GOTTFRIED v. FCC:
THE PUBLIC INTEREST STANDARD AND BROADCASTER RESPONSIBILITY TO THE HEARING-IMPAIRED

Under the Communications Act of 1934, the Federal Communications Commission (FCC or Commission) may issue or renew broadcast licenses only to serve the public interest. The Commission's explication of the public interest requirement has established significant standards that broadcasters must meet to receive or renew a license. Now familiar aspects of broadcaster responsibility derived from the public interest standard include the personal attack rule, the fairness doctrine, and the prime-time access rule.

In Gottfried v. FCC, the District of Columbia Circuit Court of Appeals held that the public interest requirement now includes serving the needs of the nation's deaf and hearing-impaired population. The court required the Commission to consider Los Angeles public television station KCET's efforts to meet the programming needs of the deaf and hearing-impaired as part of the station's license-renewal proceedings.

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2 47 U.S.C. §§ 307(a); 307(d) (renewal); 309(a) (1976).
4 See id. The personal attack rule requires that when an attack on the honesty, integrity, character, or similar personal quality of an individual or group is made during a presentation on a "controversial issue of public importance," the individual or group attacked be notified and given an opportunity to respond. 47 C.F.R. § 73.1920 (1980).
5 See Note, supra note 3, at 118. The fairness doctrine is established by 47 U.S.C. § 315(a) (1976), and encompasses the presentation of public issues and corresponding opposing viewpoints. See The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 2-3 (1974). The personal attack rule, supra note 4, may be viewed as an outgrowth of the more comprehensive fairness doctrine.
6 See Note, supra note 3, at 130. To ensure that locally significant programming is broadcast during the heaviest viewing time, the prime-time access rule limits network programming in the 50 largest television markets to three of the four daily prime-time hours. 47 C.F.R. § 73.658(k) (1980).
7 In addition, the FCC formulated the family-viewing-hour concept because of its concern about the possible detrimental effects of violent and sexually-oriented material on children. See Report on the Broadcast of Violent, Indecent, & Obscene Material, 51 F.C.C.2d 418 (1975). The National Association of Broadcasters issued guidelines under which the first hour of prime-time network programming and the preceding hour would be reserved for programming appropriate for the family. Id. 422.
9 The court did not impose this requirement in license renewal determinations for commercial stations. Id. 312-16. Chief Judge McGowan dissented from that
The major importance of the court's holding in *Gottfried* is its potential influence on judicial review of administrative agency determinations. Prior to *Gottfried*, courts had accorded the FCC considerable deference in defining the meaning of Congress's command to serve the public interest. In imposing the requirement to evaluate the needs and problems of the nation's hearing-impaired, the court took the definitional function into its own hands, admonishing the Commission to "act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now."\(^9\)

*Gottfried* merits attention both because of the affirmative obligations to the hearing-impaired the court created and because of the way the court created those obligations. It is important to note that the court—not the FCC, which is charged with interpreting the statute and defining the public interest in the first instance—expanded the agency's definition by incorporating a perceived national policy of nondiscrimination against the handicapped into "the public interest." The court found this policy of nondiscrimination in section 504 of the Rehabilitation Act of 1973.\(^10\)

The court's holding has two important components. First, it suggests that in reviewing decisions of administrative agencies charged by Congress with the duty of upholding the public interest, courts may identify and incorporate perceived national policies into the public interest. Second, it implies that federal agencies may be required by courts to take account of matters of national concern which are within the jurisdiction of other agencies. In view of the Supreme Court's recent decision in *FCC v. WNCN Listeners Guild*,\(^11\) which emphasized agency discretion in determining the public interest, the court of appeals' intervention in *Gottfried* is difficult to justify.

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9 655 F.2d at 301 (emphasis added).

10 "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1976)).

The *Gottfried* court made substantial use of section 504. Beyond exploring its connection with the public interest standard, this Comment will not discuss that section. For detailed examinations of section 504 and its implications, see Schoenfeld, *Civil Rights for the Handicapped Under the Constitution and Section 504 of the Rehabilitation Act*, 49 U. CIN. L. REV. 580 (1980); Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59 (1979).

Also of importance is the Gottfried court’s failure to make service to the hearing-impaired a factor in license renewal determinations for commercial stations. Ironically, public broadcasters as a group have taken the lead in providing television service to the hearing-impaired. Creation of a “double” public interest standard for license renewals discriminates against public broadcasters, who have acted independently to reach the hearing-impaired. Yet commercial broadcasters, who would seem to require more prodding in this area, are free to carry on as before.

Gottfried reached this peculiar result by looking to the Rehabilitation Act to make its determination of the public interest. The court’s decision suggests that its use of a “national policy” is limited to that policy’s strict statutory basis. The court therefore concluded that although section 504 of the Act articulates a general national policy on discrimination against the handicapped, it is enforceable only against recipients of federal funds.

Such a reading is unsatisfactory because the FCC is not bound by the specifics of section 504; its discretion is far broader because of its public interest mandate. Thus, the court’s limitation of its holding to noncommercial broadcasters is difficult to justify in light of its concern about extending the benefits of television to the deaf.

Part I of this Comment sets forth the facts and holding of Gottfried. Part II discusses the relevant statutory provisions, analyzes the public interest standard, and relates the FCC’s prior involvement in providing service to the hearing-impaired. That part then assesses the appropriate role of court and agency in the administrative process when statutory interpretation is involved, and examines the Gottfried decision in light of the principles and policies of administrative law. Finally, Part III criticizes the Gott-

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12 Because the FCC may adopt regulations in the public interest, it is free to develop its own interpretations of policies expressed in other laws. Thus, the Commission has enacted equal employment opportunity requirements for its licensees different from the requirements promulgated by the Equal Employment Opportunity Commission. See infra notes 73-74 and accompanying text; see also Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976); Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968); 47 C.F.R. § 73.2080 (1980).

