 31, 1971, while the application for assignment was still pending before the Commission, WGLN (FM) began experimentation with a "progressive rock" music program for several hours late each evening. The unprecedented success of the program led to the eventual complete change of the format to "progressive rock" on October 15, 1971.

On February 23, 1972, the Commission without the benefit of a hearing found that the "grant of [the WGLN (FM) assignment] application will serve the public interest, convenience and necessity," and released an order granting the application. Shortly thereafter it became evident to the individuals who now make up the Citizens Committee that the "progressive rock" format which they so dearly cherished was to be abandoned. The Committee was formed, petitions calling for the retention of the "progressive rock" format circulated, and on March 27, 1971, a Petition for Stay, Reconsideration and Permanent Denial of Assignment Application was filed with the Commission. The Committee's main contention was that since the "progressive rock" format of WGLN (FM) was unique to the Toledo area, and since a significant portion of the "residents of the metropolitan Toledo area" (as evidenced by more than 11,000 petition signatures ultimately garnered and submitted) desired retention of the format, this court's decision in Citizens Committee v. FCC, 436 F2d 263 [20 RR 2d 2026] (DC Cir. 1970), mandated a hearing to examine the public interest implications of the proposal to convert the communities' only "progressive rock" music station into one of several "middle of the road" stations. The Commission, for reasons we now deem unpersuasive, denied the Petition and affirmed its original order. Twin States Broadcasting, Inc., 35 FCC 2d 969 [24 RR 2d 766] (1972).

WGLN (FM) has since changed its call letters to WXEZ (FM), moved its studios to those of WOHO (AM) in Oregon, Ohio, and provides the same "middle of the road" format that is now offered to the Toledo environs by at least six other licensees.

4/ The licensee experienced an operating cash profit of $2,036.00 in 1969, a loss of $27,072.00 in 1970, and a loss of $21,901.00 during the first six months of 1971. Jt. App. at 84.

5/ Jt. App. at 24. We agree with the Commission that the similarity between a "golden oldies" and "middle of the road" format voids appellant's argument that this is a misrepresentation. See Twin States Broadcasting, Inc., 35 FCC 2d 969, 972 [24 RR 2d 766] (1972).

II.

In Citizens Committee we held that the public has an interest in diversity of entertainment formats and therefore that format changes can be detrimental to the public interest. Consequently, in compliance with its statutory mandate to approve only those assignment applications which it finds to serve the public interest, convenience, and necessity, 47 USC §309(a) (1970), the Commission must consider format changes and their effect upon the desired diversity.

The majority of format changes do not diminish the diversity available, and are thus left to the give and take of each market environment and the business judgment of the licensee. See WCAB, Inc., 27 FCC 2d 743, 746 [21 RR 2d 146] (1971), and Hartford Communications Committee v. FCC, 467 F2d 408 [24 RR 2d 2160] (DC Cir. 1972). 6/ Citizens Committee dealt with the specialized situation where the format to be discontinued, "classical music," was apparently unique to the area while the proposed format, "middle of the road," was not. A "not insignificant protion" (sixteen per cent) of the area's residents desired retention of the unique format, and we stated, 436 F2d at 269:

> "[I]t is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible."

6/ It makes no practical difference whether an adequate listening alternative is considered one of many elements (although undoubtedly the most important, and normally the conclusive element) to be considered by the Commission, or as a factor that renders inapplicable the entire Citizens Committee rationale. In either instance, the presence and adequacy of the alternative source is a material issue. See Keyes Corp., 31 FCC 2d 32, 38 [22 RR 2d 701] (1971):

> "It has been fully demonstrated that other stations serving the community of Canton carry substantially the same entertainment format as that presently carried by WNYN-FM and that, in consequence, its proposed change of format will not result in the elimination of the only station providing 'quiet pool' entertainment fare. The assignee proposes contemporary popular music and standard popular music from the past. Thus, there is considerable doubt whether the doctrine of the Citizens' Committee Case even comes into play. However, even if the doctrine of that case were to be applied here, the application establishes beyond a doubt that the assignee's proposals, as described above, are designed to serve the needs and interests of Canton and that the tastes of Canton for entertainment programming will continue to be met." (Footnote omitted.)

See also Biola Schools and Colleges, Inc., 29 FCC 2d 787 [21 RR 2d 1275] (1971).

