In the

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION ET AL., Petitioners, v. WNCN LISTENERS GUILD, ET AL.;	)	No. 79-824
INSILCO BROADCASTING CORPORATION ET AL., Petitioners, v. WNCN LISTENERS GUILD, ET AL.;	)	No. 79-825
AMERICAN BROADCASTING COMPANIES, INC., ET AL., Petitioners, v. WNCN LISTENERS GUILD, ET AL.; and	)	No. 79-826
NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., Petitioners, v. WNCN LISTENERS GUILD, ET AL.	)	No. 79-827

Washington, D.C.
November 3, 1980

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Washington, D.C.
Monday, November 3, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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MS. KRISTIN BOOTH GLEN, ESQ., 36 West 44th Street, New York, New York, 10036; on behalf of the Respondents, WNCN Listeners Guild, Inc., et al.

MS. WILHELMINA REUBEN COOKE, ESQ., Citizens Communications Center, 1424 16th Street, N.W., Washington, D.C. 20036; on behalf of the Repondents, Office of Communication of the United Church of Christ, et al.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Federal Communications Commission v. WNCN Listeners and the related and consolidated cases.

Mr. Saylor, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID J. SAYLOR, ESQ., ON BEHALF OF THE PETITIONERS FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MR. SAYLOR: Thank you, Mr. Chief Justice, and may it please the Court:

This is an important case for the nation's nearly 9,000 radio stations and their millions of avid listeners. The decision here will determine whether regulators in Washington over their own strong objections must intrude into the workings of the radio entertainment marketplace in countless communities across the country.

QUESTION: You seem to emphasize radio. Do you think it has no bearing on broadcasting generally?

MR. SAYLOR: I think the case does have bearing on television as well, but the Commission's policy statement is restricted to radio. Therefore, I believe the issue before the Court today strictly relates to radio.

The issue before this Court is this: must the Federal Communications Commission in ruling on radio license renewals and transfers decide whether to permit a radio station

to change from one type of entertainment programming to another. Or, stated a different way, did the FCC correctly determine in the proceedings below that the Communications Act of 1934, read in light of the First Amendment, grants the Commission the discretion to decline to review changes in so-called unique entertainment formats?

The Court of Appeals for the District of Columbia Circuit sitting en banc ruled against the Commission. The Court declared that the Commission must hold a hearing to determine whether a format change is consistent with the public interest.

QUESTION: Mr. Saylor, what was not entirely clear to me in reading the briefs is, are we talking about changes that have been made or prospective changes, or both?

MR. SAYLOR: Mr. Justice Stewart, this case involves proposed changes as well as changes that may have taken place midterm in a three-year license period.

QUESTION: Both?

MR. SAYLOR: Yes. However, according to a footnote in the Court of Appeals decision, a challenge to the midterm change in format would not come until the time for renewal.

QUESTION: Renewal or transfer.

MR. SAYLOR: Yes.

QUESTION: Would the standard be any different if we were talking about the initial issuance of a license, if such

licenses were available? All the statute says as I read it is the public interest.

MR. SAYLOR: That's correct. It's the same standard, public interest, convenience, and necessity. The Commission's view in this situation, both renewals and transfers, is that it would not be in the public interest to engage in regulation of unique formats. There's a somewhat different question posed when it's an initial licensing. The Commission has considered so-called specialized program issues in comparative cases which would come up often at initial licensing time. But in none of those cases has the Commission ever considered the entertainment programming as such in deciding whether or not the application should be granted. So that while the Commission did not address itself in this policy statement to the question you raise, Mr. Justice Rehnquist, I believe the Commission's policy in the past has been not to consider entertainment programming in making decisions regarding initial licensing.

QUESTION: I'm not sure how you relate that to the issues. Let me put another question to you. Suppose on renewal of a license at the expiration of three years the representatives of the listening audience came in and demonstrated that this station had changed its format and was showing nothing except football games, basketball games, hockey games, prizefights, and athletic events; nothing else. Would that be relevant to the issue of renewal of the license?

MR. SAYLOR: The Commission would not, in my view, consider the entertainment programming as such. The Commission would, however, be concerned if the licensee or the applicant indicated no interest in programming news and public affairs, so-called non-entertainment programming. The Commission has --

QUESTION: So the format if -- I'm not sure exactly what that term embraces in this case, but the content of programming is a very relevant factor in the renewal of a license, is it not?

MR. SAYLOR: The Commission has considered the quantity of non-entertainment programming proposed by an applicant, but it has never delved into the quality of the programming and has not made value judgments regarding whether one type of entertainment programming is more in the public interest than another.

QUESTION: So the standard is the same for both the issuance of the original license and for the renewal, is it not?

MR. SAYLOR: Yes, it is.

QUESTION: And does the Commission treat them differently in the sense of evaluating entertainment versus news and that sort of thing?

MR. SAYLOR: No. In neither instance does the Commission consider the entertainment programming as such.

The non-entertainment programming such as news and public affairs programming is considered but in a very general sense. The Commission simply wants to assure itself that the applicant will not neglect that type of programming. The Commission inquires as to what percentage of the broadcast week, or the broadcast day, will be devoted to news and other informational programming.

QUESTION: It's basically a quantitative consideration?

MR. SAYLOR: It is a quantitative consideration --

QUESTION: Plus, I suppose, objectivity and fairness and so on?

MR. SAYLOR: Yes, Mr. Justice Stewart. And the reason for that is that the news and other informational programming makes up a small, relatively small portion of the broadcast day, whereas the entertainment programming traditionally consumes the balance of the broadcast day and it is there that the Commission has felt that the Congress wanted broadcasters to compete. And basically that's where they compete, with their entertainment program. Were the Commission to regulate entertainment programming it would reduce the licensee discretion in that very large portion of the broadcast day and raise in the Commission's view serious First Amendment considerations.

QUESTION: Mr. Saylor, what about the percentage of

time for commercials? Is there any regulation of that?

MR. SAYLOR: The Commission has a guideline in the form of a delegation of authority to the Staff of the Broadcast Bureau. If the applicant proposes a percentage of broadcast hour above a certain number for commercial programming, the Commission would consider that and if there is not an adequate explanation from the licensee, the Commission might well put that matter into hearing to determine whether or not the licensee is proposing an excessive amount of commercial programming.

QUESTION: What is the justification for that other than its possible impact on the entertainment part of the programming.

MR. SAYLOR: Well, I guess historically the Congress has expressed some interest in the amount of commercials on broadcast programming and the Commission has felt that perhaps some supervision is appropriate in order to insure that licensees don't vastly exceed what would be in the public interest. However, the Commission is presently reconsidering that. It has reached the tentative conclusion that the marketplace is sufficiently competitive so that broadcasters are most unlikely to engage in excessive commercialization.

But I can't say at this point, of course, that the Commission has gotten rid of those regulations entirely, but they are processing guidelines and they are quantitative rather than

qualitative and they relate to a smaller portion of the broadcast day than entertainment programming.

QUESTION: Well, this distinction between quantity and quality becomes a little blurred, does it not, if quantitatively all or most of the program is devoted to one kind of activity, namely, the athletics that I suggested in the hypothetical? Does that not come into the area of quality of service, by the failure to have any news broadcasts, by the failure to have any educational broadcasts, any music?

MR. SAYLOR: The failure to have any news or public affairs programming of any sort would be a matter of interest and concern to the Commission, but the fact that it was sports as opposed to something else that was occupying most of the broadcast day, that would not be a matter which the Commission would feel it's competent to evaluate.

The Commission does not believe that it has the capacity to determine whether sports programming is more in the interest of the public than a particular type of musical programming. And most of these cases, of course, have come up in the context of one type of musical programming versus another. And especially in that instance the Commission doubts that it has the capacity, the wherewithal to ascertain what the public really wants, the intensity of preference on the part of the public, and whether one group which prefers one type of format outnumbers another group, and whether or

not the group which outnumbers would in fact listen to the programming.

QUESTION: I have to ask the question I wanted to ask, and I don't mind asking after what you just said. In order to decide this case, I don't have to find out the difference between rock, hard rock, and jazz, do I?

MR. SAYLOR: Mr. Justice Marshall, you do not need to decide the difference between them but I do think that you have to wrestle with the same problem the Commission has in determining how the Commission in a given case would be able to distinguish between different kinds of music in order to judge whether or not a type of music is being abandoned and there are no reasonable or adequate substitutes elsewhere in the marketplace. That is a very difficult, subjective, almost an esthetic value judgment which in most cases, administrative law judges, commissioners, and Justices of this Court simply can't have the knowledge to draw the distinctions, and even if, as happened before the administrative law judge in the WEFM case, even if an expert is brought in, a musicologist, the other side can just as easily bring in a musicologist on the other side.

QUESTION: Is there any real question under the Court of Appeals opinion as to whether the Commission would know whether a change is planned or had taken place?

MR. SAYLOR: Mr. Justice White, there certainly are

some instances where the Commission would not have any difficulty determining that a change had taken place. Certainly the difference between classical music and country and western is clear.

QUESTION: Well, the limits of the Court of Appeals' opinion as I understand it is that if a change is contemplated the Commission should take into consideration whether or not there's some -- whether it's economically sound and whether there's a public market for it or a public demand for it. And if it is, the Commission ought to really think about whether they ought to permit the change. Is that the rule?

MR. SAYLOR: That's part of the test the Court of Appeals --

QUESTION: Part of it, but what do you think the Court of Appeals held?

MR. SAYLOR: The Court of Appeals held that the Commission must hold a hearing if the format --

QUESTION: But the Court of Appeals said almost never would a hearing be necessary.

MR. SAYLOR: Well, they felt that there were not that many protests and that there really wouldn't be a need for a hearing in very many instances. But --

QUESTION: Well, then, is it right to say the Court of Appeals said there must be a hearing every time?

MR. SAYLOR: No, they did not. They said that there

must be a hearing if four threshold requirements are met. First, the format must be arguably unique; secondly, there must be significant public grumbling by those loyal to that particular format; third, the format must be one which could be -- the adherents of that format must be sufficiently numerous so that one could say there are enough frequencies available in the community so that in a technological sense their preference could be satisfied. And fourth, the point that you were raising a moment ago, there must either be a substantial material question about the financial viability of the format or as to whether or not that format could arguably become financially viable.

QUESTION: Now, is it the Commission's submission that considering those threshold matters that you just listed is beyond the Commission's competence or that's just a wrong construction of the statute? And I suppose you would suggest that raises a First Amendment question.

