SUPREME COURT OF UNITED STATES

Federal Communications Commission

Vs.

WNCN Listeners Guild Insilco Broadcasting Corporation

Nos. 79-824 to 79-827.

Argued Nov. 3, 1980.

Decided March 24, 1981.

Kristin Booth Glen, New York City, for respondents WNCN Listeners Guild, Inc., et al.

Wilhelmina Reuben Cooke, Washington, D. C., for respondents, The Office of Communication of United Church of Christ, et al.

Justice WHITE delivered the opinion of the Court.

Sections 309(a) and 310(d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* (Act), empower the Federal Communications Commission to grant an application for license transfer1 or renewal only if it determines that "the public interest, convenience, and necessity" will be served thereby.2 The issue before us is whether there are circumstances in which the Commission must review past or anticipated changes in a station's entertainment programming when it rules on an application for renewal or transfer of a radio broadcast license. The Commission's present position is that it may rely on market forces to promote diversity in entertainment programming and thus serve the public interest.

This issue arose when, pursuant to its informal rulemaking authority, the Commission issued a "Policy Statement" concluding that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters and that a change in entertainment programming is therefore not a material factor that should be considered by the Commission in ruling on an application for license renewal or transfer. Respondents, a number of citizen groups interested in fostering and preserving particular entertainment formats, petitioned for review in the Court of Appeals for the District of Columbia Circuit. That court held that the Commission's Policy Statement violated the Act. We reverse the decision of the Court of Appeals.

* Beginning in 1970, in a series of cases involving license transfers,3 the Court of Appeals for the District of Columbia Circuit gradually developed a set of criteria for determining when the "public-interest" standard requires the Commission to hold a hearing to review proposed changes in entertainment formats.4 Noting that the aim of the Act is "to secure the maximum benefits of radio

to all the people of the United States," *National Broadcasting Co. v. United States*, [1943] USSC 100; 319 U.S. 190, 217[1943] USSC 100; , 63 S.Ct. 997, 1009[1943] USSC 100; , 87 L.Ed. 1344 (1943), the Court of Appeals ruled in 1974 that "preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Citizens Committee to Save WEFM v. FCC*, [1974] USCADC 616; 165 U.S.App.D.C. 185, 207[1974] USCADC 616; , 506 F.2d 246, 268 (en banc). It concluded that a change in format would not present "substantial and material questions of fact" requiring a hearing if (1) notice of the change had not precipitated "significant public grumbling"; (2) the segment of the population preferring the format was too small to be accommodated by available frequencies; (3) there was an adequate substitute in the service area for the format being abandoned;5 or (4) the format would be economically unfeasible even if the station were managed efficiently.6 The court rejected the Commission's position that the choice of entertainment formats should be left to the judgment of the licensee,7 stating that the Commission's interpretation of the public-interest standard was contrary to the Act.8

In January 1976, the Commission responded to these decisions by undertaking an inquiry into its role in reviewing format changes.9 In particular, the Commission sought public comment on whether the public interest would be better served by Commission scrutiny of entertainment programming or by reliance on the competitive marketplace.

Following public notice and comment, the Commission issued a Policy Statement11 pursuant to its rulemaking authority under the Act.12 The Commission concluded in the Policy Statement that review of format changes was not compelled by the language or history of the Act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovation in radio programming. In support of its position, the Commission quoted from *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940): "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."13 The Commission also emphasized that a broadcaster is not a common carrier14 and therefore should not be subjected to a burden similar to the common carrier's obligation to continue to provide service if abandonment of that service would conflict with public convenience or necessity.

The Commission also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats. Such regulation would require the Commission to categorize the formats of a station's prior and subsequent programming to determine whether a change in format had occurred; to determine whether the prior format was "unique";16 and to weigh the public detriment resulting from the abandonment of a unique format against the public benefit resulting from that change. The Commission emphasized the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format.

Finally, the Commission explained why it believed that market forces were the best available means

of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment formats.18 Second, format allocation by market forces accommodates listeners' desires for diversity within a given format and also produces a variety of formats.19 Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that "the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners."

