FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE FEDERAL COMMUNICATIONS COMMISSION OF THE UNITED STATES

November 15, 1968 to January 31, 1969

Volume 15, Second Series

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NOVEMBER 15, 1968 TO JANUARY 31, 1969

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ERRATA—VOLUME 15 (2D SERIES)

Page 25—"Notice of Inquiry and proposed Rulemaking" should be attached to the previous document as "Appendix A".

Page 35—Heading should read, "KACY, Inc."

Page 995—paragraph 4—line 6—Should read, "station will have to rely in great part * * *"

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TABLE OF ABBREVIATIONS

AM—Amplitude Modulation.
Act—Communications Act of 1934, as amended, 47 U.S.C. 151 et seq.
Amer. B/cing Cos.—American Broadcasting Companies.
Amer. Tel. & Tel.—American Telephone and Telegraph.
Assn—Association.
B/c—Broadcast.
B/cers—Broadcasters.
B/cing—Broadcasting.
CATV—Community Antennae Television.
Col. B/cing Sys.—Columbia Broadcasting System.
ComSat Corp.—Communications Satellite Corporation.
Co.—Company.
Corp.—Corporation.
CP—Construction Permit.
FCC—Federal Communications Commission.
FM—Frequency Modulation.
Inc.—Incorporated.
ITT World Comm.—International Telephone and Telegraph World Communications.
National B/cing Cos.—National Broadcasting Companies.
Rule—Rules and Regulations of the Federal Communications Commission.
Satellite Act—Communications Satellite Act, 47 U.S.C. 701 et seq. (1962).
TV—Television.
UHF—Ultra High Frequency.
VHF—Very High Frequency.

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FCC 68-1072

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ALL AMERICA CABLES AND RADIO, INC. For Authorization Under Section 214 of the Communications Act of 1934, as Amended, To Install and Operate Channelizing Equipment on a Microwave System Between San Juan and Cayey, P.R.	Docket No. 18072 File No. P-C-6811
ALL AMERICA CABLES AND RADIO, INC. For Construction Permits To Establish New Facilities in the Domestic Public Point-to-Point Microwave Radio Service Between San Juan, P.R., and the Interface of the Cayey, P.R., Earth Station	Docket No. 18073 File Nos. 690-C1-P-68, 691-C1-P-68, 692-C1-P-68, 693-C1-P-68
PUERTO RICO COMMUNICATIONS AUTHORITY For Construction Permits To Establish New Facilities in the Domestic Public Point-to-Point Microwave Radio Service Between San Juan, P.R., and the Interface of the Cayey, P.R., Earth Station	Docket No. 18074 File Nos. 1091-C1-P-68, 1092-C1-P-68, 1093-C1-P-68, 4020-C1-P-68

DECISION

(Adopted October 29, 1968)

BY COMMISSIONER WADSWORTH FOR THE COMMISSION: CHAIRMAN HYDE ABSENT; COMMISSIONERS COX AND JOHNSON DISSENTING; COMMISSIONER H. REX LEE NOT PARTICIPATING.

APPEARANCES

John A. Hartmen, Jr., *Terrence L. Slater* and *Victor M. Berger* on behalf of All America Cables and Radio, Inc., and ITT World Communications Inc.; *David H. Lloyd* (Arnold and Porter) on behalf of the Puerto Rico Communications Authority; *Leonard W. Tuft*, *Eugene F. Murphy* and *Jerome F. Matedero* on behalf of RCA Communications, Inc.; *Robert E. Conn*, *R. P. Romanelli* and *T. J. McCabe*, on behalf of Western Union International, Inc.; *Paul M. McDonough*, *Adrien R. Auger* and *Robert F. Gosse* on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

106-513—68——1

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I. Background

1. This proceeding involves the mutually exclusive microwave applications of All America Cables and Radio, Inc. (All America), and the Puerto Rico Communications Authority (PRCA) for authority to construct a three hop terrestrial microwave link between the All America terminal in San Juan, P.R., and the communications satellite earth station at Cayey, P.R.

2. In the outstanding authorization for the Cayey earth station, the Commission ordered that it be completed on or before October 30, 1968. Because the facilities which are the subject of this proceeding (para. 1) are necessary to enable traffic to be handled via the earth station, the subject facilities must also be operational on or before the same date, October 30, 1968. Therefore, the Common Carrier Bureau staff held meetings with the applicants in December 1967, and January 1968, to determine whether their differences could be compromised.

3. As a result of these meetings, some matters were compromised and a joint application was filed based upon agreed technical specifications, interim joint construction, installation, maintenance and management arrangements. Under section 319(d) of the Communications Act, the applicants requested and received a waiver of the requirements for a construction permit in order to commence construction prior to Commission action. Thereafter, on June 11, 1968, a joint construction permit was granted, limited to construction and equipment tests, and subject to further orders issued in this proceeding. Construction has proceeded.

4. However, the applicants were unable to resolve their differences concerning ultimate ownership, operation and the conditions of use proposed in their competing applications. Therefore, we designated the applications for hearing on the following issues, and in view of the time element, directed the examiner to certify the record to us without an initial decision (12 FCC 2d 38, March 19, 1968):

> (*a*) To determine, on a comparative basis, whether, and to what extent, the proposal of ITTCRPR [All America] or PRCA would better serve the public interest, convenience, and necessity with respect to the following:
>
> (1) the rates, charges, practices, classifications, regulations, personnel and services;
>
> (2) the proposed degree of reliability and whether such degree of reliability is likely to be achieved;
>
> (3) the cost of the proposed system, including estimated maintenance and operating costs;
>
> (4) the manner by which the facilities and services of the proposed system shall be made available to authorized carriers;
>
> (*b*) To determine whether it is necessary and desirable to establish physical connections between existing and proposed facilities, to establish through routes and charges applicable thereto and the divisions of such charges and to provide facilities and regulations for operating such through routes, within the meaning of section 201(a) of the Communications Act of 1934, as amended; and, if so, what connections, routes, charges, facilities and regulations should be established;
>
> (*c*) To determine whether it is necessary and desirable to establish charges, classifications, practices, regulations and other terms and conditions in order to insure that all present and future authorized carriers

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shall have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations within the meaning of section 201(c)(2) of the Communications Satellite Act of 1962; and, if so, what charges, classifications, practices, regulations and other terms and conditions should be established, and further, in this connection to determine whether the offering of channels to authorized carriers and users of the Cayey earth station on a contract basis as proposed by PRCA is consistent with the provisions of the Communications Satellite Act of 1962;

(*d*) To determine whether grant of any application should be conditioned to require that channels shall be made available to all communications common carriers, international and domestic, on the basis of indefeasible right of user arrangements; and if so, what terms and conditions, if any, should be established;

(*e*) To determine whether PRCA is required to obtain authority pursuant to section 214 of the Communications Act of 1934, as amended, to install, own and/or operate channelizing equipment to be used in connection with the subject point-to-point microwave radio system;

(*f*) To determine, in light of the evidence adduced on all the foregoing issues, whether or not, and under what conditions, the public interest, convenience or necessity will be served by the grant of any of the subject applications, and/or by the establishment of an interconnected system.

5. On April 8, 1968, PRCA sought to have the issues enlarged to:

> Determine to what extent, if any, a grant to either applicant would best serve the interests of the Commonwealth of Puerto Rico and result in the implementation of laws and policies of the United States relating thereto and to what extent, if any, determinations made on the foregoing issue bear upon the public interest, convenience and necessity.

All America opposed PRCA's motion. It argued that under the Communications Act, the public interest of Puerto Rico was not distinguishable from the public interest of all the people of the United States. In a *Memorandum Opinion and Order* (12 FCC 2d 895, May 16, 1968), the Review Board denied the requested issue, because PRCA had not shown that the public interest of Puerto Rico differed from the public interest, convenience and necessity finding required by the Communications Act, and already included as the ultimate issue in the case.

6. The Commonwealth of Puerto Rico sought to intervene in the case. Intervention was denied by the examiner (FCC 68M-828, May 23, 1968). However, the examiner ordered that PRCA could:

> * * * Within the bounds of reason, relevancy and economy of presentation, as determined by the hearing examiner * * * show how a grant to one or the other of the two applicants would affect the interests of the Commonwealth of Puerto Rico. * * *

Petitions to intervene, by RCA Communications, Inc. (RCA), Western Union International, Inc. (WUI), and ITT World Communications, Inc. (ITT World Com), were granted.

7. A prehearing conference was held on April 9, 1968, and hearings were held on May 27, 28, 29, 31, June 3, 4, 5 and 11, 1968. The record was closed by the examiner's order of June 17, 1968, and pursuant to the designation order, the matter was certified to the Commission without an examiner's initial decision. Proposed decisions and reply briefs were filed by the parties, and oral argument was held before the Commission, en banc, on September 12, 1968.[1]

[1] The parties have filed unopposed motions to correct the transcript of the oral argument. There being no objection and it appearing that the corrections requested are necessary and proper, the aforesaid motions to correct the record will be granted and the transcript will be corrected accordingly.

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II. Findings of Fact

A. *The Applicants*

8. *PRCA* is a Puerto Rico government corporation, authorized to acquire, maintain and operate communications facilities within Puerto Rico. The act of May 12, 1942 creating PRCA, empowers it to determine, fix, alter, change and collect rates, fees, rentals and other charges for the use of its facilities and services. Its operations are solely within Puerto Rico. PRCA provides about 10 percent of the domestic telephone service within the island. PRCA's telephone service is limited to 12 telephone exchanges—including the Cayey exchange in which the earth station will be located—in the east central part of Puerto Rico, and the offshore islands of Vieques and Culebra. Communications traffic between the Puerto Rico and overseas points originating or terminating in PRCA's territory is routed through facilities owned by All America and the Puerto Rico Telephone Co., which is a subsidiary of ITT and affiliated with All America. PRCA also provides all of the domestic telegraph service in Puerto Rico. Messages to be delivered to overseas points are accepted at PRCA offices within Puerto Rico and routed through PRCA's system to the office of the designated international carrier in San Juan. PRCA also accepts messages in San Juan from the international carriers for delivery within Puerto Rico. Additionally, PRCA provides domestic telex service. Its subscribers can place calls to other stations within their exchange, to stations in other exchanges, and to overseas telex stations. Its overseas telex service is provided by interconnection in San Juan with the facilities of the three international record carriers, and PRCA has no ownership or other interest in any other communications common carrier in Puerto Rico.

9. *All America* is a communications common carrier providing voice message service between Puerto Rico and overseas points. It is a wholly owned subsidiary of American Cable and Radio Corp., which in turn, is wholly owned indirectly by International Telephone and Telegraph Corp. All America has a 30-percent interest in the earth station at Cayey. Its operating headquarters are located in San Juan, which is the other terminal of the microwave link. All America also has an ownership interest in: (*a*) the submarine cable between Florida and Puerto Rico; (*b*) an over-the-horizon radio relay system between Monte del Estado, P.R., and the Dominican Republic; (*c*) a microwave system used to carry traffic between Puerto Rico and St. Thomas, Virgin Islands; (*d*) a coastal harbor telephone station at Cubuy, located about 17 miles southeast of San Juan and, (*e*) a high frequency radio system, also located at Cubuy, for communications between Cuba and Puerto Rico. All of these systems terminate at All America's operating headquarters in San Juan.

B. *Facilities*

10. The facilities of the microwave system will be the same whichever application is granted since construction has already proceeded pursuant to the joint construction permit. Both applicants contem-

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plate virtually identical terminal points of the microwave link at the All America operating headquarters in San Juan and at the Cayey earth station, with two unattended relay stations at Cerro Las Pinas and Cerro Marguesa. The system will consist of three duplex radio channels, each of which will have capacity of 960 voice circuits. One channel will be used for voice and record services; one will be used for television transmission; and one will be operated as a protection (diversity) channel for both, with the voice and record services having priority over television. In view of traffic projections for the system, the applicants agreed that there be installed initially only sufficient multiplex equipment for the provision of 180 voice circuits on the primary voice and record channel and on the protection channel.

C. *Proposals of the Applicants*

(1) *All America*

11. All America proposes to use about two-thirds of the voice circuit capacity of the system for its own overseas voice traffic, and to make the remaining capability of the system available to other carriers authorized to use the ground station on an indefeasible right of user (IRU) basis, or alternatively (except for television) on a lease basis.[2] IRU would be granted to authorized users for the life of the instant microwave equipment. Provision would be made for the sharing of capital and operating and maintenance costs attributable to the system, and All America would maintain the system. Grantees would have the option of increasing their original allotment of voice circuits in proportion as the total number of available circuits in the system is increased. All America proposes to provide facilities in the microwave link up to any capacity that the using carriers are authorized by the Commission to offer to the public, and will treat all authorized carriers equally when requested to activate new circuits on short notice.

12. All America's total estimated cost of the system is $1,025,000. On the premise that the capacity of the system normally will be used two-thirds for voice and record communications and one-third for television, All America would allocate 87 percent, or $887,000, of the system cost to voice and record services and 13 percent, or $138,000, to television.[3] An additional investment at the San Juan terminal, entirely attributable to voice and record services, would bring the total voice and record portion of system cost to $916,000. On the basis of the estimated construction cost, the foregoing cost allocation, and the fact that the system will be initially equipped to provide 180 voice circuits on each of two channels, the initial investment for an IRU in a voice circuit will be $5,100. This figure is subject to adjustment to reflect the actual cost of construction and to readjustment when the system is expanded in the future. The initial cost of an IRU for the television

[2] All America would also make voice circuits in the system available to PRCA should the latter, in the future, desire to use the system for domestic service.

[3] All America states that this division is in recognition of the fact that the basic use of the system will be for voice and record service, and the added investment to provide television facilities is incremental. In making the allocation, All America credited to television only construction costs related solely thereto.

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circuit will be $138,000, subject to adjustments to reflect the actual final cost of construction of the proposed system.[4]

13. All America estimates the annual maintenance and operating expenses of the system as follows:

Labor, direct	$100,400
Social benefits	12,000
Supervision	11,000
Shift differential	2,000
Meal allowance	800
Transportation	5,200
Rental (Marquesa land, Cayey and Pinas building space)	7,800
Materials and supplies	8,700
Power	4,800
Building maintenance	700
Tower maintenance	600
Total	154,000

Dividing total maintenance and operating expense between the voice-record and television portions of the system in the same proportion as costs, All America estimates that each carrier acquiring IRUs in voice circuits in the proposed system would incur annual maintenance and operating expense of approximately $750 per voice circuit. Any carrier or group of carriers obtaining the IRU for the television circuit would incur an annual charge of $20,000. All America will impartially maintain and restore, in the event of outage, the circuits of all IRU owners.

14. A carrier purchasing an IRU acquires a capital investment in the circuit, incurs the depreciation expense, and is entitled to an opportunity to earn a fair return on its investment. Under All America's proposal, the cost of an IRU in a circuit in the future will be the net book value of the circuit at the time an IRU in the circuit is acquired. In other words, All America would carry idle circuits and not charge future IRU purchasers for intervening maintenance or depreciation.

15. All America would also lease voice circuits to the authorized carriers, if they so desired, at a fixed annual charge of approximately $2,000 per circuit. This annual charge, which would remain fixed regardless of the number of voice circuits actually in use in the system, is calculated by dividing All America's annual revenue requirements for the proposed system by the initial equipped voice circuit capacity of the system (180 voice circuits). All America's estimated annual revenue requirements for the voice circuit portion of the system is as follows:[5]

Maintenance and operating expenses[6]	$134,000
Property taxes	19,500
Municipal tax	4,000
Income tax	24,000
Depreciation expenses	68,200
Administrative expense	34,800

[4] All America, a voice carrier, does not propose to use the television channel, since it considers the service one appropriately to be provided by a record carrier. It contemplates that the IRU for the television channel might be granted to one of the three international record carriers serving Puerto Rico, or two or more on a fractional basis if more than one requests an IRU.

[5] It should be noted that All America is subject to certain Puerto Rican taxes from which PRCA is exempt.

[6] Maintenance for voice channels only.

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Insurance	3,900
Net operating income (8 percent rate of return)	73,000
Total	361,400

Although the net book value of the system will be decreased by depreciation, the $2,000 annual lease charge per circuit will remain constant because All America believes that the depreciation will be offset by increases in labor and administrative expenses.

16. With respect to maintenance and operating personnel, All America proposes to have 13 technicians and one supervisor allocated as follows. There would be one technician on duty at each of the San Juan and Cayey terminal stations 24 hours per day, 7 days per week, to maintain and operate the terminal stations. Two additional technicians working an 8-hour shift, 5 days per week, at the San Juan terminal will be responsible for regular maintenance of the two unattended relay stations of the proposed system as well as three unattended relay stations in other All America microwave systems.[7] In addition, All America proposes to have two technicians on duty 24 hours per day, 7 days a week, at the San Juan terminal who will be responsible for emergency maintenance of the foregoing five unattended relay stations.

(2) *PRCA*

17. Contrary to its initial proposal as reflected in the designation order, PRCA does not propose to use the proposed system to provide domestic, i.e., intraisland, communications services to its subscribers. It proposes to own the facilities and to lease circuits to the authorized international carriers on a contractual basis.[8] PRCA does not propose to grant IRUs. It states:

> **The indefeasible right of use concept might have been practical to PRCA had it pursued its initial proposal so that the system could be used for both overseas and domestic traffic. Under the existing proposal, all traffic which the microwave system will carry will be routed through the international carriers. If PRCA were to make this facility available on an indefeasible right of use basis, it would in actuality have little if any ownership in the system * * *.**

18. PRCA's lease charge per circuit would be set at an amount which would allow PRCA to recover the system construction costs, that is depreciation, maintenance and operating expenses (including the cost of capital), and would, in addition, yield to PRCA a profit of 8 percent of total unrecovered investment in the system. The sum of these costs, expenses and profit (revenue requirements) is estimated at $390,620, broken down as follows:

[7] All America proposes integrated operation of the microwave link with its operating complex and would use the same test board for satellite circuits that it uses for other overseas circuits.

[8] PRCA anticipates that it would have no difficulty in negotiating satisfactory arrangements with the carriers. It has submitted a suggested form of lease arrangement that would be satisfactory to it.

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Salaries, direct maintenance	$78,000
Employee overhead	32,296
Maintenance, road and building	8,000
Parts, spare	30,000
Utilities	3,000
Lease payments	[9] 1,200
Insurance	7,055
Interest	47,385
Administrative	19,500
Total	226,436
Depreciation Expenses	79,930
PRCA Profit	84,254
Total (revenue requirements)	$390,620

[9] PRCA states that the lease figure does not include payments for space at the earth station and at the San Juan terminal, and may have to be increased. All America estimates that the annual charge for its San Juan terminal would be approximately $20,000, and for the Cayey terminal $6,000 per year, but has submitted no evidence to substantiate this claim.

19. The lease charge per circuit would be determined by dividing the revenue requirement by the number of circuits actually leased (never fewer than 104 for purposes of calculation). Based on estimated revenue requirements of $390,620 and an initial use of 104 voice circuits, PRCA proposes initially to lease voice circuits in the system at a monthly charge of $311.50 per circuit or approximately $3,738 annually. As the number of voice circuits leased in the system increases above 104, or as unrecovered investment decreases, PRCA would decrease the monthly charge per voice circuit in accordance with the formula set forth above.

20. The total annual revenue requirements on which the monthly lease charge is based includes interest of $47,385, or 4½ percent of total estimated construction cost, and is the cost of capital for financing the proposed system. The 4½-percent interest figure is not included in the 8-percent profit of $84,254, but rather is in addition to that figure. The monthly lease charge per voice circuit includes compensation to PRCA for the television capability of the microwave system. PRCA does not know if it would make an adjustment in the voice circuit charge to a carrier or carriers leasing voice circuits which either made no use of the television capability or used it to an extent disproportionate to the use of voice circuits. PRCA states that it sees "no harm in permitting the message traffic to 'subsidize' television traffic until some pattern of usage is established and it becomes clear just precisely how television service is going to be provided in Puerto Rico."