MR. SAYLOR: The Commission's basic position is that there's nothing in the statute which requires this type of inquiry. The second point of my argument today is that the Commission's judgment as to what is or is not in the public interest was a reasonable judgment. And third, the Court of Appeals' approach to this matter raises serious First Amendment reservations.

QUESTION: Does this represent a change of mind by

the Commission, or has it always had this position?

MR. SAYLOR: The Commission has always had this position. There was a period subsequent to the Voice of Atlanta case announced by the Court of Appeals in 1970 where the Commission was trying to determine how it could satisfy the --

QUESTION: But prior to 1970 the Commission's position was always what you say it should be today?

MR. SAYLOR: Yes.

QUESTION: Or it is today?

MR. SAYLOR: Yes: that it's a matter for the licensee to decide what type of entertainment programming is most in the public interest.

QUESTION: Subject always to the risk that he may be confronted with some complaints at the time of renewal of the license on program content.

MR. SAYLOR: He might be subject to those complaints but --

QUESTION: Haven't some licenses been lost on that grounds?

MR. SAYLOR: Not on entertainment programming.

QUESTION: Not on entertainment, but on content of the total broadcast, the use of the total broadcast time?

MR. SAYLOR: Yes. there have been licenses taken away for violations of the Fairness Doctrine, which is in a sense a content-related concept. I believe licenses -- a few,

at least, have been taken away, or applications denied, for a failure to indicate any desire to program news and public affairs; information, not entertainment.

QUESTION: What if the change that happens to be at issue in a renewal proceeding is an abandonment of any news content in the broadcast day? Suppose in the midterm a licensee abandons any kind of diversity in its program and goes to, say, all sports, as the Chief Justice suggests, and no news, no educational matters, and things like that. Then, would you say that's to be left to the marketplace completely?

MR. SAYLOR: The Commission's position is that the licensee does have discretion to change midterm from what the licensee proposed at the outset of the license term. However, if there is evidence that the licensee never intended to fulfill that proposal --

QUESTION: That isn't my question. I mean they -- the licensee did intend to fulfill it at the outset and then changed it, but in the midterm it decides to change to all sports or in a transfer proceeding the transferee proposes to go to all sports, whereas his predecessor had a little variety in his program. Now, is that a -- would that be outside the reach of the Commission?

MR. SAYLOR: I think not. I think the Commission would take a look at that to determine why the licensee thought that it would be in the public interest to program --

QUESTION: Well, would the Commission have the power to, under the statute to deny the transfer on that basis?

MR. SAYLOR: I think the Commission would have the authority under the statute to deny the transfer or to deny renewal, but the inquiry --

QUESTION: Well, is that different than the issue that's involved here?

MR. SAYLOR: I think it is.

QUESTION: Why is that?

MR. SAYLOR: The inquiry in that case would, if I understand the hypothetical correctly, the inquiry would be into the quantity of news and other non-entertainment programming. The licensee would have changed to zero percent programming.

QUESTION: Well, public interest, convenience, and necessity is virtually unbridled discretion unless it's somehow filled in by the FCC, and how has the FCC filled it in in this respect?

MR. SAYLOR: Mr. Justice Rehnquist, I would agree with your characterization of the public interest standard. The Commission years ago indicated that diversity was an important aspect of the public interest. But in this context the Commission concluded that there are two types of diversity of ideas. There is diversity between broad format categories and in addition there is diversity within a format category.

There are perhaps over a hundred different types of middle-of-the-road programming. Middle-of-the-road is a classification. There are, as I think was implicit in Justice Marshall's question, many different types of rock music. The Commission felt that there are two different types of diversity and the Commission is not in a position to choose between one and the other. Listeners do indeed identify substantial differences within a given format category. In addition there are other public interest considerations, other considerations which fall into this rubric of the public interest.

One is the idea that the licensee should have wide discretion. This Court has indicated as much, its approval of that concept, in several decisions recently, including the Midwest Video II case, and the case of CBS v. Democratic National Committee. In addition, the concept of how to balance and accommodate these different interests is one which this Court has said is appropriately a matter for Commission discretion. Here the Commission concluded that it simply lacked the capacity to decide what is most in the public interest in the case of two different competing types of entertainment programming.

QUESTION: Well, is it the Commission's position that if there's a proposal to switch from one kind of diversity to another, that's the business of the broadcaster?

MR. SAYLOR: Yes.

QUESTION: But if a broadcaster wants to shift from a program that's got some diversity in it to a thoroughly unique program, all one-sided or all one content, that he is in trouble?

MR. SAYLOR: Only insofar as under the current guidelines the licensee would be neglecting news and informational programming entirely.

QUESTION: Well, he may not get renewal then, or the transfer may not go through; right?

MR. SAYLOR: Perhaps, but it depends upon the licensee's explanation. If the Commission concludes that the licensee has done it in good faith and believes that it is in the public interest, then the Commission would not prevent renewal.

QUESTION: So your suggestion is that these are exactly the kinds of judgments of the public interest that the Commission ought to make rather than a court?

MR. SAYLOR: Absolutely. Furthermore, there is nothing -- as I said earlier, that's -- on the face of the statute or in its legislative history or anything that's implicit in the statute that would indicate the approach taken by the Court of Appeals is mandatory.

QUESTION: But if you suggest that all of those things that we've just been talking about, are they equally

suspect under the First Amendment? I guess you can't say that.

MR. SAYLOR: I think that, if -- by different things you mean the amount of entertainment programming or the quality of the entertainment programming?

QUESTION: The shift from -- is it equally suspect under the First Amendment to object to shifting to uniqueness as it is to shift from one diversity to another?

MR. SAYLOR: I don't think there's --

QUESTION: I don't understand your First Amendment argument then.

MR. SAYLOR: The First Amendment argument really relates to -- it is not that the First Amendment -- except in the area of chilling experimentation the Commission did not conclude that there would be a First Amendment bar. They did believe that the impact upon experimentation, on licensees who would want to try unique format, would be adverse, counterproductive even to the objective of the Court of Appeals. So in that area the Commission viewed the situation as creating an impermissible chilling effect.

But otherwise, I think the Commission's concern was with the values of the First Amendment. The greater the degree of Commission intrusion, the greater the portion of the broadcase day which is affected, the greater the amount to which the Commission is entangled in making value judgments about programming, the more the First Amendment is implicated.

It is a balancing of different values, and certainly in this case involving entertainment programming the Commission felt that the balance tipped very much in favor of leaving the judgment to licensee discretion.

QUESTION: Mr. Saylor, when a license is initially granted, particularly where you have competition between two applicants, is entertainment program format relevant in the Commission's view?

MR. SAYLOR: The Commission has never indicated that entertainment programming would be decisionally significant in a comparative case.

QUESTION: Does it inquire into the entertainment program format of a prospective applicant?

MR. SAYLOR: No.

QUESTION: It doesn't even ask for it?

MR. SAYLOR: Well, it does ask what programming --

QUESTION: What does it usually ask?

MR. SAYLOR: -- what programming is proposed, but it's a very general question, and one, I believe, if the Commission is affirmed in this case, it would probably eliminate that question from its --

QUESTION: But it has been asking that question up to now. And I'm just -- why would that even be relevant under your theory?

MR. SAYLOR: Why would -- ?

QUESTION: Why has it done it -- it's done this for years, hasn't it?

MR. SAYLOR: The Commission has gathered the information for years, I would say more for statistical purposes than anything else, but the publicly available sources are sufficient to provide that information so I think the Commission might well reconsider even asking for that information.

QUESTION: And you would say it would never be significant in choosing between rival applicants?

MR. SAYLOR: Entertainment programming has never been and would not be in the future. I would like to reserve five minutes of my time, if I may, with the permission of the Court. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dyk.

ORAL ARGUMENT OF TIMOTHY B. DYK, ESQ.,

ON BEHALF OF THE PETITIONERS AMERICAN BROADCASTING COS., INC., ET AL., & NATL. ASSN. OF BROADCASTERS ET AL.

MR. DYK: Thank you, Mr. Chief Justice, and may it please the Court:

What we have in this case, of course, is a policy judgment by the Commission not to engage in a particular kind of regulation of broadcast programming. And that fact alone distinguishes this case from many of the other situations about which the Court was asking. Because in those situations the Commission has determined to engage in program regulation

in its view of the public interest.

The Congress in 1927 and again in 1934 charged the Commission with the task of determining what is in the public interest in broadcasting. And when the Commission gets into the programming area that of course requires the drawing of very delicate and difficult lines. This is not the first case involving such questions to come before this Court and I'm sure it will not be the last. But where the Commission as here has reached a policy judgment that regulation would not serve the public interest the Court of Appeals should not substitute its judgment for the Commission and impose a regulatory regime which the Commission is very much opposed to.

QUESTION: Going back, Mr. Dyk, to this question in the application, either an initial application or a transfer with a new transferee, is the question in your view directed -- questions about program content -- and they do; the Commission does ask about that -- is that directed at determining whether there is the appropriate diversity or is it directed at the quantitative aspects of a particular program?

MR. DYK: The Commission asks a number of questions on the form about programming, including the quantity of news, public affairs, informational programming. It asks questions about so-called ascertainment of community needs, an obligation which the Commission has imposed to require the broadcaster to go out in the community and interview the general

public and community leaders to determine the problems, needs, and interests of the community. The broadcaster is required to make lists of these problems and to propose programming responsive to them.

There are other questions on the form also relating to the amount of commercials. In addition to all of that --

QUESTION: Is this the form for an original license?

MR. DYK: It would both be on the form for an original license and for a renewal of license though the amount of details required is somewhat different. But on both of those the broadcaster has been asked in the past a question about format. And at one time there was a question there that asked how this contributed to diversity? That second question has been eliminated from the form because the Commission thought that it was inappropriate to get into those areas.

But despite the existence of these questions on the form, the Commission has never gotten into the question of whether a particular format should be abandoned or whether a broadcaster should be required to continue with a particular format, because of the Commission's view that that intrudes very much in the area of program content.

As to why the question is on the form, I think one needs perhaps to understand a little bit of the history of it. When the Commission first got into business of applying the public interest standard, there were many fewer broadcast stations

than there are today. There are about 8,500 of them now, of which I think about 1,000 are public stations. There were only a few hundred at the time, originally. And the Commission's view in the early days was that -- and this was the view of broadcasters also, that there should be a general approach to programming, and they had various categories and broadcasters were thought to pretty much have the same programming approach, and that conformed to what broadcasters wanted to do at that time.