The Court of Appeals, sitting en banc, held that the Commission's policy was contrary to the Act as construed and applied in the court's prior format decisions. [1979] USCADC 270; 197 U.S.App.D.C. 319, 610 F.2d 838 (1979). The court questioned whether the Commission had rationally and impartially re-examined its position21 and particularly criticized the Commission's failure to disclose a staff study on the effectiveness of market allocation of formats before it issued the Policy Statement.22 The court then responded to the Commission's criticisms of the format doctrine. First, although conceding that market forces generally lead to diversification of formats, it concluded that the market only imperfectly reflects listener preferences23 and that the Commission is statutorily obligated to review format changes whenever there is "strong prima facie evidence that the market has in fact broken down." *Id.*, at 332, 610 F.2d, at 851. Second, the court stated that the administrative problems posed by the format doctrine were not insurmountable. Hearings would only be required in a small number of cases, and the Commission could cope with problems such as classifying radio format by adopting "a rational classification schema." *Id.*, at 334, 610 F.2d, at 853. Third, the court observed that the Commission had not demonstrated that the format doctrine would deter innovative programming.24 Finally, the court explained that it had not directed the Commission to engage in censorship or to impose common carrier obligations on licensees: *WEFM* did not authorize the Commission to interfere with licensee programming choices or to force retention of an existing format; it merely stated that the Commission had the power to consider a station's format in deciding whether license renewal or transfer would be consistent with the public interest. 197 U.S.App.D.C., at 332-333, 610 F.2d, at 851-852.

Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the Court of Appeals asserted that the format doctrine was "law," not "policy,"25 and was of the view that the Commission had not disproved the factual assumptions underlying the format doctrine.26 Accordingly, the court declared that the Policy Statement was "unavailing and of no force and effect." *Id.*, at 339, 610 F.2d, at 858.27

II

Rejecting the Commission's reliance on market forces to develop diversity in programming as an unreasonable interpretation of the Act's public-interest standard, the Court of Appeals held that in

certain circumstances the Commission is required to regard a change in entertainment format as a substantial and material fact in deciding whether a license renewal or transfer is in the public interest. With all due respect, however, we are unconvinced that the Court of Appeals' format doctrine is compelled by the Act and that the Commission's interpretation of the public-interest standard must therefore be set aside.

It is common ground that the Act does not define the term "public interest, convenience, and necessity."28 The Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, [1940] USSC 15; 309 U.S. 134, 138[1940] USSC 15; , 60 S.Ct. 437, 439[1940] USSC 15; , 84 L.Ed. 656 (1940). Although it was declared in *National Broad* casting Co. v. United States, that the goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," 319 U.S., at 217, 63 S.Ct., at 1010, it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved. The Court accordingly declined to substitute its own views on the best method of encouraging effective use of the radio for the views of the Commission. *Id.*, at 218, 63 S.Ct., at 1010. Similarly, in *FCC v. National Citizens Committee for Broadcasting*, [1978] USSC 106; 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment, *id.*, at 795, 98 S.Ct., at 2112, but emphasized the Commission's broad power to regulate in the public interest. We noted that the Act permits the Commission to promulgate "such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act],"29 and that this general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *Id.*, at 793, 98 S.Ct., at 2111.30 Furthermore, we recognized that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' "

The Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. The Court of Appeals and the Commission agree that in the vast majority of cases market forces provide sufficient diversity. The Court of Appeals favors Government intervention when there is evidence that market forces have deprived the public of a "unique" format, while the Commission is content to rely on the market, pointing out that in many cases when a station changes its format, other stations will change their formats to attract listeners who preferred the discontinued format. The Court of Appeals places great value on preserving diversity among formats, while the Commission emphasizes the value of intraformat as well as interformat diversity. Finally, the Court of Appeals is convinced that review of format changes would result in a broader range of formats, while the Commission believes that Government intervention is likely to deter innovative programming.

In making these judgments, the Commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from Government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. This decision was in major part based on

predictions as to the probable conduct of licensees and the functioning of the broadcasting market and on the Commission's assessment of its capacity to make the determinations required by the format doctrine. The Commission concluded that " '[e]ven after all relevant facts ha[d] been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.' " *Policy Statement*, 60 F.C.C.2d 858, 865 (1976). It did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission.

Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. See, *e. g., FCC v. National Citizens Committee for Broadcasting, supra; FCC v. WOKO, Inc.*[1946] USSC 131; , 329 U.S. 223, 229[1946] USSC 131; , 67 S.Ct. 213, 216[1946] USSC 131; , 91 L.Ed. 204 (1946). Furthermore, diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC v. National Citizens Committee for Broadcasting*, *supra*, at 810, 98 S.Ct., at 2119. The Commission's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. As we see it, the Commission's Policy Statement is in harmony with cases recognizing that the Act seeks to preserve journalistic discretion while promoting the interests of the listening public.

The Policy Statement is also consistent with the legislative history of the Act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming.33 Similarly, one of the bills submitted prior to passage of the Radio Act of 192734 included a provision requiring stations to comply with programming priorities based on subject matter.35 This provision was eventually deleted since it was considered to border on censorship.36 Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication."37 That section was retained in the Communications Act.38 As we read the legislative history of the Act, Congress did not unequivocally express its disfavor of entertainment format review by the Commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

In the past we have stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ."39 Prior to 1970, the Commission consistently stated that the choice of programming formats should be left to the licensee.40 In 1971, the Commission restated that position but announced that any application for license transfer or renewal involving a substantial change in program format would have to be

reviewed in light of the Court of Appeals' decision in *Citizens Committee to Preserve the Voice of the Arts in Atlanta*[1970] USCADC 183; , 141 U.S.App.D.C. 109, 436 F.2d 263, 267 (1970), in which the Court of Appeals first articulated the format doctrine.41 In 1973, in a statement accompanying the grant of the transfer application that was later challenged in *WEFM*, a majority of the Commissioners joined in a commitment to "take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming."42 However, the Commission's later Policy Statement concluded that this approach was "neither administratively tenable nor necessary in the public interest."43 It is thus apparent that although the Commission was obliged to modify its policies to conform to the Court of Appeals' format doctrine, the Policy Statement reasserted the Commission's traditional preference for achieving diversity in entertainment programming through market forces.

III

It is contended that rather than carrying out its duty to make a particularized public-interest determination on every application that comes before it, the Commission, by invariably relying on market forces, merely assumes that the public interest will be served by changes in entertainment format. Surely, it is argued, there will be some format changes that will be so detrimental to the public interest that inflexible application of the Commission's Policy Statement would be inconsistent with the Commission's duties. But radio broadcasters are not required to seek permission to make format changes. The issue of past or contemplated entertainment format changes arises in the courses of renewal and transfer proceedings; if such an application is approved, the Commission does not merely assume but affirmatively determines that the requested renewal or transfer will serve the public interest.

Under its present policy, the Commission determines whether a renewal or transfer will serve the public interest without reviewing past or proposed changes in entertainment format. This policy is based on the Commission's judgment that market forces, although they operate imperfectly, not only will more reliably respond to listener preference than would format oversight by the Commission but also will serve the end of increasing diversity in entertainment programming. This Court has approved of the Commission's goal of promoting diversity in radio programming, *FCC v. Midwest Video Corp.*, [1979] USSC 52; 440 U.S. 689, 699[1979] USSC 52; , 99 S.Ct. 1435, 1441, 59 L.Ed.2d 692 (1979), but the Commission is nevertheless vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it. The Act itself, of course, does not specify how the Commission should make its public-interest determinations.

A major underpinning of its Policy Statement is the Commission's conviction, rooted in its experience, that renewal and transfer cases should not turn on the Commission's presuming to grasp, measure, and weigh the elusive and difficult factors involved in determining the acceptability of changes in entertainment format. To assess whether the elimination of a particular "unique" entertainment format would serve the public interest, the Commission would have to consider the benefit as well as the detriment that would result from the change. Necessarily, the Commission would take into consideration not only the number of listeners who favor the old and the new programming but also the intensity of their preferences. It would also consider the effect of the format change on diversity within formats as well as on diversity among formats. The Commission is convinced that its judgments in these respects would be subjective in large measure and would only approximately serve the public interest. It is also convinced that the market, although

imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming. Those who would overturn the Commission's Policy Statement do not take adequate account of these considerations.