21. PRCA proposes a basic staff of 10 technicians to maintain and operate the proposed system, and will have additional technical personnel available in case of unusual problems or serious malfunctionings requiring specialized skills. There would be one technician on duty at each of the San Juan and Cayey terminal stations 24 hours per day, 7 days per week, to operate and maintain the terminal stations. In addition, there would be one technician on duty for one 8-hour shift per day at each of the terminal stations who will maintain the two unattended relay stations and be available to perform duties at their respective terminal station bases. One technician in San Juan and one in Cayey will be "on call" at his home or elsewhere to perform

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emergency maintenance, and would be compensated only if called to duty. Only one PRCA technician would respond to an emergency call (whereas All America would send two), and it is estimated that such technician would reach the unattended relay stations within one hour after a malfunction occurred.

III. Contentions of the Parties

22. All America, and the Common Carrier Bureau urge that the proposal of All America is superior and should be granted, principally on the ground that All America itself proposes to use two-thirds of the voice capacity and to grant IRUs for the rest, and PRCA does not. They point out that the microwave link is an integral and necessary adjunct of the Cayey earth station and is to be used solely for transmitting interstate or international traffic between the All America terminal and earth station. Since the Commission's policy with respect to earth stations and international cables (e.g., the Florida-Virgin Islands cable and TAT IV and V) is to relate ownership to use, they reason that the same policy should be applied to a microwave link affording the international carriers access to the earth station when their overseas traffic goes via satellite instead of cable. An IRU is akin to ownership and hence is consistent with such a policy.

23. They further assert that the IRU proposal of All America would afford authorized carriers "nondiscriminatory use of, and equitable access to, the communications satellite system and the satellite terminal stations under just and reasonable charges," as required by section 201(c)(2) of the Communications Satellite Act. In addition, they urge that the PRCA lease proposal is inconsistent with section 201(c)(2) because it improperly includes in operating expenses the 4½-percent interest charge on borrowed capital, as well as an 8-percent return, and because the charge for voice circuits includes compensation for the television capability of the system and thereby discriminates among carriers.

24. All America and RCA urge that All America's IRU proposal (an initial per voice circuit purchase price of $5,100 plus $750 annually) would result over the life of the system in considerable economies to the carriers as opposed to PRCA's per voice circuit lease charge of $3,738 annually. However, the Common Carrier Bureau claims that they overstate the savings. For, while the carriers would pay less per voice circuit on an IRU basis, the purchase price constitutes a capital investment which would go into their rate base and on which they would incur depreciation expense. Moreover, while PRCA's initial lease charge per voice circuit is more than All America's, the PRCA charge would decrease as more circuits in the system are used whereas the All America lease charge would remain constant. It is conceded by all parties that, at least initially, rates to customers of the international carriers will be the same whether All America or PRCA obtains the microwave grant, since the carriers propose composite rates rather than different rates for the same type of service rendered via cable or satellite.

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25. Claiming that PRCA's maintenance proposal is inadequate, All America asserts that twice as many maintenance personnel would be desirable. It further asserts that its own manpower requirements are lower because it is already operating in the San Juan terminal and can make use of such personnel as needed. The Common Carrier Bureau disagrees with All America's contention that PRCA's maintenance proposal is totally inadequate. However, the Bureau urges that the All America maintenance proposal is nevertheless superior and that this preference is entitled to more weight because the PRCA proposal contemplates emergency performance by "on call" personnel and only one technician would respond to such a call, whereas All America would send two.

26. PRCA urges that the two proposals are substantially equal except for the IRU versus lease distinction, and that its application should be granted because the facilities are located wholly within Puerto Rico, and should therefore be licensed to the domestic carrier operating in the Cayey area. It further asserts that no section 214 certificate is required, since PRCA would be operating as a "connecting carrier" within the meaning of section 2(b) of the Communications Act. All America takes issue with this position as a matter of law, but the Common Carrier Bureau does not reach the question in view of its recommendation for a grant to All America.

27. Rafael A. Riviera-Cruz, Solicitor General of the Commonwealth of Puerto Rico, testified on behalf of PRCA at the direction of the Commonwealth's Governor and Attorney General as to why the Commonwealth favors a grant of the application to PRCA and why the Commonwealth believes that such a grant would be to its best interests. Generally, Riviera-Cruz testified concerning (*a*) the extent to which the Commonwealth government actively participates in matters which, in other areas, might be left to private interests; (*b*) how government participation has led to the island's economic development over the past few decades; (*c*) the history of the United States relationships to Puerto Rico; and (*d*) the economic and other benefits which the Commonwealth would receive were PRCA to be granted the authorization. Specifically, he testified that the Commonwealth favored a grant to PRCA because the microwave operation would be a source of revenue to PRCA (which operates at a loss in providing domestic service) and would enhance the prestige of the Commonwealth. In addition to pointing to the dominant role of ITT companies in the Caribbean area, the Solicitor General urged that the Commission should respect the views of the Puerto Rican government because of its Commonwealth status and "unique relationship" with the United States. He further suggested that a grant to PRCA would accord with United States policy of promoting the development of Puerto Rico and its local independence in matters of commerce.

28. On the question of IRU versus lease, PRCA points out that, to date, all terrestrial links to other earth stations have been licensed to local carriers with circuits made available to international carriers on a lease basis. The PRCA lease proposal, being almost identical to one in effect for the terrestrial link between Honolulu and the Paumalu earth station, cannot be said to be contrary to Commission policy.

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Moreover, the IRU concept would be impracticable for PRCA since all traffic on the Puerto Rican earth station link will be routed through the international carriers, and PRCA would therefore have little or no ownership of facilities. With respect to recovery of interest expense, PRCA notes that it is not a stock corporation which can rely on equity, but a public corporation operating at a loss. However, in the event of a Commission determination that PRCA should not be permitted to recoup interest expense, PRCA states that the Commission could so condition its grant. In response to the contention that its lease proposal subsidizes television and discriminates among carriers, PRCA notes that the television use is uncertain now and it proposes to make changes as it gains experience.

29. In reply to PRCA's contentions, the Common Carrier Bureau asserts that this case is different from Paumalu, Andover and Brewster Flat because: (*a*) this is the first contested, comparative case; (*b*) in those cases existing facilities of the local carriers were utilized in substantial part, whereas here entirely new facilities are required so that there is no question of a substantial, uneconomic duplication of facilities or inefficient use of spectrum; and (*c*) in those cases the terrestrial facilities were used, and continued to be used, to handle domestic traffic of the licensee carrier as well as earth station traffic, whereas here the facilities will be dedicated to serving the Cayey earth station and will not be used by PRCA, at least initially, for intra-Puerto Rico traffic. It asserts further that no general policy has yet been established as to which entity or entities should operate the connecting facilities between an earth station and a central operating office when no facilities exist. The Bureau states that it favors the IRU concept both as a means of assuring equitable and nondiscriminatory access to the earth station and also because of the public interest consideration of encouraging carriers to invest in the facilities which they use to provide service to the public.

30. The Bureau agrees that the desires of the Commonwealth are entitled to consideration and would be of decisional significance if the two proposals were equal or approximately so. However, since it does not believe that this is the case here, the Bureau urges that the Commission should not reject a superior proposal offering more benefits to the Commonwealth as a whole in terms of communications service because the Commonwealth would prefer to have an entity in which it has a proprietary interest perform the service. The Bureau claims that the evidence on behalf of the Commonwealth does not demonstrate how a grant to PRCA would result in better, more efficient or less expensive service or would further the economic goal, status or prestige of the Commonwealth.

CONCLUSIONS

31. The competing proposals of the applicants in this case do not present substantial comparative differences in some respects. Since construction has already proceeded pursuant to the agreement of the applicants and the joint construction permit, the technical facilities, system reliability and construction costs will be virtually identical no matter which entity is licensed. Thus, our comparative evaluation must

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turn on the differences in their proposals for operating the system, and on our determination as to whether the public interest would be better served by relating ownership of the earth station link to use of the system or by licensing another carrier to lease the facilities to the carriers using the system.

32. While the estimates of All America and PRCA as to annual operating costs and revenue requirements are relatively close, those of PRCA are somewhat higher.[10] The differences in details appear to be attributable primarily to the circumstances that All America is subject to various taxes from which PRCA is exempt, and PRCA includes 4.5-percent interest on borrowed capital in its operating expenses, in addition to proposing an 8-percent return. Since PRCA proposes to recoup such cost of capital as well as an 8-percent return, whereas All America proposes only an 8-percent return on its lease alternative and no return on the basic IRU proposal (except as All America and the authorized carriers would each include its share of the facilities in its own rate base), the All America proposal is preferable on this score.[11]

33. It also appears that the All America proposal will be less costly to the carriers using the system, as claimed by All America and RCA, though we agree with the Common Carrier Bureau that they overstate the savings. Under PRCA's proposal, the annual per voice circuit charge is $3,738 as compared to an initial IRU purchase price of $5,100 plus $750 annually under All America's IRU proposal (see paras. 11 and 12, above) or $2,000 annually under its alternative lease proposal. While PRCA proposes to decrease its charge as more circuits in the system are used, All America's lease charge would remain constant. However, All America states that the price of an IRU is subject to readjustment when the system is expanded in the future beyond the initial 180 voice circuits. Moreover, we think it follows from the difference in estimated revenue requirements and proposed returns that the PRCA proposal is likely to be more costly to the carriers. The circumstance that the carriers propose to charge the same composite rate to the public for service via satellite or cable, regardless of whether All America or PRCA obtains the microwave grant, does not do away with the need for concern as to the ultimate effect on rates to the public. The cost of facilities to the carriers is bound to be reflected eventually in rates charged to their customers. Accordingly, the All America proposal warrants a preference in this area also.

34. The PRCA lease charge per voice circuit includes compensation for the television capability of the system. It is asserted that one effect of this proposal is to subsidize television service through higher rates charged to the users of voice and record services and that it is discriminatory against carriers who do not plan to provide television transmission service, contrary to the requirements of section 201(c)(2)

[10] We note that PRCA has not included the cost of leasing facilities in the earth station and in the All America terminal in San Juan. Moreover, regardless of the outcome of this proceeding, PRCA will own the repeater site and buildings at Cerro las Pinas. It states that it would use them for other services and make them available to All America for a nominal fee. PRCA assumes that All America would do the same with respect to its San Juan terminal in the event of a grant to PRCA.

[11] While PRCA states that the Commission could condition a grant to it to exclude the interest item, this is a comparative proceeding and the decision should turn on the proposals of the applicants.

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of the Communications Satellite Act. We think that the cost of the television capability of the facilities should be segregated from the voice circuit cost. While the PRCA proposal is deficient in this respect, All America's proposal also has some questionable aspects. All America estimates that the capacity of the system will normally be used two-thirds for message traffic and one-third for television. However, it allocates only 13 percent of the system cost to television, counting only those construction costs related solely thereto, and proposes an annual charge of only $20,000 for the carrier or carriers obtaining the IRU for the television channel. All America states that this is because the basic use of the system will be for voice and record service, and the added investment and operating expense to provide television facilities is incremental. All America contemplates that the IRU for the television channel might be granted to one of the record carriers, or to two or more on a fractional basis if more than one requests an IRU.[12] But, it is not clear on precisely what basis the television capability and costs would be apportioned in the event that more than one carrier has television requirements.

35. It may be that both applicants have been handicapped in their proposals by an unavoidable present uncertainty as to future use of the system for television service. Accordingly, while the All America proposal comes closer to segregating costs and charges, and to this extent is superior to the clearly deficient PRCA proposal, we do not attach decisional significance to the difference. We are unable to determine, on the basis of the record, whether the sale of an IRU in the television circuit would assure equitable and nondiscriminatory access to the earth station for the provision of television transmission service. A grant to either applicant would require appropriate conditions to protect the public interest and to insure consistency with the provisions of section 201(c)(2) of the Communications Satellite Act.

36. On the matter of maintenance, we conclude that the All America proposal is entitled to a comparative preference. All America will have technical personnel on duty 24 hours a day to cover all sites and will have two more persons on its assigned technical staff than PRCA. Under the PRCA proposal emergency maintenance would be performed by "on call" personnel, who would be compensated only if called to duty. PRCA estimates that a technician would reach the unattended stations within one hour after a malfunction occurred. Moreover, PRCA would send only one technician in response to an emergency call, whereas All America would send two.

37. The principal significant difference between the two applicants is that All America will be a primary user of the system and will grant other authorized carriers access to the facilities on terms akin to ownership, whereas PRCA is seeking a grant for the sole purpose of leasing the facilities to All America and the other authorized carriers. We are not persuaded by the suggestion that the IRU concept is per se preferable to a leasing arrangement as a means of assuring equitable access to an earth station. As PRCA correctly points out, terrestrial links to other earth stations have been licensed to local carriers, with circuits made available to authorized carriers on a lease basis.

[12] Intervenor ITT World Com. has already expressed an interest in the television channel.

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It is the Commission's responsibility under section 201(c)(2) of the Communications Satellite Act to insure equitable access to an earth station, and any grant here would incorporate that requirement. However, the IRU concept is a practical and reasonable method of relating ownership to use where facilities are to be used by more than one carrier.[13] Therefore, if, as we believe, the ownership principle appropriately applies here, the All America proposal warrants a substantial preference over the lease-only proposal of PRCA.

38. In general, we think that common carriers should own the facilities they use to serve the public unless there is some advantage in utilizing the facilities of another carrier or other entity, such as economy, efficiency, spectrum conservation, etc. Moreover, since the instant microwave system is dedicated exclusively to earth station traffic and is an indispensable adjunct of the earth station, there is considerable force to the argument that an analogous policy of ownership should apply. In our *Second Report and Order on Ownership and Operation of Earth Stations*, we stated (5 FCC 2d 812, 818–819):

> We find that the most logical and equitable formular is one under which ownership is reasonably related to use. Any major departure from this principle would, in essence, mean that a carrier ready, willing, and able to pay for facilities which it actually requires to handle traffic would be required to lease them from a second carrier. The sole function of the second carrier would be that of the investor in facilities on which such second carrier would realize a return at the expense of the first carrier user. In this connection we note that in our TAT–4 decision we stated that in the future we could expect ownership in cables to reflect the use made by the various carriers.

39. PRCA has not established any countervailing advantages in granting these facilities to a middleman carrier. Unlike other earth station situations, such as Hawaii, there is no question here of uneconomic duplication of existing facilities or inefficient spectrum usage if All America is authorized to own the microwave system. The Puerto Rican microwave facilities are entirely new and will be devoted exclusively to earth station traffic, at least initially.[14] Moreover, the All America proposal is preferable insofar as maintenance and costs to the authorized carriers are concerned. And since the earth station link will terminate in All America's San Juan central operating headquarters where other overseas facilities also terminate, All America would appear to be in a better position to achieve integrated operations on an efficient and economical basis. For example, All America proposes to use the same test board and to draw on technical personnel in its terminal to assist in maintaining the earth station link.

40. Indeed, PRCA does not claim that its proposal is superior from a communications standpoint. Its position is rather that the two proposals are approximately equal in this regard and that it is entitled to a grant on other policy grounds. PRCA asserts that the facilities are

[13] An IRU gives an interest which is sufficient to obtain most of the important goals of joint ownership, such as an indisputable right to use a proportionate share of the facilities, at costs which are proportionate to total cost without including a return element to the licensee, and inclusion of the investment in the acquired circuits in the acquiring carrier's rate base. And, at the same time, efficiency is furthered by retaining the responsibility for maintenance and operation of the system in the hands of a single entity.

[14] We note that All America proposes to make voice circuits in the system available to PRCA should it desire, in the future, to use the system for intra-Puerto Rico service.

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"domestic" and should therefore go to a domestic carrier, and that this would afford diversity as well as accommodate the wishes of the Commonwealth of Puerto Rico. For the reasons set forth above, we do not regard the two proposals as approximately equal on their merits. We shall nevertheless consider the asserted policy grounds.

41. Contrary to the contention of PRCA, the microwave facilities are not "domestic" despite their physical location entirely within the commonwealth of Puerto Rico. A microwave link between the operating headquarters of an international carrier and an earth station of an international communications satellite system, which is to be used exclusively or principally for overseas earth station traffic, is clearly part of an interstate or foreign line. See sections 3(e) and 3(f) of the Communications Act. *Cf. California Interstate Telephone Co.* v. *Federal Communications Commission*, 328 F. 2d 556 (C.A.D.C.); *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *General Telephone Company of California*, 13 FCC 2d 448. We are also of the view that section 214 of the Communications Act is applicable to a line of this nature and that PRCA would not have exempt status as a "connecting carrier" within the meaning of section 2(b). See *Memorandum Opinion and Order* in docket No. 17333, FCC 68–973 (September 27, 1968).[15] If there is any force to the argument that the type of carrier should match the type of facility, it tends to support a grant to an international carrier like All America.

42. PRCA's further contention that it should receive a grant because of the dominant position of ITT and its subsidiaries in the area of Puerto Rico might carry some weight if PRCA were seeking to compete with All America in providing services to the public. But PRCA does not presently propose to use the facilities for its own traffic and, in the event it should undertake to do so in the future, has not suggested that it would engage in overseas operations as an authorized user of the communications satellite system. In the circumstances, we fail to see how a grant to PRCA would promote diversity in the sense of enhanced competition. While diversity may be furthered by permitting others to own a portion of the facilities used by a carrier in serving the public, there are operational drawbacks to this type of division and it is inconsistent with the principle set forth in para. 38 above in the absence of countervailing advantages.

43. The Commission has given careful consideration to PRCA's final argument with respect to the desires of the Commonwealth of Puerto Rico. This factor is clearly the strongest point in favor of a grant of the PRCA application, and we would be inclined to accord decisional significance to the wishes of the Commonwealth if the two proposals were equal or approximately so. However, in our view the record establishes that a grant of the All America proposal would result in more efficient and less expensive service and would better accord with the principle of relating ownership to use as a matter of communications policy. That being so, the public in the Commonwealth of Puerto Rico should derive some benefits from a grant of All Amer-

[15] Unlike All America, PRCA has not filed an application for a section 214 certificate to authorize channelizing equipment. The filing of such an application would be required in the event of a grant to it.

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ica's application. In the circumstances, we cannot conclude that this point of preference for PRCA is sufficient to outweigh the superior aspects of the All America proposal.

44. In light of all the foregoing we conclude that the public interest would be better served by a grant of All America's applications, and a denial of the PRCA applications. We further find that the subject facilities are necessary to provide physical connection between existing communications facilities in San Juan and the earth station near Cayey, P.R.

45. We turn to the conditions to be placed on the authorizations pursuant to the Commission's authority under sections 4(i), 214(c) and title III of the Communications Act of 1934, and section 201(c)(2) of the Communications Satellite Act of 1962.[16]

46. Consistently with our action in *American Telephone and Telegraph Co., et al.*, 38 FCC 1315, 1321, and in order to effectuate the purpose of section 201(c)(2) of the Communications Satellite Act, we shall condition both the construction permit and the certificate to be issued to All America to provide that authorized carriers shall have equitable access to the Cayey earth station through the proposed facilities, on fair and nondiscriminatory terms. Since we cannot determine at this time, on the basis of the record, whether the sale of an IRU in the television circuit will comport with that requirement, we shall also impose a condition that All America may not dispose of any interest in the television circuit of the proposed system without further authorization by the Commission. We can foresee that there may be instances when the authorized carriers would properly wish to acquire voice circuits in the proposed system on a lease basis, e.g. a need for a voice circuit for a short period of time, and shall therefore require All America to permit the authorized carriers to acquire voice circuits on either an IRU or a lease basis. In order to insure that the lease charges, terms, and conditions comport with the requirements of section 201(c)(2) of the Communications Satellite Act, we shall retain jurisdiction over these matters.[17]

47. Intervenor Western Union International (WUI) urges that a grant should contain a condition that All America must make space available to the authorized carriers in its San Juan terminal in order to assure them equitable and nondiscriminatory access to the earth station. There is no evidence on this point in the record, and we are not in a position to determine whether such a condition is necessary, equitable or in the public interest. However, the interests of the carriers are protected because we are retaining jurisdiction over all aspects of this matter in view of the various problems and uncertainties which remain with respect to future use and growth of the system. WUI may wish to explore this question further with the Common Carrier Bureau

[16] While the provision of facilities by one carrier to another does not ordinarily come within sections 201–205 of the Communications Act, the statutory authority cited above includes ample power to impose conditions reasonably required in the public interest and in the execution of our responsibilities under the 1934 and 1962 acts.