13 It should be noted that the court did not consider the creation of different duties under the public interest standard for commercial and noncommercial broadcasters to be the conclusion of the matter. The court stated that the Commission could more appropriately deal with the problem of commercial broadcasters’ responsibility to extend service to the hearing-impaired free from judicial interference. 655 F.2d at 312-16. But the court warned that “should the Commission fail to fulfill its obligations to the nation’s hearing-impaired minority . . . judicial action might become appropriate . . . .” Id. 316.
fied court's distinction between the duties of commercial and noncommercial broadcasters in light of the court's admonition that broadcasters must meet the needs of the hearing-impaired.

I. THE DECISION

The Federal Communications Commission issues television broadcast licenses for five-year terms after determining that granting a license would serve the public interest.\(^\text{14}\) A station may apply for renewal of its license for additional five-year terms, with the Commission again guided by the public interest standard.\(^\text{16}\) After an application is filed, "[a]ny party in interest" may file a "petition to deny" the application with the FCC.\(^\text{16}\)

In 1977 seven commercial and one noncommercial Los Angeles television stations filed license renewal applications with the FCC.\(^\text{17}\) Sue Gottfried, a deaf resident of the Los Angeles area, filed petitions to deny each of the eight applications.\(^\text{18}\) The petitions alleged first that the stations, in violation of the requirements imposed by the public interest standard, had failed to address the problems of the hearing-impaired, and second, that the stations discriminated against the hearing-impaired in violation of section 504 of the Rehabilitation Act of 1973.\(^\text{19}\) The petition to deny public television station KCET's application also charged that it "had shown indifference to the needs of the deaf by failing to broadcast, through most of its license term, a captioned version of the ABC Evening News that was made available to it by the Public Broadcasting Service."\(^\text{20}\)

The Commission rejected Mrs. Gottfried's "petitions to deny." It held that because the FCC does not require broadcasters either


\(^{16}\) Id.


\(^{17}\) License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California, 69 F.C.C.2d 451 (1978) [hereinafter cited as Renewal Applications], reconsideration denied, 72 F.C.C.2d 273 (1979) [hereinafter cited as Reconsideration].

The commercial stations were KABC-TV, KCOP-TV, KHO-TV, KNBC-TV, KNXT-TV, KTLA-TV, and KTTY-TV. The noncommercial station was KCET-TV. Gottfried, 655 F.2d at 300 n.1.

\(^{18}\) Gottfried, 655 F.2d at 304. Mrs. Gottfried also filed her petition on behalf of the Greater Los Angeles Council on Deafness, Inc. (GLAD) and numerous other organizations. The FCC recognized Mrs. Gottfried as the only petitioner who established standing. Renewal Applications, supra note 17, at 453. But see Gottfried, 655 F.2d at 304 n.32 (GLAD's standing implicitly recognized on reconsideration).

\(^{19}\) 655 F.2d at 304.

\(^{20}\) Id. (footnote omitted).
to determine what portion of the population is hearing-impaired or to make programming accessible to the hearing-impaired through captioning or other techniques, the petitions failed to allege a violation of Commission regulations or guidelines. Thus, the petitions failed to meet the statutory standard of raising substantial or material questions whether the renewal grant would serve the public interest.

After the Commission denied reconsideration of the ruling, Mrs. Gottfried appealed to the Court of Appeals for the District of Columbia Circuit. The court concluded that section 504 applied to noncommercial television stations, imposing upon those stations an affirmative obligation to consult with and provide services for the hearing-impaired.

The court used a national policy of nondiscrimination against the hearing-impaired, which it perceived to be embodied in section 504, to expand the public interest standard of the Communications Act. The Supreme Court granted certiorari to consider whether the court of appeals had the power to override the FCC's interpretation of the public interest standard or to require the Commission to implement a national policy that is neither directly applicable to, nor enforced by, the agency.

II. THE PUBLIC INTEREST

A. The Legislative Mandate

In passing the Communications Act Congress incorporated the public interest requirement from the Act's predecessor, the

21 Renewal Applications, supra note 17, at 455, 458.

22 Renewal Applications, supra note 17, at 459. The statute requires that petitions contain specific allegations of fact showing that a grant of the application would be prima facie inconsistent with the public interest standard. 47 U.S.C. § 309(d)(1) (1976). If a substantial and material question of fact is presented, the Commission must designate the application for hearing. Id. § 309(d)(2).

23 The Act establishes the review procedure. Id. § 402(b)(6).


Radio Act of 1927.\textsuperscript{27} The standard was viewed as a flexible check on any excesses of broadcasting licensees.

Despite both the importance and potential breadth of the standard, Congress has never defined "public interest, convenience, and necessity." Instead, the public interest standard has been "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."\textsuperscript{28} Without specific congressional guidance, the Commission has used this delegation of authority to etch out a rough idea of the standard's content.

B. The FCC and the Hearing-Impaired

1. Ascertaining the Public Interest: Requirements for Licensees

The Commission has held that a major part of a station's public interest duty is the active discovery of community problems. The Commission thus requires broadcasters to consult with members of the viewing public and with community leaders in meeting their responsibility to create programming responsive to those problems.\textsuperscript{29} In 1971, the Commission issued a Primer on Ascertainment of Community Problems by Broadcast Applicants (Primer),\textsuperscript{30} which codified broadcaster responsibilities and set out the FCC's expectations in question-and-answer form.

\textsuperscript{27}The Radio Act of 1927, Pub. L. No. 69-632, § 11, 44 Stat. 1162 (1927) (repealed 1934) provided:

If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding.

Other statutes incorporate this standard. For example, the Interstate Commerce Act, addressing the Interstate Commerce Commission's role in evaluating proposed consolidations of railroads or of a motor carrier and a railroad, states that the Commission may approve the merger "when it finds the transaction is consistent with the public interest." 49 U.S.C.A. § 11344(e) (West Supp. 1982). The Commission may approve a motor carrier-railroad consolidation "only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition." Interstate Commerce Act. Id.


\textsuperscript{29}"[T]he principal ingredient of the licensee's obligation to operate [its] station in the public interest is the diligent, positive and continuing effort ... to discover and fulfill the tastes, needs and desires of his service area, for broadcast service." Ascertainment of Community Problems by Broadcast Applicants, 53 F.C.C.2d 3 (1975) (quoting Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 20 RAD. REG. (P & F) ¶1901 (1960)).