It is also contended that since the Commission has responded to listener complaints about nonentertainment programming, it should also review challenged changes in entertainment formats.45 But the difference between the Commission's treatment of nonentertainment programming and its treatment of entertainment programming is not as pronounced as it may seem. Even in the area of nonentertainment programming, the Commission has afforded licensees broad discretion in selecting programs. Thus, the Commission has stated that "a substantial and material question of fact [requiring an evidentiary hearing] is raised *only* when it appears that the licensee has abused its broad discretion by acting unreasonably or in bad faith." *Mississippi Authority for Educational TV*, 71 F.C.C.2d 1296, 1308 (1979). Furthermore, we note that the Commission has recently re-examined its regulation of commercial radio broadcasting in light of changes in the structure of the radio industry. See *Notice of Inquiry and Proposed Rulemaking, In the Matter of Deregulation of Radio*, 73 F.C.C.2d 457 (1979). As a result of that re-examination, it is eliminated rules requiring maintenance of comprehensive program logs, guidelines on the amount of nonentertainment programming radio stations must offer, formal requirements governing ascertainment of community needs, and guidelines limiting commercial time. See *Deregulation of Radio*, 46 Fed.Reg. 13888 (1981) (to be codified at 47 CFR Parts 0 and 73).

These cases do not require us to consider whether the Commission's present or past policies in the area of nonentertainment programming comply with the Act. We attach some weight to the fact that the Commission has consistently expressed a preference for promoting diversity in entertainment programming through market forces, but our decision ultimately rests on our conclusion that the Commission has provided a reasonable explanation for this preference in its Policy Statement.

We decline to overturn the Commission's Policy Statement, which prefers reliance on market forces to its own attempt to oversee format changes at the behest of disaffected listeners. Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully. As we stated in *National Broadcasting Co. v. United States* :

"If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." 319 U.S., at 225, 63 S.Ct., at 1013.

IV

Respondents contend that the Court of Appeals judgment should be affirmed because, even if not violative of the Act, the Policy Statement conflicts with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, [1969] USSC 141; 395 U.S. 367, 390[1969] USSC 141; , 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969). *Red Lion* held that the Commission's "fairness doctrine" was consistent with the public-interest standard of the Communications Act and did not violate the First Amendment, but rather enhanced First Amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public." *Id.*, at 385, 89

S.Ct., at 1804. Although observing that the interests of the people as a whole were promoted by debate of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs. The Commission seeks to further the interests of the listening public as a whole by relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners.46 This policy does not conflict with the First Amendment.

Contrary to the judgment of the Court of Appeals, the Commission's Policy Statement is not inconsistent with the Act. It is also a constitutionally permissible means of implementing the public-interest standard of the Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Under §§ 309(a) and 310(d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* (Act), the Federal Communications Commission (Commission) may not approve an application for a radio license transfer, assignment, or renewal unless it finds that such change will serve "the public interest, convenience, and necessity."1 Any party in interest may petition the Commission to deny the application, § 309(d)(1), and the Commission must hold a hearing if "a substantial and material question of fact is presented," § 309(d)(2). In my judgment, the Court of Appeals correctly held that in certain limited circumstances, the Commission may be obliged to hold a hearing to consider whether a proposed change in a licensee's entertainment program format is in the "public interest."2 Accordingly, I would affirm the judgment of the Court of Appeals insofar as it vacated the Commission's "Policy Statement."

* At the outset, I should point out that my understanding of the Court of Appeals' format cases is very different from the Commission's.4 Both in its Policy Statement and in its brief before this Court, the Commission has insisted that the format doctrine espoused by the Court of Appeals, "favor[s] a system of pervasive governmental regulation,"5 requiring " 'comprehensive, discriminating, and continuing state surveillance.'6 The Commission further contends that enforcement of the format doctrine would impose "common carrier" obligations on broadcasters and substitute for "the imperfect system of free competition . . . a system of broadcast programming by government decree."7 Were this an accurate description of the format doctrine, I would join the Court in reversing the judgment below.8 However, I agree with the Court of Appeals that "the actual features of [its format doctrine] are scarcely visible in [the Commission's] highly-colored portrait." [1979] USCADC 270; 197 U.S.App.D.C. 319, 332[1979] USCADC 270; , 610 F.2d 838, 851 (1979).