In essence, one man's Bread is the next man's Bach, Bacharach, or Buck Owens and the Buckeroos, and where "technically and economically feasible," it is in the public's best interest to have all segments represented. 7/

Having thus raised format change to a public interest level, in Citizens Committee we went on to find factual disputes concerning (a) the financial necessity for the format change, (b) the accuracy of interviews with prominent citizens pertaining to the retention of the classical music format, and (c) the extent to which daytime listeners in Atlanta (the city of license) were provided with classical music from a non-Atlanta source. Since the format change was an issue to be considered in determining whether the assignment application was in the public interest, these factual disputes became "substantial and material" and 47 USC §309(e) (1970) required a hearing.

Not too suprisingly, Citizens Committee has become the object of dichotomous interpretation. The Commission, on the one hand, recognized Citizens Committee (and subsequently a summary reversal based thereon in Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC, No. 71-1336 (DC Cir. May 13, 1971)) to such an extent that in its Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 680 [21 RR 2d 1507] (1971), it stated:

> "[A]ny application involving a substantial change in program format – including assignment and transfer applications (where this type of question has usually arisen) and also applications for renewal or major changes in facilities if they involve a basic programming change – will be scrutinized in light of [the Citizens Committee] decision; and applicants should be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other stations. A careful reading of this decision is recommended." (Footnote omitted.)

It is our distinct impression, however, based on the briefs and oral arguments in the case sub judice and Lakewood Broadcasting Service, Inc., et al., v. FCC, Nos. 72-1757-58 (DC Cir. May 4, 1973), also issued today, that the Commission desires as limiting as interpretation as is possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of Citizens Committee to cases involving Atlanta classical music stations. On the other hand, voices have been heard, see dissenting opinion of Commissioner Johnson in this case, 35 FCC 2d at 973, espousing a more liberal interpretation – one holding that any format change diminishing the diversity available automatically gives rise to a hearing.

7/ This assumes, of course, that a "significant minority" voices support for the format to be discontinued. De minimis non curant arbitri, but neither may the Commission ignore a minority's petitions nor should it establish a quantitative minimum. Each situation is different and should be treated as such. Certainly the degree of support for retention of a unique format can be of critical importance in what otherwise are "close cases."

We treat format changes no differently from any other element affecting public interest. If there are factual disputes, as there were in Citizens Committee, then a hearing must be held. If there are none – for instance the financial viability of the existing format and the alternative sources of that format may be undisputed, 8/ so that the Commission is faced only with balancing the competing interests with known and unchallenged 9/ factors, and thus determines where the public interest lies – then no hearing is required.

In Hartford Communications Committee v. FCC, supra, we were presented with allegations running to (1) the financial qualifications of a proposed assignee, and (2) diminution of service, issues long considered in the public's interest, yet we did not grant appellant's request for a Commission hearing because we found no substantial factual dispute as to those material issues. The dispute concerned the interpretation from a public interest posture to be given the indisputable facts. That determination was for the Commission to make and did not require a hearing. See Anti-Defamation League of B'nai B'rith v. FCC, 403 F2d 169, 171 [14 RR 2d 2051] (DC Cir. 1968), cert. denied, 394 US 930 (1969). An identical procedure is applicable for format change considerations. When we say that a format change is of public interest proportions we mean that it must be considered by the Commission in its ultimate determination of public interest, and thus will be an element scrutinized by this court when called upon to exercise its review. If none of the issues pertaining to the format change are substantially in dispute, however, no hearing need be held. 10/

Thus, the proposed format change before us should have been surveyed by the Commission, and we must look to the record to determine if any substantial and material issues of fact are present.

III.

The Commission's decision views "the facts here as very much analogous to those which were before the Commission in WCAB, Inc., 21 RR 2d 146, 27 FCC 2d 743 (1971)." 35 FCC 2d at 970. In WCAB, however, there was no dispute that under a "progressive rock" format the licensee had suffered and continued to suffer serious financial losses. In addition, there was no dispute that an alternative source of the format, WZMF (FM) licensed to Menomonie Falls, Wisconsin, was available to Milwaukee area residents. Those issues are disputed here.

8/ We assume that all other issues relevant to the format change determination are likewise undisputed.

9/ "Unchallenged" is tempered with acknowledgement that "[c]ontradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest." Broadcast Enterprises, Inc. v. FCC, 390 F2d 483, 485 [12 RR 2d 2001] (DC Cir. 1968).

10/ See Lakewood Broadcasting Service, Inc. et al., Nos. 72-1757-58 (DC Cir. May 4, 1973).