As part of the ascertainment process, the *Primer* obligated broadcasters to identify "significant groups" by means of a compositional survey which covered "the minority, racial or ethnic breakdown of the community, its economic activities, governmental activities, public service organizations, and any other factors or activities that make the particular community distinctive."  

In response to criticism of this demographic breakdown requirement, the Commission replaced it with a community leader checklist requirement for renewal applicants. The checklist covered "19 typical institutions and elements normally present in a community." Interviews with leaders in each of the areas established "a prima facie case of compliance with the Commission's ascertainment guidelines."  

Formal ascertainment requirements originally applied only to commercial broadcasters, but the Commission extended these requirements (with some modifications) to noncommercial broadcasters by rulemaking. Although ascertainment requirements still apply with full force to commercial television broadcasters, the Commission, citing bureaucratic interference and cost, recently ended primer guidelines for commercial radio stations and has proposed similar treatment for all noncommercial broadcasters.

Ascertainment requirements merely mandate that broadcasters reach their communities; they say nothing about how broadcasters should respond to the problems they discover. Because there are only a limited number of frequencies on which problems

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31 *Primer*, 27 F.C.C.2d at 683 (Answer 9).

32 Ascertainment of Community Problems by Broadcast Applicants, 53 F.C.C.2d at 7. The Commission issued a new Commercial Primer in 1976, eliminating the compositional survey but calling for a year-round ascertainment process. Ascertainment of Community Problems by Commercial Broadcast Applicants, 57 F.C.C.2d 418 (1976). The community leader checklist included nineteen enumerated categories:

(1) Agriculture; (2) Business; (3) Charities; (4) Civic, Neighborhood and Fraternal Organizations; (5) Consumer Services; (6) Culture; (7) Education; (8) Environment; (9) Government (local, county, state & federal); (10) Labor; (11) Military; (12) Minority and ethnic groups; (13) Organizations of and for the Elderly; (14) Organizations of and for Women; (15) Organizations of and for Youth (including children) and Students; (16) Professions; (17) Public Safety, Health and Welfare; (18) Recreation; and (19) Religion. *Id.* 442. The checklist also included an "other" category, to be used at the broadcaster's discretion. *Id.*


can be discussed, broadcasters have never been expected to address all concerns, but are free to respond to the community's problems as they see fit. The courts and the Commission have often disagreed on the relative weights of different problems, but there is complete agreement that broadcaster discretion is paramount.

Even before beginning deregulation of the communications industry, the Commission did not expect broadcaster response to each problem. Its oversight role was limited to "expect[ing], and . . . requir[ing], . . . broadcasters to be responsive to the issues facing their community." The breadth of this requirement that broadcasters address "community problems" led women and minorities to argue that the media pays inadequate attention to their needs.

As the petitions to deny license renewal in Gottfried indicate, the hearing-impaired hold similar views.

2. FCC Response to the Problems of the Deaf

The history of the FCC's relationship with the deaf is short and relatively uneventful. Its most notable feature is the Commission's insistence that television broadcasters remember the needs and problems of the deaf. The FCC's first notice broaching the subject, _The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing_, was "merely advisory" and placed no

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25. Question: Must an applicant plan broadcast matter to meet all community problems disclosed by [its] consultations?
Answer: Not necessarily. However, [it] is expected to determine in good faith which of such problems merit treatment by the station. In determining what kind of broadcast matter should be presented to meet those problems, the applicant may consider [its] program format and the composition of [its] audience, but bearing in mind that many problems affect and are pertinent to diverse groups of people.

Primer, 27 F.C.C.2d at 685.

37 See Stone v. FCC, 466 F.2d 316, 328 (D.C. Cir. 1972) ("[A broadcaster] may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public"); _Broadcast License Renewals Act: Hearings on S. 16, S. 247, S. 272, S. 613, S. 646, S. 922, S. 844, S. 849, S. 851, S. 1311, S. 1589, S. 1870, S. 3937, and H.R. 12993 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 2d Sess. 104 (1974)" ("A strongly expressed problem or need may not be ignored; however, there is no requirement that a licensee apportion a specific amount of broadcast time to each of the groups and elements that comprise its service area") (statement of Richard E. Wiley, FCC Chairperson).


40 26 F.C.C.2d 917 (1970). The report suggested that broadcasters caption emergency announcements to alert the hearing-impaired and to emphasize the importance of the message. It also made general statements about television's poten-
affirmative requirements on broadcasters. It did, however, suggest that broadcasters in multistation markets consider offering programming for the deaf on a rotating basis.\textsuperscript{41}

The Commission said nothing more on the subject until late 1975, when it proposed regulations requiring broadcasters to transmit emergency messages both aurally and visually.\textsuperscript{42} Regulations were adopted in late 1976,\textsuperscript{43} but language in the proposed regulations asking viewers to inform their hearing-impaired friends of the emergency message was deleted in the adopted version.\textsuperscript{44} The Commission withdrew the proposal because it agreed with comments that the sentence might cause "needless concern and anxiety" and discourage broadcasters from transmitting the emergency messages.\textsuperscript{45}

Commission efforts in nonemergency areas have had even less positive results. The most important action concerned the Public Broadcasting Service's attempt to reserve a segment of the broadcast signal—line 21 of the vertical blanking interval—solely for the use of closed captions.\textsuperscript{46} In its proposal, the Commission requested comments addressing the possible negative effects of total reservation of line 21 on future technical development and exploitation of data transmission capabilities.\textsuperscript{47} After reviewing the comments, the Commission concluded that there were too many unanswered questions to warrant total reservation.\textsuperscript{48} It

\textsuperscript{41} Id. 918.

\textsuperscript{42} Amendment of Part 73 of the Commission's Rules to Establish Requirements for Captioning of Emergency Messages on Television, 57 F.C.C.2d 99 (1975).

\textsuperscript{43} Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television, 61 F.C.C.2d 18 (1976).

\textsuperscript{44} Id. 21. See Amendment of Part 73 of the Commission's Rules to Establish Requirements for Captioning of Emergency Messages on Television, 57 F.C.C.2d at 104.

\textsuperscript{45} 61 F.C.C.2d at 20.