In fact, the Court of Appeals accepted the Commission's conclusion that entertainment program formats should ordinarily be left to competitive forces. The court emphasized that the format doctrine "was *not* intended as an alternative to format allocation by market forces," and "fully recognized that market forces do generally provide diversification of formats." *Ibid.* (Emphasis in original.) It explained that "the Commission's obligation to consider format issues arises only when

there is strong prima facie evidence that the market has in fact broken down," *ibid.*, and suggested that a breakdown in the market may be inferred when notice of a format change "precipitate[s] an outpouring of protest," *id.*, at 323, 610 F.2d, at 842, or "significant public grumbling," *ibid.* The Court of Appeals further stated that "[n]o public interest issue is raised if (1) there is an adequate substitute in the service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable." *Id.*, at 332, 610 F.2d, at 851. Finally, the Court of Appeals indicated that the Commission's obligation to hold an evidentiary hearing is limited to those situations in which the record presents substantial questions of material fact. *Id.*, at 324, 610 F.2d, at 843.

The Court of Appeals thus made clear that the format doctrine comes into play only in a few limited situations. Consequently, the issue presented by these cases is not whether the Commission may adopt a general policy of relying on licensee discretion and market forces to ensure diversity in entertainment programming formats. Rather, the question before us is whether the Commission may apply its general policy on format changes indiscriminately and without regard to the effect in particular cases.

II

Although the Act does not define "public interest, convenience, and necessity," it is difficult to quarrel with the basic premise of the Court of Appeals' format cases that the term includes "a concern for diverse entertainment programming." *Id.*, at 323, 610 F.2d, at 842.9 This Court has indicated that one of the Act's goals is "to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, [1943] USSC 100; 319 U.S. 190, 217[1943] USSC 100; , 63 S.Ct. 997, 1009[1943] USSC 100; , 87 L.Ed. 1344 (1943).10 And we have recognized "the long-established regulatory goal of . . . diversification of programming." *FCC v. Midwest Video Corp.*, [1979] USSC 52; 440 U.S. 689, 699[1979] USSC 52; , 99 S.Ct. 1435, 1441, 59 L.Ed.2d 692 (1979). At the same time, our cases have acknowledged that the Commission enjoys broad discretion in determining how best to accomplish this goal. See *FCC v. National Citizens Committee for Broadcasting*, [1978] USSC 106; 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978); *National Broadcasting Co. v. United States, supra*. The Commission has concluded that a general policy of relying on market forces is the best method for promoting diversity in entertainment programming formats. As the majority notes, *ante*, at 595, this determination largely rests on the Commission's predictions about licensee behavior and the functioning of the radio broadcasting market.

I agree with the majority that predictions of this sort are within the Commission's institutional competence. I am also willing to assume that a general policy of disregarding format changes in making the "public interest" determination required by the Act is not inconsistent with the Commission's statutory obligation to give individualized consideration to each application. The Commission has broad rulemaking powers under the Act,11 and we have approved efforts by the Commission to implement the Act's "public interest" requirement through rules and policies of general application. See, *e. g., FCC v. National Citizens Committee for Broadcasting, supra; United States v. Storer Broadcasting Co.*[1956] USSC 61; , 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); *National Broadcasting Co. v. United States, supra*.

The problem with the particular Policy Statement challenged here, however, is that it lacks the flexibility we have required of such general regulations and policies. See, *e. g., United States v. Storer Broadcasting Co., supra, National* Broadcasting Co. v. United States, supra. The Act imposes an affirmative duty on the Commission to make a particularized "public interest" determination for each application that comes before it. As we explained in *National Broadcasting Co. v. United States, supra*, 319 U.S., at 225, 63 S.Ct., at 1013, the Commission must, in each case, "exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' " The Policy Statement completely forecloses any possibility that the Commission will re-examine the validity of its general policy on format changes as it applies to particular situations. Thus, even when it can be conclusively demonstrated that a particular radio market does not function in the manner predicted by the Commission, the Policy Statement indicates that the Commission will blindly assume that a proposed format change is in the "public interest." This result would occur even where reliance on the market to ensure format diversity is shown to be misplaced, and where it thus appears that action by the Commission is necessary to promote the public interest in diversity. This outcome is not consistent with the Commission's statutory responsibilities.