While it is true that financial difficulties were experienced under the "country and western" and "golden oldies" format, appellant has produced numerous affidavits of station employees and sales personel to the effect that the "progressive rock" format was rapidly achieving financial viability. Hooper surveys for November-December, 1971, and January-February, 1972, showed substantial audience gains during all programming segments, and the station had risen to middle ranking in the twelve station market between 3:00 p.m. and 12:00 p.m. 11/ More importantly, the rate card was adjusted upward from $2.80 per sixty second announcement to $14.00, 12/ and a "no cut" policy was adopted and faithfully observed. The financial losses of the licensee under the prior formats are relevant, inter alia, to suspension of the "three year rule," 13/ but not directly to the format change aspect of the public interest determination. 14/ 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. WCAB represented a case of known economic unfeasibility. Contrariwise; here there exists a legitimate dispute concerning the viability of a "progressive rock" format, and the past

---

11/ See affidavit of Dorian Paster, Jt. App. at 150, 155, 157, which was included with appellant's Petition for Reconsideration.

12/ See affidavit of Charles Schmitt, former sales manager for WGLN (FM), Jt. App. at 164, 166, which was included with appellant's Petition for Reconsideration. See also affidavit of Richard Bird, Jr., former public affairs director for WGLN (FM), Jt. App. at 176. The affidavits submitted with appellant's Petition for Reconsideration generally speak of the improved status of WGLN (FM) since the adoption of the "progressive rock" format, but also contain statements indicating that the station was not as financially sound as it should be, or would be in the future.

13/ 47 CFR §1.597(a) provides that unless the "assignor . . . has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that (due to unavailability of capital . . .) Commission consent to the proposed assignment or transfer of control will serve the public interest, convenience and necessity," then if the station involved in a proposed assignment "has been operated by the proposed assignor . . . for less than three successive years, the application will be designated for hearing" pursuant to 47 USC §309(e) (1970).

The test is generally whether the assignor has made a sufficient showing that he is not "trafficking in broadcast licenses." 35 FCC 2d at 972.

14/ It is possible, although not probable, that a licensee could suffer such financial losses under prior formats that a newly found profitable format will be too little too late. In the event that no purchaser can be found willing to program the new economically feasible format (equally unlikely), and the public is thus faced with abandonment of the channel altogether, the financial losses of the licensee under prior formats would have to be considered relevant to the format change determination.

difficulties under other formats are only minimally relevant. As appellant aptly points out in its brief, "[t]he question before the Commission is not whether WGLN (FM)'s prior format was profitable in the past, but whether progressive rock as a format has been, and is now, 'economically feasible.'" 15/

The supposed WCAB analogy is equally inapplicable from an alternative source viewpoint. While two "top forty" formats now service the Toledo area there has been no showing, at least on the record, 16/ that an alternative source of "progressive rock" is available. The implied Commission assertion that one is available - through reference to WCAB, and by the nunc pro tunc assertion in the Memorandum Opinion and Order denying appellant's motion for stay, August 8, 1972, 17/ that "Toledo presently has two stations utilizing a 'Top Forty' entertainment format which, though not devoted exclusively to petitioners' tastes, include some 'progressive rock' music" - is in the face of contrary allegations by the appellant that raise material issues of fact which must be explored in a hearing. We deal here with format, not occasional duplication of selections.

Finally, the Commission attempts to support its conclusion by reference to the fact that WGLN (FM) is the only station licensed to Sylvania, that we stated in Citizens Committee that "if there were only one radio channel available to Atlanta" the result therein might have been different, 436 F2d at 269, and that the vast majority of petition signatures were those of Toledo rather than Sylvania residents. 18/

15/ Brief for Appellant at 32.

16/ At oral argument reference was made by counsel for the Commission and Intervenor to a new "progressive rock" station servicing the Toledo metropolitan area. This is a matter for the Commission's consideration on remand.

17/ The Commission's original decision was released on June 30, 1972, and is reported at 35 FCC 2d 969. Later, on August 8, 1972, Commissioners Robert E. Lee and H. Rex Lee, "acting as a Board," adopted an opinion and order denying appellant's motion for stay of the effective date of the Commission's earlier order. Jt. App. at 288. In this second opinion the Commission for the first time distinguished the Citizens Committee case on the grounds that WGLN (FM) was Sylvania's only station, and that alternative sources of "progressive rock" were available. Appellant contends that this second opinion and order cannot be considered when reviewing the Commission decision to grant the application. We find the Commission decision defective even if we consider the reasons set out in the second opinion, and so we need not decide the issue.