Part of the implication at that time was that a specialized format such as we have now in great abundance because of the large number of stations, the development of FM and so on, that that might raise special public interest questions, so the question on the form really arose because the Commission was concerned that at some point that the move to these specialized formats and away from a more general programming approach might itself be something with which the Commission should concern itself. I think the Commission, based on the present experience and the great diversity that exists, has recognized that most stations now, perhaps 90 percent of them, have these specialized formats, and it really has determined that it should not regulate.

QUESTION: Inform me what you mean by specialized format. You say, 90 percent of the radio stations have a specialized format?

MR. DYK: Yes. For example, WMAL I think, in this city, might be viewed by some people as having a more general programming approach, news, music, talk, and so on. But most of the stations have a specialized format, whether it be classical or rock or middle-of-the-road, beautiful music, all news; there's an immense variety of them, depending on how you categorize them. There could be said to be hundreds and hundreds of different formats.

And it's not just the music that's played, but also how you treat the news, where you place it, the style, the pace of the station. And these are things that appeal very differently to different members of the audience, so that someone might see a great difference between one station which classifies itself as a rock station and another station which also may classify itself as a rock station, but the sound of those stations, their quality and their approach, may be very, very different and mean very, very different things to the listener.

QUESTION: Mr. Dyk, when the Commission has reached its determination along these lines, that it would not be in the public interest to regulate as it has, what is the standard of review which the Court of Appeals applies to review that decision?

MR. DYK: The Commission decision not to regulate? I would suppose under the statute it's an arbitrary and capricious standard. But here we're dealing with a situation where

there's no specific statutory language requiring this regulation, where there's no legislative history suggesting that the Commission should do it. And indeed, there is very specific legislative history, we think, suggesting that this kind of a qualitative approach to programming, whether it be in the entertainment area or the news area or any other area, is something that the Commission is not supposed to do. It's not supposed to set --

QUESTION: Well, that's the contrary to law standard.

MR. DYK: Pardon me? Yes.

QUESTION: You're suggesting it's the contrary to law standard?

MR. DYK: Yes. I think that's what the Court of Appeals viewed it as, and they suggested that what the Commission was doing was contrary to law. I think we find it somewhat difficult to find in the statute any legal requirement that the Commission engage in this very kind of intrusive regulation where the First Amendment and the statute and the history of the statute and the policy of the statute reflected in this Court's decisions in CBS and Midwest Video all counsel against a very intrusive kind of Commission regulation that would be involved here.

QUESTION: The law being public interest, convenience and necessity?

MR. DYK: That is apparently what the Court viewed

as governing here, and --

QUESTION: Is there any other statute for it to fall back on?

MR. DYK: I think not. No, I think that is the only provision that they could rely on, and it is the only provision that they relied on here. I think there was some reference to some other general portion of the statute in one of the other earlier decisions, just about the larger use of radio or something like that, but that's equally general and this Court in NCCB suggested that that is not a ground for the Court of Appeals telling the Commission what to do.

QUESTION: Mr. Dyk, as I understand your position, the statute does not require the Commission to take the view that the Court of Appeals took: they must follow these factors. Do you think the statute would have permitted the Commission to adopt the same rule that the Court of Appeals has in effect forced them to adopt?

MR. DYK: That, of course, is not a question that's here. But I think the answer is clearly, no, that the Commission could not have adopted that kind of intrusive regulation.

QUESTION: Even if it thought this was the appropriate way to achieve diversity?

MR. DYK: Yes, I think that is true. Because when the Commission gets down into this question of prohibiting the broadcaster from presenting a particular kind of program, as

this Court recognized in Red Lion, as this Court recognized in Pacifica while sustaining the particular Commission ruling there, there are very substantial First Amendment and statutory questions. And for the Commission to get into this area of regulation would require it to make the most elusive and subjective kinds of judgments.

QUESTION: Do you say that for a constitutional reason or a statutory reason or both?

MR. DYK: Both. The statutory reason relating to this history of Commission regulation; the 1927 Act where Congress adopted very few provisions in the Act requiring specific regulation of programming; Section 315, of course; Section 1464, which was involved in Pacifica. And at the same time it rejected many, many other proposals to require more intrusive regulation of programming, including the priorities provision which I had mentioned a moment ago, a provision to require equal time for the discussion of public issues, provisions to prohibit various kinds of discrimination against programming. And the Congress rejected all of these, and instead adopted Section 326 and in 1934 adopted Section 3(h) which this Court has discussed in its various decisions.

And in order to avoid these constitutional questions one looks back at the statute and finds that the Congress was deeply concerned about Commission intrusion into program content --

QUESTION: Mr. Dyk, if I understand your argument then, it is not that the Commission has made the policy judgment; rather that Congress has made this policy judgment.

MR. DYK: My argument, Mr. Justice Stevens, is, both. That the Commission in this case has made the policy judgment not to intrude, and that that alone is sufficient to sustain the Commission --

QUESTION: But you do also contend that Congress made precisely the same policy judgment?

MR. DYK: That is correct, Your Honor. And --

QUESTION: You mentioned that 90 percent of all the stations have a particular format?

MR. DYK: Specialized format.

QUESTION: Specialized format. Suppose the Commission was confronted with a situation in a community that's served by five radio stations, we will assume. Four of them are already specialized on rock music, whatever that definition embraces, and the fifth one comes in and says, they can do a better job of rock music than the others. Would the Commission say, no, we've got enough rock stations, we want a broader base, more diversity in your entertainment?

MR. DYK: No, it would not and it could not, and the reason that it would not, or one of the reasons that it would not is because the hypothetical, Mr. Chief Justice, which you are assuming is not the way the market works. It's a very

dynamic market, a very competitive market, it's a terribly fragmented market, as compared to television. In the larger cities we have dozens and dozens of stations. They are always looking for a new programming approach. They are always trying to innovate. They are always trying to get a larger share of the audience. And you find that format shifts occur constantly. And one of the things that the Commission strongly suggested here is that if you have this kind of intrusive regulation, that broadcasters would be very reluctant to adopt these innovative formats, for example, the all news format, which came into being in the late 1960s. Many people and Commissioner Robinson suggested this before. Many people believed that that innovation would never have occurred if the Court of Appeals regulatory regime had been in effect, because a broadcaster is extremely reluctant to get himself into a situation where he adopts an innovative format, finds that it does not work, and then is barred from changing that without having to go through a lengthy and expensive hearing, all the while, perhaps, losing very, very substantial amounts of money. The WEFM station involved in one of these earlier cases lost about $2 million under the format that was involved in that case, and of course a hearing was held to be required because the Court said, well, maybe you didn't lose the $2 million because of the format, maybe you lost it because of mismanagement or something like that. So, the hearing that would be required in

many, many of these cases is a very substantial deterrent to a broadcaster who is thinking of changing the format.

QUESTION: Then, are you saying that in this hypothetical, four stations, all rock music, and another one that is a so-called good music station with a variety of classical music, is going to shift to the rock pattern and a half a dozen community organizations come in, the symphony or the opera society, choral groups, religious groups, and say, this community is saturated with rock music, there should be one station which will have a broad base, religious music, opera, classical music, semi-classical, popular, the Commission wouldn't hear that, I take it?

MR. DYK: It would not hear that and it would not need to because if such a demand existed it would be met by broadcasters in the market. We find in a number of these --

QUESTION: Well, where do you -- from what do you draw that statement?

MR. DYK: Well, for example, there was a recent change in New York. I think that it was, the call letters were WRVR, which was a jazz station, which changed its jazz format to country music, and almost immediately a couple of other stations in the market expanded their jazz programming. They came in to fill that gap. There's a substantial amount of evidence in the record that that sort of thing happens. If someone abandons a format and there is a great need for that kind of

programming, a great demand for it, someone will come in and do it. But the problem is that in some of these situations where -- for example, in the Atlanta case, the Voice of the Arts in Atlanta, a case which was decided by the Court of Appeals, they relied on this survey that purportedly showed that 16 percent of the people in that market really preferred classical music. Well, there were lots of defects to that survey. But the major defect is that there wasn't anything like 16 percent of the people listening to that station. It was less than one percent. If 16 percent of the people in that market had wanted classical music, there wouldn't have been one classical music station; there probably would have been three of them, because that's an enormous market share.

The only way that listener preferences can really be determined here is by allowing the marketplace to work, allowing broadcasters to innovate and change, based on their hunches, based on their own surveys to try to meet the demands of the audience.

QUESTION: Are you saying that Congress in the '27 and '34 acts has in effect mandated that the marketplace and nothing else is to govern?

MR. DYK: Well, I think, Mr. Chief Justice, that that would be going a little far. I think that Congress obviously contemplated that in some areas the Commission would have to intervene. Since 1959, I assume, or when Congress adopted the

Fairness Doctrine as part of the statute, that that is one of those areas, and one of the parts of the Fairness Doctrine, the so-called first part of the Fairness Doctrine, is that broadcasters have to present controversial issue programming.

So, in your example of the station which did nothing but program all sports, as Mr. Saylor said, that probably would raise an issue of compliance with the Fairness Doctrine, because the broadcaster wouldn't be serving the public by total absence of information programs.

QUESTION: But that's because of a specific statutory provision.

MR. DYK: Yes, a specific statutory provision, which obviously we do not have here. And I think that the Commission because of the dynamism of the radio market and because of the large number of stations, because of the very kinds of subjective judgments that they would have to make here, was correct in concluding that it could determine not to impose this particular kind of intrusive regulation. The kinds of distinctions that would have been required, or would be required by the Court of Appeals' regime, are terribly subjective between fine arts stations and classical stations, between contemporary music and progressive rock, and even in one case which isn't recorded in F.2d -- it's the WONO case, the allegation was that the selections that the broadcaster was choosing were incongruous and unadventurous. And the court said, well,

you've got to have a hearing to see whether under those circumstances there's a unique format that's been abandoned and that the Commission should raise a public interest question. So it's those kinds of very intrusive judgments that would have to be made here.

Now, in addition, of course, to the specific priorities provision that was deleted from the statute, the Congress, as this Court has recognized in CBS and Midwest Video, decided to set up a system of public trusteeship leaving to the broadcaster, by and large, the specific programming judgments. And just as this Court in the CBS case said that to require a general system of access, as the court, the same court has required there, would be to abandon this editorial role for very speculative gains, so it would seem here, that the same kind of speculative gains is all that one could hope from the regulatory regime which the Court of Appeals would impose, and as the Commission found, the gains would not only be speculative, but there would be this very, very adverse effect on innovation, experimentation, and the operation of the marketplace.