Moreover, our cases have indicated that an agency's discretion to proceed in complex areas through general rules is intimately connected to the existence of a "safety valve" procedure that allows the agency to consider applications for exemptions based on special circumstances. See *E. I. du Pont de Nemours & Co. v. Train*, [1977] USSC 29; 430 U.S. 112, 128[1977] USSC 29; , 97 S.Ct. 965, 975[1977] USSC 29; , 51 L.Ed.2d 204 (1977); *Permian Basin Area Rate Cases*[1968] USSC 140; , 390 U.S. 747, 771-772[1968] USSC 140; , 88 S.Ct. 1344, 1362-1363, 20 L.Ed.2d 312 (1968); *FPC v. Texaco Inc.*, [1964] USSC 131; 377 U.S. 33, 40-41[1964] USSC 131; , 84 S.Ct. 1105, 1109-1110[1964] USSC 131; , 12 L.Ed.2d 112 (1964); *United States v. Storer Broadcasting Co., supra*, 351 U.S., at 204-205, 76 S.Ct., at 771-772; *National Broadcasting Co. v. United States, supra*, 319 U.S., at 207, 225, 63 S.Ct., at 1005, 1013. See also *WAIT Radio v. FCC*, 135 U.S.App.D.C. 317, 321, 418 F.2d 1153, 1157 (1969); *American Airlines v. CAB*, 123 U.S.App.D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); *WBEN, Inc. v. United States*, [1968] USCA2 173; 396 F.2d 601, 618 (CA2), cert. denied, 393 U.S. 914, 89 S.Ct. 238, 21 L.Ed.2d 200 (1968). For example, in *National Broadcasting Co. v. United States, supra*, we upheld the Commission's Chain Broadcasting Regulations, but we emphasized the need for flexibility in administering the rules. We noted that the "Commission provided that 'networks will be given full opportunity, on proper application . . . to call our attention to any reasons why the principle should be modified or held inapplicable.' " *Id.*, 319 U.S., at 207, 63 S.Ct., at 1005. And we concluded:

"The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.*, at 225, 63 S.Ct., at 1013.

Similarly, in upholding the Commission's Multiple Ownership Rules in *United States v. Storer Broadcasting Co. supra*, we noted that the regulations allowed an opportunity for a "full hearing" for applicants "that set out adequate reasons why the Rules should be waived or amended." *Id.*, at 205, 76 S.Ct., at 771.

This "safety valve" feature is particularly essential where, as here, the agency's decision that a general policy promotes the public interest is based on predictions and forecasts that by definition lack complete factual support. As the Court of Appeals admonished the Commission in a related context:

"The Commission is charged with administration in the 'public interest.' That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases. A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for a waiver of the rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest." *WAIT Radio v. FCC, supra*, at 321, 418 F.2d, at 1157.

In my judgment, this requirement of flexibility compels the Commission to provide a procedure through which listeners can attempt to show that a particular radio market differs from the Commission's paradigm, and thereby persuade the Commission to give particularized consideration to a proposed format change. Indeed, until the Policy Statement was published, the Commission had resolved to "take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming."13 As I see it, the Court of Appeals' format doctrine was merely an attempt by that court to delineate the circumstances in which the Commission must temper its general policy in view of special circumstances. Perhaps the court would have been better advised to leave the task of defining these situations to the Commission.14 But one need not endorse every feature of the Court of Appeals' approach to conclude that the court correctly invalidated the Commission's Policy Statement because of its omission of a "safety valve" procedure.

This omission is not only a departure from legal precedents; it is also a departure from both the Commission's consistent policies and its admissions here. For the Commission concedes that the radio market is an imperfect reflection of listener preferences,15 and that listeners have programming interests that may not be reflected in the marketplace. The Commission has long recognized its obligation to examine program formats in making the "public interest" determination required by the Act. As early as 1929, the Commission's predecessor, the Federal Radio Commission, adopted the position that licensees were expected to provide a balanced program schedule designed to serve all substantial groups in their communities. *Great Lakes Broadcasting Co.*, 3 F.R.C.Ann.Rep. 32, 34, rev'd on other grounds, 37 F.2d 993 (D.C.Cir.), cert. dism'd, 281 U.S. 706, 50 S.Ct. 467, 74 L.Ed. 1129 (1929). The Commission's famous "Blue Book,"16 published in 1946, reaffirmed the emphasis on a well-balanced program structure and declared that the Commission has "an affirmative duty, in its public interest determinations, to give full consideration to program service."17 As the Commission explained:

"It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."