18/ Appellant circulated petitions with the following heading:

"We the people of the community know [sic] as Toledo, Ohio:

Protest the elimination of programming dedicated to progressive rock and public affairs serving our community as formerly presented by station

[Footnote continued on following page]

WGLN (FM)'s city of license is its primary obligation. In considering the needs of the community it must stress those of Sylvania and program accordingly. A licensee's obligations do not end there, however, and a secondary obligation exists to satisfy the demands of the surrounding environs. 19/ Recognition of this requirement can be seen in Twin States' application for construction and license, discussed earlier, 20/ and in the survey of community leaders. The survey contained in the assignee's application, for example, compiled the results of interviews with eleven Toledo and five Oregon residents, six residents of other suburban communities, and thirty-five Sylvania residents. To the extent that WGLN (FM) secondarily serves Sylvania's neighbors, it is secondarily responsible to them.

18/ [Footnote continued from preceding page]

WGLN-FM. We the citizens oppose the approval of transfer of frequency 105.5 FM to Lewis Dickey, president of Midwestern Broadcasting and owner of WOHO-AM.

We feel the interest of the public will best be served by an independent broadcaster using the same broadcasting principles established by WGLN prior to the takeover and elimination by Midwestern Broadcasting.

Petition sponsored by Citizens Committee to Keep Progressive Rock!"

Jt. App. at 187. Appellant asserts that 11,122 signatures "from the greater Toledo, Ohio, area" have been submitted to the Commission. Despite the language of the heading it is clear from the record that the petitions did include signatures of non-Toledo residents, although the exact number is questioned. Appellant stated in its Reply Brief in the Commission proceedings, Jt. App. at 237, that "a substantial percentage of the signers are residents of Sylvania," and submitted with its Reply Brief the signatures of 188 additional Sylvania residents.

19/ See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 682, question #6 (1971):

"Question: Is an applicant expected to ascertain community problems outside the community of license?

"Answer: Yes. Of course, an applicant's principle obligation is to ascertain the problems of this community of license. But he should also ascertain the problems of the other communities that he undertakes to serve, as set forth in his response to Question 1(a)(2) of Section IV-A or IV-B. . . . If an applicant chooses not to serve a major community that falls within his service contours a showing must be submitted explaining why. However, no major city more than 75 miles from the transmitter site need be included in the applicant's ascertainment, even if the station's contours exceed that distance."

20/ See text at note 2 supra, and text of note 3 supra.

More importantly, however, is the degree to which Sylvania is served by the area's other radio stations. WGLN (FM) may be the only channel licensed to Sylvania, but the availability of the multitude of other stations has a distinct bearing upon the format change determination before the Commission. Thus, in WCAB an alternative source available in Menomonie Falls eased the way for the format change of a Wauwatosa station serving the entire Milwaukee metropolitan area. Likewise, in Citizens Committee we remanded for a hearing to determine the extent to which a non-Atlanta station provided an alternative source of a "classical music" format for Atlanta residents. We realize that the fewer the radio sources the more the tastes of the majority must be recognized, and that some easy listening format could represent the greatest good for the greatest number. Nonetheless, when considering the "greatest good" in this case we cannot ignore the multitude of non-Sylvania stations serving the Sylvania residents.

The Commission's reasoning contains an interesting, if unacceptable, inconsistency. The Commission marks Sylvania as the sole city of license in an effort to support its failure to consider the petition signatures of non-Sylvania residents, and to support its disapproval of a specialized format; yet when the issue of alternative listening sources is raised it quickly points to two "top forty" formats offered by stations not licensed to Sylvania. Equally important, of course, it the fact that significant numbers of Sylvania residents did petition for retention of the "progressive rock" format. 21/ All things considered, a significant minority of those whom WGLN (FM) was obligated to serve desired retention of the apparently unique format. Change of the format became an issue for the Commission and a hearing was required regarding the disputed facts: alternative sources and economic feasibility. The Commission's failure to recognize its obligation mandates this remand. 22/

21/ See note 18 supra.