Mr. Chief Justice, unless there are questions, I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Dyk. Ms. Glen.

ORAL ARGUMENT OF MS. KRISTIN BOOTH GLEN, ESQ.,

ON BEHALF OF RESPONDENTS, THE WNCN LISTENERS GUILD, ET AL.

MS. GLEN: Thank you, Mr. Chief Justice; may it please the Court.

My name is Kristin Booth Glen. I represent the WNCN Listeners Guild, which was one of the petitioners in the three cases below. I'll be speaking for all the respondents today, except that Ms. Wilhemina Cooke, my cocounsel, will be speaking for the last ten minutes on the specific issue of foreign language formats, which is perhaps the starkest example of what we have in front of us today.

I'd like to speak generally about the issues that I think the Court has been exploring with Mr. Dyk and Mr. Saylor, but suggest that if there is time I hope to save a few moments at the end to raise with you an independent ground upon which the Commission's policy statement here can be set aside. And that is, it's blatant and flagrant violation of Section 553 of the Administrative Procedure Act, which we have argued at some length, so poisoned this record that the policy statement simply may not stand, even under your rulings in Vermont Yankee.

QUESTION: Which section is that, counsel?

MS. GLEN: Excuse me, Your Honor? Section 553, the notice and comment requirement. I could speak to that now if you wish but I think perhaps --

QUESTION: No. Anytime.

MS. GLEN: I hear from the questions that the Court has been asking a great deal of concern with what I think has

troubled us from the beginning of this case. The Commission itself in over ten years of listening to the D.C. Circuit, counsel for the Commission and for the private parties today, have repeatedly mischaracterized what the D.C. Circuit has been doing as some intrusion into policy, as some rewriting of the public interest standard, as some requirement that the Commission or the Government range freely among broadcasters, telling them what to play, telling them what not to play. And nothing, in fact, as I think the very restrained opinion of the D.C. Circuit below says, is farther from the truth.

This is really quite a simple case. This is not a case in which there is disagreement on what the public interest requires in terms of diversity. This is not a case in which the D.C. Circuit is substituting its policy judgment. This is a case actually unlike most of the communications cases that you hear. This is simply about procedure, about the requirement that a regulatory agency follow the procedure that the statute which Congress has passed requires it to do. And --

QUESTION: Well, the regulatory agency and the Court of Appeals don't have quite the same view of the statute, do they?

MS. GLEN: Well, they certainly don't, Your Honor, but certainly it is a premise of the separation of powers in this country, that a court's construction of the statute is ultimately binding. Now, obviously you have it within your

power to construe this statute differently than the Court of Appeals did, but the Court's construction of the statute itself, which is not a policy issue here, is binding on the agency. And it is in fact this construction which is quite clear and which I think quite clearly comes from the statute that the Commission has for reason of its own -- and I'll speak to that, I think -- repeatedly refused to follow this statute. Now --

QUESTION: That is, as construed by the D.C. Court of Appeals?

MS. GLEN: Your Honor, not just as construed by the D.C. Circuit. I think that --

QUESTION: No, as construed by you as well?

MS. GLEN: Not even by me, Your Honor. I think actually as construed by this Court as early back as the case of Ashbacker Radio. If you look at the statutory scheme, particularly Sections 309 and 310, you notice that, what again I think you meant at the argument here, what Congress did was set up a comprehensive licensing scheme to deal with the electromagnetic spectrum. And what it also did was say that we will choose among various applicants if there are choices; if there are none, we will look at the applicant who comes in to decide who will best serve the public interest convenience and necessity. And we will do that in three-year blocks. We will give licenses for three years. There is no property right in

those licenses. The statute says, in three separate sections, that there is no right beyond the three-year period.

And, in fact, the whole congressional scheme is that in this renewal decision which the Commission must make, the channels which are allocated are always free to be reallocated if someone else can better serve the public. And as Justice Burger -- then Judge Burger, said in the D. C. Circuit, "Licensees run on their record." That's what they do. The way we choose licensees is by their service. In the end that's it, and service is programming.

So this is clearly within the statute, and has always been involved in the Commission's determinations. And I will in a moment, if you will bear with me, go down a whole series of areas in which the Commission looks into this kind of programming in terms of judging service, both for initial applicants, for renewal applicants, for competing applicants, for waivers of allocation policy, and so forth.

But the statute itself, I think, really requires some care. Section 309(a) states -- and it is the mandatory quality of the statute, I think, that the D. C. Circuit is dealing with, again and again, and which takes us away from the Commission's decision that it is its policy not to make judgments -- 309(a) says that in each application the Commission "shall determine whether the public interest, convenience, and necessity would be served by granting."

Section 309(d)(1) provides -- and this is different from many regulatory statutes, but it is special here because of the special nature of the elctromagnetic spectrum, that any party in interest may file with the Commission if it believes that the public interest will not be served. And in the seminal case of the United Church of Christ that Justice Burger decided in 1966, the public was given standing to raise precisely those issues, because it is the public, that decision said, who is best in a position to talk about the service that the licensee has rendered or will render. They know it the most, they care the most, and therefore they are appropriate parties.

Finally -- and I might add, that the transfer situation is governed by 310 but the standards are exactly the same and the language, the Commission "must" or "shall", is equally there.

Finally, Section 309(d)(2) provides that if a substantial and material question of fact is presented or if the Commission for any reason is unable to find that the grant of the application -- and again this would be either the initial application, the renewal, or the transfer -- would be consistent with Subsection (a): it shall provide as proceeded; if not it must hold a hearing.

In other words, we have a statutory scheme which says, every time an application is made, whether it is an

application to be the first broadcaster on a frequency; to renew your license; an application by a competing applicant who comes in at a renewal period and says, I can do it better; or when an existing licensee wishes to transfer his license; the Commission must make the public interest determination.

Now, there has never been any question until this proceeding -- and in fact I believe that there is not even any question in this proceeding -- that that public interest determination includes diversity. The diversity standard of the public interest standard is not free-wheeling; it comes from the Act. The Act begins, that "the purpose of this Act is to provide service to all the people of the United States."

QUESTION: Now, what kind of diversity? Wouldn't it depend upon what's already in the market? Let's say you have an area, a metropolitan area, in which there are 12 radio stations, and eight of them already broadcast various kinds of rock and roll, and/or country and western music, various kinds of it?

In that market, if an applicant for a license said he wanted a -- he proposed to broadcast as the entertainment portion of his programming rock and roll or country and western, it would be quite a different situation from a market, wouldn't it, where the ten stations already broadcasted various sorts of classical or semi-classical or conventional popular music?

MS. GLEN: Well, of course, Your Honor. And in fact

the Commission --

QUESTION: Or does in your submission each applicant for a license or for a transfer or for a renewal have to himself provide diversity, regardless of what's already in the market?

MS. GLEN: No. Your Honor, I think, actually, I'd like to clear up something that was said before. With regard, for example, to initial applicants, the form --

QUESTION: This case does not involve the initial --

MS. GLEN: It doesn't, Your Honor, except that --

QUESTION: -- applicant -- it promotes the same statutory language.

MS. GLEN: Right. Except that in every situation other than the situation raised in this policy statement, that is to say, when citizens come in and say, this proposed abandonment or this actual abandonment of a unique format has decreased diversity. In every other situation where diversity is at issue, the Commission looks from, starting from the application for an initial license where contrary to counsel's position, on the radio license form 301, and it's in Footnote 7 of our brief, the citation, the question is asked, what programming do you propose and how does it contribute to overall diversity? They don't ask that on television licenses, and I think that that's a clear choice, understanding that there's a conscious choice, to look for diversity within a service area

when making choices among either new applicants or competing applicants. Now, when an applicant for a station or a competing applicant comes in and says, I propose a new format, a specialized format, a unique format, whether that is classical music in a market with ten rock stations or whether it is Spanish language in a mixed market or whatever, the Commission's own statement, its own policy statement, reaffirmed as recently as September of this year, says that that applicant gets a comparative plus, a merit, in the determination as to whether he or she will best serve the public interest and get the license.

QUESTION: And is this true only if there is not already a Spanish language station? Or if it --

MS. GLEN: Well, what the most recent case says, it's the case called Cameron, which again is cited in our brief, it says that the comparative merit will be given only to a licensee who proposes a unique format, and that is a unique format, obviously, in the service area. So if there are already four Spanish language stations, he gets nothing.

QUESTION: Then it's not unique.

MS. GLEN: But if it is the first classical music station, he does.

QUESTION: What if there was a unique format proposed in Montana, a Spanish-language speaking station and there are 20 witnesses before the Commission, and all of them say they

don't understand the language and they wouldn't tune in to a Spanish language speaking station, and there is no proponent of the thing testifying. Does the Commission nonetheless grant a frequency to the Spanish language speaking station?

MS. GLEN: Well, Your Honor, the question of uniqueness or of contribution to diversity is never necessarily controlling. It is simply a public interest aspect which the Commission takes into account. It may be counterbalanced by some other aspect, there may be another format that many people wish to hear, there may be other reasons, there may be minority ownership -- and that's something that the Commission is interested in -- it need not be dispositive, and clearly if there is no need for it in the service area, the plus which it may get may not be enough to outweigh the programming proposals of the other applicant or prospective licensee.

QUESTION: In other words, a Bulgarian language station would be unique but it might not be in the public interest and --

MS. GLEN: It's also pretty unlikely that anybody would propose it in Montana. -- Exactly. But it is an aspect of the public interest, and it is an aspect which the Commission looks at all the time. Right here in Washington, even as we speak, the Commission has said, in a competing application for WOOK-FM, because of the loss of a Spanish language format and that whole complicated situation, leaving 300,000 people

in the standard metropolitan statistical area without Spanish language programming, that one of the competing applicants, a Hispanic, has proposed a Spanish language programming format in its application. In the event a threshold showing is made to the administrative law judge that Hispanic's proposed format is specialized and unique, an inquiry into the need for that format may be considered under the standard comparative issue.

So in fact there you have the Commission itself saying, when a broadcaster comes in and says, I propose to increase diversity and to serve a portion of the community that has not been served, they'll look at it.

QUESTION: Well, if the Commission is saying this, why did the Court of Appeals overrule?