\textsuperscript{46} See Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, 57 F.C.C.2d 1013 (1976) (proposed rulemaking); 63 F.C.C.2d 378 (1976) (report and order). "Closed captioning" is visible only on television sets equipped with special decoding devices. The Public Broadcasting Service and Sears, Roebuck & Co. have cooperated in developing such a device. \textit{Reconsideration, supra} note 17, at 281.

\textsuperscript{47} 57 F.C.C.2d at 1016.

\textsuperscript{48} 63 F.C.C.2d at 388. Public broadcasters' comments supported total reservation of line 21. But industry representatives argued that the cost of captioning was excessive, that line 21 could be put to better use, that the size of the hearing-impaired audience (estimated by the Public Broadcasting Service at 14 million persons) would be approximately 1.8 million viewers, and that alternatives such as amplification devices would be more efficient. \textit{Id.} 381-87.
therefore amended the rules governing line 21 to permit—but not require—closed captioning, and to make individual licensees responsible for determining how best to meet the needs of their hearing-impaired viewers. In a separate statement, Commissioner Joseph Fogarty expressed concern that response to the Commission's "six-year-old policy statement" encouraging broadcaster service to the deaf was "disappointing." He lauded the Public Broadcasting Service's efforts as "the only exception to this sad observation."

Advocates for the hearing-impaired would certainly share the view that little has been done for their constituents in the ascertainment and programming areas. In response to the petition to deny license renewal filed by Sue Gottfried, the Commission noted that broadcasters were under no obligation to actively seek out leaders of the handicapped, and that there was no requirement that broadcasters utilize special programming techniques such as captioning. Once again, though, the Commission called upon broadcasters to provide some service for the deaf, but in comparison with its 1970 statement, its tone was mild.

In denying reconsideration of Mrs. Gottfried's "petitions to deny," the Commission again stated that rulemaking might be necessary "at a later date" if the closed captioning program was unsuccessful. Finally, the Commission specifically rejected an attempt to include a "handicapped" category in its community leader checklist, stating that the handicapped would fall into the "other" category and would be interviewed only if they contacted a broadcaster and the broadcaster determined that they were a "significant" portion of the community.

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49 Id. 389.  
50 Id. 392.  
51 PBS and two commercial networks are currently cooperating to provide up to twenty hours per week of captioned programming. Gottfried, 655 F.2d at 303 & n.18.  
52 See Renewal Applications, supra note 17, at 456.  
53 Id. 458.  
54 See supra note 40 and accompanying text.  
55 "[W]e urge all television licensees to review the options presently available that, within reason, might provide some of the benefits of the medium of television for this nation's hearing impaired." Renewal Applications, supra note 17, at 459 (emphasis added).  
56 Reconsideration, supra note 17, at 281.  
57 Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees, 76 F.C.C.2d 401, 418 (1980). See supra note 33.
In short, the Commission has addressed the needs and problems of the hearing-impaired largely by relying on licensee initiative. Public broadcasters as a group have taken the lead in providing television service to the hearing-impaired; commercial broadcasters have responded with somewhat less enthusiasm, although two networks provide up to twenty prime-time hours of close-captioned programming per week. Nevertheless, the Commission, while encouraging these efforts, has taken no steps to require broadcasters to serve the needs of the hearing-impaired.

C. The Judicial Role

The FCC, as an expert agency, has performed most of the substantive work in defining the public interest. But because the Communications Act provides for judicial review of agency determinations, the courts have a significant oversight role.

Judicial review is typically granted after the Commission has declined to hold a hearing, as it did in Gottfried. The Communications Act requires the Commission to conduct an evidentiary hearing whenever a "substantial and material question of fact is presented [by a petition to deny] or the Commission for any reason is unable to make the [public interest] finding." But like the public interest standard, the "substantial and material" requirement evades definition. The legislative history of the 1960 Communications Act amendments stated that the purpose of the "substantial and material" language was to make it absolutely clear that the application will be designated for a hearing before a grant in any case where a substantial and material question of fact is presented and not disposed of. For the purpose of sections 309 (d) and (e) a "material question of fact" is a question of fact which is material to determination of the question

58 See Gottfried, 655 F.2d at 303 & n.18.
60 The appeal to the Court of Appeals for the District of Columbia Circuit stemmed from the Commission's refusal to schedule a hearing at which the petitioners could more fully state the reasons for their contention that the stations' licenses should not be renewed. See generally Renewal Applications, supra note 17; Reconsideration, supra note 17. Courts have required a hearing when a petition to deny makes "substantial and specific allegations of fact which, if true, would indicate that a grant of the application would be prima facie inconsistent with the public interest." Stone v. FCC, 466 F.2d 316, 322 (D.C. Cir. 1972).
whether the public interest, convenience, or necessity would be served by the granting of the application with respect to which such question is raised.\(^{62}\)

In essence, the Commission is left to determine what meets the "substantial and material" criterion, and the courts review that decision. In general terms, the courts' role is limited by the principle that they may not substitute their judgment about what is in the public interest for that of the agency,\(^{63}\) and may reverse only if the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\(^{64}\)

Once the FCC defines the public interest, however, the courts have a greater role. Then it is the duty of the reviewing judges to determine whether a substantial and material question of fact is actually raised by the petitions that the agency has acted upon. This requires the court, accepting the agency's determination of the boundaries of the public interest,\(^{65}\) to determine whether on the facts set forth in the petition the Commission could reasonably have found that no material or substantial factual question whether the licensee had acted in the public interest was raised.

This was the court's position in *Office of Communication of the United Church of Christ v. FCC.*\(^{66}\) In *United Church of


\(^{63}\) The Court most recently articulated this principle in *FCC v. WNCN Listeners Guild*, 450 U.S. 382 (1981), in sustaining an FCC policy of permitting market forces to promote diversity in radio entertainment formats. *See also* FCC v. National Citizens Comm. for Broadcasting, 426 U.S. 775 (1978) (upholding FCC ban on common ownership of newspaper and broadcast station in the same community).