22/ The Commission stated, 35 FCC 2d at 971 n. 3:

> "It should be noted that WGLN did not have a 'Progressive Rock' format when assignee contracted to buy it or when the assignment application was filed. Certainly assignee should not be held responsible for the continuation of a format which was not in existence when it filed its application. This factor clearly distinguishes this case from the decision in Citizens Committee (WGKA) v. FCC 436 F2d 263 DC Cir. (1970) and where the Court found that there was a substantial question as to whether the stations were operating as a loss."
>
> We find, as did Commissioner Johnson in his dissent, that the time of adoption of the "progressive rock" format is "a distinction without a difference," 35 FCC 2d at 974 n. 2:
>
> "The majority attempts to distinguish this case from Citizens by pointing out that the current format was not adopted until after Midwestern contracted to buy the station, or even until after the application for approval of the purchase was filed. While this may be a distinction between this

[Footnote continued on following page]

If no objection is raised to a format change the Commission may properly assume that the format is acceptable and, so long as all else is in order, it may grant the application. 23/ When the public grumbling reaches significant proportions, as here and in Citizens Committee, the format change becomes an issue for resolution and hearing procedures are applicable if issues of fact are in dispute. Questions regarding the extent of support for the format themselves may be material, and if substantial then the proper procedure is either a survey of the area residents or a hearing on the issue. Once the factual disputes are exposed and a hearing held the Commission's decision regarding the public interest must be reasoned and based upon substantial evidence. Failure to hold a required hearing or failure to render a reasoned decision will be, as always, reversible error. No more is required, no less is accepted. 24/

We recognize that in reviewing the Commission's determinations, even as to whether a hearing should be held, our scope of review is limited. See West Michigan Telecasters, Inc. v. FCC, 396 F2d 688 [13 RR 2d 2039] (DC Cir. 1968), and Southwestern Operating Co. v. FCC, 351 F2d 834 [5 RR 2d 2121] (DC Cir. 1965). 25/ The failure to hold evidentiary hearings herein simply

---

22/ [Footnote continued from preceding page]

case and citizens, it is a distinction without a difference. The relevant question is still whether, given what we know about the current operation of the station and the proposed future operation, the assignment is in the public interest."

Naturally the length of time that a specific format has been on the air is a factor to be considered in the ultimate public interest determination, for it can have a direct bearing on the degree of attachment which the public has to the unique format. It is also relevant to determinations of economic feasibility. See WCAB, Inc., 27 FCC 2d 743, 746 n. 7 (1971), and Note, The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes, 40 GEO. WASH. L. REV. 933 (1972).

23/ Again, Commissioner Johnson dissenting, 35 FCC 2d at 974: "Normally, when a station proposes to change a format, it is a matter between it and its community. If no one objects, the Commission assumes – and properly so – that the new format is acceptable."

24/ We see not greater difficulty in characterizing "progressive rock" as a format than that present in the characterization of "classical music" as such. See Citizens Committee v. FCC, 436 F2d 263, 265 n. 1 [20 RR 2d 2026] (DC Cir. 1970).

25/ As we stated in West Michigan Telecasters, Inc. v. FCC, 396 F2d 688, 691 (DC Cir. 1968):

"Admittedly, the scope of our review is quite narrow; we defer to the expertise and experience of the Commission within its field of speciality

[Footnote continued on following page]

cannot pass muster even under the limited test we impose, and so the Commission's order granting the assignment application of WGLN (FM) and denying appellant's Petition for Reconsideration is

Reversed and remanded for further proceedings consistent with this opinion.

25/ [Footnote continued from preceding page]

and would reverse only where the Commission's position is arbitrary, capricious or unreasonable. And it is clear that the decision of when hearings are necessary or desirable to clarify issues is one which lies in the first instance with the Commission." (Citations omitted.)

See also Hartford Communications Committee v. FCC, 467 F2d 408, 411-12 [24 RR 2d 2160] (DC Cir. 1972), and the cases cited therein.

CITIZENS COMMITTEE TO SAVE WEFM

CITIZENS COMMITTEE TO SAVE WEFM, INC. v. FEDERAL COMMUNICATIONS AND UNITED STATES

GCC COMMUNICATIONS OF CHICAGO, INC., ZENITH RADIO CORP., Intervenors

U.S. Court of Appeals, District of Columbia Circuit, November 15, 1973

No. 73-1057

[¶10:309(I)(1), ¶51:580, ¶53:24(R), ¶53:24(Z)(7)]
Assignment of license; change in program format.

The Commission was not required to hold an evidentiary hearing on an application to assign the license of a Chicago FM station to an assignee which proposed to change the program format from classical to contemporary music, since it was undisputed that the entire area served by the station is served by another classical music station. Assuming that the question of whether the assignor had sustained losses during its operation of the station would require a hearing in the absence of a substantial diversity issue, no substantial issue of fact was presented. There was sufficient evidence to support a finding that the assignor had incurred substantial losses in the period after 1965. Citizens Committee To Save WEFM v. FCC, 28 RR 2d 1251 [1973].