[17] Insofar as the public is concerned, it appears that rates presently on file with the Commission, or amendments thereto which may become effective, will apply. The record shows that this will be the case for All America's services and there is nothing to indicate that the same will not be the case for the other authorized carriers. The record does not establish the need for a requirement as to interconnection of facilities under issue 2(b).

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and the other carriers involved, in an effort to reach a mutually satisfactory solution. In the event that the matter remains unresolved and WUI properly supports its claim, the Commission will take such action as then appears appropriate.

48. As noted, joint construction permits (file Nos. 4026 through 4029–C1–P–68) have been granted to All America and PRCA which were expressly made subject to further orders issued in these proceedings. Since we are granting All America's applications, we will order that the construction permits to be issued shall supersede the said joint authorizations. In this connection, we note that All America's predecessor, ITTCRPR, and PRCA, by Agreement of February 5, 1968, provided that the successful applicant herein would reimburse the other for contribution towards costs and expenses attributable to the construction and installation of the subject facilities in accordance with the terms specified in the agreement. Our action herein is not intended to relieve All America of any obligations it has under that agreement, as amended or supplemented. After All America has fully reimbursed PRCA for all proper and necessary contributions towards the cost of construction of the subject facilities insofar as consistent with applicable rules of the Commission, it shall account for such reimbursement in compliance with part 31 of our rules.

ORDER AND CERTIFICATE

49. *It is hereby certified*, That the present or future public convenience and necessity require or will require operation of the equipment as proposed for use in conjunction with the subject point-to-point microwave radio system between San Juan, P.R., and the earth station near Cayey, P.R.;

50. *It is ordered*, That application file No. P–C–6811 *Is granted* and that All America Cables and Radio, Inc. *Is hereby authorized* to operate the channelizing equipment heretofore authorized to be installed by the Commission's Order and Certificate, File No. P–C–6811–A granted on May 15, 1968;

51. *It is further ordered*, That the above described microwave applications of All America Cables and Radio, Inc. (file Nos. 690 through 693–C1–P–68) *Are granted* subject to the terms, conditions, and limitations specified below; and that the above described applications of Puerto Rico Communications Authority *Are denied;*

52. *It is further ordered*, That the authorizations granted herein shall be subject to the condition that the facilities authorized shall be made available to all authorized carriers, as defined in section 25.103 (b) (1) of part 25 of the Commission's rules, and to such others as are, or may in the future be, authorized by the Commission to use the communications satellite system on such fair and nondiscriminatory terms as will assure equitable access thereto;

53. *It is further ordered*, That All America Cables and Radio, Inc. shall make available to all authorized carriers and users, as defined in the ordering clause immediately above, who are authorized to acquire them, and to other carriers, circuits on an indefeasible right of use basis; or if such carriers do not desire to acquire circuits on an

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indefeasible right of use basis, by lease upon such terms and conditions and at such rates as may be approved or prescribed by the Commission:

54. *It is further ordered*, That All America Cables and Radio, Inc. shall not dispose of any interest in the television transmission capacity of the facilities authorized herein without prior authorization of the Commission;

55. *It is further ordered*, That All America Cables and Radio, Inc. shall not, except upon authorization of the Commission, dispose of any interest in circuits in the facilities authorized herein to any carrier not fully subject to title II of the Communications Act of 1934, as amended;

56. *It is further ordered*, That All America Cables and Radio, Inc. shall not increase the voice circuit capacity in the system beyond the initial 180 unless authorized by the Commission;

57. *It is further ordered*, That the construction permits granted jointly to All America Cables and Radio, Inc. and Puerto Rico Communications Authority on June 11, 1968 (file Nos. 4026 through 4029–C1–P–68) *Are superseded* by the authorizations herein granted to All America Cables and Radio, Inc.;

58. *It is further ordered*, That the Commission retains jurisdiction over all aspects of this matter; and

59. *It is further ordered*, That the motions to correct transcript filed September 16, 1968, by Puerto Rico Communications Authority; September 18, 1968, by the chief, Common Carrier Bureau; September 20, 1968, by All America Cables and Radio, Inc.; and September 23, 1968, by Western Union International, Inc., *Are granted* and that the transcript *is corrected* accordingly.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-915

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Request by
AMERICAN BROADCASTING COS., INC.
Concerning Lack of Comparable Facilities in Various Television Markets

(September 5, 1968)

The Commission, by the Commissioners Hyde, Chairman; Lee, Wadsworth, Bartley, Cox, and Johnson, with Commissioner Cox dissenting and issuing a statement in which Commissioner Johnson joins, approved the following document:

MR. LEONARD H. GOLDENSON,
President, American Broadcasting
Companies, Inc.,
1330 Avenue of the Americas,
New York, N.Y. 10019

DEAR SIR: Your letter of March 29, 1968 to Commissioners Lee and Cox together with communications from other interested persons relevant thereto have been carefully considered by the Commission.

The Commission continues to be concerned with the problems raised by lack of comparable facilities in various television markets—particularly the problems of internetwork competition. It does not, however, believe that in the circumstances it would be appropriate to take the actions urged by you. The Commission will continue to keep in close touch with developments in this area.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX IN WHICH COMMISSIONER NICHOLAS JOHNSON JOINS

My file on this matter is nearly two inches thick, including very bulky memoranda from our staff. The problem posed is one which the management of one of our three national television networks considers crucial to its ability to remain competitive. Yet a majority of my colleagues have disposed of this very complex matter, after the briefest of oral discussion, in a letter of just nine lines. They simply state their conclusion—that "in the circumstances," which are not specified in any way, it would not be appropriate to take the actions urged by ABC—without giving any rational explanation for this result. I have complained of other instances where similarly inadequate grounds have been given for the results reached, because this makes it impossible for

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parties adversely affected or for Commissioners who disagree with the result to come to grips with the majority's action.

Here, for example, I cannot tell, on the basis of the letter or of the oral statements of my colleagues, whether the members of the majority believe (1) that there is no problem because ABC now enjoys equal competitive status, (2) that even though it lacks equally competitive facilities, the recent developments complained of do not pose any serious threat to ABC's competitive position, (3) that even if ABC's position deteriorates, the public interest will not be impaired, (4) that there is a problem, the public interest is endangered, but we lack legal authority to act as ABC has requested, (5) that the public interest may be damaged but that dealing with the problem would require a course of action markedly different from anything we have done before, and that this is just too much trouble, or (6) that unrestrained competition must be preserved, even if it results in loss or deterioration of service to the public. It is therefore very difficult to comment on their action.

Whatever their reasons, I think the result is contrary to the public interest. I wish I had time to develop the matter fully, but I must content myself with a very brief statement of my position.

ABC has always been at a competitive disadvantage in terms of facilities. This has been recognized for years by the Commission and the Congress, and the achievement of three fully competitive commercial networks [1] has been a major objective of congressional and Commission policy. No one has urged that it is any obligation of government to insure that all three networks realize equal profits. But I think there has been agreement that it is an appropriate concern of government to provide the opportunity for equal access to the national audience which is a necessary prerequisite to free and equal network competition.[2]

In recognition of this obligation, the Commission has done a number of things. It dropped-in third VHF channels in New Orleans, Rochester, Syracuse, Grand Rapids, etc. to permit the development of competitive outlets for ABC,[3] and proposed similar action in seven other markets. Similarly, the Commission deintermixed Fresno, Bakersfield and Elmora—and was well on the way to doing the same thing in Evansville, until, having proposed such action in seven other markets, it abandoned the whole deintermixture concept in the wake of the all-channel set legislation. Again, this technique was designed

[1] I do not suggest that three national program services provide all the program diversity that may be needed. But faced with the facts that the Dumont Network had ceased operations, largely because of lack of outlets, and that ABC was also lagging in that regard, it was natural for all concerned to concentrate on achieving the goal of three competitive networks. The abortive Overmyer Network came into existence much later, but was not comparable in scope or function to ABC, CBS and NBC.

[2] This is not to say that profits are irrelevant to this problem. To the extent that lack of equal access to the audience results in lower ratings than ABC's programs would otherwise obtain, this makes that network's sales job more difficult and reduces the rates at which its commercial time can be sold, which, in turn, reduces its revenues and profits. This may then compound the problem by reducing ABC's financial resources for its continuing competitive struggle with CBS and NBC. If equality of facilities is ever achieved, then the networks will be free to compete for affiliates, programs, audiences, and advertising revenues on an equal basis. No doubt they will earn varying levels of profit, but that would be no occasion for governmental intervention.

[3] In several instances it denied requests that these channels be reserved for noncommercial educational use, pointing out that ABC's need for a VHF outlet in order to be competitive was more critically important than the admittedly desirable objective of establishing a VHF educational station.

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to open up the potential for multiple services—including a third commercial network outlet by providing for competitively equal facilities.

Following the majority's action in terminating our drop-in proposals, we considered a number of other devices for equalizing network competition. These included market sharing and time sharing, among others. Indeed, Chairman Minow, in casting the decisive vote to kill the drop-ins, appended a concurring statement in which he said all such possible alternatives had to be fully explored. But all our discussions led to nothing, and the Commission finally wrote to ABC, on March 19, 1965, indicating that it was still concerned about the competitive situation but rejecting all the proposals which had been made for alleviating the situation in the major two VHF markets.

After that, things settled down to a sort of stabilized stand-off. ABC still lacked equal competitive outlets, but it had achieved, and seemed likely to maintain, a level of access which apparently assured it of viable status as a national network—though its lack of equal competitive opportunity hampered its efforts to achieve full parity with CBS and NBC. For example, even when it develops programs which lead in their time periods in those markets having three equal facilities, it still lags in overall ratings because of its problem in gaining access for its programs in one and two VHF markets where it must often content itself with delayed exposure in less desirable time slots. And its perennial third place position, in turn, further compounds its difficulties in building a fully competitive service. This damages not just the interests of ABC and its shareholders. Its disadvantage means that its affiliates normally are unable to charge rates equal to their local competitors who are affiliated with the other two networks. This means that their ability to provide an equally competitive local service is also often impaired. Thus the entire viewing public—even in markets having three or more equal facilities—is deprived of service it could reasonably expect to receive if ABC, and its affiliates, enjoyed equal competitive opportunities.

It should be noted, of course, that even this precarious position was attained at a high—and damaging—cost. ABC was able to obtain VHF affiliates in some one and two VHF markets by the device of paying such affiliates a much higher percentage of their rates than ABC—or the other networks—normally pay. In my judgment this is undesirable. Ideally, the affiliates of a network should enjoy the same compensation rights and other terms and conditions, with any differences in their value to advertisers reflected in increased rates, on a logical and consistent basis. But ABC found it necessary to pay premium compensation in these scarcity markets, thus further increasing its operating costs and reducing its resources in its efforts to achieve competitive parity. And, eventually NBC decided to use similar tactics in Charlotte, Dayton and Toledo, with the results about which ABC is now complaining. In this kind of competition, NBC has all the advantages.

With things in this posture, ABC increased its revenues along with CBS and NBC. It increased its percentage share of total television network revenues from 1956 through 1961, but thereafter its share fell off a bit and stabilized in the range 25.3 to 27.7 percent in the period

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1962 through 1967. Furthermore, its network operation, as such, lost money in every year beginning with 1963. While its overall operations—including its owned and operated stations—remained profitable its percentage share of total network profits has fallen sharply from its peak in 1961, and was less than one-third of that peak rate in 1967. Thus, while its television operations continue to turn a profit, this should not obscure ABC's very real competitive problems. The situation cannot be said to be healthy when one network earns 7 percent of total industry profits and its two competitors share the remaining 93 percent![4]

ABC tried to improve its situation by merging with International Telephone and Telegraph. I voted against approval of that merger because I thought it had other aspects which were contrary to the public interest. In any event, I felt—and still feel—that its basic problem was lack of equality in station facilities, and I did not see how the merger would help correct this. Assuming that the merger would have yielded substantial additional financing for ABC—and there was evidence that ITT expected to withdraw money from the network, rather than put it in—this would have helped only in the short run, because I don't think sheer money would have won enough VHF affiliates to make ABC equally competitive.

The merger fell through when ITT withdrew because of delay in resolution of the appeal from a favorable Commission ruling. ABC was thus right back where it had been—except that the status quo which had existed for several years began to come unstuck. ABC gave up VHF exposure in Louisville and Jacksonville, shifting to full affiliation with UHF stations in those markets. This clearly benefits the struggling UHF stations there by giving them a full network schedule, with strong shows as well as weaker ones. This greatly improves their competitive posture as compared to their former situation where they got the tail end of the three networks' schedules. In the long run I think this will benefit ABC—when the all-channel law is fully effective and a high-powered UHF station will enjoy circulation quite comparable to its VHF competitors. But for the short run ABC suffered a loss in circulation because it shifted its most popular programs from one of the two VHF stations where, even though often presented in less desirable time periods, they nonetheless had garnered larger audiences than they can hope to achieve on the UHF stations for some time. And this means, of course, reduced ratings, with all that connotes in this ratings-ridden industry. ABC's loss is, of course, offset by gains for NBC and CBS. It would have been commendable—and, in the long run, in their own selfinterest—if the latter two networks had taken comparable steps in other two VHF markets where ABC has achieved a costly preferred position and where UHF stations are available for affiliation. But they have not done so. They are apparently not interested in promoting UHF in these markets—and, there-

[4] I do not claim that ABC would necessarily enjoy profit parity with NBC and CBS if it enjoyed equal facilities, nor is exact equality of profits necessary. It may be that part of its problems are due to other considerations—though in some areas it clearly surpasses its competitors. But it seems clear to me beyond question that the major contributing cause of its profit lag—and resulting continued competitive disadvantage—is its inability to achieve equal facilities for equal access to the national audience.

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by, nationwide—or in strengthening our overall network structure and service. They have elected to stick with the preponderant VHF stations and to let ABC carry the burden of increasing UHF affiliation in these unequal markets.

Through resort to its only successful method of winning VHF affiliates, namely, upping the local station's share of the revenues, ABC picked up an additional VHF station in Augusta, Ga. Then in rapid succession it lost—or has been informed it will lose—preferred VHF positions in Charlotte, Dayton and Toledo, and is threatened with further erosion in New Haven and other markets. I do not think this development has been accidental. All the shifts in affiliation are to NBC, and the latter has clearly embarked on a conscious course of action designed to improve its competitive position vis a vis CBS by aggravating ABC's already significant disadvantage in facilities. It is claimed, of course, that this is just good, hard competition, and that the Government should not interfere with arrangements agreed upon between networks and local stations—especially when, as here, a facade of service to the public interest is thrown over the whole transaction. But this is not a result of fair competition among equally advantaged networks. This is a significant new effort by one of the two dominant networks to distort further an already undesirable unbalance in network structure. Despite the public interest phrases used, the objective is increased profits for NBC and for the stations shifting affiliation. But this is a business deeply affected by the public interest, and I think that paramount interest is being submerged and impaired by tactics designed only to promote private profit. I am not opposed to profit for broadcasters, but none of the companies here involved are suffering in any way. They are all highly profitable, and I do not equate further increase in their profit levels with the public interest.

When ABC expressed concern over these developments, Commissioner Lee and I proposed that the Commission issue a notice of inquiry and proposed rulemaking with respect to this problem. This was designed to treat the 19 markets among the top 100 which have less than three equal facilities as a special case, and to achieve approximately equal access to the homes in these markets for all three networks. While a number of alternatives were mentioned, I was particularly interested in some kind of market sharing approach. This would have meant that all three networks would have full affiliations with UHF stations in some of these markets. It would have required changes in affiliation from NBC or CBS to ABC in some instances. Understandably, this is not attractive to the two dominant networks or to those of their VHF affiliates who would be affected. I do not claim this is an ideal way to achieve the desired equality in facilities, nor that it would be without problems. But I am satisfied that it is legally within our powers and that it would achieve the desired results. It would not have been a permanent arrangement, but would have been strictly an interim measure until UHF stations attain their full circulation potential through the all-channel legislation. I would have been willing to accept any reasonable alternative which would have moved, at this late date, toward adjustment of the inbalance in network facilities. But as in the past all we received—was criticism. No one—

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inside or outside the Commission—offered a better plan. Despite the fact that our proposal pointed, for the time being, in a direction different from that which we have taken in the past in dealing with network-affiliate relations, I am satisfied that this proposal, after balancing all relevant considerations, was clearly in the public interest. In order that interested parties can have a clear understanding of what was at issue, I am attaching a copy of the proposal to this opinion as appendix A. This is exactly in the form in which Commissioner Lee and I originally suggested it, but I was prepared to accept any suggested changes which would have promoted the objective of equal competitive opportunity in these markets. In particular, I came to agree that the reference to competing applications for the VHF stations in these markets was unnecessary and perhaps unduly punitive. But this, with some modification, is what I think we should have done to promote the public's interest in equal competition and improved network service. My good friend, Commissioner Lee, decided, in the final event, to vote with the majority, leaving only Commissioner Johnson and I supporting the proposal.

As I said at the outset, I think this result is contrary to the public interest. However, I do not think the exercise has been in vain. I think that some, at least, of my colleagues of the majority are deeply concerned about the threatened worsening of the network competitive picture which is posed by these recent developments. They apparently do not share my sense of urgency over developments to date, and they obviously have greater difficulties with the proposed remedy than I do. But I hope and believe that if they find themselves faced with further deterioration in the competitive balance among the networks, they will act promptly, by any means available—possibly the one I have proposed—to preserve and promote the opportunity for access to the American audience which is critically essential to healthy and beneficial competition among the networks.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TELEVISION STATION NETWORK AFFLIATION AS IT AFFECTS A FULLY COMPETITIVE TELEVISION BROADCAST SERVICE	Docket No.

NOTICE OF INQUIRY AND PROPOSED RULEMAKING

BY THE COMMISSION: PROPOSAL SUBMITTED BY COMMISSIONERS LEE AND COX BUT NOT ADOPTED BY THE COMMISSION.

1. Notice is hereby given of inquiry and proposed rulemaking in the above-entitled matter.

2. Of the 100 largest communities in the United States there are 19 which have only two VHF stations, so that a fully competitive television broadcast service must rely upon the development of UHF service. At the present time nine of these areas have no UHF station in operation, seven have one UHF station, two have two UHF stations, and one has three UHF stations. We note also that a number of these communities have pending applications for UHF operation. The Commission has been informed that in several of these communities affiliation changes have either already taken place or are proposed which would deprive the ABC network of substantial program clearances on a VHF station in favor of the NBC network. We have been advised that station WSOC–TV, Charlotte, which had previously accepted a majority of ABC's prime time schedule, became a primary affiliate of NBC in 1967 and terminated its clearance of ABC programs. We have also been informed that station WSPD–TV, Toledo, has advised ABC that the station will become a primary NBC affiliate at the expiration of its present ABC affiliation agreement. It appears that ABC has also been told that station WLWD, Dayton, will become a primary affiliate of NBC in September 1968. The same shift in affiliation is feared by ABC in other major markets.

3. The Commission has long been interested in preserving and enlarging full competition among network organizations. It has considered the existence of strongly competitive networks to be essential in order to maximize service to the public in an industry where networks play such a large role. This policy has of course received judicial recognition as well. See *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 345 F. 2d 954 (C.A.D.C., 1965), cert. den. 383 U.S. 906; *Joint Council on Educational Broadcasting* v. *Federal Communications Commission*, 305 F. 2d 755 (C.A.-D.C., 1962). The ABC network has also historically been in a more difficult competitive position than CBS or NBC, largely due to the existence of longstanding radio affiliations which gave CBS and NBC an

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early advantage in obtaining television affiliations. This remains a problem today.

4. At the same time, it has become clear that we must rely upon UHF stations for the development of a truly nationwide television broadcast service, since the available VHF channels are insufficient for that purpose. To this end Congress passed the all-channel receiver legislation, which requires that television receivers shipped in interstate commerce or imported into this country be capable of receiving all frequencies allocated by the Commission to television broadcasting. Section 303(s) of the Communications Act, 47 U.S.C. 303(s). This legislation has had a significant effect and UHF development has proceeded apace. Nevertheless, this is still a very critical period for the sound establishment of UHF service, particularly in the highly competitive environment of the larger cities.