\(^{65}\) In the past, courts were usually asked to approve or disapprove the Commission's independent efforts to expand the public interest requirement. *See, e.g.*, NBC v. United States, 319 U.S. 190 (1943). In that case the Court upheld the Commission's right to promulgate regulations concerning licensing, network control, and so forth. The Court also held that the FCC could consider antitrust policies in determining what action would serve the public interest.

NBC rejected the view that the FCC was merely a "traffic cop" controlling use of the airwaves. *Id.* 215-16. It is interesting to note, however, that recently appointed FCC members seem to favor the "traffic cop" role. *See Deregulation of Radio*, 84 F.C.C.2d 963 (1981); *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 46 Fed. Reg. 43,190 (1981).

\(^{66}\) 359 F.2d 994 (D.C. Cir. 1965).
Christ, individual members and the congregation of a United Church of Christ in the Jackson, Mississippi area presented the Commission a "petition to deny" a local television station's renewal application based chiefly on the grounds of racial and religious discrimination in the station's programming. The Commission denied the "petition to deny" without a hearing and granted conditional renewal of the license for one year. Writing for the District of Columbia Circuit, Judge Warren Burger reversed the Commission, holding that under the circumstances alleged by the petition, a renewal hearing was required to resolve the public interest issue.

The court held that a history of misconduct of the kind set forth in the petition would, under FCC decisions, preclude the Commission as a matter of law from making the public interest finding. It rejected the Commission's argument that the importance of having a station in Jackson overrode the violations, commenting that the FCC's "'policy' decision is not the result of some long standing or accepted proposition but represents an ad hoc determination in the context of Jackson's contemporary problem. . . . [I]t is a determination valid in the abstract but calling for explanation in its application." 70

Thus, United Church of Christ established two propositions. First, the court held that "[p]ublic participation is especially important in a renewal proceeding . . . [unlike] the case when the Commission considers an initial grant . . . ." 71 Second, the court made it clear that, once the FCC defines the parameters of the public interest, it cannot then ignore its own definition. The courts stand ready to ensure, on behalf of the public, that the Commission's determination of what meets the public interest standard in particular cases is consistent with its formulation of the public interest standard in the abstract.72

The D.C. Circuit followed the United Church of Christ court's reasoning in National Organization for Women v. FCC.73 In that

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67 Id. 998-99. The petitioners also alleged that the station had violated the fairness doctrine, see supra note 5, and that the station's programming "provided a disproportionate amount of commercials and entertainment." 359 F.2d at 998.

68 Id. 1006-07.

69 Id. 1007.

70 Id. 1008.

71 Id. 1004.

72 Id. 1008.

73 555 F.2d 1002 (D.C. Cir. 1977).
case the FCC declined to hold a hearing on a license renewal application despite the petitioner's claim that the licensee had violated the FCC's own guidelines on nondiscrimination in employment practices. The court upheld the issuance of the regulations under the public interest standard, and ordered a hearing to determine whether the allegations were true. Thus, the court again demonstrated its willingness to enforce the FCC's determination of the boundaries of the public interest by requiring the Commission to follow its own regulations.74

The D.C. Circuit greatly expanded the United Church of Christ doctrine when it began to require hearings in entertainment "format" cases. The Commission had held that the public interest was best served by allowing radio stations to change their entertainment formats at will, permitting market forces to determine the kinds of programming available.

In a series of cases culminating in Citizens Committee to Save WEFM v. FCC,75 however, the D.C. Circuit began requiring hearings when a proposed format change coincided with a license renewal or transfer. The court articulated as the basis for its holding a concern that a significant part of the listening public be able to receive the format of its choice. Thus, if no substitute were

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74 That the Commission has the power to adopt regulations requiring broadcasters to take affirmative steps on behalf of the hearing-impaired is hardly open to doubt. The Supreme Court explicitly noted the breadth of the FCC's power to protect minority interests under the public interest standard in NAACP v. Federal Power Comm'n., 425 U.S. 662 (1976). That case involved an attempt to require the FPC to impose equal employment opportunity and nondiscrimination in employment requirements on its regulatees under its statutory "public interest" mandate. See id. 666 & n.4.

The Supreme Court held that the "public interest" standards guiding the FPC and the FCC were different. Specifically, the Court stated:

The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. *

* The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups. It has nowhere been argued that the Federal Power Commission needs similar regulations to promote energy production at reasonable rates.

Id. 670 & n.7 (citations omitted).

available in the listening area, the court held that the public interest might require that the station retain its format.\textsuperscript{76}

The Commission responded with a policy statement announcing that a change in entertainment programming would not be considered a material factor by the Commission in passing upon license renewals and transfers. The FCC stated its conclusion that market forces were the best determinants of broadcasting formats, and that the Communications Act did not require hearings to determine whether format changes were in the public interest.\textsuperscript{77} The policy statement specifically asked the D.C. Circuit to reconsider its decision in \textit{Citizens Committee to Save WEFM}.\textsuperscript{78}

The en banc D.C. Circuit adhered to its decision in \textit{Citizens Committee to Save WEFM}, declaring the FCC's policy statement "to be unavailing and of no force and effect."\textsuperscript{79} The court reasoned that its position on format hearings

\textsuperscript{76}\textit{WEFM}, 506 F.2d at 262. In \textit{Progressive Rock}, the court of appeals went so far as to warn the Commission that its public interest determinations might be subject to judicial review. The court stated that "[f]ailure to render a reasoned decision will be, as always, reversible error." 478 F.2d at 934, quoted in FCC v. WNCN Listeners Guild, 450 U.S. at 587 n.8.

Perhaps the most extreme example of judicial intrusion occurred in \textit{Consolidated Edison Co. v. Federal Power Comm'n}, 512 F.2d 1332 (D.C. Cir. 1975). In that case the court of appeals temporarily implemented a plan previously rejected by the agency. One commentator observed that the case presented not a clash over alternative policies but one over the agency's limitations in effecting a particular policy. The Court undoubtedly will uphold a permanent plan . . . when the Commission's final decision . . . is rendered. But it will be a plan formulated and implemented in a manner approved by the Court. A prolonged, highly charged dispute turned not on a conflict of political or economic ideologies but . . . on the differing institutional perspectives of court and agency.