Appeal from the Federal Communications Commission [26 RR 2d 174, 1624]

Harry R. Booth, of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of court and Thomas D. Allison, Jr., with whom Richard F. Watt was on the brief, for appellants.

Joseph Volpe, III, Counsel, Federal Communications Commission, with whom John W. Pettit, General Counsel and Joseph A. Marino, Associate General Counsel, Federal Communications Commission, were on the brief, for appellees. Jon H. Marple, Counsel, Federal Communications Commission and Howard E. Shapiro, Attorney, Department of Justice, also entered an appearance for appellees.

Paul Dobin, with whom Ronald A. Siegel and Philip J. Curtis were on the brief, for intervenor GCC Communications of Chicago, Inc.

A brief was filed on behalf of The Friends of the Chicago Public Library as amicus curiae. Kenward K. Harris entered an appearance for The Friends of the Chicago Public Library as amicus curiae.

Before: Bazelon, Chief Judge, Fahy, Senior Circuit Judge and Robb, Circuit Judge

Circuit Judge Robb concurs in Parts I and II and in the result.

Bazelon, Chief Judge: The Federal Communications Commission, without a hearing, approved the assignment of the license of a radio station and the proposal of the new licensee to change the format of the station from classical to contemporary music. The narrow question presented by the parties is whether the Federal Communications Act required the Commission to hold a hearing. But our review must also consider the First Amendment consequences of government control of format change.

I

Radio Station WEFM-FM has been operated in the Chicago area by the Zenith Radio Corporation since 1940. For the entire thirty-three year period the station has had a classical music format.

In March, 1972, Zenith entered into an agreement to sell the station to GCC Communications of Chicago, Inc. and sought FCC approval for assignment of the license. GCC proposed to change the musical format of WEFM from classical to contemporary music, later defined to be "rock music." The goal of GCC was to appeal to what it had determined to be the primary musical interests of the young adults in the Chicago area.

In June, 1972, appellants, a group of Chicago area residents, filed a Petition to Deny with the FCC, opposing the transfer because of the proposed change in format and requesting a hearing. The FCC denied appellants' request and granted the assignment of the license. 1/

II

In recent years this court and the FCC have begun to develop principles governing government control of format changes. 2/ This court has held that the public has an interest in the diversity of entertainment formats. 3/

1/ Memorandum Opinion and Order, FCC 72-1129, adopted December 13, 1972 and released December 21, 1972, 38 FCC 2d 838 [26 RR 2d 174] (1972). This order also dismissed a Complaint filed by appellants. The Complaint had requested that the FCC dedicate WEFM's channel to a classical and related cultural music format for so long as the listening audience remained interested in such programming and a qualified person or group was willing to continue such a format.

2/ See Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 141 US App DC 109, 436 F2d 263 [20 RR 2d 2026] (1970); Hartford Communications Committee v. FCC, _____ US App DC _____, 467 F2d 408 [24 RR 2d 2160] (1972); Lakewood Broadcasting Service, Inc. v. FCC, Slip Opinion Nos. 72-1757-58 [27 RR 2d 543] (DC Cir. May 4, 1973); The Citizens Committee to Keep Progressive Rock v. FCC, Slip Opinion No. 72-1675 [27 RR 2d 463] (DC Cir. May 4, 1973).

3/ The Citizens Committee to Keep Progressive Rock, at 5.

Consequently the Commission has had to consider format changes in its statutory determination that a proposed assignment of a license comports with "the public interest, convenience, and necessity." 4/ Factual disputes surrounding the format change are material and if substantial become subject to the statutory requirement that a hearing be held. 5/

In this case appellants contend that substantial factual disputes exist on two issues relating to the proposed format change – the diversity of available formats and Zenith's alleged financial losses.

As to diversity, appellants maintain that a substantial issue of fact exists as to whether the Chicago public demands and needs the continuation of classical music on WEFM as opposed to "yet another contemporary music station." 6/ Appellants point to the numerous letters and petitions of protest which greeted the news that WEFM was about to abandon its classical format. They note that Chicago has numerous rock stations already, while the demise of WEFM will leave only one classical music station with the power to reach the entire Chicago area.

Our previous opinions and the Commission's actions indicate that the majority of format changes are left to the give and take of the market environment and the business judgment of the licensee. 7/ It is only when the format to be discontinued is apparently unique to the area served that a hearing on the public interest must be held. 8/ In such cases the public interest in diversity may outweigh the dangers of government intrusion into the content of programming.

In this case it is undisputed that the entire area served by WEFM is served by another classical music station, WFMT-FM. 9/ Thus we are unable to

---

4/ Lakewood Broadcasting Service, Inc., at 5.