5. The Commission would be concerned with any action at this time by either CBS or NBC to effect changes in primary affiliation by VHF stations now primarily affiliated with ABC in those communities in the top 100 markets where there are only two VHF stations. Such changes would not only appear adversely to affect the area of network competition, but might also have an adverse effect upon the development of fully competitive UHF stations in these communities. The problems seem to be related to each other. A weakening of ABC's competitive capacity at the same time that UHF stations are required in increasing numbers to engage in primary affiliations with ABC would appear to be inconsistent with the Commission's objectives in the two areas concerned, network competition and the development of UHF service. It is desirable that a UHF station in each of these markets have a full primary affiliation with one of the networks, so that it will have the benefit of an integrated program service including some of the most popular programs, and can promote its service in such a way as to develop a really favorable identification with a single network. It would seem that this would also simplify business relations, communications, etc. between the networks and their respective affiliates. But it would be unfair to expect ABC to provide this primary affiliation in most of these communities. Such a development would weaken, rather than strengthen, its competitive posture, and might impair its ability to provide high quality service in those markets where it does have an affiliate with an equally competitive facility. It is noted that the licenses of stations WSPD-TV and WLWD were renewed in September 1967, at which time it was represented that a majority of their network programs would be taken from ABC.

6. The purpose of this notice is to bring the problem to the attention of all interested persons, to secure the relevant facts and, if action by the Commission is warranted, to request suggestions as to the form that action should take. Several possibilities may be considered. Thus, the Commission could limit the amount of programing taken from any one network by a VHF station in the cities involved. Such a rule would prevent undue domination by any network until such time as the UHF stations there become competitively equal in terms of their access to the audience, so that the free forces of competition can play their proper role. A second alternative might be a rule which would limit

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or regulate affiliation in these markets in such a way that each network would have reasonably equal access to the aggregate homes in these communities through apportionment of the available VHF and UHF facilities. Or, instead of such an over-all approach, the Commission could consider the particular situation in each city where affiliation changes are being made, or proposed, either in terms of the significance of such a change where a licensee has proposed an ABC primary affiliation or, more generally, by making clear that competitive applications for VHF channels proposing an ABC affiliation would be given careful consideration. It should be made clear that all of these alternatives have the purpose of serving the long range public interest by preserving the competitive situation while UHF is developing,[1] and are not designed to give favored treatment to ABC for its own sake. The Commission has long sought to promote fair and equal network competition in order to maximize service to the public. It considered some of these possibilities in 1964–65, but decided to do nothing about them at that time. See *Public Notice* of March 24, 1965 (mimeo No. 65559). In the period since then, while ABC did not gain the equal access it had sought, at least conditions seemed to have stabilized. But now these existing competitive patterns—unsatisfactory as they are—seem to be changing for the worse. The Commission is therefore renewing its consideration of these matters. It regards the situation as serious, and would be greatly concerned if changes which would lead to further deterioration in the network competitive picture were to take place pending its study of the problem.

7. This proceeding bears the double caption, *Notice of Inquiry and Proposed Rulemaking*. We would hope that upon the basis of the additional information obtained, we would determine the most appropriate course, and that if that course takes the form of a rule, we would issue a further and more detailed notice. However, the public interest may require prompt action. For that reason, we have set forth "a description of the subjects and issues involved" (5 U.S.C. 553(b)(3)), and expressly put the intended parties on notice that we may take final action in this proceeding on the basis of the comments, and including counterproposals, received.

8. Authority for this proceeding is contained in sections 4(1), 303, 307, and 403 of the Communications Act, 47 U.S.C. 154(i), 303, 307, and 403.

9. Pursuant to applicable procedures set out in section 1.415 of the Commission's rules, interested parties may file comments on or before 1968, and reply comments on or before 1968. All submissions by parties to this proceeding or by persons acting in behalf of such parties must be in written comments, reply comments, or other appropriate pleadings. It is not our intention to limit the responses of interested persons to the specified alternatives. Any relevant material may be submitted, either factual data or suggestions as to proposed courses of action. Pending this proceeding, any VHF television station in one of the markets involved which proposes a change, with a statement of the

[1] We stress that any action taken would be of an interim or temporary nature and would end with the improvement in conditions for UHF competition (e.g., an upper 90 percent UHF-equipped set saturation figure).

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effect the change would be likely to have upon the public interest, giving particular attention to the considerations discussed in this notice.

10. In accordance with the provisions of section 1.419 of the rules, an original and 14 copies of all written comments, replies, pleadings, briefs, or other documents shall be furnished the Commission.

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FCC 68-1075

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COS. Charges for Interstate and Foreign Communications Service	Docket No. 16258
In the Matter of AMERICAN TELEPHONE AND TELEGRAPH CO. Charges, Practices, Classifications, and Regulations For and In Connection With Teletypewriter Exchange Service	Docket No. 15011

MEMORANDUM OPINION AND ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: CHAIRMAN HYDE ABSENT; COMMISSIONER JOHNSON DISSENTING TO THE DECISION REGARDING THE COMMISSION'S INTERNAL PROCEDURES AND CONCURRING IN ALL OTHER RESPECTS; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. Air Transport Association of America and Aeronautical Radio, Inc., intervenors in this proceeding and hereinafter called "petitioners", filed a petition on September 17, 1968, seeking reconsideration of our *Memorandum Opinion and Order* of September 12, 1968, herein, which directed that a recommended decision be issued by the Chief of the Common Carrier Bureau (14 FCC 2d 568). The Bell System respondents and National Association of Motor Bus Owners (NAMBO) filed statements in support of the petition.

2. Petitioners allege that, because the cited order had been initiated on the basis of a letter request, rather than on formal pleadings, they had not been afforded opportunity to address themselves to the subject matter, and request waiver of our rule 1.106(a) which prohibits reconsideration of interlocutory orders. That request is granted.

3. Petitioners seek two-fold relief. First, they contend that the Common Carrier Bureau should be directed to "submit for the record, subject to cross-examination by the parties, testimony stating its position", and that the Commission should direct that in the current phase of the proceeding an initial decision be prepared by the hearing examiner assigned to assist the Telephone Committee. In their statement of support, respondents point to this request and refer to petitions they previously filed as early as January 12, 1966, objecting to the role of the Common Carrier Bureau. NAMBO also supports the relief sought.[1]

[1] We find no support for the general allegations by NAMBO concerning the Common Carrier Bureau's "hostile" or prejudicial position on the TELPAK offering. See also our opinion adopted October 25, 1968, in docket No. 17457 (FCC 68-1069).

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4. Petitioners, in effect, seek a change, at this late date, in the basic procedures established by our orders (2 FCC 2d 142, 1965, and 877, 1966). No grounds not previously advanced in petitions to us have been offered. While not required to do so, we have modified the procedures to provide that a recommended decision shall be issued by the chief of the Common Carrier Bureau. We did this in our discretion in response to the assertion that the parties, in effect, are unable to determine what assessment the Common Carrier Bureau places on the evidentiary record. Petitioners seek, in effect, a separation of the Bureau from the decisional process. This is neither required by law nor appropriate for the reasons set forth in our several orders, including that for which reconsideration is sought.

5. In view of the foregoing, *It is ordered*, that the said petition be *Granted in part* to the extent indicated in paragraph 2 above, and in all other respects It is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1073

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of USE OF THE CARTERFONE DEVICE IN MESSAGE TOLL TELEPHONE SERVICE In the Matter of THOMAS F. CARTER AND CARTER ELECTRONICS CORP., DALLAS, TEX. COMPLAINANTS *v.*	Docket No. 16942
AMERICAN TELEPHONE AND TELEGRAPH CO., ASSOCIATED BELL SYSTEM COS., SOUTHWESTERN BELL TELEPHONE CO., AND GENERAL TELEPHONE CO. OF THE SOUTHWEST DEFENDANTS	Docket No. 17073

ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: CHAIRMAN HYDE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

The Commission having under consideration a petition filed October 22, 1968 by American Telephone and Telegraph Co. for an extension of the effective date of our decision herein from November 1, 1968 to January 1, 1969, and upon consideration of the opposition thereto filed by Carter and Carter Electronics Corp., the statement in partial support filed by the Chief, Common Carrier Bureau, the statements in support filed by the U.S. Independent Telephone Association, the Central Committee on Communication Facilities of the American Petroleum Institute, General Telephone Co. of the Southwest and G.T. & E. Service Corp., and the National Retail Merchants Association, and the statement of the Department of Justice;

It is ordered, That the Commission's decision is stayed until January 1, 1969 insofar as it required that Tariff FCC No. 263 be vacated, except with respect to the interconnection of customer-provided mobile radiotelephone systems through customer-provided acoustic or inductive devices, e.g., the Carterfone. As to such interconnection, the effective date of the requirement that the invalid tariff provisions be stricken, to be supplanted only with compliant tariff provisions, remains November 1, 1968.

It is further ordered, That the reply of United Utilities, Inc., is dismissed as not filed in accordance with section 1.223 of our rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1043

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
ADMINISTRATION OF PERSONAL ATTACK AND EDITORIALIZING RULES PENDING SUPREME COURT REVIEW

(October 16, 1968)

The Commission, by Commissioners Bartley (Acting Chairman), Lee, Cox, Wadsworth and Johnson, approved the following *Public Notice*, released Oct. 16, 1968:

Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's rules and regulations contain requirements governing the responsibility of broadcast licensees to furnish reply time where the station has editorialized concerning a political election or has carried a personal attack as part of a discussion of a controversial issue of public importance. The United States Court of Appeals for the District of Columbia Circuit has sustained an order of the Commission requiring that reply time be given in a personal attack situation which arose prior to the adoption of the rules. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 381 F. 2d 908, cert. granted 389 U.S. 968. The Court of Appeals for the Seventh Circuit has held the rules to be invalid, *Radio Television News Directors Association* v. *United States and Federal Communications Commission*, decided September 10, 1968, but has stayed the issuance of its mandate for a period of 30 days from October 11, 1968 upon being advised that the Government would seek certiorari.

When a petition for a writ of certiorari is filed within 30 days, the stay of mandate will remain in effect pending further Supreme Court review.

In accordance with a representation made to the Court of Appeals for the Seventh Circuit upon which a stay of mandate was sought, the Commission will enforce these rules upon the following basis pending a Supreme Court resolution of the questions involved:

> Licensees will be expected to comply with the rules, and the Commission will continue to entertain and rule upon complaints of violations. Such Commission rulings will be subject to judicial review and judicial enforcement. However no fine or forfeiture will be imposed, no criminal penalty will be sought, and no renewal or revocation proceeding will be instituted, based upon violations of the rule occurring during the course of further judicial review of the rules by the Supreme Court. In addition, the Commission does not intend to make a final determination of any pending renewal or revocation proceedings involving the rules pending a Supreme Court decision.

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FCC 68-1081

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of KACY, INC. (KACY), PORT HUENEME, CALIF. Has: 1520 kc, 1 kw, 10 kw-LS, DA-2, U Requests: 1520 kc, 1 kw, 50 kw-LS, DA-2, U For Construction Permit	File No. BP-16677

MEMORANDUM OPINION AND ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; AND WADSWORTH ABSENT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned and described application for increase in power for standard broadcast station KACY, Port Hueneme, Calif.

2. The cities of Port Hueneme and Santa Barbara, Calif., have 1960 census populations of 11,067 and 58,768, respectively. According to the data on file, the applicant's present 5-mv/m contour covers the entire city of Santa Barbara. The proposed KACY operation would increase radiation over Santa Barbara and extend the 5-mv/m contour further into adjacent areas. Under these circumstances, a presumption that the applicant is realistically proposing to serve Santa Barbara arises under the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901. *Madison County Broadcasting Co., Inc.*, 5 FCC 2d 674, recon. den. 8 FCC 2d 752, 10 R.R. 2d 587 (1967).

3. In response to Commission correspondence, the applicant filed engineering exhibits and other data in an attempt to rebut the aforementioned presumption. Having examined this material, we find that KACY has effectively rebutted that presumption. KACY points out that its home county, Ventura County, has almost doubled its 1960 population and that it has attempted to keep pace with this growth by increasing the station's power from its original 250 w to its present 10 kw. Nonetheless, the county's size coupled with the rugged mountains to the east make it impossible to place a usable signal over

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the entire area. According to the applicant, the increase in power will enable KACY for the first time to place premium grade signals over a number of key highways in the mountainous regions of the county. KACY also points out that the 5-mv/m gain area falls principally in Ventura rather than Santa Barbara County enabling the station to encompass the growing communities of Ojai, Oak View, Meiners Oaks, and Wheeler Springs.

4. The applicant's engineering exhibits support its assertion that the increase in radiation towards Santa Barbara is occasioned not by any intent to derive revenue from that city [1], but from a unique combination of protection requirements and a long salt water path between the two cities. Port Hueneme is on the Pacific coastline approximately 32 miles southwest of Santa Barbara. Since the coastline between the two cities describes an arc, approximately 26 of the 32 miles is a salt water path. KACY is required to protect several existing stations to the east and southeast. In addition, it must not increase radiation in the direction of a Navy electronics facility located west-southwest of the site. Because of these requirements, the increased radiation is directed more to the north. Notwithstanding this fact, neither the present nor proposed 5-mv/m contours would penetrate Santa Barbara but for the existence of the salt water path. Actually, the nearest point of land to which the proposed 5-mv/m contour extends prior to its entry into the Pacific lies approximately 20 miles south of Santa Barbara. KACY's proposal appears to exemplify the type of situation for which provision was made when, in denying reconsideration of the policy statement [2], we stated that high conductivity paths and protection requirements would be considered in determining whether the presumption had been rebutted.

5. Also of significance is the fact that Port Hueneme is not in the same standard metropolitan statistical area as Santa Barbara [3], as delineated by the U.S. Census. Other than the fact that both are located on the California coast, the cities have no relationship with each other. Thus, for this reason and for the reasons stated above, we find that the applicant has effectively rebutted the 5-mv/m presumption. Cf. *Jersey Cape Broadcasting Corp.* (WCMC), 2 FCC 2d 942, 7 R.R. 2d 540; *Major Market Stations, Inc.* (KREL), 8 FCC 2d 13, 9 R.R. 2d 1368.

6. In view of the foregoing, the Commission finds that there are no substantial or material questions of fact which warrant designating this application for hearing; that the applicant is qualified to construct and operate as proposed; and that a grant of the application would serve the public interest, convenience, and necessity.

[1] Less than 10 percent of KACY's revenue is derived from Santa Barbara and most of that amount comes from regional as distinguished from local advertisers. Furthermore, KACY states that, as a practical matter, the distance between the two cities precludes any attempt to sell time in Santa Barbara.

[2] 2 FCC 2d 866, 6 R.R. 2d 1908.

[3] Santa Barbara is an SMSA, whereas Port Hueneme is part of the Ventura-Oxnard urbanized area.

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7. Accordingly, *It is ordered*, That the above-captioned application *Is granted* subject to the terms and conditions specified in the construction permit.[4]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] KACY is owned by Lincoln Dellar and his wife, Sylvia, who also own Radio KHAI, Inc., a party in a comparative hearing in docket 16676. Since the Commission has not ruled on matters relating to the Dellars qualifications, the construction permit will be subject to the condition that the grant is without prejudice to whatever future action the Commission may take as a result of matters contained in the docketed proceeding.

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FCC 68R-454

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LEWIS BROADCASTING CORP., SAVANNAH, GA.	Docket No. 16976 File No. BPCT-3696
WSGA TELEVISION, INC., SAVANNAH, GA. For Construction Permits for New Television Broadcast Station	Docket No. 16978 File No. BPCT-3727

ORDER

(Adopted October 28, 1968)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT; BOARD MEMBER KESSLER ABSTAINING.

1. The Review Board having under consideration herein (1) a petition to reopen the record and for leave to amend, filed April 24, 1968, by Lewis Broadcasting Corp. (Lewis) whereby Lewis' application would be amended to reflect the substitution of an officer due to death of the predecessor, and (2) a joint petition for approval of agreement, filed September 16, 1968, by WSGA Television, Inc. (WSGA) and Lewis, whereby the application of WSGA would be dismissed, the application of Lewis would be granted, and Lewis would partially reimburse WSGA for expenditures made by such applicant in the preparation and prosecution of its application;[1]

2. *It appearing*, That good cause for the petition to reopen the record and for leave to amend has been shown; that no objections to the acceptance of such amendment have been made; and that such amendment is proper and should be accepted; and

3. *It further appearing*, That under the agreement, Lewis would reimburse WSGA in the amount of $3,000; that the expenses for which reimbursement is sought have been adequately substantiated; that affidavits setting forth the nature of the consideration involved and details of the initiation and history of the negotiations have been submitted; that approval of the agreement would serve the public interest in that it would permit an immediate grant of the Lewis application, thereby expediting commencement of a new UHF television service to Savannah, Ga.; that the Broadcast Bureau interposes no objection to the approval of the agreement,[2] and the parties have shown full compliance with section 1.525 of the Commission's rules;

[1] By decision released Mar. 5, 1968, the Review Board granted the Lewis application and denied the WSGA application (11 FCC 2d 889, 12 R.R. 2d 627 (1968)). Thereafter, on Apr. 29, 1968, WSGA filed an application for review with the Commission. By order (FCC 68-1029 released Oct. 18, 1968) the Commission referred the two petitions now under consideration to the Board and ordered the application for review held in abeyance.

[2] Broadcast Bureau comments supporting the joint petition were filed on Oct. 1, 1968.

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4. *It is ordered*, That the petition to reopen the record and for leave to amend, filed April 24, 1968, by Lewis Broadcasting Corp. *Is granted* and the amendment *Is accepted;* and

5. *It is further ordered*, That the joint petition for approval of agreement, filed September 16, 1968, by Lewis Broadcasting Corp. and WSGA Television, Inc., *Is granted;* that the agreement *Is approved;* that the application of WSGA Television, Inc. (BPCT-3727) *Is dismissed* with prejudice; and that the application of Lewis Broadcasting Corp. BPCT-3696) *Is granted.*[3]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] This proceeding cannot be terminated until appropriate disposition is made of WSGA's application for review now pending before the Commission.

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FCC 68R-453

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ORANGE NINE, INC., ORLANDO, FLA.	Docket No. 11081 File No. BPCT-1153
MID-FLORIDA TELEVISION CORP., ORLANDO, FLA.	Docket No. 11083 File No. BPCT-1801
CENTRAL NINE CORP., ORLANDO, FLA.	Docket No. 17339 File No. BPCT-3697
FLORIDA HEARTLAND TELEVISION, INC., ORLANDO, FLA.	Docket No. 17341 File No. BPCT-3737
COMINT CORP., ORLANDO, FLA.	Docket No. 17342 File No. BPCT-3738
TV-9, INC., ORLANDO, FLA. For Construction Permit for New Television Broadcast Station	Docket No. 17344 File No. BPCT-3740

MEMORANDUM OPINION AND ORDER

(Adopted October 28, 1968)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The above-captioned applications, each seeking an authorization for a new television broadcast station to operate on channel 9, Orlando, Fla., were designated for consolidated hearing in an order adopted on March 29, 1967 (FCC 67-416, 7 FCC 2d 788). On the same date, the Commission adopted a *Memorandum Opinion and Order*, FCC 67-415, 7 FCC 2d 801, authorizing Mid-Florida Television Corp. (Mid-Florida) to continue to operate its present facility on channel 9 until further order of the Commission.[1] On January 8, 1968, the hearing examiner granted a request to postpone scheduling dates for the commencement of the hearing pending the outcome of appeals from the Commission's grant of interim operating authority to Mid-Florida.[2] In *Consolidated Nine, Inc.* v. *FCC*, —— F. 2d ——, case No. 20,961, decided September 3, 1968, the court of appeals remanded the case to the Commission with instructions to vacate the grant of interim authority to Mid-Florida. Thereafter, the hearing examiner, at a pre-

[1] The chronology of events leading up to the Commission's actions is set forth in the above-cited documents, and need not be repeated here.

[2] In *Orange Nine, Inc.*, FCC 68R-53, 11 FCC 2d 806, the Review Board denied an appeal from this ruling.