This theme was reiterated in the Commission's 1960 Program Statement,19 which set forth 14 specific categories of programming that were deemed "major elements usually necessary to meet the public interest, needs and desires of the community,"20 and which emphasized the necessity of each broadcaster's programming serving the "tastes and needs" of its local community.21 To ensure that licensee programming serves the needs of the community, the Commission has, for example, decreed that licensees have a special obligation to provide programs for children, even going so far as to declare that licensees must provide "a reasonable amount of [children's] programming which is designed to educate and inform and not simply to entertain."

Moreover, in examining renewal applications, the Commission has considered claims that a licensee does not provide adequate children's programming,23 or programming for women and children,24 or for a substantial Spanish-American community,25 or that the licensee has ignored issues of significance to the Negro community,26 or has not provided programming of specific interest to residents of a particular area.27 In each case, the Commission reviewed submissions ranging from general summaries to transcripts of programs, to determine whether the licensee's programming met the public-interest standard.

There is an obvious inconsistency between the Commission's recognition that the "public interest" standard requires it to consider licensee programming in the situations described above and its Policy Statement on review of entertainment program formats. Indeed, the sole instance in which the Commission will not consider listener complaints about programming is when they pertain to proposed changes in entertainment program formats. The Policy Statement attempts to explain this exceptional treatment of format changes by drawing a distinction between entertainment and nonentertainment programming. The Policy Statement suggests that the Commission reviews only nonentertainment programming, and even then, only in special circumstances. Thus, the Policy Statement argues that the fairness doctrine and political broadcasting rules issued pursuant to § 315, 47 U.S.C. § 315, allow the Commission to exercise direct control of programming. In these areas, reasons the Statement, the Commission's role "is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community."28 This "limited involvement in licensee decisionmaking in the area of news and public affairs"29 is contrasted, in the Commission's view to "the pervasive, censorial nature of the involvement in format regulation."30 The majority presumably concludes that the Commission has provided a rational explanation for distinguishing between entertainment and nonentertainment programming. With all due respect, I disagree.

In the first place, the distinction the Commission tries to draw between entertainment and nonentertainment programming is questionable. It is not immediately apparent, for example, why children's programming necessarily falls on the "nonentertainment" side of the spectrum, and the Commission has provided no explanation of how it decides the category to which particular programming belongs. Second, I see no reason why the Commission's review of entertainment programming cannot be as limited as its review of nonentertainment programming. Nothing prevents the Commission from limiting its role in reviewing format changes to "directing the licensee to broadcast additional material," thereby ensuring that the viewpoints of listeners who complain about a proposed format change are not completely ignored. Third, and most important, neither the fairness doctrine nor the political broadcasting rules have anything to do with the various

situations described above in which the Commission has not hesitated to consider program formats in making the "public interest" determination. The fairness doctrine imposes an obligation on licensees to devote a "reasonable percentage" of broadcast time to controversial issues of public importance, and it requires that the coverage be fair in that it accurately reflect the opposing views. See *Red Lion Broadcasting Co. v. FCC*, [1969] USSC 141; 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). The political broadcasting rules regulate broadcasts by candidates for federal and nonfederal public office. See *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209 (1978). The Commission's examination of whether a broadcaster's format includes programming directed at women or at residents of the local community, or its requirement that licensees provide programming designed to serve the unique needs of children, simply has nothing to do with either the fairness doctrine or the political broadcasting rules. Thus, the Commission's purported justification for its inconsistency is no explanation at all, and I am puzzled by the majority's apparent conclusion that it provides a rational basis for the Commission's policy.

The majority attempts to minimize the inconsistency in the Commission's treatment of entertainment and nonentertainment programming by postulating that the difference "is not as pronounced as it may seem," *ante*, at 602. This observation, even if accurate, is simply beside the point. What is germane is the Commission's failure to consider listener complaints about entertainment programming to the same extent and in the same manner as it reviews complaints about nonentertainment programming. Thus, whereas the Commission will hold an evidentiary hearing to review complaints about nonentertainment programming where " 'it appears that the licensee has . . . act[ed] unreasonably or in bad faith,' " *ibid*. (quoting *Mississippi Authority for Educational TV*, 71 F.C.C.2d 1296, 1308 (1979)), the Commission will not consider an identical complaint about a licensee's change in its entertainment programming. As I have indicated, see *supra*, at 614-616, neither the Commission nor the majority is able to offer a satisfactory explanation for this inconsistency.