5/ Id.

6/ Appellants' brief, at 38.

7/ The Citizens Committee to Keep Progressive Rock, at 5.

8/ Id. at 5, 6.

9/ A third classical music Station, WNIB-FM, currently serves a smaller part of the Chicago area. GCC has agreed that if their license application is approved, they will relinquish the call letters WEFM to WNIB and give WNIB the WEFM classical music library as well as technical assistance designed to enable WNIB to increase its power.

find a substantial issue of fact requiring a hearing on the diversity point. 10/

Appellants also contend that a substantial issue of fact exists concerning the losses Zenith alleges it sustained during its operation of WEFM. Even assuming that such an issue would require a hearing in the absence of a substantial diversity issue, we do not find that appellants have raised a substantial issue of fact here. The Commission had sufficient evidence to support its finding that WEFM had incurred substantial losses in the period after 1965, when the station was operated on a commercial basis and not as a research and development adjunct to the Zenith corporation. 11/

10/ The long history of WEFM's service does not diminish the impact of WFMT's similar programming. The length of time that a format has been on the air is usually relevant only when that format is unique. See Citizens Committee to Keep Progressive Rock, at 15, note 22:

"Naturally the length of time that a specific format has been on the air is a factor to be considered in the ultimate public interest determination, for it can have a direct bearing on the degree of attachment which the public has to the unique format." (Emphasis added).

This approach to the diversity issue cannot be applied in a mechanistic fashion. Whether a format to be discontinued is unique can be a subtle question requiring that more than mere labels be examined. The fact, for example, that two stations are labelled "classical" does not automatically mean that they provide substantially similar programming. One of the stations might never play music composed in this century, while the other devotes considerable amounts of time to such music. In this case, however, it is apparent that WEFM and WFMT have substantially similar programming, both covering a broad range of classical music. Cf. Citizens Committee to Keep Progressive Rock, at 11, 12, where this court noted that "Top 40" stations cannot automatically be assumed to provide substantial amounts of "progressive rock" music.

11/ Zenith was not, for example, able to obtain enough advertising to fill the two and one-half minutes per hour it allotted for ads. Joint Appendix at 73.

Appellants' contention concerning the adequacy of the notice of the application for voluntary transfer is also without merit. The Commission properly found that Zenith complied with the notice requirements of the Commission's Rules. The notice given was not constitutionally defective.

Similarly, appellants' contention that the Commission's ex parte rules had an unconstitutional impact on the public discussion of the format change is without merit in the setting of this case.

III

The current approach of this court and the Commission, that a hearing is required only when a format becomes unavailable, must be evaluated in light of the First Amendment. Whether the issue is the fairness doctrine, 12/ the nature of "licensee responsibility," 13/ or, as here, the standards governing format change, any government effort to regulate the content of programming must be carefully scrutinized for possible interference with free expression.

Important First Amendment rights are at stake when music formats are regulated. Music and other forms of cultural expression are traditionally protected under the First Amendment. 14/ In addition to its artistic value,

---

12/ See Brandywine-Main Line Radio, Inc. v. FCC, Slip Opinion No. 71-1181 [25 RR 2d 2010] (DC Cir. Nov. 4, 1972) (Bazelon, C.J., dissenting).

13/ See Yale Broadcasting Company v. FCC, On Motion for Rehearing En Banc, Slip Opinion No. 71-1780 [26 RR 2d 1675] (statement of Bazelon, C.J.).

14/ See, e.g., Jacobellis v. Ohio, 378 US 184, 191 (1964) (Brennan, J.) ("It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection [of the First Amendment].") (Emphasis added).

See, also, Roth v. United States, 354 US 476, 484 (1957). ("The importance of [freedom of the press] consists, besides the advancements of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government . . . .") (Emphasis added).

Zechariah Chafee, Jr. set forth the historical argument that the First Amendment was designed to include the arts within its protection:

"No doubt, the Zenger trial and the controversy over Wilkes and Junius in England did associate the struggle for freedom of speech to some extent with popular discussion of political questions, but the struggle was also related to the abolition of the censorship of books of any sort. Milton's Areopagitica advocated freedom of much else besides political tracts. The First Amendment brackets freedom of speech with freedom of the press. . . . If 'speech' is limited . . . so is 'press.' Yet that is impossible in view of the address of the Continental Congress in 1774 to the people of Quebec, in which freedom of the press, in addition to its political values, is said to be important for 'the advancement of truth, science, morality and arts in general.'. . .