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hearing conference held on September 19, 1968, set procedural dates for the commencement of the comparative hearing—the applicants being required to exchange proposed exhibits by February 3, 1969, and the hearing to commence on March 3, 1969.[3] Presently before the Review Board is an appeal from this ruling, filed on September 27, 1968, by Florida Heartland Television, Inc., TV–9, Inc., and Central Nine Corp.[4]

2. In support of their request to reverse the examiner, appellants point out that the court's opinion reflects that it was desirous of ending the interim operation of Mid-Florida, but left up to the Commission the matter of deciding whether any interim operation should be authorized, and, if so, which applicants should receive that authorization. The disputed examiner's action, appellants note, took place before a determination in accordance with the court of appeals' mandate had been made. Appellants contend that it may take considerable time in order to choose a valid and proper interim operation; that Mid-Florida, which is continuing to operate until a successor is chosen, may therefore be operating the station after the comparative proceeding commences; and that this situation was deemed by the court of appeals to be unlawful and prejudicial to the other applicants. "Nothing is more clear from the court's remand", appellants argue, "than the fact that the comparative hearing may not proceed until a valid interim grant is made."

4. As stated by the Board in our previous opinion affirming the examiner's action herein (see note 2, supra), the granting of a continuance is within the general authority of a hearing examiner to regulate the course of a hearing, and his decision will not be overturned unless it is arbitrary or capricious, or an abuse of his discretion. Although appellants assert that the court made it clear that the comparative hearing cannot commence until the matter of interim operating authority is finally decided, they did not refer the examiner to any specific language in the court's decision to support their interpretation. Nor did the appellants attempt to demonstrate to the examiner exactly how the commencement of the comparative case prior to the inauguration of a different (or no) interim operation could prejudice them, other than noting that an interim operation could provide the operator with the funds to prosecute its application. We agree with the examiner that this factor is not, of itself, a sufficient basis to require a prolongation of this already protracted proceeding. Finally, we find it significant that, in setting the dates for the commencement of the hearing, the examiner scheduled a noncomparative aspect of the case first, and attempted to compromise between the dates suggested by Mid-Florida and those urged by other applicants for the comparative hearing.[5] Under these circumstances, we find that the examiner was neither arbitrary nor capricious, and that he did not exceed the bounds of his authority.

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[3] The examiner's ruling was formalized in a statement and order after further prehearing conference, FCC 68M–1319, released Sept. 20, 1968.

[4] The following related pleadings are also before the Board: (a) opposition, filed by Mid-Florida on Oct. 4, 1968; (b) Broadcast Bureau's comments, filed on Oct. 8, 1968.

[5] Other applicants suggested dates only after the examiner denied their requests to postpone any setting of procedural dates.

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4. Accordingly, *It is ordered*, That the appeal to the Review Board of the order of hearing examiner setting forth procedural hearing dates, filed on September 27, 1968, by Florida Heartland Television, Inc., TV–9, Inc., and Central Nine Corp. *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1077

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re application of PEOPLES TV ASSOCIATION, INC., MOSES LAKE, WARDEN, ROYAL CITY, AND OTHELLO AREA, WASH. For Construction Permit For New Television Broadcast Translator Station	File No. BPTT-1805

MEMORANDUM OPINION AND ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: CHAIRMAN HYDE ABSENT; COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned application of Peoples TV Association, Inc. (Peoples), requesting a construction permit for a new 100-w UHF television broadcast translator station to serve Moses Lake, Warden, Royal City, and Othello Area, Wash., by rebroadcasting television broadcast station KXLY-TV, channel 4, Spokane, Wash. (CBS), on output channel 79; a petition to deny, filed July 8, 1968, by Cascade Broadcasting Co. (Cascade), licensee of television broadcast station KEPR-TV, channel 19, Pasco, Wash. (CBS/ABC), and an opposition thereto, filed August 21, 1968,[1] by the applicant.

2. The Othello area is within the predicted grade B contours of stations KEPR-TV and KNDU, channel 25, Richland, Wash. (NBC); the other communities to be served by the proposed translator are outside the predicted grade B contour of any television broadcast station. The Othello area is on the outermost fringes of station KEPR-TV's predicted grade B contour, the town itself lying about 2 miles inside the predicted grade B contour.

3. Petitioner claims standing in this proceeding as a "party in interest" within the meaning of section 309(d) of the Communications Act of 1934, as amended, on the grounds that rebroadcast of station KXLY-TV's signals within station KEPR-TV's predicted grade B contour would divert viewers and advertising revenues from station KEPR-TV and would cause petitioner economic injury. We find that petitioner has standing. *Federal Communications Commission* v.

[1] The applicant, which is not represented by counsel, filed its opposition 34 days beyond the time period specified in section 1.45 of the Commission's rules. The opposition was not served upon petitioner, but a copy was made available to petitioner by the Commission's staff. We believe that the public interest requires that we consider the opposition in reaching a decision in this matter and we will, therefore, upon our own motion, waive section 1.45(a) of our rules and accept the late-filed pleading.

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Sanders Brothers Radio Station, 309 U.S. 470, 60 S. Ct. 693, 9 R.R. 2008.

4. Petitioner, which operates station KEPR–TV as a semisatellite of station KIMA–TV, channel 29, Yakima, Wash., requests that the application be granted subject to a simultaneous nonduplication condition which will protect station KEPR–TV from duplication of its CBS programing. The applicant is a community-owned, nonprofit organization whose purpose is to construct and operate translator stations [2] to bring to its principal communities television services which it states are not now available because of distance and terrain factors. There is a dispute as to whether any part of the area which would be served by the proposed translator station lies within station KEPR–TV's predicted grade B contour, but we need not resolve that question in reaching a decision on the merits of this matter.

5. Our rules and the policy announced in the *Second Report and Order* in docket No. 14895 (2 FCC 2d 725, 6 R.R. 2d 1717) require the imposition of a nonduplication condition only upon a licensee-owned VHF translator located within the predicted grade A contour of a television station whose programing would be duplicated and outside the predicted principal city countour of the primary station. Furthermore, we stated in the *Report and Order* in docket No. 15971, 13 FCC 2d 1577, that we would continue such policies with respect to nonduplication conditions pending a further study of the entire problem. Where, as in this case, the proposed translator is nonlicensee owned and UHF we have consistently adhered to our stated policy. *Citizens TV, Inc.*, 13 FCC 2d 892, 13 R.R. 2d 1025; *Riverside TV, Inc.*, 12 FCC 2d 120, 12 R.R. 2d 812; *Spokane Television, Inc. (K14AA)*, 12 FCC 2d 462, 12 R.R. 2d 1167; *Earl W. Reynolds*, 12 FCC 2d 117, 12 R.R. 2d 588, reconsideration denied, 13 FCC 2d 778, 13 R.R. 2d 766. There have been no facts presented here which require a different result. The main community to be served by the proposed translator is Moses Lake, approximately 25 miles beyond KEPR–TV's predicted grade B countour. A nonduplication condition would curtail service to this and other areas without any commensurate benefit to KEPR–TV or the public. The applicant estimates that the translator would provide usable signals to approximately 23,000 persons who, it alleges, are unable to receive them at the present time. These facts have not been challenged by the petitioner.

6. We find that no substantial or material questions of fact have been raised by the pleadings. We further find that the applicant is qualified to construct, own and operate the proposed translator station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, *It is ordered*, That the petition to deny filed herein by Cascade Broadcasting Co. *Is denied*, and the above-captioned application of Peoples TV Association, Inc. *Is granted*, in accordance with specifications to be issued.

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[2] The applicant has, in addition to this application, applications pending for two additional UHF translators to serve these same communities and areas, one to rebroadcast station KHQ–TV, Spokane, Wash. (BPTT–1806) and the other to rebroadcast station KREM–TV, Spokane (BPTT–1804). These applications are uncontested.

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It is further ordered, That, upon the Commission's own motion, section 1.45(a) of the Commission's rules *Is waived*, and the applicant's opposition pleading, filed August 21, 1968, *Is accepted.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in the result because so little of the area to be served lies within KEPR–TV's grade B contour.

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FCC 68R-456

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of PORT JERVIS BROADCASTING CO., INC., PORT JERVIS, N.Y. MURRAY HILL ASSOCIATES, INC., PORT JERVIS, N.Y. For Construction Permits	Docket No. 18267 File No. BPH-6115 Docket No. 18268 File No. BPH-6185

MEMORANDUM OPINION AND ORDER

(Adopted October 28, 1968)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the applications of Port Jervis Broadcasting Co., Inc. (Port Jervis) and Murray Hill Associates (Murray Hill) for authority to construct a new FM broadcast station in Port Jervis, N.Y. By order, FCC 68-758, released July 30, 1968, the mutually exclusive applications were designated for hearing on issues which include Suburban issues as to both applicants and a standard comparative issue, pursuant to which evidence regarding Port Jervis' proposed program duplication (of WDLC, Port Jervis, N.Y.) is admissible for the limited purpose of demonstrating any benefit to be derived therefrom. Presently before the Board [1] is a petition to enlarge issues, filed August 19, 1968, by Port Jervis, requesting a modification of the comparative issue to encompass: (1) a comparison of the background and experience of both applicants; (2) a comparison of the proposals of both applicants with respect to management and operation; and (3) a full comparative programing issue.[2]

2. No discussion of the first two requested issues is merited. Facts concerning background and experience and proposals for management and operation, as correctly noted by the Broadcast Bureau and Murray Hill, may be properly introduced under the standard comparative issue.[3] In support of its request for the addition of a comparative programing issue, Port Jervis alleges that there are significant differences in proposed programing between its 100 percent duplicated programing and the independent programing of Murray Hill, and that it has

[1] Other pleadings before the Board for consideration are: (a) Broadcast Bureau comments, filed Sept. 10, 1968; (b) opposition, filed Sept. 10, 1968, by Murray Hill; and (c) reply to oppositions, filed Sept. 20, 1968, by Port Jervis.

[2] Port Jervis requests in its petition that the above-mentioned issues be inserted in lieu of designated issue No. 6 (standard comparative issue). However, no allegations or arguments are presented in support of this modification. In effect, Port Jervis is asking for the deletion of the standard comparative issue, which encompasses the first two of its three requested issues. The Review Board will disregard this inconsistency and consider the petition as one to enlarge issues.

[3] Port Jervis raises the issue of staff adequacy for the first time in its reply, alleging that the proposed Murray Hill staff of six is inadequate. Not only is the request procedurally deficient under rule 1.45, but it is entirely devoid of specific factual allegations supported by persons with personal knowledge, as required by section 1.229 of the rules.

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shown a superior devotion to public service. Petitioner notes that its proposed FM operation will serve large areas not now served by its standard broadcast station, and outlines its past broadcast record and experience, local residence and consequent knowledge of the community, participation in civic affairs and efforts to ascertain and meet the needs and desire of the community while operating an AM station in Port Jervis, and alleges Murray Hill's lack of experience and knowledge of the Port Jervis area. Port Jervis contends that the "overwhelming desires and needs" are for country and western entertainment and news; and that Murray Hill's programing "is not realistic," not formulated to meet the needs of the area, and not capable of being effectuated.

3. The Review Board agrees with Murray Hill and the Broadcast Bureau that Port Jervis has not satisfied the requirements of *Chapman Radio and Television Co.*, 7 FCC 2d 213, 215, 9 R.R. 2d 635, 638 (1965), wherein the Commission stated that:

> * * * a proponent of the programing issue should be required to make prima facie showing that there are significant differences in the programing proposed and should relate his claimed substantial superiority in program planning to his ascertainment of community needs.

Clearly petitioner has failed to supply the Review Board with specific allegations of fact sufficient to support the action requested. Port Jervis failed to specifically describe the nature of the program plans of either applicant. The fact that petitioner will emphasize country and western entertainment whereas its opponent will emphasize a different form of entertainment cannot be regarded as a threshold showing that petitioner's proposal reflects a superior devotion to public service. Moreover, even if such a difference could be viewed as material and substantial, petitioner has not sufficiently related the difference to its ascertainment of community needs. Petitioner's allegations that Murray Hill's program proposal is unrealistic and cannot be effectuated provides no basis for enlarging the comparative inquiry. Not only is program effectuation no longer a separate factor to be considered under the comparative issue,[4] but petitioner has supplied no substantial reason to believe that Murray Hill cannot carry out its program proposal. Finally, the fact that petitioner's FM proposal would serve areas not now encompassed in the service area of its standard broadcast station may be relevant to the question of program duplication. However, it affords no basis for comparing petitioner's program proposal with that of a competing applicant.

4. Port Jervis notes that the showing permitted by the designation order would preclude a consideration of the relative merits of the program proposals. In the subject petition, it appears to be attempting to turn a disfavored quality, i.e., duplication, into a comparative advantage. In *Jones P. Sudbury*, 6 FCC 2d 618, 9 R.R. 2d 554 (1967) review denied, 8 FCC 2d 360, 362, 10 R.R. 2d 114, 117 (1967), the Commission stated:

> Where, in a comparative hearing such as this, one applicant proposes duplicated programing and another proposes independent programing, we are

[4] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965).

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> convinced that, in the absence of * * * countervailing benefits, the former proposal is more wasteful, less efficient, and less desirable than the latter. Thus, the former applicant must demonstrate that there are benefits offsetting the disadvantages of its duplicated programing in order to avoid a demerit in the comparative evaluation of the applications.

The Commission went on to conclude that Sudbury would be given an opportunity to show that the proposed duplication was not inferior to independent programing and that, therefore, there was no need for a comparable showing on the part of the proponent of independent programing. In the instant case, the showing by Port Jervis will be permitted only to allow the petitioner to show that his proposals should not be considered inferior to those of Murray Hill, not for the purposes of determining which proposal is preferable.

5. Accordingly, *It is ordered*, That the petition to enlarge issues, filed August 19, 1968, by Port Jervis Broadcasting Co., Inc., *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1067

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Inquiry of
SEN. BIRCH BAYH CONCERNING COMPLIANCE WITH SECTION 315 OF THE COMMUNICATIONS ACT BY STATION WISH-TV, INDIANAPOLIS, IND.

Telegram

This refers to your letter of October 22, 1968 filed on behalf of station WISH-TV, Indianapolis, Ind., in which you request a ruling on request from Robert J. Keefe on behalf of the Honorable Birch Bayh, candidate for reelection to U.S. Senate. Facts as stated by you are as follows: A debate between Senator Bayh and his Republican opponent was videotaped by station WPTA, Fort Wayne, Ind. on October 14. WISH-TV arranged to have a copy of tape made for broadcast at 10:30 that night. At approximately 6 p.m. it learned that because of technical failure of WPTA's videotape machine the video portion of 2 minutes and 50 seconds of Senator Bayh's closing remarks was lost, although the audio recording was unaffected. In broadcasting the tape that night, WISH substituted a still picture of Senator Bayh on screen during portion of playback in which image was defective and immediately thereafter flashed a slide bearing the words "technical difficulties". On October 16 WISH received a request from Mr. Keefe that "You afford the Senator an opportunity to broadcast that portion of the television tape played on your station on October 14 which was not shown because of defective taping * * *" Mr. Keefe added that his request was only that Senator Bayh be afforded the opportunity to "Repeat what was said on the defective portion of the tape."

Upon the basis of the above, the Commission believes that the licensee of WISH-TV has substantially complied with the requirements of section 315 of the Communications Act and the Commission's rules, in that the audio portion of Senator Bayh's remarks was broadcast without interruption and the licensee appears to have made a reasonable effort to remedy the defect in the video portion. Holding limited to facts of case.

Commissioners Hyde and Cox absent. Commissioner Johnson dissented.

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FCC 68-1047

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
REQUEST FOR WAIVER OF SECTION 73.242(a)

(October 16, 1968)

The Commission by Commissioners Lee, Wadsworth, Cox, and Johnson, with Commissioner Hyde, Chairman, absent and Commissioner Bartley dissenting, approved the following document:

Certified Mail—Return Receipt Requested

CHARLES RIVER BROADCASTING, INC.,
Radio Station WLKW-FM,
228 Weybosset Street,
Providence, R.I. 02903

GENTLEMEN: This is with reference to your request for continued waiver of section 73.242(a).

After careful consideration, the Commission has concluded that grant of a waiver is not justified and would be discriminatory to other stations in the Providence area.

Accordingly, your request for waiver of section 73.242(a) is denied. However, you are granted a temporary exemption through November 30, 1968, in order to achieve compliance. After that, you will be expected to operate in conformity with section 73.242(a).

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68–1048

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
REQUEST FOR WAIVER OF SECTION 73.242(a)

(October 16, 1968)

The Commission by Commissioners Lee, Wadsworth, Cox, and Johnson, with Commissioner Hyde Chairman, absent and Commissioner Bartley dissenting, approved the following document:

KNOK BROADCASTING CO.,
Radio Station KNOK–FM,
Post Office Box 7116,
Fort Worth, Tex. 76111

GENTLEMEN: This is with reference to your request for waiver of section 73.242(a).

After careful consideration, the Commission has concluded that grant of a waiver is not justified and would be discriminatory to other stations in the Dallas-Fort Worth area.

Accordingly, your request for waiver of section 73.242(a) is denied. However, you are granted a temporary exemption through November 30, 1968, to achieve compliance. After that, you will be expected to operate in conformance with section 73.242(a).

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

15 F.C.C. 2d

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FCC 68-1045

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
REQUEST FOR WAIVER
OF SECTION 73.242(a)

(October 16, 1968)

The Commission by Commissioners Lee, Wadsworth, Cox and Johnson, with Commissioner Hyde, Chairman, absent and Commissioner Bartley dissenting, approved the following document:

UNITED STATES TRANSDYNAMICS CORP.,
Radio Station WAVA-FM,
1901 Ft. Myer Drive,
Arlington, Va. 22209

GENTLEMEN: This is with reference to your request for waiver of section 73.242(a) of the Commission's rules and regulations.

The Commission is of the view that a waiver of section 73.242(a) through the end of WAVA-FM's current license term, which is October 1, 1969, is warranted and is hereby granted. It is noted that station WAVA-FM broadcasts 24 hours a day, Monday through Friday, 20 hours on Saturday, and 17 hours on Sunday for a total of 157 hours a week. Station WAVA, the companion standard broadcast station, operates daytime hours only, and based on a yearly average, WAVA-FM will be duplicating only 7 percent over the amount permissible under the terms of section 73.242(a). Finally, both WAVA and WAVA-FM feature an exclusively news and information format.

You are also advised that in conjunction with the filing of your next license renewal applications, you should submit a complete breakdown of the programing of stations WAVA-AM-FM, differentiating the various types of news and information programing featured by the stations.

This letter should be posted along with stations WAVA-FM's license certificate as evidence of your authority to exceed by approximately 7 percent the normal program duplication limitations of section 73.242(a).

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1049

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
REQUEST FOR WAIVER OF SECTION 73.242(a)

(October 16, 1968)

The Commission by Commissioners Lee, Wadsworth, Cox, and Johnson, with Commissioner Hyde, Chairman absent and Commissioner Bartley dissenting, approved the following document:

UNIVERSITY ADVERTISING CO.,
Radio Station KVIL-FM,
4152 Mockingbird Lane,
Dallas, Tex. 75205

GENTLEMEN: This is with reference to your request for waiver of section 73.242(a) of the Commission's rules and regulations.

The Commission has concluded that grant of a waiver of the duration requested is not warranted. However, in view of the pending applications for assignment of the licenses of stations KVIL-AM-FM to Carla Broadcasting, Inc. (BAL-6399 and BALH-1120), the Commission has determined that a temporary waiver extending through a date 30 days from the date of consummation of the assignments, if they are approved by the Commission, or through a date 30 days from the date of Commission denial of these applications, is warranted, and is hereby granted. After the dates indicated, station KVIL-FM must operate in conformity with section 73.242(a).

This letter should be posted along with your station license as evidence of your temporary authority to exceed 50 percent duplicated programing.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1046

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
REQUEST FOR WAIVER OF SECTION 73.242(a)

(October 16, 1968)

The Commission by Commissioners Lee, Wadsworth, Cox, and Johnson, with Commissioner Hyde, Chairman, absent and Commissioner Bartley dissenting, approved the following document:

ZANESVILLE PUBLISHING CO.
Radio Station WZIP-FM,
Vernon Manor Hotel,
Cincinnati, Ohio 45219

GENTLEMEN: This is with reference to your request for waiver of section 73.242(a) of the Commission's rules.

After careful consideration, the Commission has concluded that grant of a waiver is not justified and would be discriminatory to other stations in the Cincinnati area.