MS. GLEN: Because they say it in every situation except the single situation which is before you here and which was before the Commission in the policy statement. And that is, where the question is not an increase in diversity because a broadcaster is proposing a unique format or increasing diversity by some specialized program, but where listeners, where the very public who were let into these proceedings in 1966 by the UCC case says, this proposed abandonment of a unique format will decrease diversity. And the Court of Appeals has said, it must be treated the same way. Certainly the policy considerations, the difficulties that the Commission and the private parties speak of in terms of making these

determinations are exactly the same. And yet the Commission has said, in this instance where it's the public who raises it, where we're talking about the decrease, we will not look. And it is that "we will not look" that the Commission has said finally and clearly in its policy statement, although it had previously had at least a generalized statement that it would take hard looks in hard cases and if a unique format was really abandoned it would take a hard look. In this policy statement, no date at the end of the statement, it said, we have decided that we will not look. In other words, we will not make the public interest determination that the statute mandates.

QUESTION: Was that the Commission's position before 1970?

MS. GLEN: Well, the Commission always took a position that licensee discretion in general and that the marketplace did best in terms of allocating its own formats.

QUESTION: When did this hard look notion come up? After 1970? After the Court of Appeals decision?

MS. GLEN: No, Your Honor. Earlier -- well, the decision that was reviewed in WEFM, which was the first en banc format case in the D. C. Circuit, in fact had appended to it a policy statement that Commissioner Burch -- that Commissioner Burch wrote and that other commissioners joined in, in which he said -- and this is what's very interesting, because there is no disagreement here between the Court of Appeals and this

policy statement, that, in general we think that the marketplace works very well. In general we think that the marketplace maximizes diversity. We think that these choices should be made by licensees, and that's the best thing. But where -- and it's quoted in our brief -- that where a unique format is going to be abandoned, where there will truly be a loss of diversity, we will take a hard look and consider that. Now, that I consider to be consistent with the statutory standard.

QUESTION: Was that a Commission position or just several commissioners?

MS. GLEN: Well, it was a majority. I think it was six out of seven of the commissioners who issued that statement and they did so particularly because, although there was a specific adjudicatory situation, they said, we want you to know what we're talking about. And what we're talking about is in general letting the marketplace do it, but a hard look, the safety valve, the kind of things discussed in --

QUESTION: You say that was attached to their position they took in the Court of Appeals in 1970?

MS. GLEN: In WEFM itself; exactly.

QUESTION: What was the difference between them and the Court of Appeals, then, at that time?

MS. GLEN: Well, the difference in that case, that was an adjudication, and they did not look, and they said, we don't find that there is an issue of fact. And in fact, two

out of three judges of the original panel of the Court of Appeals that heard it said, right, there's no question of fact. And it was the en banc --

QUESTION: So, you think -- do you think this new policy statement is wholly inconsistent with the policy statement that six of the seven commissioners stated in 1970?

MS. GLEN: It is, Your Honor, and I think they specifically say in the Appendix at 134a, it's Footnote 8, to their decision, to the policy statement that is in review here. And it reads as follows: "The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming." And then it cites the Zenith Radio Corp., which was in fact the WEFM case at the Commission.

QUESTION: Well, then, that would seem to apply whether the public raised a fuss or not?

MS. GLEN: Well, it only comes up, really, if the public raises a fuss, although I think that the obligation to look is always on the Commission. But I think that the case below here says that you have to have public grumbling. But the Commission continues here, having just stated that it will give a hard look where a unique service is going to be taken away, "Having given the entire matter further study, however, we have concluded that such a position is neither

administratively tenable nor necessarily in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats and that Commission supervision in this area will not be conducive either to producing diversity or satisfied listeners." In other words, we will not look.

And it is the "we will not look" which is the abdication of the statutory responsibility.

QUESTION: Couldn't it be that we did look and don't agree with you?

MS. GLEN: No, Your Honor, this is a policy statement. And in fact, the very interesting thing about this --

QUESTION: It says that, we listened to you and we decided the other way. Isn't that what it says?

MS. GLEN: Your Honor, the Commission itself throughout both the notice of inquiry --

QUESTION: I'm only talking about what you just read.

MS. GLEN: Well, perhaps I can relate it back. In all of these documents, the Commission itself says --

QUESTION: They did give you a hearing, didn't they? And they didn't stop you from putting on anything you wanted to put on?

MS. GLEN: No, Your Honor, but what they have said is, they will never give us a hearing again. We can walk in and say, there are 300,000 Hispanics in this city, there are

40 radio stations. The Hispanic station is now changing to a format which is duplicated by several other stations. This is a terrible loss, both to diversity and to the service of a minority community which is part of the undivided ownership and the Commission --

QUESTION: Wouldn't it also be a loss of finance to the station?

MS. GLEN: Your Honor, we can say this format is making money, this format is necessary, this format will create a terrible loss, and the Commission has said in the policy statement which you are reviewing here and which the D. C. Circuit has struck down, we will not look. The Commission has said, throughout this proceeding, we recognize that there are marketplace failures.

QUESTION: So your only complaint is they said they wouldn't look?

MS. GLEN: Well, but Your Honor, in saying they will not look they are saying that they will not make the statutory public interest determination that 309 and 310 require them to make.

QUESTION: Well, that's their own -- if they hadn't made that statement you wouldn't be here?

MS. GLEN: In this policy review? No, if they said, we will look, we will follow the statute, we will follow the law as the D. C. Circuit has explicated it, we will do in a

situation where listeners raise this question.

QUESTION: Now, will you answer my question? My question is, if all they said was, if they had not said, we wouldn't look, would you be here?

MS. GLEN: In this policy statement? No, Your Honor, I would not be here.

QUESTION: Thank you.

MS. GLEN: I would not be here. It's somewhat peculiar that these cases didn't come up in adjudicatory situations. There were four of them, as you know, and the Commission had actually prepared a petition for certiorari in WEFM, and for reasons best known to itself, decided not to appeal that specific factual case to this Court. So all we have is the policy statement here.

But it is, I think, that the policy statement places in very stark terms the Commission's statement that it will not follow the statute, that it is abdicating its statutory responsibility --

QUESTION: No, no, now, the Commission did not say it will not follow the statute. The Commission said, we are following the statute.

MS. GLEN: Well, Your Honor, the Commission has said, we will not make this public interest determination.

QUESTION: Exactly.

MS. GLEN: And I think that this is --

QUESTION: And we are following the statute, and this is the only way to follow the statute. That's what the Commission said. It never said, we will not follow the statute. Don't tell us that.

MS. GLEN: I'm not even sure that the Commission said that. The Commission said, if our --

QUESTION: Did it say we are going to violate the statute, as you've just argued to us?

MS. GLEN: No, but it said, in our judgment it's best to let the marketplace make the determination across the board.

QUESTION: And that that's what the statute requires.

MS. GLEN: But, it's pretty clear, I think, from the decisions of this Court as far back as Ashbacker Radio, that when the statute requires a procedure, when the statute requires a hearing between competing applicants, as was the case in Ashbacker, or as here where material and substantial questions going to the public interest are raised, that the fact that the Commission, even given its expertise and whatever, thinks than another procedure might be better, is simply not permissible.

That is in a sense what happened in UCC. The Commission said, we don't have to let these people in, we don't have to give them standing, and we're not going to hold a hearing. Justice Burger said, this is a procedural case. In Ashbacker

the Commission said, we think it would be better to just grant this application and put the competing application to the side and hold a hearing later, because it would be in the public interest to get somebody on the air.

And this Court said, no. The statute says, there is a right to a hearing. And the fact that you think that there's a better procedure is not within your power. If you think there's a better procedure, go to Congress. And in fact, the Commission has gone to Congress every year, and they're there again this year as are many other members of the private broadcast industry saying, don't make us do this, don't make us regulate. But we have a statutory scheme right now, and the statutory scheme says that they do have to regulate, that there do have to be choices made about who will use this scarce resource.

And, for better or worse, that choice is on the Commission and at least the Commission is in some senses democratically responsible. For them to say, the marketplace will make the choice, we won't look, is to put the power to decide what shall be heard and who will be served not in people who are responsible to the President and the Congress but to people with marketplace forces. And that is precisely the scheme that the Congress eschewed by developing a licensing system in the first place.

QUESTION: But you could say alternatively that the

Commission has decided that the public interest, convenience, and necessity are best served by the marketplace allocation force.

MS. GLEN: Your Honor, the Commission must make in cases in this Court, from as far back as Pottsville, through NBC and RKO, to discussion in the National Citizens Communications for Broadcasting case, about the broad rule that the D. C. Circuit would have imposed in terms of cross-ownership. Talk about the Commission's, the requirement that the Commission make an individualized determination, and to say, we're not going to make determinations, we're not going to look, we're just going to let the marketplace do it, is to say we will not make that individualized determination. And I think that that's really related to the right that the statute creates for a hearing.

QUESTION: If that's the way they construed the statute, admittedly it's contrary to the Court of Appeals construction. But it would not require a hearing, an individualized hearing in every case. They say, we're going to let the marketplace do it.

MS. GLEN: But if the marketplace were to be allowed to make these decisions, then you wouldn't have comparative renewal hearings, you wouldn't have initial renewal hearings, you wouldn't have the Commission making choices in every other situation about who will best serve the public. And that's the

question that's being asked here, where someone says, I'm going to abandon the only Spanish language format, or I'm going to abandon the only classical format, or the only black format, is that person best serving the public interest? And the Commission cannot avoid that determination under this statutory scheme.

In NCCB you said the reason that it's okay to not have an across-the-board rule about divestiture and concentration is because the rights of both competing applicants and petitioners to deny, under 309, are protected because the Commission will make an individualized determination in each case where those issues are raised, whether the concentration issue so substantially affects the public interest that the license should be denied or that it should be given to someone else.

QUESTION: Some of this discussion has left me a little bit confused, but maybe you can clear it up. You'll recall the hypothetical I gave to your friends on the other side of the table about the community with five radio stations, four of them already in rock, and the fifth one is going to move -- and this is either on a renewal or at any time -- going to move into all rock, because rock is doing so well. Now, what's your position on the scope of the Commission's authority to weigh the diversity of programming over the whole community and over all of the stations?

MS. GLEN: Well, Your Honor, it's not my opinion of

the Commission's ability to weigh this. The Commission itself speaks to this all the time. And in initial application, if there's an open frequency and this is the only applicant, although he was asked the question, how are you going to contribute to diversity, presumably he will not be denied the license because he is not contributing diversity, because there's no one else. If, however, it's a renewal situation and someone else comes in and says, here's this fellow who's playing rock; I propose to program to the black community -- which is 40 percent of this community and which is otherwise unserved.