[Footnote continued on following page]

music, both classical and popular, can be an important mode of political and moral expression. 15/ There is even the possibility of repression when, for example, the lyrics of popular songs communicate controversial ideas. 16/ Danger lurks in government regulation of what music can be put on the airwaves. Such regulation, ostensibly in the name of diversity, may open the door to withholding approval of transfers if the new format is more controversial than the one to be abandoned.

It is also true that complete reliance on the market may inhibit rather than promote the First Amendment goal of "the widest possible dissemination of information from diverse and antagonistic sources." 17/ The broadcasting media may be subject to greater concentration of ownership and difficulty of access than the printed media. 18/ Thus more government regulation of broadcasting may enhance the variety of political and cultural viewpoints to be heard. 19/

These First Amendment considerations have implications for decisions as to when a hearing must be held in a format change case. On the one hand, hearings may open the door to increased government regulation with the concomitant possibility of abuse. Moreover, the prospect of lengthy and costly hearings may deter new licensees from changing their format even when that change is in the public interest. 20/

14/ [Footnote continued from preceding page]

"Moreover, the framers would hardly have relegated science, art, drama, and poetry to the obscure shelter of the Fifth Amendment, . . . inasmuch as 'due process' meant mainly proper procedure until the middle of the nineteenth century. . . ." Chafee, Book Review, 62 HARV. L. REV. 891, 896 (1947).

15/ See Yale Broadcasting Company v. FCC, On Motion for Rehearing En Banc, at 8, note 23, and sources cited therein. See, also Morison, Oxford History of the American People, 292, 472, 912, 913 (1965) for comments on the role of classical music in American culture.

16/ See, generally, Yale Broadcasting Co., On Motion for Rehearing En Banc

17/ Associated Press v. United States, 326 US 1, 20 (1945).

18/ See Brandywine-Main Line Radio, Inc. (Bazelon, C.J., dissenting), at 26-27.

19/ Id.

20/ See, e.g., Memorandum Opinion and Order, FCC 73-329, adopted March 21, 1973 and released March 22, 1973, 40 FCC 223 [26 RR 2d 1624] (1973), additional views of Chairman Burch.

On the other hand, hearings could help develop standards under which a diversity of formats could be encouraged without undue government regulation. The "full light" of a public hearing is often the best insurance that important policies are developed for the benefit of the public, rather than the benefit of administrators and regulated industries. 21/

IV

At present we simply do not know how to ideally resolve the conflict between diversity and freedom from regulation. Our awareness that conflicting values are at stake here is our best protection against falling into the abyss of dogmatism. We must remain open to new information and ideas. But at the present juncture and with the facts of this case, the current approach of minimizing regulation except when diversity is most seriously threatened appears to be reasonably in accord with the goals of the Federal Communications Act and the First Amendment.

Accordingly, the decisions of the Commission are

Affirmed.

Fahy, Senior Circuit Judge, dissenting: The question now is limited to whether the assignment should have been approved without a hearing. A hearing is required to resolve factual disputes which are substantial and material. 47 USC §309(e). There is no doubt that this provision applies when the Commission is to decide whether a format change such as here proposed would go into effect upon Commission approval of the assignment of the broadcasting license, a decision to be made under the standard of the public interest, convenience, and necessity. See, e.g., Lakewood Broadcasting Service v. FCC, _____ US App DC _____, 478 F2d 919 [27 RR 2d 543] (1973).

In approving the application for the assignment the Commission relied materially and substantially upon alleged financial losses suffered by Zenith, the assignor. I agree with Commissioner Johnson in his dissenting opinion that the attribution of such losses to Zenith's classical music format is a question which could not be answered without further investigation. The claim of losses was put in factual dispute by the Committee opposing the assignment, since Zenith continued to use the station to advertise its own manufactured products.

Since the court now affirms, I do not attempt an analysis of the further contention of the Committee that a hearing was required under the reasoning of this court's decision in the Atlanta case of Citizens Committee v. FCC, 141 US App DC 109, 436 F2d 263 [20 RR 2d 2026] (1970), where the proposed abandonment of a classical music format was also involved. I add, however, that the limitation upon issues which require a hearing contained in the Keep Progressive Rock case 1/ does not seem to me to accord with the approach of our court in the Atlanta case.

21/ Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F2d 584, 594 (1971).

1/ The Citizens Committee to Keep Progressive Rock v. FCC, _____ US App DC _____, 478 F2d 926 [27 RR 2d 463] (1973).