Accordingly, your request for waiver of section 73.242(a) is denied.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

15 F.C.C. 2d

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FCC 68-1076

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WILLIAM D. STONE (WRDS), SOUTH CHARLESTON, W. VA. Has: 1410 kc, 1 kw, Day Requests: 1450 kc, 250 w, 1 kw-LS, U	Docket No. 18366 File No. BP-17145
CLAUDE R. HILL, JR., FAYETTEVILLE, W. VA. Requests: 1450 kc, 250 w, 1 kw-LS, U For Construction Permits	Docket No. 18367 File No. BP-17560

MEMORANDUM OPINION AND ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: CHAIRMAN HYDE ABSENT; COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING

1. The Commission has before it for consideration (*a*) the above-captioned mutually exclusive applications; (*b*) a petition to deny the WRDS proposal filed by WPAR, Inc., licensee of station WPAR, Parkersburg, W. Va.; (*c*) a petition to deny the application of Claude R. Hill, Jr., filed by William D. Stone; and (*d*) pleadings in opposition and reply thereto.

2. WPAR, Inc. bases its claim of standing as a party in interest on the ground that a grant of the WRDS application would result in objectionable interference to the present operation of station WPAR. Since it appears that the proposed operation of WRDS would cause interference to WPAR, the Commission finds that the petitioner does have standing as a party in interest within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *FCC* v. *National Broadcasting Co., Inc.* (*KOA*), 319 U.S. 239 (1943).

3. On March 14, 1966, WRDS tendered its application for filing and it was found unacceptable absent a waiver of section 73.37(a) of the rules. On August 18, 1966, the Commission waived section 73.37(a) and accepted the application for filing. By waiving section 73.37 of the rules, the Commission eliminated the two-step process whereby WRDS would first apply for 250 w. on 1450 kc. That application presumably would have been eligible for a grant without hearing because it involved no interference to existing operations. As an existing class IV station operating at 250 w., WRDS could then file for an increase in power to 1 kilowatt. At that point, WPAR could not be heard to complain of a potential modification of its license because its own authorization had been expressly conditioned to accept any

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interference resulting from a grant of another class IV station increasing power from 250 w. to 1,000 w. WPAR contends that since WRDS did not follow the above two-step process, it is not precluded by section 73.24(b)(2) and 73.37(d) of the rules from raising objections to the proposed interference and requests an interference issue be included. Since, admittedly, WRDS's proposed .025-mv/m contour overlaps WPAR's .5-mv/m contour, an interference issue will be included.[1]

4. WPAR also requests that a financial issue be included as to WRDS. We find that an issue is necessary because of the applicant's failure to complete paragraph 1, section III of FCC form 301. WRDS estimates that construction costs of only $1,600 will be needed in addition to increased operating costs of $15,000. In similar cases it has long been our policy, in the absence of information to the contrary, to assume that existing stations had at least $5,000 in cash flow allocable to construction costs,[2] as well as sufficient revenue to absorb any prospective increase in operating costs. However, since WRDS has failed to meet these minimal requirements by complying with the form's instructions, it must establish its qualifications in hearing.

5. Commission study of the engineering portion of the WRDS proposal indicates that the nighttime limitation contour (22.4 mv/m) does not encompass the city limits of South Charleston. Therefore, an appropriate coverage issue will be specified.

6. In his petition to deny the application of Claude R. Hill, Jr., William D. Stone requests inclusion of a real party in interest issue, plus misrepresentation and character issues based on the same allegations. On June 20, 1967, the petitioner, his son, William, Jr., and associate Melvin Pennington met with Claude R. Hill, Jr., at the latter's office to discuss the possibility of persuading Hill to change the frequency of his application. The petitioner submits the affidavits of Pennington, his son, and himself to show that Hill made certain statements concerning the existence of other parties to his application. These affidavits, in substance, relate that Hill was unable to make a decision regarding the petitioner's suggestion without first discussing the proposition with his "associates". The petition also contains a letter from Hill to Mr. William E. Hamb, Stone's local attorney, stating that Hill had discussed petitioner's suggestion with several of his "colleagues" and had decided not to accommodate Mr. Stone.

7. In opposition to the petition to deny, Hill does not deny making reference to "associates" and "colleagues" but denies that anyone other than himself has a financial interest in the application. Hill asserts that his total inexperience in the field of broadcasting made it necessary for him to consult with his attorney and a local engineer. While maintaining that he has the sole financial interest in the application, he acknowledges the possibility of forming a corporation to act as the licensee if he were to receive a construction permit, in which event

[1] WPAR asserts that the presence of the "most unique and compelling circumstances" warrants imposition of a greater burden of proof on WRDS than would customarily be required. Aside from WPAR's unsupported allegation that the interference would somehow impede its ability to function as a local station, no data tending to justify the request have been forthcoming.

[2] Where construction costs are under $5,000, applicants are instructed (par. 4(b), section I) that only paragraph 1 of the financial portion (section III) of the application need be completed.

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he may relinquish up to 45 percent of the stock as an inducement to secure a competent station manager and engineer. According to Hill, small portions of this minority interest might also be offered to local business interests to insure the station's economic viability.

8. Upon examination of the material presented, the Commission finds that a substantial and material question of fact has been raised which should be resolved in hearing. Accordingly, an issue will be included to determine, inter alia, whether Hill is the sole party in interest to his application. Since the charges underlying this issue were raised by Stone, he will bear the initial burden of proceeding with the introduction of evidence but the ultimate burden of proof will be upon the applicant because the principal information concerning this issue is peculiarly within his knowledge.

9. Hill estimates that it will cost $55,250 to construct and operate his station for 1 year, itemized as follows: $5,000, down payment on equipment; $5,750, first-year payment on equipment (including interest); $2,500 miscellaneous expenses; and $42,000 working capital. The applicant submitted a balance sheet dated December 1966, showing his net worth to be $130,600. On the basis of the balance sheet the Commission finds the applicant's net liquid assets to be $19,000 ($4,000 cash on hand and $15,000 cash value of life insurance) thereby requiring the applicant to show an additional $36,250 to meet his financial commitment.

10. Examination of section IV of both applications indicates that both applicants have failed to list or evaluate the suggestions received in their respective program surveys. Thus, since the requirements set out in *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796, and the Commission public notice of August 22, 1968, FCC 68–847, have not been met, an issue will be included to determine what efforts the applicants have made to determine community needs and interests and by what means the applicants propose to meet these needs and interests.

11. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, *it is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent order, on the following issues:

1. To determine the areas and populations which would receive primary service from the proposal of Claude R. Hill, Jr., and the availability of other primary service to such areas and populations.

2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WRDS and the availability of other primary service to such areas and populations.

3. To determine with respect to the application of Claude R. Hill, Jr.:

(*a*) The manner in which the applicant will obtain additional funds to construct and operate the proposed station for 1 year.

(*b*) Whether, in light of the evidence adduced pursuant to (*a*), above, the applicant is financially qualified.

4. To determine with respect to the application of Claude R. Hill, Jr.:

(*a*) Whether he is the sole party in interest in the above-captioned application.

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(*b*) Whether, in the event (*a*), above, is answered in the negative, Claude R. Hill, Jr., has made material misrepresentations of fact to the Commission.

(*c*) Whether, in the light of evidence adduced pursuant to (*a*) and (*b*), above, Claude R. Hill, Jr., is qualified to become a licensee of this Commission.

5. To determine the efforts made by each of the applicants to ascertain the community needs and interests of the areas to be served and the means by which the applicants propose to meet those needs and interests.

6. To determine whether the proposed operation of WRDS would cause objectionable interference to station WPAR, Parkersburg, W. Va.

7. To determine whether the proposed operation of WRDS meets the requirements of section 73.30(c) of the Commission's rules, and, if not, whether circumstances exist which would warrant a waiver of said section.

8. To determine, with respect to the application of William D. Stone:

(*a*) Whether the applicant has sufficient cash, liquid assets, or station revenue available to finance the estimated construction and operating costs.

(*b*) Whether, in light of the evidence adduced pursuant to (*a*) above, the applicant is financially qualified.

9. To determine, in the light of section 307(*b*) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

10. To determine, in light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

13. *It is further ordered*, That with respect to issue 4, the burden of proceeding with the introduction of evidence will be upon William D. Stone, and the burden of proof upon Claude R. Hill, Jr.

14. *It is further ordered*, That WPAR, Inc., *Is made a party* to the proceeding.

15. *It is further ordered*, That the petition to deny filed by WPAR, Inc., *Is granted* to the extent indicated above and *is denied* in all other respects.

16. *It is further ordered*, That the petition to deny filed by William D. Stone *Is granted* to the extent indicated above and *Is denied* in all other respects.

17. *It is further ordered*, That in the event of a grant of either application, the construction permit shall contain the following condition:

Permittee shall accept such interference as may be imposed by other existing 250 w. class IV stations in the event they are subsequently authorized to increase power to 1000 w.

18. *It is further ordered*, That in the event of a grant of the application of William D. Stone, the construction permit shall contain the following conditions:

The horizontal inverse distance field intensity at 1 mile shall be reduced to essentially 150 mv/m/kw by the addition of a series resistor in the transmission line.

Before program tests are authorized, the permittee shall submit sufficient field intensity measurement data to show that radiation has been reduced to essentially 150 mv/m/kw.

19. *It is further ordered*, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

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20. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1082

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SUNDIAL BROADCASTING CO., INC., PARMA, OHIO Requests: 1000 kc, 500 w, DA-D	Docket No. 18368 File No. BP-17121
HOWARD L. BURRIS, WARREN, OHIO Requests: 1000 kc, 1 kw, DA-D For Construction Permits	Docket No. 18369 File No. BP-17574

ORDER

(Adopted October 30, 1968)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; AND WADSWORTH ABSENT; COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it (*a*) the above-captioned applications as amended, which are mutually exclusive in that simultaneous operation of the stations as proposed would result in prohibitive overlap as defined by section 73.37 of the Commission's rules; (*b*) A petition to deny filed by the Chicago Federation of Labor and Industrial Union Council (WCFL), licensee of station WCFL, Chicago, Ill.; and (*c*) responsive pleadings.

2. WCFL bases its claim of standing as a party in interest on its allegation that Sundial's proposed daytime directional array would result in prohibited overlap of the proposed 0.005-mv/m contour with its 0.1-mv/m contour. If simultaneous variation in the operating parameters in the order of 2 percent and 2 degrees is permitted the proposed MEOV's will be exceeded and overlap to WCFL would result. The applicant states that it is their intention to adjust the array to values below the specified MEOV's and that advanced monitoring equipment will be installed to permit monitoring of the phases and fields within the required tolerance. The Commission's study of the Sundial and Burris proposals indicates that, on the basis of all available measurement data, neither applicant has accurately shown the extent of the WCFL 0.1-mv/m contour. As a result we find that both proposals are critical with regard to adequate protection to WCFL. In addition, neither applicant has clearly indicated expected initial adjustment values of radiation towards WCFL and permissible variations in operating parameters after adjustment which would establish that the proposed MEOV's would not be exceeded. Accordingly, appropriate issues will be included to determine whether the proposed operations would afford adequate protection to WCFL. Also, it has been suggested that modern, highly accurate phase monitors could be employed to maintain the directional antenna parameters within

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permissible limits. However, these devices may cost as much as $10,000 and if their use is ultimately required, this cost must be considered in connection with the applicants financial qualifications.

3. Based on figures and information provided by Sundial, this applicant will need a total of $138,763 to cover first-year construction and operating costs, consisting of the following: down payment on equipment, $16,772; first year's payments on equipment (including interest), $19,791; land, $1,200; building, $14,000; miscellaneous, $10,000; and working capital for 1 year, $77,000. Sundial plans to meet these costs with $1,350 in existing capital and $96,150 in new capital stock subscriptions. The applicant makes no mention of an intention to rely on any operating revenues. Thus, based on its own estimates, the applicant has failed to meet the Commission's financial requirements. Therefore, it will be necessary for Sundial to establish the availability of additional funds. Accordingly, a financial issue will be specified.

4. The other applicant, Howard L. Burris, will need a total of $84,945, on the basis of the information and data supplied in the application, to meet his first-year construction and operating expenses, consisting of the following: down payment on equipment, $12,800; first year's payments on equipment (including interest), $13,145; building, $6,000; miscellaneous, $5,000; and working capital for 1 year, $48,000. Burris attempts to substantiate a showing of liquid assets "in excess of $125,000", but other than stating that $80,000 of this sum (consisting of cash in banks, accounts receivable, U.S. bonds and listed securities) is available for the proposed station, this applicant provides no verification or substantiation of these figures. Moreover, Burris provides no balance sheet or other indication of his current liabilities. Burris has indicated that he will not rely on first-year revenues as a source of funds, and thus has made no showing in this category. Therefore, even if Burris can provide proper documentation showing that the full $80,000 will be available, he has not established the availability of sufficient funds. Hence, an appropriate financial issue will also be specified as to Howard L. Burris.

5. Regarding programing, both applicants have failed to meet the requirements set forth in *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796, 12 R.R. 2d 602 (1968), and the Commission's public notice of August 22, 1968, FCC 68–847. In the case of Burris, the applicant states that his programing proposal was developed on the basis of personal and telephone conversations with individuals in the community and states that representative organizations, interests, and persons surveyed include the Mayor of Warren, political parties of Trumbull County, the United Givers Fund, and the police department. However, there is no indication of what suggestions were made by these civic officials. Further, although Burris subsequently filed survey report forms with comments of 40 local residents, this list of interviewees does not include a representative range of community groups and leaders, and the applicant did not relate his program plans to the needs of the community as he evaluated them.

6. Likewise the Sundial application suffers from somewhat the same basic deficiencies. Thus, although in this case the applicant pre-

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sents a list of 26 community officials and civic leaders who were personally contacted (and also refers to a random-sampled telephone poll, of approximately 200 residents of Parma and immediately adjacent suburbs), it fails to list the suggestions made and does no more than describe in general narrative form its views and philosophy of the function of a radio station in the Parma community, along with references to certain basic program categories and typical programs which it plans to emphasize or include generally in the program format. Accordingly, a *Suburban* issue will be included as to both applications.

7. Parma is located within the southwestern portion of the Standard Metropolitan Statistical Area of Cleveland, Ohio. The two cities have 1960 U.S. Census populations of 82,845 and 876,050, respectively. Since the proposed 5-mv/m contour penetrates (virtually encompassing) the city limits of Cleveland, a presumption that the applicant is realistically proposing to serve the larger community is raised under the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901. Aside from the statement in its engineering amendment filed March 14, 1967, to the effect that the 5-mv/m penetration of Cleveland was unavoidable, Sundial has not attempted to make a showing in rebuttal of the aforementioned presumption. Accordingly, the 307(b) suburban community issue will be included.

8. In the event that Sundial in the course of this proceeding fails to rebut the presumption that it is realistically proposing to serve the larger community, Cleveland, rather than Parma, and fails to show, pursuant to issue 11 below, that its proposal meets all of the technical provisions of the Commission's rules for a station assigned to Cleveland, its application will be denied. If, however, its proposal qualifies as one for Cleveland under such issue, we will then consider whether its application should be allowed to remain in hearing.

9. In addition to the foregoing deficiencies, the transmitter site photographs in the Sundial application are not of sufficient detail and clarity to demonstrate that the site is satisfactory. As to the Burris application, Commission studies indicate that the proposed antenna parameters do not accurately depict the proposed radiation pattern. Thus, issues as to the foregoing will also be included.

10. From the information before the Commission it appears that except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, because the applications are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues set forth below.

11. Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

2. To determine, with respect to the application of Sundial Broadcasting Co., Inc.:

(*a*) The source of additional funds necessary to meet the costs of construction and operation of the proposed station during the first year.

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(*b*) In light of the evidence adduced pursuant to (*a*) above, whether the applicant is financially qualified.

3. To determine whether Sundial or Burris has accurately determined the extent of the WCFL normally protected 0.1-mv/m contour.

4. To determine whether Sundial Broadcasting Co., Inc., would, in the event of a grant of its application, be able to adjust and maintain the proposed directional antenna system within the maximum expected operating values of radiation, as proposed.

5. To determine whether Howard L. Burris would, in the event of a grant of his application, be able to adjust and maintain the proposed directional antenna system within the maximum expected operating values of radiation, as proposed.

6. To determine, in the light of the evidence adduced pursuant to issues Nos. 3, 4, and 5, above, whether the proposed operations of Sundial and Burris would adequately protect station WCFL, Chicago, Ill.

7. To determine whether the transmitter site proposed by Sundial Broadcasting Co., Inc., is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern.

8. To determine, with respect to the application of Howard L. Burris:

(*a*) How much, if any, of the $80,000 listed by the applicant as available in cash and liquid assets is, in fact, available.

(*b*) The sources of additional funds necessary to meet the costs of construction and operation of the proposed station during the first year.

(*c*) In light of the evidence adduced pursuant to (*a*) and (*b*) above, whether the applicant is financially qualified.

9. To determine whether the proposed directional antenna parameters accurately depict the proposed radiation pattern of Howard L. Burris.

10. To determine whether the proposal of Sundial Broadcasting Co., Inc. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(*c*) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

11. To determine, in the event that it is concluded pursuant to the foregoing issue that the proposal will not realistically provide a local transmission service for its specified station location, whether such a proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Cleveland, Ohio.

12. To determine, with respect to both of the applicants, the efforts made to ascertain the respective community needs and interests of the areas to be served and the means by which the applicants propose to meet those needs and interests.

13. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

14. In the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

12. *It is further ordered.* That, the petition to deny the application of Sundial Broadcasting Co., Inc., filed by the licensee of station WCFL, Chicago, Ill., *Is granted* to the extent indicated above and *Is denied* in all other respects.

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13. *It is further ordered*, That, Chicago Federation of Labor and Industrial Union Council, licensee of station WCFL, Chicago, Ill., *Is made a party* to the proceeding.

14. *It is further ordered*, That, in the event of a grant of either of the subject applications, the construction permit shall contain the following condition:

> Any presunrise operation must conform with sections 73.87 and 73.99 of the rules, as amended June 28, 1967 (32 F.R. 10437), supplementary proceedings (if any) involving docket No. 14419, and/or the final resolution of matters at issue in docket No. 17562.

15. *It is further ordered*, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

16. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R–455

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WLUC, INC., IRON MOUNTAIN, MICH.	Docket No. 18216 File No. BPTTV-2666
NORBERTINE FATHERS, IRON MOUNTAIN, MICH. For Construction Permit For New VHF Television Broadcast Translator Station	Docket No. 18217 File No. BPTTV-2713

MEMORANDUM OPINION AND ORDER

(Adopted October 28, 1968)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the mutually exclusive applications of WLUC, Incorporated (WLUC), licensee of television broadcast station WLUC, channel 6, Marquette, Mich., and Norbertine Fathers (WBAY), licensee of television broadcast station WBAY, channel 2, Green Bay, Wis., each seeking a construction permit for a new 100-w VHF television translator station to operate on channel 8, Iron Mountain, Mich., rebroadcasting the programs of their respective stations. The applications were designated for hearing by order, FCC 68–119, released June 18, 1968 under an issue to determine whether WBAY can effectuate its proposal, and various comparative issues. Presently before the Review Board is a joint petition, filed August 2, 1968, by WLUC and WBAY, requesting approval of an agreement looking toward a dismissal of the WBAY application and a grant of the WLUC application.[1]

2. The above agreement provides that (*a*) when WLUC becomes licensee of its translator proposal that translator will rebroadcast all of the WLUC–TV programs; (*b*) all of the WBAY–TV programs, except for CBS network programs that are broadcast simultaneously on WBAY–TV and WLUC–TV, will be rebroadcast with WBAY's consent in Iron Mountain on W72AA, a 100-w translator operating on channel 72, licensed to U.P. TV Systems, Inc. (U.P.); and (*c*) when WLUC–TV and WBAY–TV are carrying the same CBS programs, W72AA will rebroadcast WLUC–TV rather than WBAY–TV. In order to effectuate the above WLUC–WBAY agreement, WBAY has entered into a separate agreement with U.P.,[2] whereby

[1] Also before the Board are the following pleadings: (a) a supplement (to the joint petition), filed Aug. 15, 1968, by WLUC and WBAY; and (b) comments, filed Aug. 15, 1968, by the Broadcast Bureau.

[2] The WBAY–U.P. agreement is dated July 25, 1968, and is an integral part of the WLUC–WBAY agreement, which is dated July 26, 1968. Both agreements are attached to the joint petition.