The Commission itself has said, in cases cited in our brief in Cameron and as I say, as recently as the WOOK case here in Washington, that that applicant will be given a preference, that that is -- on that issue. And that that is something that the Commission will look at and looks at all the time. It does look at contributions to diversity when broadcasters raise them. It simply doesn't look at decreases in diversity when citizens raise them.

And in a sense that is symptomatic of the Commission's continued hostility to the United Church of Christ decision, which did allow the public in and which did allow the public to raise these issues. Nobody but the public knows better.

QUESTION: Well, but that wasn't a decision of this Court.

MS. GLEN: No, it wasn't, Your Honor, but it certainly has received such a citation across the board in cases of this Court and commentators and whatever that I think that there's not a lot of question. I don't even think that the Commission would deny that it's good law. It's not, of course, but it's a very important and very substantial explication of what the Act is about, why Congress has chosen this licensing scheme, the kinds of choices that are made, so that this very special resource, the electromagnetic spectrum, which the public owns, and which the Government controls, shall be used to serve all the people.

QUESTION: That holding didn't go to what you have just suggested. That holding went only to to the parties that the Commission must hear, not how the Commission should decide the issue.

MS. GLEN: Of course, Your Honor, and I certainly don't want to overly butter you up, but it was an opinion in which you really spoke in historic and in policy terms about the statute, about the need for service --

QUESTION: The judges who decided it thought it was a pretty narrow issue, in terms of intervention, not substantive.

MS. GLEN: It's not substantive, but what it says is that the public, or responsible members of the public, are frequently the best judges of the service that is being given to them, and the Act provides that they are entitled to service.

That's the scheme we have. And as the opinion said, they care the most and they know the most, and they may be in the best position to vindicate the public interest, and that's why they should be there in these format cases. And I think it's also important to say --

QUESTION: Couldn't the Commission's policy follow directly from that statement? Insofar as the public lets its wishes be known, it does so by tuning in to various stations, and the ownership or management of a station would know that, and with the profit motive motivating it, it would give the public what it wanted.

MS. GLEN: Your Honor, I think that's a very important question and it really goes to one of the confusions that permeate this case, which is the confusion that the Commission engages in over the difference between audience satisfaction or consumer satisfaction and the public interest. It is very clear that the marketplace in radio is not between the listener and the broadcaster. Listeners are the bait by which broadcasters obtain advertising --

QUESTION: Well, of course, broadcasters are only interested in that segment of the public which are potential radio listeners.

MS. GLEN: Well, they're also interested in that segment of --

QUESTION: Some people just never listen to the radio

and broadcasters presumably would have no interest in their tastes, even if their tastes represented 15 percent of the community.

MS. GLEN: Well, but Justice Stewart, it's not just their tastes or whether they listen, it's whether they have dollars to spend on products that advertisers wish to advertise, which is why you see perpetually that large portions of the population or large minorities, the poor, racial minorities, children, the elderly --

QUESTION: Listeners to country and western?

MS. GLEN: -- are not served. Listeners to country and western are at least perceived by advertisers as having good demographics, as having high disposable income, and therefore you may see four country and western stations or five rock stations, because those consumers are favored consumers, and nothing that broadcasts to the elderly, little that broadcasts to children, little that broadcasts to racial minorities who are not perceived as being markets for the advertisers. So, in fact, the scheme of the Act -- and we're not certainly not asking and there's nothing in this decision that says the Commission should go out and say, aha, here's an unserved minority, let's allocate a station. I mean, that's what in a sense the legislative history that's talked about throughout all the briefs talks about. And that's not at issue here; we're not talking about allocations. What we are talking

about, though, is that where there is diversity, where there isn't a minority taste or a minority ethnic or a minority age group, a group of listeners who after all own the air waves just as much as the people who buy pimple cream, that when that minority --

QUESTION: They might be the same people.

MS. GLEN: Hopefully not. -- when that minority is being served and a broadcaster says, I don't want to do that anymore, I'd rather play rock and make more money, that that is a legitimate question, that that decrease in diversity, that decrease in service to that minority audience is a part of the public interest that the Commission should look at in deciding whether to renew the license or grant the transfer, or whatever. It doesn't have to decide it in favor of keeping format; it doesn't require that -- the D. C. Circuit in the opinion below is extraordinarily careful to say how very limited its holding is, that the Commission has no power to tell people they must retain formats or what they must play. It simply must look at the effect on diversity of the loss of the unique format, what that's raised by a substantial group of the public.

QUESTION: But if the issue is raised, you have to assume there will be some cases in which they would tell the licensee, you must continue the same format.

MS. GLEN: Well, Your Honor, they don't tell the

licensee he must continue. Every licensee runs on his record. Every licensee who has no property right beyond the three years knows -- it doesn't happen frequently -- but knows that if somebody comes along and says, I'll do better, that the Commission has the absolute power, although it chooses not to exercise it very frequently, to replace him with someone who will serve better.

QUESTION: Well, is it not part of your position that in a given transfer application that would involve a dramatic change of format, that there would be some case in which the public could come in and convince the Commission that they should not allow the change to take place because they want to retain the old format, it's in the public interest to retain the old format?

MS. GLEN: Your Honor, that's absolutely right and it doesn't compel anyone to do anything. The prospective licensee clearly has no right to --

QUESTION: Well, it compels them not to do something they want to do.

MS. GLEN: Well, no, the prospective licensee clearly is out of it. He has no right to the license at all. So that the fact that he is being told, we don't need more rock, certainly doesn't violate his rights in any way. And the present licensee is simply being told, if you don't want to program this, you can go away. If somebody else wants to

program this format, we're going to give them a preference because this is a minority portion of the community that deserves service under the universal service standard of the Act, and that the public interest would best be served. No one is compelled to continue; there is not a common carrier obligation. But the other side of common carrier, and I think it's important to look at this, is that licensees don't get financial and economic protection from the Commission either. That's what the Sanders Brothers case says.

In Sanders Brothers there was a licensee in the community. The Commission said, we're going to put in another station, because that will increase diversity in this community. And the first licensee came in and said, wait a minute, you're going to cut into our profits, there aren't going to be enough advertisers, we don't want this guy in here. Don't let him in. And this Court held, that's not what it's about. The Commission's interest, the Commission's vindication of the public's interest in diversity far overrides the broadcaster's interest in profits. He's given the license, he's allowed to exploit it; if he makes money, fine; if he doesn't make money, fine. That's not the Commission's concern unless it involves ultimately a decrease or a diminution of the public service. He's not a common carrier, he's not entitled to protection.

QUESTION: When you get down to the question of diversity, it sounds quite easy and manageable when you start

talking, or when you first think of it, but when you start thinking of examples of it, there is going to be kind of hanging over the head of any programmer who -- as Justice Stevens suggests -- who wants to abandon a unique format, the threat that his license would be not renewed at the end of the three-year period. Now, to what extent does the Commission have to weigh diversity?

MS. GLEN: Well, Your Honor, that obviously -- let me answer that in two ways. One is to just restate, in case this is troubling you at all, that it's perfectly clear that this Court has held numerous times that the First Amendment is not violated by not renewing a licensee because someone else will better serve the public. The question of how diversity is implicated or weighed is a fact question in every case. It's precisely the kind of fact question that the Commission decides all the time. And in fact it's very illustrative that in the ten years that the Commission has lived under First Voice of Atlanta and then WEFM and now this case, that it has found in various instances that diversity is not terribly affected. There was a case recently; this is a station in Cincinnati, where the Commission said there are three other stations in the market that play roughly the same thing, therefore diversity won't really be affected, therefore there doesn't have to be a hearing, therefore it doesn't impact on the public interest in such a way that you lose your license.

QUESTION: The only reason you have a hearing is because there's an issue of fact that could result in some different outcome. I mean, just to say that all you have to do is have a hearing isn't dispositive of the case, because if you're having a hearing it must be about some meaningful contested issue of fact that will result in a different outcome depending on how it's decided.

MS. GLEN: That's true, Your Honor, but there might also be situations -- and sadly enough, since I represent a lot of classical music lovers -- there are situations where very unique formats are abandoned, and there is not the sufficient public grumbling which the D. C. Circuit has said must occur, and nothing happens at all. And that licensee gets a free ride. But he's not entitled to economic protection. Nobody by virtue of having a license is entitled to be protected against the vicissitudes of a system premised on a choice among licensees for who will best serve the public.

QUESTION: Well, then, if the public is the ultimate arbiter, as in your view, why should public grumbling from more than one citizen be required, in order to hold a hearing on diversity?

MR. GLEN: Well, Your Honor, because the whole point is, is the public interest in diversity being affected? If a number of people come forward and say, this is terrible, that we're losing this Spanish format, or terrible that we're not

going to have classical music anymore; there are 400,000 of us, we've listened to it and we love it. Then that goes to the impact on diversity which is part of the public interest standard, which the Commission has to decide. It may decide, for example, that the first black station or the first Haitian station in New York will be offered instead, and that that offsets the loss in diversity.

It's clearly a fact determination but it's not a fact determination any different from the determination that the Commission makes in a comparative situation where a broadcaster says, give me the license because I'm going to do something you need, because I'm going to contribute to diversity. And, in fact, across the board the Commission looks at this kind of programming.

As recently as in one of the RKO license renewals that have been going on, RKO was allowed to show meritorious service because it broadcast -- this was the station in Los Angeles -- because it broadcast concerts of the Los Angeles Philharmonic. The Commission looks at this all the time when broadcasters raise it. There is no question that it is part of the public interest.

QUESTION: Ms. Glen, do you agree with opposing counsel that the Commission's statement of policy and the Court of Appeals decision in this case relate both to program changes that have been made and those that are proposed to be made?

MS. GLEN: Yes, Your Honor. Clearly, the Court of Appeals has spoken and again, very carefully, grounded their decision in the language of the statute. I must be frank with you and tell you that when we started litigating these cases we had hoped that we could challenge format changes whenever they occurred because we felt their impact on the public interest and diversity was so great.

The Court of Appeals has very carefully grounded this in the statutory requirement that on its decision on these applications the Commission must make a determination.

QUESTION: On renewals or on transfers.

MS. GLEN: So that it is only renewals and transfers that are involved here.

QUESTION: Well, but that wasn't really my question. Yes, I understand that you're in agreement that it only applies to renewals and transfers.

MS. GLEN: I'm sorry, perhaps I misunderstood your question.

QUESTION: But does it apply to program changes that have been made as well as those that are proposed to be made to both?