\textsuperscript{77}\textit{See WNCN}, 450 U.S. at 588; \textit{see also Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations}, 60 F.C.C.2d at 861 (Memorandum Opinion and Order); 57 F.C.C.2d at 583 (Notice of Inquiry).

\textsuperscript{78}610 F.2d at 841. The Commission requested that the court reconsider the decision because of the "partnership" between the agency and the court of appeals. The Commission stated: "when such 'partners' come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive." \textit{Id.} 845 (quoting Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations (Memorandum Opinion and Order), 60 F.C.C.2d 858, 865 (1976)).

One commentator suggests that this idea of a court-agency partnership suffers from a series of conflicts stemming from courts' and agencies' differing policy objectives, bases of expertise, and definitions of problems. The agencies are oriented toward policy goals and seek to develop expertise in particular areas, leading to the development of perspectives on regulatory problems different from the perspectives of the courts. For example, in many situations an agency must be concerned with immediate action and implementation of some plan, yet courts would be concerned with private rights and procedural rules. See Fiorino, supra note 76.

\textsuperscript{79}WNCN, 610 F.2d at 898.
represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission. This Court has neither the expertise nor the constitutional authority to make "policy" as that word is commonly understood. That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the "law" the final say is constitutionally committed to the judiciary.  

The court likened its decision in the format cases to *United Church of Christ*, holding that both were statutory interpretations.  

Judge Bazelon's concurring opinion seized on the majority's distinction between "law" and "policy." He stated that "implementing the public interest standard calls for a strong dose of policy judgment, a responsibility entrusted by Congress to the FCC. Yet the majority virtually confines the FCC to a spectator's role in formulating policies that will promote and preserve diversity . . . ."  

Judge Tamm's dissent sounded the same theme, stating:

> The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment. The Commission's determination that the use of the [format] doctrine will not further the public interest is well within the parameters of reason. Faced with a conflict between judicial and administrative pol-

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80 Id. 854-55 (emphasis in original) (citations omitted). The contrary argument is persuasively advanced by one student commentator.  

The arguments supporting de novo review of legal matters are based on the language of the APA and the constitutional role of the courts as the ultimate arbiters of legal interpretation. Professor Jaffee's characterization of these arguments as "unsound" is apt. By delegating its lawmaking powers, the legislature has established the agencies as the decision makers in the first instance. Thus, to preserve the constitutional integrity of both the legislature and the agency, the delegate's role should be viewed as similar to that of the delegating authority, and agency determinations of law should be accorded some deference similar to that granted agency findings of fact. . . . Like the power exercised by the legislature, the lawmaking power delegated to the agencies could be considered as committed to the discretion of the decision maker and therefore largely immune from judicial review.  

*Perfecting the Partnership*, supra note 64, at 123 (footnotes omitted).  

81 Id. 855 (citing WEFM); id. 857 (citing *United Church of Christ*).  

82 Id. 858-59 (Bazelon, J., concurring) (footnote omitted).
BROADCASTER RESPONSIBILITY

icies, I believe that we are obliged to uphold the Commission's decision.83

The D.C. Circuit's decisions in the format cases effectively held that a court could override an agency's interpretation of its governing statute based on the court's view of that statute's meaning. Despite the Commission's explicit decision that the public interest was best served by letting market forces determine programming format, the court of appeals reinterpreted the public interest standard to reflect its own views.

This practice of interpreting an agency's statute de novo—despite a contrary interpretation from the agency—seemed peculiar in light of principles of administrative law.84 In Red Lion Broad-

83 Id. 865 (Tamm, J., dissenting) (footnotes omitted). Judge Tamm added the observation that the format decisions were based on neither law nor policy, but a mixture of both. Id. n.19. This view is supported by the authors of a recent defense of agencies, who state:

For example, when directed by Congress to arrive at judgments that will serve "the public convenience, interest or necessity" or to set rates that are "just and reasonable," an agency is not expected to derive the meaning of its mandate from the language and the legislative history of a statute. The agency is expected, instead, to draw upon its practical experience to develop new meanings of these phrases as time passes.


Beyond those areas that constitute the agency's ambit of expertise the courts are "comparatively the experts" in interpreting statutes other than the agency's enabling statute, constitutional doctrine, judge-made law, and legal philosophy. In these areas in which discretion has not been delegated to the agency, the court is not merely a supervisory partner but a co-equal decision maker. The court can abandon the abuse of discretion analysis in reviewing those parts of the agency's determination that stray beyond the area of the agency's acknowledged expertise and defer to the agency's judgment in reviewing the remainder.

Perfecting the Partnership, supra note 64, at 129 (emphasis added) (footnote omitted).

84 "Courts reviewing administrative action frequently begin their analysis of a disputed question of construction by assuming that the agency's interpretation is correct and then inquiring whether other factors outweigh the agency's view." Woodward & Levin, supra note 83, at 332. The widely-held view is that the justifications for this approach are the agency's familiarity with and sophistication regarding the statute it administers. For example, an agency's day-to-day administration of its governing statute reveals the practical consequences of one interpretation instead of another.

Factors leading courts to hold the presumption of agency correctness rebutted include congressional activity relating to the administrative construction, disagreement among agencies, lack of need for technical expertise in interpreting the statute, and so forth. See generally Mid-Louisiana Gas Co. v. Federal Energy Regulatory Comm'n, 664 F.2d 530, 554 (5th Cir. 1981).

With respect to the format case situation, however, the Supreme Court seemed to express itself quite clearly in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). The Court stated:
the Supreme Court held that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." In CBS, Inc. v. FCC, the Court reaffirmed the Red Lion rule with the observation that "[s]uch deference ‘is particularly appropriate where, as here, an agency’s interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.’"

The Supreme Court resolved the conflict between the D.C. Circuit’s format rule and the Red Lion rule of deference in FCC v. WNCN Listeners Guild. The Court reversed the court of appeals, reinstating the FCC’s format change policy statement and holding that the Commission’s public interest decisions were to be accorded “substantial judicial deference.” The Court stated:

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.”

The Court thus announced that the judiciary must avoid entering the public interest field unless the Commission has failed to act reasonably in fulfilling its statutory obligation. WNCN

Where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited. . . . [T]he [agency’s] determination . . . is to be accepted if it has “warrant in the record” and a reasonable basis in law.