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U.P. will file with the Commission an application to change its primary station from WLUC–TV to WLUC–TV and WBAY–TV so that W72AA will be authorized to rebroadcast either of those primary stations.[3] Attached to the joint petition is a letter, dated July 29, 1968, from Robert C. Nelson (WBAY's general manager) to Richard E. Abrams (U.P.'s president) stating that WBAY agrees to pay "about $1,000" for the equipment conversion that will make it possible for W72AA to carry WBAY–TV in accordance with the agreements, and that WBAY also agrees to contribute $1,800 to the cost of the W72AA operation for the first year "under these agreements."

3. The Review Board agrees with the Broadcast Bureau that the information submitted and attested by the affidavits of the parties comports with the requirements of section 1.525(a) of the rules. Dismissal of WBAY's application is supported by no consideration passing among the applicants. The details regarding the initiation and history of negotiations with respect to the WLUC–WBAY agreement are set forth in the joint petition and attested to in affidavits from the parties. Approval of the agreement is in the public interest in that it will eliminate the necessity for a hearing thereby expediting the inauguration of service proposed by WLUC–TV, and permit the programs of WLUC–TV and WBAY–TV to be rebroadcast in the Iron Mountain area where WLUC–TV will be the only regular operating television station. The agreement will be approved.[4]

4. Accordingly, *It is ordered*, That the joint petition for approval of agreement, filed August 2, 1968, by WLUC, Incorporated and Norbertine Fathers, *Is granted;* that the agreement *Is approved;* that the application of Norbertine Fathers (BPTTV–2713) *Is dismissed* with prejudice; that the application of WLUC, *Incorporated* (BPTTV–2666) *Is granted;* and that this proceeding *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] U.P.'s application to install WBAY–TV as an alternative primary station was granted on Oct. 8, 1968. Public notice, report No. 7618, dated Oct. 10, 1968.

[4] The Broadcast Bureau, in its comments, points out that in amendment, filed July 2, 1968, WLUC increased its proposed tower height (accepted by order, FCC 6817–1053, released July 15, 1968), and that FAA approval of the amended proposal is required. However, an FAA determination of no hazard to air navigation for WLUC's amended proposal was received by the Commission on Oct. 8, 1968.

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FCC 68-1092

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORP., AMERICAN TELEPHONE & TELEGRAPH CO., ITT WORLD COMMUNICATIONS, INC., RCA GLOBAL COMMUNICATIONS, INC., WESTERN UNION INTERNATIONAL, INC. For Termination of Outstanding Authorizations, and transfer of Outstanding Construction Permits Pertaining to the Transportable Earth Station Facility at Andover, Maine	53-CSG-AP-69
In the Matter of the Application of COMMUNICATIONS SATELLITE CORP. For Authority To Acquire and Operate the Transportable Earth Station Facility at Andover, Maine, To Provide Telemetry, Command and Control, Monitoring and Tracking (T. & C.) Services to Intelsat III Series Satellites	55-CSG-L-69

MEMORANDUM OPINION, ORDER, AND AUTHORIZATION

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The above-entitled applications filed July 18, 1968, request: (*a*) Authority to transfer and assign the outstanding construction permit (7-CSG-P-66, as amended, 46-CSG-ML-68) for the Andover, Maine, transportable earth station from the Communications Satellite Corp. (Comsat), American Telephone & Telegraph Co. (A.T. & T.), ITT World Communications, Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA), and Western Union International (WUI) to Comsat; (*b*) to terminate the outstanding special temporary authority to operate said facility; (*c*) to dismiss the outstanding joint application filed April 6, 1967 (38-CSG-L-68), by the above-named applicants for regular authority to operate said facility; and (*d*) upon grant of the foregoing, Comsat requests authority on its own behalf to operate the Andover transportable to provide telemetry command and control, monitoring and tracking (T. & C.) services in conjunction with satellites owned and operated by Intelsat.

2. The application was accepted for filing by issuance of public notice on July 29, 1968, and no objections or other comments have been filed with respect thereto.

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3. The joint ownership and operation of the Andover transportable was approved by order of the Commission on July 19, 1967 (38–CSG–TC–67), which designated the ownership interests in said facility in the following proportions: Comsat, 50 percent; A.T. & T., 28.5 percent; ITT Worldcom, 7.0 percent; RCA, 10.5 percent; and WUI, 4.0 percent in accordance with the second report and order in docket No. 15735 (5 FCC 2d, 812).

4. On February 21, 1968, the Commission authorized the above-named joint owners to modify the Andover transportable (46–CSG–ML–68) to enable said facility to provide T. & C. services in conjunction with the Intelsat III series satellites. The application informed the Commission of the decision of the Interim Communications Satellite Committee (ICSC) to utilize the services of the Andover transportable for T. & C. functions. On June 10, 1968, the joint owners, having determined that the transportable station in the near future no longer will be required on a regular basis for commercial communication service and, in order to accommodate Intelsat's interest in the availability of said station for T. & C. purposes, entered into an agreement for the purchase and sale of said station, the execution of which was made subject to Commission approval. A copy of the agreement is attached as annex A of the application.

5. On August 27, 1968, Comsat informed the Commission that the modification program had been completed substantially in accordance with the technical characteristics specified in the foregoing authorization.

6. The agreement for purchase and sale of the station provides, inter alia, that the purchase price shall be an amount equal to 50 percent of the capital cost of the station and related equipment determined on the basis of the book cost thereof, less depreciation (net of retirements) accrued to the closing date on the basis of Comsat's depreciation rates.

7. With respect to the T. & C. services Intelsat agrees: (*a*) To reimburse Comsat for the costs incurred by it which are allocable to the provision of such service, including but not limited to the costs of modification, depreciation, operation, and maintenance of the station, repair and replacement of parts; and (*b*) to pay Comsat an annual rate of compensation of $97,000 for the rendition of the T. & C. services.

8. Upon review and consideration of the subject applications and the associated information and data, it appears that applicants are legally, technically, financially, and otherwise qualified to effectuate the requested transfers and that Comsat possesses the necessary qualifications to acquire and operate said facility on its own behalf in the manner requested. The operation proposed to be rendered by the station will provide facilities intended to serve the communications needs of the United States and others on a global basis and thereby advance the objectives of the Communications Satellite Act of 1962. We shall, therefore, grant the subject applications with appropriate conditions, it appearing that such action will serve the public interest, convenience, and necessity.

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ORDER AND AUTHORIZATION

It is ordered, pursuant to section 310(b) of the Communications Act of 1934, and section 201(c)(7) of the Communications Satellite Act of 1962, That the Commission hereby consents to the transfer of the outstanding construction permit for the Andover transportable earth station (7–CSG–P–66, as amended, 46–CSG–ML–68) and the transfer of the ownership interests of said station and associated equipment, more particularly described in exhibit A of annex A of the application, from the above-named joint applicants to Comsat;

It is further ordered, That upon transfer of the ownership interests in the subject facilities, no further change whatever shall be made therein except upon grant of an appropriate application;

It is further ordered, That upon transfer of said construction permit and the ownership interests in the subject facilities, the outstanding special temporary authority to operate said station *Be terminated;*

It is further ordered, That the application for operating license 20–CSG–L–67, amended April 6, 1967, 38–CSG–TC–67, to include the joint owners as applicants *Be, and hereby is, dismissed;*

It is further ordered, That Comsat effective upon transfer of said construction permit and transfer of the ownership interests in the subject facilities *Is authorized* for the period commencing with the effective date of the transfers herein authorized and ending August 30, 1971, to operate the Andover transportable earth station to provide telemetry, command and control, monitoring, and tracking services in conjunction with Intelsat satellites subject to the following technical specifications:

Call sign: WA22.
Nature of service: Communication-Satellite Service.
Class of station: Satellite earth station (transportable).
Location of station: Near Andover (Oxford), Maine.
Geographical Coordinates: 44°37'59" N. latitude.
70°41'52" W. longitude.
Communications transmitter:
Type: Composite with VA–884 Klystron.
Frequencies of operation: The frequency band 5925–6425 has been cleared for operation. Exact frequencies within the band will be notified to the Commission as they become operational.
Frequency tolerance: 0.03 percent.
Emission: 30,000 A0/A3/A9/F3/F5/F9 maximum per carrier.
Power at antenna feed: 12.5 kw.
Azimuth of radiation: 0–360°.[1]
Antenna (transmit):
Type: Casshorn parabolic reflector, rotable, 42 feet effective diameter.
Gain (transmit): 55 db at 6 GHz.
Maximum radiation in horizontal plane: 45 dbw per 4 KHz.
Beamwidth: 0.20° half power points.
Height above ground: 67 feet.
Polarization: Linear with any orientation, or right or left hand circular.
Minimum elevation: 5° above horizontal plane except at reduced power for boresight tests.
Antenna (receive):
Type: Same as communications transmit antenna.
Gain (receive): 52.5 db at 4 GHz.
Receive frequencies: Within the band 3700–4200 MHz.
Receiving system noise temperature: 100° Kelvin above 5° elevation.

[1] **Based on coordination calculations conducted with reference to application file No. 3–CSG–P–66 July 12, 1965.**

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It is further ordered, That this authorization is subject to the following terms and conditions:

(1) That this authorization shall not vest in Comsat any right to operate the station nor any right to the use of the frequencies designated in the permit except as herein authorized;

(2) That neither the facilities acquired nor the right granted hereunder shall be assigned or otherwise transferred except upon grant of an appropriate application;

(3) That this authorization is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act.

It is further ordered, That the acts necessary to effectuate the transfer herein authorized shall be completed within 5 days from the date of the release of this order and authorization, and notice shall forthwith be furnished to the Commission by the applicants showing when the acts necessary to effect the transfer of the authorizations and facilities constructed or operated pursuant thereto were completed, and upon furnishing the Commission with such notice the transfers for which authority is granted will be considered completed.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R-467

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petitions by DELAWARE COUNTY CABLE TELEVISION CO., ET AL For Authority Pursuant to Section 74.1107 of the Rules To Operate CATV Systems in the Philadelphia, Pa., Television Market (ARB 4) and the Harrisburg-Lancaster-Lebanon-York, Pa., Television Market (ARB 30) or the Wilkes-Barre-Scranton, Pa., Television Market (ARB 69) and In re Applications of ROLLINS, INC., NEWARK, DEL.	Docket No. 18140 File No. CATV 100-18 Dockets Nos. 18141, 18142, 18143, 18144, 18145, 18146, 18147, 18148, 18149, 18150, 18151, 18152, 18153, 18154, 18155, 18156, 18157, 18158, 18159, 18160, 18161, 18162, 18163 Docket No. 18164 File No. 20077-IB-15X
JERROLD-SOUTH JERSEY TV CABLE CORP., MOUNT HOLLY, N.J. For Construction Permits for New Point-to-Point Microwave Stations and In re Applications of ROLLINS, INC. For Construction Permits for New Community Antenna Relay Stations to Serve a CATV System at Wilmington, Del. LOWER BUCKS CABLEVISION, INC., LEVITTOWN, PA. LOWER BUCKS CABLEVISION, INC., PENNDEL BOROUGH, PA. Request for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules	Docket No. 18165 File No. 9538-IB-96X Docket No. 18166 Files Nos. BPCAR-2, BPCAR-3, BPCAR-4, BPCAR-5 Docket No. 18227 SR-1687 Docket No. 18228 SR-26815

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has under consideration a motion to change issues and shift the burden of proof, filed August 9, 1968, by Lower

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Bucks Cablevision, Inc. (Lower Bucks).[1] The *Lower Bucks* proceedings involve petitions, filed pursuant to section 74.1109 of the Commission's rules, by certain television station licensees,[2] seeking relief against carriage by Lower Bucks of predicted local grade B or better New York signals on its systems in Levittown, Bristol, and Penndel Borough, Pa. Because Lower Bucks' proposals will entail CATV operations in an overlapping major market area (a so-called footnote 69 issue[3]), the Commission ordered hearings on the petitions[4]; by separate order released on the same date,[5] the Commission consolidated the *Lower Bucks* proceedings with *Delaware County Cable Television Co., et. al.*, which relates to the same television market, Philadelphia, and deals with applications by certain CATV systems under section 74.1107(a) of the rules for authority to carry distant signals, as well as petitions by certain television stations under section 74.1109 asking relief against carriage of local grade B signals.[6] The designation orders in the *Lower Bucks* and *Delaware County* proceedings specified identical issues, as follows:

> (1) To determine the proposed penetration and extent of CATV service in the Philadelphia television market.
>
> (2) To determine the effects of current and proposed CATV service in the Philadelphia television market upon existing, proposed and potential television broadcast stations in the market.
>
> (3) To determine: (*a*) The present policy and proposed future plans of petitioners with respect to the furnishing of any service other than the relay of the signals of broadcast stations; (*b*) the potential for such services; and (*c*) the impact of such services upon television broadcast stations in the market.
>
> (4) To determine whether the carriage of predicted grade B or better signals from New York stations should be authorized.
>
> (5) To determine whether the applications and proposals are consistent with the public interest.

The designation orders in the *Lower Bucks* proceedings place the burden of proceeding and proof with respect to issues 1, 2, and 3 on Lower Bucks, insofar as such issues relate to its own system, and placed such burdens with respect to issue 4 on the petitioning television stations. In the *Delaware County* proceeding, the burdens as to issues 1, 2, and 3 were placed on the CATV operators, and on the television stations as to issue 4. In the motion now before us, Lower Bucks asks that burdens of proceeding and proof with respect to issues 1 and 3 be shifted to the television stations and that issues 2 and 4 be reworded and consolidated, with the burdens of proceeding and

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[1] The following related pleadings are also before us: CATV task force comments, filed Aug. 23, 1968; Broadcast Bureau comments, filed Sept. 5, 1968; opposition, filed Sept. 10, 1968, jointly by Westinghouse Broadcasting Co., Inc., U.S. Communications of Philadelphia, WIBF Broadcasting Co., and certain copyright owners made parties to the *Delaware County* proceeding; reply, filed Sept. 20, 1968, by Lower Bucks.

[2] The petitioning television station licensees are: U.S. Communications of Philadelphia, Inc., and WIBF Broadcasting Co. Seven Arts Broadcasting Co., Inc., and Westinghouse Broadcasting Co., Inc., filed comments regarding the petitions and were made parties to the proceeding.

[3] *Second Report and Order on CATV*, 2 FCC 2d 725, 786 n. 69, 6 R.R. 2d 1717, 1790 n. 69 (1966).

[4] FCC 68-684, 13 FCC 2d 899, 13 R.R. 1018 (1968); FCC 68-685, 13 FCC 2d 903, 13 R.R. 2d 1022 (1968).

[5] FCC 68-686, 13 FCC 2d 939 (1968).

[6] 12 FCC 2d 529, 12 R.R. 2d 1225 (1968).

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proof as to such consolidated issue being placed on the television stations; Lower Bucks would consolidate issues 2 and 4 to read as follows:

> **To determine the effects of the proposed carriage by Lower Bucks Cablevision, Inc. of the predicted grade B signals of the New York television broadcast stations on its CATV system in Levittown and Bristol [Penndel] upon existing, proposed and potential television stations in the Philadelphia market.**

2. In support of its motion, Lower Bucks argues that under generally recognized principles of evidence as well as the specific provisions of the Administrative Procedure and Judicial Review Act, section 556(d), the proponent of a rule or order bears the burden of proceeding and proof; that because Lower Bucks' proposals fully comply with the requirements of the Commission's CATV rules and policy pronouncements,[7] the television stations were compelled to seek special relief under rule 74.1109 based upon footnote 69 considerations; and that since the television stations were required to bear the burden of pleading under section 74.1109 and are the proponents of the order in the hearings they should, therefore, carry the burden of proceeding and proof on the issues. Lower Bucks further argues that in prior Commission decisions (citing *Buckeye Cablevision, Inc.*, 11 R.R. 2d 885 (1967); *Midwest Television, Inc.*, 4 FCC 2d 612, 8 R.R. 2d 278 (1966)) involving 74.1109 petitions, the Commission placed these burdens, at least as to the "impact" issue, on the television stations. Moreover, argues Lower Bucks, in *Fetzer Cablevision Inc., et al.*, 6 FCC 2d 845, 9 R.R. 2d 610 (1967), the only case previously before the Commission involving both footnote 69 and distant signal considerations, the burdens as to the footnote 69 issue were placed upon the television stations. Turning to the present proceedings, Lower Bucks notes that the impact issues are crucial and that, in the consolidation order the Commission indicated that the burdens as to the footnote 69 issue properly lay with the television stations. Lower Bucks contends that, pursuant to the designation order in *Delaware County*, the television stations will bear the burden of proof as to the impact of local grade B signals under issue 4 even if the CATV systems fail to justify the carriage of distant signals under issue 2.[8] It argues that since there is no distant signal question in the Lower Bucks aspect of the proceeding, the entire showing as to impact of local grade B signals will be borne by Lower Bucks under issue 2, and that this allocation is inconsistent with the Commission's statements in the consolidation order and makes issue 4 redundant. To avoid this redundancy, Lower Bucks asks that issues 2 and 4 be consolidated as requested, and that the burden of proof be placed upon the television stations.[9] Recognizing that evidence concerning CATV penetration in the market will have to be introduced

[7] Sec. 74.1103(a)(3) of the rules requires CATV systems to carry, upon request, the signal of all commercial and noncommercial stations within whose grade B contours the system is located, subject to exceptions enumerated in sec. 74.1103(b); see also, *Second Report and Order on CATV*, supra.

[8] Lower Bucks claims that if the CATV systems discharge their burden under issue 2, the carriage of local grade B signals by the systems will, a fortiori, be warranted.

[9] Lower Bucks claims that its requested rewording is similar to the footnote 69 issue designated in *Fetzer*, supra, and that the burdens of proceeding and proof are similarly placed.

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by the CATV systems under the distant signal aspect of the case, Lower Bucks asserts that the burden of proof under issue 1 should nonetheless be borne by the television stations as to the grade B signal part of the case; otherwise, asserts Lower Bucks, the failure of the CATV systems to establish a reliable penetration level as to the distant signal aspect of the case may jeopardize the outcome of the local grade B signal proposals. On similar reasoning, Lower Bucks urges that, to the extent that issue 3 (nonrelay activities) raises impact considerations, the burdens of proceeding and proof should be on the television stations. The CATV Task Force partially supports Lower Bucks, advancing an alternative approach to the placement of the burdens. The task force asserts that the consolidation of the *Lower Bucks* proceedings with the *Delaware County* case, which involves distant signal questions under 74.1107, does not justify a shift to the CATV system of the burdens concerning the 74.1109 issues of local signal impact. The task force therefore urges that the burden of proof as to issues 1 and 3 be placed upon Lower Bucks insofar as its own system is concerned but on the television stations insofar as the issue relates to other CATV systems in the area, and that the burdens as to issues 2 and 4 be placed on the television stations.

3. The Broadcast Bureau and certain of the parties to the consolidated proceeding (opposing parties) contest the motion. The Broadcast Bureau acknowledges that the burden of proof in footnote 69 cases is generally on the television stations, but asserts that the placement of the burden depends on practical considerations, not inflexible rules. It notes that the burdens have been identically placed in both the *Lower Bucks* proceedings and the *Delaware County* case, and asserts that a shift of the burdens as to the Lower Bucks aspect of the case would nullify the reasons for consolidation of the Lower Bucks case with *Delaware County*. The Bureau and the opposing parties contend that the shift of burdens would also produce an anomalous situation in which the CATV and television parties would be required to come forward under the same issues. The Bureau also asserts that Lower Bucks' requested rewording and consolidation of issues 2 and 4 presumes a difference in the nature and quality of proof between distant signal and local grade B signal cases (citing the final decision in *Midwest Television, Inc.*, 13 FCC 2d 478, 13 R.R. 2d 698 (1968)), it denies that such difference exists. The opposing parties contend that consolidation of these issues would thwart the Commission's judgment that impact issues in marketwide cases should be determined on a marketwide basis. Finally, the opposing parties assert that, as the issues are now framed, the television stations must first establish that the predicted (or theoretical) local grade B signals proposed for carriage by the CATV systems are not actually available off the air and that, once this showing is made, the burden of proceeding and proof as to impact rests on the CATV systems under issues 1–3. In reply, Lower Bucks claims that this last argument demonstrates that the burdens have been improperly placed since under the opposing parties' analysis, the showing by the television stations that theoretical grade B signals are not actual signals is, according to Lower Bucks, a condition precedent to the showing of

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impact under issues 1–3; yet, argues Lower Bucks, as the burdens are now placed, Lower Bucks would have to adduce lengthy and extensive evidence under issues 1 through 3 before the stations have satisfied that condition precedent. Lower Bucks concludes that these ambiguities can be resolved by rewording issues 2 and 4 as requested.