MS. GLEN: Oh, of course, Your Honor. For example, the RVR situation was already mentioned. There was a 24-hour jazz station in New York, WRVR. Its license comes up for renewal in the spring of '81.

QUESTION: And it has changed?

MS. GLEN: It has changed to a country and western format which duplicates --

QUESTION: During the three-year --

MS. GLEN: A month ago.

QUESTION: Yes. It already had its license.

MS. GLEN: And under the D. C. Circuit's decision -- and I believe, under the statute, and hopefully under your opinion here, when that license comes up for renewal, if in fact the 50,000 people who have already petitioned are joined by 200,000 more and there is a substantial showing that there is a need and a unique service here and a community that's served, and financial viability for the format, then it will be raised. It will not do much for the jazz listeners who want to hear it now, but it is there to be raised in the public interest determination. And I think that's -- it's also illustrative of how limited this decision is, but still how --

QUESTION: It will be equally true in a renewal or transfer proceeding in the Commission under the Court of Appeals decision and the Commission's statement of policy that if the proposed transferee or if the applicant for renewal said, if this transfer is affected or if the renewal of my license is effected, I'm going to change my programming format.

MS. GLEN: If he said that?

QUESTION: Yes. This would also be applicable.

MS. GLEN: Of course it would. Of course it would.

QUESTION: Both the changes that have been made --

MS. GLEN: Right.

QUESTION: -- and those proposed to be made.

MS. GLEN: Exactly. And obviously, the licensees, I think as a practical matter, at this point, if it's not a transfer situation, have figured out that it's better to do it mid-license term because maybe by the time the license comes up the public grumbling will disperse or people will be happier, whatever. But nevertheless the question of the decrease in that service area and to that minority community is still there. The public grumbling may dissipate. Again, Justice Rehnquist, your licensee may get away with it. That's the chance he takes.

QUESTION: How large a segment of the public does it have to be?

MS. GLEN: Well --

QUESTION: Supposing, instead of your 300,000 Hispanics, it's 200 Hispanics?

MS. GLEN: Your Honor, that's really -- that goes to the problem with the inquiry here. This Commission was told by the D. C. Circuit in saying, this is your statutory obligation, why don't you go make standards? Why don't you go devise procedures that will help you to deal with this? We don't want to wipe you out although I must say there have been

ten format cases in ten years, so it's not a huge problem for the Commission. But nevertheless, you can devise standards which will weed out these people, and in the very proceeding under review here many people came in, answered rhetorical questions that were asked by the Commission about how much grumbling is necessary, what should the burden of proof be, what, how do we decide, you know, if there's substitutability? And listeners' groups, including the group that I represent here today submitted extensive comments to try to help the Commission develop standards for dealing with this. The Commission obviously has a great deal of discretion as to how to make these choices and weed people out, just as it weeds people out in Fairness Doctrine complaints. All that is being said is that it must ultimately make the determination although it can weed them out.

What the Commission should be doing is devising these standards, not saying, we won't follow the statute, we won't follow the D. C. Circuit. And I think that it can be quite narrow, that the Circuit has said it will --

QUESTION: Well, but you say, "we won't follow the statute." What statute? The public interest?

MS. GLEN: The statute that says, before a transfer or a renewal can be granted the Commission must make a determination that the public interest will be served, and if there are material questions of fact it shall hold a hearing.

That's what the statute --

QUESTION: But the Commission has said that that isn't the way to read the statute.

MS. GLEN: Well, but they said that in Ashbacker too and this Court said, you may think that there's a better way but that's what the statute said and you have to hold the hearing because the statute provides that you have to hold the hearing.

QUESTION: Right, and this Court presumably will have to say this one way or the other here.

MS. GLEN: I would certainly hope that it would follow Ashbacker. But I think that the ability to develop standards is really something that is not so difficult for the Commission, and the ability to make these fact determinations is not so terrible, and that the areas in which they do this are really quite bewildering. They look at programs all the time, they look at the kinds of programming in renewal and in comparative hearings; they look at the promise of specialized format in comparative hearings; they have themselves engaged in such activities as developing anti-siphoning rules for pay cable saying, we're not going to let cable play certain kinds of programming which we think the audience for free broadcasting should get: feature films, sports, series programs.

In other words, they look, they make judgments all the time about programming and about service. And they do it

whenever the licensees and whenever broadcasters ask them to do it, and what they are saying here is, we will not do it when the public asks. And if this Act is really about securing service to all the people of the United States, if those very special considerations that are set forth in Red Lion -- and there's just no way, you know, that anybody arguing this case can say it better than what Red Lion said about that if this resource is to be used, that if it is the rights of the public that are paramount, then the Commission simply cannot take the position that what it will do for the broadcasters it will not do for the public, that it will not serve minority communities, that it will let the marketplace and marketplace forces dictate these choices to the detriment of racial, ethnic, undemographically favored consumers. It must make this decision. If it doesn't want to make the decision it can go to Congress and ask Congress to ask to change the statute, but until it does the statute makes it very clear. And perhaps in conclusion, I am reminded of a ditty, as it were, but it seems appropriate to me, from the first act of Ruddigore, in which Richard Dauntless -- and I would like to think of the Commission as dauntless in this even though they have been somewhat misguided -- states, "For duty, duty must be done; the rule applies to everyone. And painful though that duty be, to shirk the task were fiddle-dee-dee."

Congress has put the task of making these public

interest determinations in the hands of the Commission, not in the hands of the marketplace. The Commission may not like it but it is guided by a standard which it applies across the board in every other situation. Its job is to decide who will best serve the public who owns the airwaves, and the decision of the D. C. Circuit below does no more than say that it must make that determination in a principled way, a way which will be reviewed deferentially by the Court, butthat it must make the determination. That's what the case below says, and we would urge your affirmance on that basis.

MR. CHIEF JUSTICE BURGER: Ms. Cooke.

ORAL ARGUMENT OF MS. WILHELMINA REUBEN COOKE, ESQ.,
ON BEHALF OF RESPONDENTS, UNITED CHURCH OF CHRIST ET AL.

MS. COOKE: Mr. Chief Justice, and may it please the Court:

I am Wilhelmina Reuben Cooke and I appear on behalf of the Office of Communication of the United Church of Christ, and major Spanish-Mexican-American civil rights organizations which include the Mexican-American Legal Defense and Educational Fund, and the Bicultural-Bilingual Coalition on Mass Media. These respondents share a common belief that the implications of the order under review here today encompass not only a question of whether we, the public, will have access to diverse musical and entertainment experiences but involve central premises of our broadcast system.

First, that in a democratic society all substantial segments of the public should have some means of self-expression and access to information necessary to exercise their rights as citizens. And secondly, that at least primary first broadcast service should be provided to all the people of the United States. Because these issues are presented most vividly in the context of foreign language programming and other specialized ethnic formats, we'd like to make three points to the Court today in the time allotted to us.

First of all, that these formats are a critical aspect of this case. They demonstrate, first, that one cannot draw a strict dichotomy between entertainment and so-called non-entertainment informational features of radio service.

Secondly, they also demonstrate that the FCC's administrative nightmare argument as a justification for its absolute refusal to look at any format change is suspect.

And finally, it also demonstrates the importance of the public rights and concerns which the Commission has decided must be met by economic forces or be totally ignored. In the context of the third point we'd like to discuss the Commission's 11th hour suggestion that these formats were not covered by the opinion under review.

With respect to the totality of program service on radio, we think that the industry's and the FCC's attempt to minimize the importance of the issue of format diversity by

characterizing it as simply entertainment not only ignores this Court's decision in Red Lion but also ignores the particularly critical role of foreign language and special ethnic formats in fostering and preserving cultural heritage as well as promoting assimilation in our country.

QUESTION: Ms. Cooke, let me ask you this. Suppose someone opens a theater in a particular community, large community of New York or San Antonio where most of the people are Spanish-speaking; at least, that's their primary language; a theater, or a movie theater, or a bookstore. And the odds are they're not going to do very well if they don't put on Spanish language movies or sell Spanish language books. Is that reasonable?

MS. COOKE: That may be true.

QUESTION: Now, well, isn't that likely to be true as a matter of economics? If you aren't selling what the purchasers want in that neighborhood, they're not likely to give you much business. Now, how far do you carry that when you move out of the private theater, which can put on whatever kind of movies it wants, in any language it wants, Bulgarian, or Yugoslav, whether they have customers or not, to a radio station, and how do you make the distinction? How much response must the Commission require?

MS. COOKE: We start from the premise in the particular hypothetical that you've posited, that the aura of First

Amendment rights in the broadcasting spectrum is somewhat different, that this Court has always differentiated between the kinds of protections involved in other First Amendment areas, print and so forth, and broadcast. And that, in broadcast, because of the scarcity arguments and also because of the public ownership, and because of the licensing scheme which declares that in order -- because all cannot speak, then some mechanism must be available so that many thoughts can be heard, that the order is different.

But even in the context of format the Commission has always said that it is not the tastes of individual persons that is to be acknowledged necessarily, but that substantial segments of a population must be addressed. Where in broadcast a radio situation will come in and the segment of the community that is unserved is 20 or 30 percent, or whatever particular standard the Commission devises, then that is a substantial segment, and as part of the public owners of the air waves, it is a consideration in terms of diversity. And so that the order and the concerns are different in the theater and the private enterprise system, and that when we are dealing with a licensing system in which there is not ownership and property rights.

I think the other question that makes the broadcast situation vastly different is that in non-entertainment situations the Commission has neglected to emphasize that the

non-entertainment informational programming is selective and focuses on a particular group, so that one does not have Spanish informational services in the context of a black radio format, and the two welded together. This is important because in the specialized format situation of foreign language programming, the loss of the format may equal the loss of effective broadcast services. How can a licensee address community needs or problems or services if a large segment of the community cannot effectively communicate in that language.

Secondly, we just raise very briefly -- Ms. Glen has referred to the FCC's administrative nightmare argument, but it becomes even more suspect when it is applied to respondent's concerns. Clearly there is no difficulty in distinguishing a Spanish language station from other stations, or determining whether or not that format is unique, or whether or not there is in fact a substantial population that will be unserved, not simply underserved by the loss of that format.

QUESTION: Do you suggest that the community, a Spanish-speaking community, has a constitutional right to have broadcasts in Spanish?

MS. COOKE: I would not say that it is a constitutional right except in the sense that we need not look that far; we can look at the Act itself, which provides in terms of allocations that the duty of the Commission is to establish primary service to all people of the United States. I think

there does become a question in terms of service when people cannot understand that, and so that is one of the factors that the Commission has to raise in terms of making decisions about allocations.