Id. 131.

86 Id. 381 (footnotes omitted).
88 Id. 2823 (quoting United States v. Rutherford, 442 U.S. 544, 554 (1979)). See Mid-Louisiana Gas Co. v. Federal Energy Regulatory Comm’n, 664 F.2d at 534; cases cited in supra note 64.
90 Id. 596.
92 See Malrite T.V. v. FCC, 652 F.2d 1140, 1149 (2d Cir. 1981) ("The Commission offered a rational explanation for its policy founded on a predictive judgment well within its authority. See FCC v. WNCN Listeners Guild").
would appear to put sharp limits on the kind of review of public interest determinations undertaken by the Gottfried court.

But there is no lack of authority for the proposition that courts can require agencies to expand the scope of statutory interpretations. In *Phillips Petroleum Co. v. Wisconsin*, the Court rejected the Federal Power Commission's narrow interpretation of its governing statute, significantly expanding the Commission's jurisdiction. The Court explicitly rejected the Commission's argument that its finding "ha[d] a reasonable basis in law and [was] supported by substantial evidence of record and therefore should be accepted by the courts, particularly since the Commission ha[d] 'consistently' interpreted the Act as not conferring jurisdiction . . . ." It stated simply that it was of the opinion "that the finding was without an adequate basis in law . . . ."

The deference question may also be complicated by the kind of agency action that a court is reviewing. The argument in favor of judicial deference is strongest when the informational nature of the proceedings, including notice and comment by interested parties, makes it likely that the agency's decision is based on a "thorough exploration of the relevant issues," But in a case

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*347 U.S. 672 (1954). See also Office Employees Int'l Union v. NLRB, 353 U.S. 313, 318 (1957); Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 670 (2d Cir. 1973); Adams v. Richardson, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc) (per curiam).*

*347 U.S. at 677-78.*

*Id. at 678. The confusion in this area is aptly demonstrated in recent Supreme Court cases. For example, in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272-73 (1977), the Court unanimously refused to adopt the statutory interpretation advanced by the Director of the Office of Workers' Compensation Programs. Yet in that same term, the Court reprimanded the Eighth Circuit for substituting its judgment about the construction of a statute for that of the SEC. *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977). The Court accused the court of appeals of "all but ignoring the congressional limitations on judicial review of agency action," *id.* 55, and of "clearly depart[ing] from its statutory appellate function" in overturning "agency conclusions of law . . . based on a construction of the statute consistent with legislative intent." *Id.* 57. In that case the SEC was applying the "reasonable and fair" standard of section 17 of the Investment Company Act of 1940, 15 U.S.C. § 80a-17 (1976). This confusion continues to reign. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Court stated that it would defer to an agency staff interpretation unless that interpretation is "irrational." *Id.* 568. And in *Immigration & Naturalization Service v. Wang*, 450 U.S. 139, 144 (1981) (per curiam), the Court summarily reversed a decision by the Ninth Circuit for "improvidently encroach[ing]" on the agency's determination of the meaning of "extreme hardship." But in *Watt v. Alaska*, 451 U.S. 259, 262-63 (1981), the Court overturned a statutory interpretation concurred in by the Department of the Interior and the Comptroller General. See generally K. Davis, *Administrative Law Treatise* § 30.09 (Supp. 1982).

like *Gottfried*, in which the agency's decision is merely a refusal to act,

[j]udicial review may be the first stage at which the policy is subjected to full criticism by interested parties. Consequently a policy judgment expressed as a general statement of policy is entitled to less deference than a decision expressed as a rule or an adjudicative order. Although the agency's expertise and experience cannot be ignored, the reviewing court has some leeway to assess the underlying wisdom of the policy and need not affirm a general statement of policy that merely satisfies the test of reasonableness.97

*WNCN* and *Ford Motor Credit Co. v. Milhollin* 98 may have sounded the death knell for this reasoning, for the former involved judicial review of a policy statement and the latter review of an agency staff interpretation. In each case the Supreme Court firmly reiterated the need for deference.

Indeed, the Court has shown no inclination to recognize a line between agency action that has been subjected to public comment and that which has not.99 The Court granted certiorari in *Gottfried* specifically to address the deference question. Based on the decisions in the line of cases from *Red Lion* to *WNCN*, it is likely that the Court will conclude that the court of appeals acted improperly in substituting its reading of the Communications Act for the FCC's interpretation. Hopefully, the Court will take the opportunity to resolve some of the confusion about the deference question by clarifying the extent to which the judgment of reviewing courts is relevant in interpreting the statutory commands governing administrative agencies.

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97 Id. 40 (footnote omitted).
99 See supra note 95. The question of overlapping agency jurisdiction is beyond the scope of this Comment. The reader is referred to a very few decisions of the courts of appeals considering the issue. See Board of Trade v. SEC, Fed. Sec. L. Rep. (CCH) ¶ 98,695 (7th Cir. Mar. 24, 1982); SEC v. American Commodity Exchange, Inc., 546 F.2d 1361, 1367-68 (10th Cir. 1976); see also Section of Administrative Law 1976 Bicentennial Institute, *Oversight and Review of Agency Decisionmaking*, 28 Ad. L. Rev. 569, 626 (1976) ("Idea competition between the [Department of Transportation and the ICC] gave Congress in [consideration of national transportation policy] a much better perspective on the issues involved") (remarks of ICC Commissioner A. Daniel O'Neal). Cf. *Ford Motor Credit Co.*, 444 U.S. at 566 (particular deference due to agency Congress designates to interpret and apply law).
III. THE COMMERCIAL—NONCOMMERCIAL DISTINCTION

Part II of this Comment demonstrated that recent Supreme Court decisions and settled administrative law principles suggest that the D.C. Circuit lacked the authority to command the FCC to consider the needs of hearing-impaired viewers in license renewals. In the event that analysis proves incorrect, this Part considers whether the court of appeals' substantive holding in Gottfried v. FCC is justifiable.