Nor can the Commission find refuge in its claim that " '[e]ven after all relevant facts [h]ad been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.' " *Policy Statement,* 60 F.C.C.2d 858, 865 (1976), quoting *Notice of Inquiry*, 57 F.C.C.2d 580, 586 (1976). The same must be true of the decisions the Commission makes after reviewing listener complaints about nonentertainment programming, and I do not see why the Commission finds this result acceptable in one situation but not in the other. Much the same can be said for the majority's suggestion that the Commission should be spared the burden of "presuming to grasp, measure and weigh . . . elusive and difficult factors" such as determining the number of listeners who favor a particular change and measuring the intensity of their preferences, *ante*, at 601. But insofar as the Commission confronts these same "elusive and difficult factors" in reviewing nonentertainment programming, it need only apply the expertise it has acquired in dealing with these problems to review of entertainment programming.

III

Since I agree with the Court of Appeals that there may be situations in which the Commission is obliged to consider format changes in making the "public interest" determination mandated by the Act, it seems appropriate to comment briefly on the Commission's claim that the " 'acute practical problem[s]' inherent in format regulation render entirely speculative any benefits that such regulation might produce."31 One of the principal reasons given in the Policy Statement for

rejecting entertainment format regulation is that it would be "administratively a fearful and comprehensive nightmare,"32 that would impose "enormous costs on the participants and the Commission alike."33 But at oral argument before the Court of Appeals, Commission counsel conceded that the " 'administrative nightmare' " argument was an " 'exaggeration' " which was not " 'very significant at all' " to the Commission's ultimate conclusion. 197 U.S.App.D.C., at 330, 610 F.2d, at 849. The Commission's reliance on claims that its own counsel later concedes to lack merit hardly strengthens one's belief in the rationality of its decisionmaking.

Although it has abandoned the "administrative nightmare" argument before this Court, the Commission nonetheless finds other "intractable" administrative problems in format regulation. For example, it insists that meaningful classification of radio broadcasts into format types is impractical, and that it is impossible to determine whether a proposed format change is in the public interest because the intensity of listener preferences cannot be measured.34 Moreover, the Commission argues that format regulation will discourage licensee innovation and experimentation with formats, and that its effect on format diversity will therefore be counterproductive.

None of these claims has merit. Broadcasters have operated under the format doctrine during the past 10 years, yet the Commission is unable to show that there has been no innovation and experimentation with formats during this period. Indeed, a Commission staff study on the effectiveness of market allocation of formats indicates that licensees have been aggressive in developing diverse entertainment formats under the format-doctrine regime.35 This "evidence"— a welcome contrast to the Commission's speculation—undermines the Commission's claim that format regulation will disserve the "public interest" because it will inhibit format diversity.

The Commission's claim that it is impossible to classify formats, is largely overcome by the Court of Appeals' suggestion that the Commission could develop "a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational."36 197 U.S.App.D.C., at 334, 610 F.2d, at 853. Even more telling is the staff study relied on by the Commission to show that there is broad format diversity in major radio markets, for the study used a format classification based on industry practice.37 As the Court of Appeals noted, it is somewhat ironic that the Commission had no trouble "endorsing the validity of a study largely premised on classifications it claims are impossible to make." *Ibid.*38 To be sure, courts do not sit to second-guess the assessments of specialized agencies like the Commission. But where, as here, the agency's position rests on speculations that are refuted by the agency's own administrative record, I am not persuaded that deference is due.

IV

The Commission's Policy Statement is defective because it lacks a "safety valve" procedure that would allow the necessary flexibility in the application of the Commission's general policy on format changes to particular cases. In my judgment, the Court of Appeals' format doctrine was a permissible attempt by that court to provide the Commission with some guidance regarding the types of situations in which a re-examination of general policy might be necessary. Even if one were to conclude that the Court of Appeals described these situations too specifically, a view I do not

share, I still think that the Court of Appeals correctly held that the Commission's Policy Statement must be vacated.

I respectfully dissent.