And in fact, this Court, in Allentown, the FCC v. Allentown, took on the same kind of considerations. It did so in the context of geographic communities rather than ethnic communities, and what we're suggesting to the Court is that same kind of reasoning which is premised in the statutory system, and the allocations policy should also be one of the factors that the Commission consider under the public interest standard.

One example we might use is that the Commission uses it, and as Ms. Glen has pointed out to the Court, when the public comes in the values may shift. For example, there is present in the record before the Court a situation in Alice, Texas, in which a licensee came in to the Commission at a comparative stage and said, I will do Spanish programming to a community that is comprised of 65 percent Mexican Americans and are clearly bilingual. On the basis of that it was preferred and it got the station and three months later terminated that format and went to Top 40.

Under the Commission's policy statement which suggests that the Commission make an inquiry into diversity and concern at initial licensing, this particular format change,

although it might have been perfectly viable financially, is precluded from inquiry and precluded from challenge under this particular statement.

Finally, what we would like to emphasize is that the Commission --

QUESTION: Then you are saying there is some obligation on the part of the broadcaster to put the broadcasts in the language of a substantial number of listeners?

MS. COOKE: The Commission itself has suggested this. One of them --

QUESTION: But not as a constitutional matter, you say?

MS. COOKE: But as a question of the statutory obligation, yes. I think there are constitutional implications of a decision that says that the reality of First Amendment rights is such that we have large segments of our community whose First Amendment rights can only be addressed in the context of their particular language. I think that there are implications there. But the Commission can look at the statute.

QUESTION: This particular distinction says, we're doing very well without any Spanish language broadcasts and if someone else can have Spanish language broadcasts, this is the United States and the language of this country is American. And we aren't going to broadcast anything in Spanish, even if we lose some business, as long as we're doing pretty well

without it.

MS. COOKE: I would suggest we're only talking about something that has existed, not an affirmative obligation of a licensee to come in and have to meet needs. The Commission has suggested in some ways that -- and, in fact, this is one of the tenets of allocation and regulation, that when a licensee comes in, the licensee makes certain promises on the basis of which the Commission can find a grant of that particular license is in the public interest. And then that licensee runs on the record.

Here we would have a situation in which a licensee came in and made the initial determination that there were certain needs, exercised their particular editorial discretion, and then the Commission must state, to make certain changes, you have to have them grounded in public interest considerations, if unmet needs of substantial segments of the population will not be served.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Saylor?

ORAL ARGUMENT OF DAVID J. SAYLOR, ESQ., ON BEHALF OF THE PETITIONERS FEDERAL COMMUNICATIONS COMMISSION, ET AL.

-- REBUTTAL

MR. SAYLOR: I have several brief points to make in rebuttal. First of all, I believe Ms. Glen characterized this case as one involving procedures. That's directly contrary to the way we view this case. This is a case of substance.

The Commission engaged in substantive rulemaking or policy making in an attempt to determine what the public interest standard in the statute requires; a question of substance.

QUESTION: Mr. Saylor, right on that point, do you share the view of Mr. Dyk that the policy judgment was made by Congress rather than by the Commission, and that the Commission was required to take this position by the statute?

MR. SAYLOR: The Commission's view as expressed in its policy statement is that the statute does not require regulation, but the position we've taken in our brief, and the position the Commission took in its policy statement, was that while there are statements of the Congress regarding the issue in the course of hearings, there then is no need to reach a determination as to whether or not the statute would bar the Commission from engaging in the type of regulation the Court of Appeals imposed. In other words --

QUESTION: So you take no position on whether the Court of Appeals position would be consistent with the statute?

MR. SAYLOR: We think it's a difficult statutory question but we don't think this Court is required to decide that issue, if you are inclined to rule our way. This is a case of discretion and the Commission has interpreted the public interest standard in a way consistent with the statute.

QUESTION: May I ask one other question? In a free

market you can rely on Adam Smith's principles to achieve your diversity; the entertainment market generally. And if a person wants to make a foolish investment he is free to do so and no harm's done. But suppose you have a case with a limited number of radio stations that some very wealthy eccentric person decided to buy a station and broadcast nothing except some program nobody was really interested in, maybe Russian folk music or something, that nobody wanted to hear, and you could demonstrate that the audience was practically zero. Would the Commission have the authority to take the license, to decline to renew the license at the end of the three-year period under the policy statement?

MR. SAYLOR: Well, I don't think the policy statement is addressed to that type of a question. There is a very difficult --

QUESTION: No, but it does take the position you won't look at program content at all --

QUESTION: The policy statement, and this Court's decisions, only go to a change in programming, don't they?

MR. SAYLOR: Yes. I can't conceive of the marketplace ever working in that way so that someone wanted to waste his money. But if it should happen, I think perhaps the correct answer is, is the Commission would allow the licensee to retain that license.

QUESTION: People do publish books that don't make

them any money, just because they want to vindicate their egos, and have some special interest in it. That could happen in the radio field.

MR. SAYLOR: I can conceive of people having that inclination but it's an expensive proposition and I think most unlikely. If there is a frequency being wasted in that way, I am sure someone will come in and offer to pay a very substantial amount of money to obtain that license, and I doubt that that --

QUESTION: Even in that case, you'd let the free market make its decision?

MR. SAYLOR: I would. I believe the Commission would allow the marketplace to function. As I said earlier, this is a case involving the meaning of the public interest standard. This is much like the newspaper-broadcast cross-ownership case where the Commission was attempting to determine what the public interest requires. There there was a conflict, or arguable conflict, between diversification in ownership which is calculated to lead to diversity of ideas on the one hand, versus the concept of best practicable service and the concept of local ownership, and how desirable local ownership was.

The Commission concluded that despite these cross-ownership situations most of them should be grandfathered, because to push the goal of diversity too far would undercut some

of the other statutory objectives inherent in the public interest standard. We view this case in much the same way. However, here there is an additional twist, and that is, even pursuing diversity, the Commission reached the view that there are two types of diversity competing here: diversity between format types and diversity within format types. The Commission simply does not have the capacity and thinks it would be inappropriate to attempt to choose between one type of diversity and another.

We think, on the other hand, that the Court of Appeals did make that choice and in doing so acted in contravention of a standard that this Court long ago announced in the case of NBC v. United States, but it is not for the Court of Appeals to say whether the public interest will be furthered or retarded; that's the Commission's job.

I have one other quick point to make that, with respect to Spanish language programming, the Commission's view is that the entertainment elements of that programming are subject to this policy statement but that the informational programming and the licensee's, or the applicant's responsibility to ascertain the problems, needs, and interests of the community and to respond to that with informational programming is something different, which the Commission didn't face in this policy statement and the Court need not decide.

QUESTION: Mr. Saylor, with reference to the Zenith

Radio Corporation matter before the FCC referred to on the petition for cert., Appendix 134a, in which the Commission recites that in the Zenith Radio Case it had taken a hard look position?

MR. SAYLOR: Yes. That, now, was --

QUESTION: That was in 1973, I take it?

MR. SAYLOR: Yes.

QUESTION: And it was after the Voice of Atlanta case.

MR. SAYLOR: It was after that case.

QUESTION: Was that hard look position adopted under the pressure of the Voice of Atlanta, or had it always been the Commission's view?

MR. SAYLOR: It was adopted under the pressure from the Court of Appeals in the Atlanta case and the Progressive Rock case, and another case which has been cited in the --

QUESTION: And in the Voice of Atlanta case the Commission appeared before the Court of Appeals asserting that it should let the market --

MR. SAYLOR: Absolutely. And that has been the Commission's position throughout, but the Court and the Commission -- the Commission was attempting to in some way comply with the Court's mandate.

QUESTION: So the six-commissioner statement in the --

MR. SAYLOR: It's an aberration.

QUESTION: I'm not sure it was an aberration.

It was no more of an aberration than the hard look Zenith Radio position. It was just that it was at a -- well, that six-commissioner --

MR. SAYLOR: That is the same --

QUESTION: -- statement was in 197--

MR. SAYLOR: That was in the Zenith case.

QUESTION: Exactly.

MR. SAYLOR: That was the concurring statement, concurred in by six commissioners in WEFM.

QUESTION: So, you say it was under pressure of the Court of Appeals position?

MR. SAYLOR: Well, one has to view it in that context.

QUESTION: That isn't what the commissioners said, is it?

MR. SAYLOR: Not precisely. But I think the Court of Appeals in this case concluded that the Commission had never changed its mind on the basic proposition that it's a matter of licensee discretion.

QUESTION: In any event, your submission is that prior to the Voice of Atlanta case the Commission's position was exactly what it is now?

MR. SAYLOR: Yes. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dyk?

MR. DYK: Yes, thank you, Mr. Chief Justice.

ORAL ARGUMENT OF TIMOTHY B. DYK, ESQ.,
ON BEHALF OF THE PETITIONERS AMERICAN BROADCASTING COS., INC.,
ET AL., & NATL. ASSN. OF BROADCASTERS ET AL. -- REBUTTAL

MR. DYK: Just very briefly, in response to Mr. Justice White, the Court of Appeals in the course of this decade of decisions was extraordinarily critical of the Commission for continually resisting its policy. The Court of Appeals --

QUESTION: Well, like it is in this case?

MR. DYK: Yes. And the Court of Appeals did not suggest in any of these opinions that the Commission had departed from an earlier policy. What the Court of Appeals was suggesting is that the Commission consistently declined to adopt the policy --

QUESTION: Had been consistently wrong?

MR. DYK: -- and been consistently wrong. And that's the issue in this case.

QUESTION: Well, why didn't the FCC petition for certiorari for some of those earlier decisions?

MR. DYK: Well, I couldn't answer that, but I think the WEFM case, for example, did not raise the statutory issues which we've been urging, or the constitutional issues, as Judge Bazelon, I think, had noted in his separate opinion in WEFM. So I think it is quite likely that one of the reasons that the Commission went back and considered these issues in

this policy proceeding which is under review was because some of the issues hadn't been decided by the Commission and hadn't been presented to the Court of Appeals in that earlier case.

If there's nothing else, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-824, Federal Communications Commission et al. v. WNCN Listeners Guild et al.
No. 79-825, Insilco Broadcasting Corporation et al. v. WNCN Listeners Guild et al.
No. 79-826, American Broadcasting Companies, Inc., et al., v. WNCN Listeners Guild et al.
No. 79-827, National Association of Broadcasters et al. v. WNCN Listeners Guild et al.

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BY: William J. Wilson