In requiring that the Commission inquire into noncommercial broadcasters' efforts to serve the hearing-impaired, the Gottfried court focused primarily on the strictures imposed on recipients of federal funds by section 504 of the Rehabilitation Act. The court determined that because commercial broadcasters did not receive federal funds directly, they were beyond the reach of section 504. The court did state, though that the Commission, in its discretion under the public interest standard, could require commercial broadcasters to act affirmatively in order to extend service to hearing-impaired viewers. In view of the FCC's history of inaction on the problems of the hearing-impaired, the court's reliance on the Commission's discretion amounts to preserving the status quo.

Leaving aside the question whether commercial broadcasters receive federal funds or aid, subjecting them to the dictates of section 504, the court could have used the public interest standard to apply the same requirements to commercial broadcasters as it applied to their noncommercial counterparts. The court "recognize[d] that the Commission's statutory obligation to pursue the public interest requires it to protect the interests of the hard of hearing in having meaningful access to commercial broadcasting." The court also stated that the benefits of both commercial and noncommercial television "should be made available to persons with impaired hearing now." The court did not articulate the

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102 Gottfried, 655 F.2d at 314-15.
103 See supra notes 40-57 and accompanying text.
104 Ms. Gottfried argued that FCC conferral of broadcast licenses should be viewed as "federal financial assistance" within the meaning of § 504. See Appellants' Opening Brief at 27-38; Appellants' Reply Brief at 4-9, Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981). The Supreme Court declined to review this contention. 102 S. Ct. 1004 (1982) (denial of certiorari).
105 Gottfried, 655 F.2d at 301.
106 Id. 306.
reasoning supporting its dual public interest standard, but it was probably concerned about the limitations imposed on its ability to second-guess agency policy judgments imposed by the Supreme Court's decision in FCC v. WNCN Listeners Guild.\(^{107}\) Although, as Part II of this Comment demonstrates, some concern on that score was justified, the court's decision to incorporate the provisions of section 504 into the public interest doctrine made it illogical to limit the holding to public broadcasters.

The court concluded that its authority was limited by the "federal financial assistance" provisions of section 504.\(^{108}\) Nevertheless, the federal assistance limitation goes to Congress's power to reach purely private conduct, and does not suggest that national policy permits or encourages discrimination against the handicapped by private entities. The use of section 504 to limit the government's power, under the sweeping public interest standard, to prevent discrimination against the handicapped reveals the government's reluctance to press for a truly nondiscriminatory national policy.

Other FCC and court decisions indicate that the once-frequently drawn distinction between commercial and noncommercial broadcasters has been abandoned. For example, the Commission initially exempted noncommercial broadcast license applicants from ascertainment requirements because "'[g]iven the reservation of channels for specialized kinds of programming, educational stations manifestly must be treated differently than commercial stations.'"\(^{109}\) In 1976, however, the Commission subjected most noncommercial applicants\(^{110}\) to the same ascertainment requirements as commercial applicants,\(^{111}\) including filing a demographic survey and using a Community Leaders Checklist. Subsequent changes in ascertainment requirements apply without distinction to commercial and noncommercial broadcasters.\(^{112}\)


\(^{108}\) 655 F.2d at 312-14.

\(^{109}\) Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d at 651.

\(^{110}\) Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 58 F.C.C.2d 526 (1976).

\(^{111}\) Ascertainment of Community Problems by Broadcast Applicants, 53 F.C.C.2d 3 (1976). See supra note 32.

\(^{112}\) See supra notes 31-33 and accompanying text.

In addition to ascertainment requirements, other Commission policies apply to commercial and noncommercial broadcasters alike. The equal employment opportunity requirement, for example, applies to all broadcasters with ten or more employees. See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 235 (1976). Similarly, political candidates'
The D.C. Circuit upheld the FCC’s public interest oversight of noncommercial licensees in *Accuracy in Media, Inc. v. FCC.*113 The court stated that the Commission could enforce the fairness doctrine and other components of the public interest standard against individual noncommercial broadcasters, just as it could against commercial licensees.114 This decision suggests by implication that the Commission could likewise impose components of the public interest standard applicable to noncommercial licensees on commercial broadcasters.

The *Gottfried* court, in looking to the policy underlying section 504, actually expanded the definition of “the public interest,” not merely the duties of particular broadcasters affected by section 504. Limiting the decision's reach to public broadcasters is flatly inconsistent with the principle that *every* licensee must serve the public interest. This should be so regardless of whether the licensee derives its revenues from the federal government or from commercial advertising. “The public interest” should encompass and effectuate substantive national policies; it should not be limited by the narrow reach of statutes announcing those policies.

IV. CONCLUSION

With respect to principles of administrative law, the decision in *Gottfried v. FCC*115 has mixed implications. The decision means that, for the moment, judicial review of the FCC’s interpretation of the public interest standard will continue. But the Supreme Court’s decision in *FCC v. WNCN Listeners Guild*116 indicates the Supreme Court’s dissatisfaction with judicial re-interpretation of that standard, and with agency statutory interpretations in general. In light of *WNCN*, the court of appeals in *Gottfried* may have gone too far.

With respect to the rights of the hearing-impaired, however, the court may not have gone far enough. For them, *Gottfried* right of access to broadcast facilities, see 47 U.S.C. §312(a)(7) (1976), extends to both public and private broadcasters. Senator James L. Buckley, 63 F.C.C.2d 952 (1976).


114 “We find nothing in [47 U.S.C.] §398 which limits established FCC authority, including the Fairness Doctrine, over local noncommercial licensees.” 521 F.2d at 295 (footnote omitted). Although it held that the Commission could enforce the public interest standard against individual noncommercial broadcasters, the court upheld the FCC's decision to refuse jurisdiction over the Corporation for Public Broadcasting.


will probably have little effect. The FCC will have to consider noncommercial broadcaster response to the problems of the deaf in license renewals but because public broadcasters lead the industry in service and programming for the hearing-impaired, the Commission will almost certainly find individual station response to be adequate. The court's greatest opportunity for constructive change was in the commercial broadcasting industry, where response to the needs of the hearing-impaired has been minimal. But the court's decision to rely on Commission discretion in that area, given the FCC's past record, bodes poorly for increased attention to the needs of the hearing-impaired.