4. The motion will be denied. The present allocation of burdens is consistent with precedent, the consolidation order, and the Commission's objectives in designating hearings in CATV cases. The Commission has stated that the purpose of the hearing is to elicit sufficient information upon which "an informed policy judgment as to the best future course in the market" [10] can be made. As noted by the Broadcast Bureau, the Commission has also indicated that the type of the proof called for under distant signal issues does not materially differ from the type of proof required under grade B signal issues, and the Commission has specifically stated that the burdens of proceeding and proof will not be accorded such weight that "the outcome depends solely on whether the proceeding was instituted pursuant to section 74.1107(a) or section 74.1109." [11] In this context, it is clear, and petitioners concede, that under issue 1, the CATV systems must show the extent of potential penetration of all CATV systems in the market; Lower Bucks need only make such a showing as to its own system.[12] Under issues 2 and 3(c) [13] the CATV systems will be required to establish that the degree of penetration resulting from all current and proposed CATV service will not adversely affect the Philadelphia television market; again, Lower Bucks need come forward on this issue only as to its own system. Lower Bucks asserts that if the systems fail to make the requisite showing under issue 2, not only will the distant signal proposals be disallowed but also, and necessarily according to Lower Bucks, its proposal to carry grade B signals will be denied. We do not agree. We find nothing in the Commission's decisions which mandates the result asserted by Lower Bucks; nor do we think it a matter of logical necessity that a "policy judgment as to the best future course in the market" requires that when distant signal proposals are disallowed, carriage of grade B signals in the same market must also be prohibited. On the contrary, we think it incumbent on the television stations to bear the burdens of proceeding and proof, under issue 4, that carriage of grade B signals should not be allowed, or should be in some manner restricted. Thus, it appears to us that issue 4 is not extraneous and that the present allocation of burdens is not only entirely consistent with the consolidation order and precedent but also affords the most orderly and expeditious means of resolving the complex and difficult questions involved in the formulation of "an informed policy judgment as to the best future course in the market." Lower Bucks' reliance on *Fetzer*, supra, is misplaced. The framing of issues depends upon the facts of each case: the circumstances of the

[10] *Midwest Television, Inc.*, 13 FCC 2d at 488, 13 R.R. 2d at 711 (1968).
[11] Id. at 489, 13 R.R. 2d at 712.
[12] The evidence to be adduced under this issue is peculiarly within the control of the CATV systems, and the burdens should properly lie with them. See *Cablevision, Inc.*, 9 FCC 2d 720, 10 R.R. 2d 1079 (1967).
[13] Issues 3(a) and 3(b), like issue 1, call for mediate data peculiarly within the possession of the CATV systems.

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market in *Fetzer* were unusual (6 FCC 2d at 847, 9 R.R. 2d at 614), and there were unique questions concerning the proposed carriage of the grade B signals (6 FCC 2d at 853, footnotes 8, 9; 9 R.R. 2d at 621, footnotes 8, 9); accordingly, for reasons not applicable here, the issues were framed differently.[14] In the last analysis, a grant of the motion or adoption of the task force's proposal would, as the Broadcast Bureau suggests, thwart the Commission's purpose in consolidating the *Lower Bucks* and *Delaware County* cases: it would have the effect of creating a subhearing within the main hearing, and of creating special subissues concerning a special submarket bounded by Lower Bucks' area of operation. Thus, as a practical matter, a grant of the petition would result in undoing what the Commission has already done; i.e., granting the petition to consolidate the *Delaware County* and *Lower Bucks* proceedings. For these reasons, the relief sought by Lower Bucks or the alternative suggested by the task force is not warranted.

5. Accordingly, *It is ordered*, That the motion to change issues and shift the burden of proof, filed August 9, 1968, by Lower Bucks Cablevision, Inc., *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[14] We are not convinced by Lower Bucks' contention that a reframing of the issues will eliminate the necessity of its producing evidence before the television stations have met the condition precedent to that evidence. The contention goes to the question of order of presentation of evidence by the parties and is not properly before us.

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FCC 68–1085

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In re Complaint of
HARRY LERNER, CONCERNING FAIRNESS DOCTRINE

(October 31, 1968)

HARRY LERNER,
Californians Against the Tax Trap Initiative,
Suite J, 4661 Sunset Boulevard, Los Angeles, Calif.:

This refers to your complaint that station KLAC, Los Angeles, has failed to comply with requirements of Fairness Doctrine in broadcasts regarding "proposition 9" which will be voted upon in California election November 5.

You state, among other things, that some KLAC announcers have broadcast statements favoring proposition 9 and that licensee has otherwise been unfair in presentation of the issue. The Commission has considered the various facets of your complaint and has obtained licensee's comments upon these matters. Upon the basis of information presently available to it, the Commission cannot conclude that the licensee has failed to comply with the requirements of the Fairness Doctrine. Licensee has furnished evidence that it has presented the viewpoints of those opposing proposition 9 a number of times on its news programs and has supplied recordings of those portions of its news programs October 10–18 airing both pro and con viewpoints. No evidence has been submitted that its newscasts since October 18 have substantially differed in this respect. The Fairness Doctrine requires that a licensee which has presented one side of a controversial issue of public importance, play a positive role in bringing about balanced presentation of the opposing viewpoints. As we have frequently stated, opposing viewpoints need not be presented in a single broadcast or program series provided the licensee in its overall programing attempts to present opposing views. The licensee of KLAC in its overall programing appears on the basis of the information presently available to have devoted a substantial amount of broadcast time to the views advocated by your organization. With respect to your complaint received October 31 regarding a remark made by a KLAC announcer on October 30 after airing a paid announcement which opposed proposition 9, the licensee states that the announcer was not instructed to make such a remark and has been reprimanded for having done so and that a make-good announcement will be broadcast today.

By direction of the Commission,

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68–1099

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: JACK O. GROSS TRADING AS (KJOG–TV), GROSS BROADCASTING CO., SAN DIEGO, CALIF. For Extension of Construction Permit	Docket No. 18377 File No. BMPCT–6661

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER H. REX LEE NON PARTICIPATING.

1. The Commission has before it for consideration: (*a*) The above-captioned application (BMPCT–6661) of Jack O. Gross trading as Gross Broadcasting Co. (Gross), permittee of Television Broadcast Station KJOG–TV, channel 51, San Diego, Calif.; (*b*) a letter of intent, signed April 1, 1967, by Gross and California Western University and filed October 31, 1967, by University; (*c*) an agreement, signed November 1, 1967, by Gross and Broadmoor Broadcasting Corp. (Broadmoor) and filed January 2, 1968, by Gross.

2. On May 4, 1964, Gross filed an application (BPCT–3346) for a construction permit for a new television broadcast station to operate on channel 51, San Diego, Calif. Since, on July 28, 1964, California Western University of San Diego (now United States International University) filed a competing application (BPCT–3421) for operation on channel 51, both applications were designated for comparative hearing *Gross Broadcasting Company* FCC 65–84, released February 5, 1965. Subsequently, on June 23, 1965, the Review Board approved a joint request for approval of agreement, filed April 30, 1965, by both applicants which provided for a grant of the Gross application, the dismissal of the United States International University (University) application and the creation of an option in University to acquire a 50-percent interest in the new television facility. By its terms the option was exercisable at any time prior to the expiration of the ninth complete calendar month following the date of a grant to Gross of program test authority. The agreement further provided that at such time as University elected to exercise its option, the parties would form a joint venture and would file an application for the assignment of the construction permit or license held by Gross to the joint venture.

3. On January 19, 1966, Gross filed an application (BMPCT–6228) for an extension of time within which to complete construction of the station. In support of the extension request, the applicant stated that while it was unable to use the site proposed in its application for a construction permit because of financial considerations, it was con-

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templated that negotiations for a new site would reach fruition shortly and that a modification application would be filed within a few weeks. The applicant indicated that construction of the station would be completed within 6 months of the grant of the extension application. The application was granted on March 4, 1966, and approximately 5 months later, on August 2, 1966, Gross filed an application (BMPCT-6355) for modification of construction permit to make changes in the station's authorized facilities.[1] The application contained a statement that the applicant had expended large sums in preparing and prosecuting the application and that the applicant intended to construct the station at the site proposed in the modification application. This application was granted on June 22, 1967, and the date for completion of construction was extended until December 22, 1967.

4. On October 31, 1967, University tendered for filing an application for assignment of the construction permit of station KJOG-TV.[2] Submitted with the assignment application was a letter of intent signed by Gross and University on April 1, 1967, which indicated Gross' intention to assign the construction permit to University. The agreement also provided that the parties would have counsel draw up an appropriate agreement and application to be filed with the Commission and that University would reimburse Gross for his actual expenses up to the time of transfer and that University would acquire "full and exclusive rights" to the construction permit. The agreement was made contingent upon Commission approval of the assignment application, the grant of an application for an extension of time within which to complete construction of the station and the approval of the executive committee of the board of trustees of University.

5. On November 3, 1967, Gross filed the above-captioned application (BMPCT-6661) for an extension of time within which to complete construction of station KJOG-TV. The extension application indicated that construction of the station had not commenced and that equipment had not been ordered. However, the permittee stated that in order to bring the station's service to the San Diego community at the earliest possible date, the permittee had decided to assign the construction permit to a corporation in which the permittee would have a continuing interest. In addition, it was stated that an agreement for the assignment of the construction permit would be concluded shortly and that it was estimated that construction of the station would be completed within 6 months after the Commission approved the assignment application. On January 2, 1968, Gross tendered for filing an application for assignment of the construction permit to Broadmoor. The application contained an agreement signed November 1, 1967, by Gross and Broadmoor which provided that Broadmoor would form a new corporation, the stock of which would be issued to Broadmoor and the corporation would pay Gross an amount equal to his actual expenses in connection with the construction permit, the assignment

[1] On Sept. 20, 1966, Gross filed an application (BPCT-3842) for a construction permit to replace an expired permit and this application was granted on Jan. 5, 1967.

[2] Since the permittee did not file the assignor's portion of the assignment application (sec. 1, pt. I, FCC Form 314), the application cannot be accepted for filing.

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application and all studies relating to the station. The agreement further provided that Gross would have an option to acquire 15 percent of the stock initially issued by the corporation upon the same prorata terms as Broadmoor shall have acquired its stock in the corporation and that the option would be exercisable within a 2-month period commencing on the last day of the 10th complete calendar month following the date of a grant to station KJOG–TV of program test authority. In addition, the agreement provided that Broadmoor would cause the new corporation to fulfill all obligations of Gross under his April 1965 agreement with University and that if University exercised its rights under that agreement, then the 15-percent option exercisable by Gross would terminate if it had not already been exercised by Gross.

6. On February 7, 1968, the Commission advised Gross that the foregoing sequence of events raised questions concerning his failure to comply with his obligations under section 1.65 of the rules to provide the Commission with complete and accurate information concerning his intentions with respect to the construction of station KJOG–TV and his failure to exercise due diligence in the construction of the station. Gross was advised that the question of his failure to comply with section 1.65 occurred during the time that his application (BMPCT–6355) for modification of facilities was pending before the Commission and prior to the grant of that application on June 22, 1967. While Gross had indicated in his modification application, which was filed in August 1966, that he intended to construct the station, on April 1, 1967, he signed a letter of intent which indicated his intention to assign the construction permit to University. However, Gross had failed to amend his pending modification application to inform the Commission of this substantial change in his plans for the construction of the station. In addition, Gross was advised that it appeared that the delay in construction of the station had been due not to any difficulty in the procurement of equipment or to an inability to complete construction because of reasons beyond his control, but rather to his voluntary decision to postpone construction because of his belief that the station could not succeed financially. The Commission's letter concluded that an evidentiary hearing would be necessary in order to resolve the foregoing matters and that unless Gross notified the Commission of his desire to participate in an evidentiary hearing, the extension application would be dismissed, the construction permit canceled and the call letters for station KJOG–TV deleted.

7. In his response to the Commission's letter, Gross states that while a letter of intent had been executed in April 1967, since it was not considered a binding agreement, but rather a document looking toward a subsequent agreement, he had been advised by counsel that the Commission did not have to be notified until a binding agreement had been executed. Furthermore, Gross contends that since a subsequent agreement was never reached with University, when the Commission granted the modification application on June 22, 1967, Gross' representation that he intended to build the station remained valid. With respect to his failure to construct the station, Gross asserts that while he believes that the proposed assignee Broadmoor has the broadcasting experience and financial resources to construct and operate the station, he will

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build the station himself in the event that the Commission does not approve the assignment application. Gross requests an evidentiary hearing if the Commission still believes that grant of the extension application is not warranted.

8. We have carefully considered the response submitted by Gross, and are of the view that an evidentiary hearing will be necessary in order to determine whether Gross has failed to comply with the requirements of section 1.65 of the rules to advise the Commission of substantial and significant changes in information concerning his intentions with respect to the construction and operation of station KJOG–TV, and whether Gross has exercised due diligence in proceeding with the construction of the station. Section 1.65 of the rules clearly sets forth the obligation of an applicant to maintain the continuing accuracy and completeness of information furnished in a pending application. However, during the time that Gross' application for modification of facilities was pending before the Commission and prior to the grant of that application, Gross manifested his intention to seek an assignment of the construction permit to University and failed to inform the Commission of this substantial change in his plans for construction of the station. In addition, while Gross has held the construction permit for station KJOG–TV for more than 3 years, it appears that construction of the station has not commenced and equipment has not been ordered. Since it does not appear that the delay in construction has been due to any difficulty in the procurement of equipment or because of reasons beyond the permittee's control, we are unable to find that Gross has been diligent in proceeding with construction or that causes beyond his control have prevented him from completing construction. Accordingly, appropriate issues shall be specified concerning these matters.

9. The Commission is also of the view that the terms of the agreement between Gross and Broadmoor raise a question concerning possible "trafficking" in the KJOG–TV construction permit. We note that under the terms of the agreement, Gross would retain an option to purchase 15 percent of the stock of a new corporation to be formed by Broadmoor upon the same pro rata terms as Broadmoor shall have acquired its stock in the corporation. The agreement provides that the option may be exercised by Gross within a 2-month period commencing on the last day of the 10th complete calendar month following the date of a grant of program test authority to station KJOG–TV. In addition, except for Gross having to bear his own expenses in connection with the preparation and prosecution of his portion of the assignment application, the agreement provides that Broadmoor and/or the corporation shall bear all costs of forming the corporation, obtaining the permit to issue stock and the issuance of the corporation's stock and that Gross shall have no obligation to make any other funds available to the corporation. The information contained in the tendered assignment application indicates that funds for the construction and first-year operation of station KJOG–TV will be obtained essentially from a $500,000 bank loan and a $500,000 loan from Clinton D. McKinnon, president and 50-percent stockholder of Broadmoor.

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Accordingly, *It is ordered*, That pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned application of Jack O. Gross trading as Gross Broadcasting Co. *Is designated for hearing* at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine whether Gross has violated the provisions of section 1.65 of the Commission's rules.
2. To determine whether Gross has engaged in trafficking in the authorization for station KJOG–TV.
3. In the event that it is determined that there has been a violation of the provisions of section 1.65 of the Commission's rules or trafficking in the station KJOG–TV authorization, whether Gross has the requisite qualifications to be a broadcast licensee.
4. To determine, pursuant to section 309(b) of the Communications Act of 1934, as amended, and section 1.534(a) of the Commission's rules:
   (*a*) Whether the failure to construct station KJOG–TV has been due to causes not under the control of Gross.
   (*b*) Whether there are other matters sufficient to justify a further extension of time to construct station KJOG–TV.
5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience, and necessity.

It is further ordered, That, upon the Commission's own motion, United States International University and Broadmoor Broadcasting Corp. *Are made parties* to this proceeding.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicant, United States International University and Broadmoor Broadcasting Corp., pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1100

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION BY PACIFIC FM, INC., TO ELIMINATE THE REQUIREMENTS OF SECTION 74.481 OF THE COMMISSION RULES CONCERNING LOGGING REQUIREMENTS FOR REMOTE PICKUP STATIONS EXCEPT THOSE RELATED TO FREQUENCY MAINTENANCE In the Matter of AMENDMENT OF SECTION 74.481 OF THE COMMISSION RULES AND REGULATIONS CONCERNING LOGGING REQUIREMENTS FOR REMOTE BROADCAST PICKUP STATIONS	RM-1246

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. On January 22, 1968, Pacific FM, Inc., licensee of FM broadcast station KPEN-FM, San Francisco, Calif., and remote broadcast pickup stations KFG-413 and KH-7586, filed a petition for rule making (RM-1246) requesting that the Commission amend section 74.481 of the rules governing remote broadcast pickup stations so as to delete the requirements for maintaining station records except those concerning frequency maintenance.

2. The petitioner argues that the requirement concerning log entries as to specific hours of operation, programs transmitted, point of origination, pertinent remarks concerning the transmission, checks of antenna lighting and frequency checks (secs. 74.481 (a) (1) through (5) and (b)) are anachronistic, having been carried over from early days of broadcasting when remote pickup operations may have involved setting up lines at fixed places and there might have been some concern as to the proportion of programs originating at such places. It is the opinion of the petitioner that the requirements serve no useful purpose as related to the facts of present day broadcasting.

3. The petitioner further argues that "these rules impose burdens and invite, because of their irrelevancy, inattention and infraction." According to the petitioner, it is impractical and unnecessary to keep records of operating times or programs transmitted because the action is occurring too rapidly and useful records of this type are difficult, if not impossible, to maintain. Moreover, it is alleged, most licensees and their employees do not know what entries to make pursuant to

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paragraph (a)(4); paragraph (a)(5) is too burdensome and must lead to wholesale noncompliance as related to the common use of these facilities in mobile units. In summary, the petitioner asserts that situations calling for any such records are too rare to warrant the rules, that the provisions, other than the one pertaining to frequency measurements, are obsolete and irrelevant, serving no useful purpose and that they are burdensome to the licensee and the Commission's inspection staff alike.

4. The petitioner appears to misunderstand the purpose of the operating logs and the logging requirements themselves. When interference complaints arise, it often becomes necessary to ascertain whether a certain station was operating at a specific time. This is so because it is obviously impossible for the Commission to monitor the operation of all stations at all times. Instead, it requires licensees to maintain certain records of the operation of their stations so that if questions arise as to whether a station was operating at a certain time and date, such information will be available in the log. In the case of mobile stations, it is also important to know where the transmitter was located when it was operated. Log entries, made whenever the transmitter is used, describing the purpose of the operation, are useful in determining whether the use was consistent with the terms of its license and the rules governing the service. The requirement that log entries be made of inspection of antenna illumination is to assure that these hazard markings, where needed to warn aircraft of the presence of the antenna, are maintained in working order. In accepting a license for the operation of any kind of radio station, the licensee is expected to also assume certain responsibilities, among which is the keeping of accurate records of station operation. The argument that such responsibilities are burdensome is without merit.

5. As a matter of fact, the logging requirements for remote broadcast pickup stations are extremely modest, so modest that the petitioner could recommend only that they be eliminated entirely to reduce the burden further. It is possible that the very simplicity of the rule has led to the use of too simple language and licensees misunderstand the requirements. For example, the requirement that the "hours of operation" be logged does not mean that each individual transmission in a series of intermittent transmissions must be logged. "Program transmitted" does not call for a complete description of the program content. "Point of program origination" merely calls for information that would tell where the transmitter was located. In the case of traffic advisory broadcasts from a helicopter, the log would simply show: "4:30 to 6 p.m. a series of intermittent transmissions from a helicopter over various parts of Washington, D.C. advising motorists of traffic conditions." The log entry for a remote pickup station broadcasting a baseball game would show: "2:15 to 4:45 p.m., preliminary setup and broadcast of baseball game from Briggs Stadium, Detroit, Mich., for broadcast (or rebroadcast) by KZYX." "Pertinent remarks" might contain a notation, "transmitter failed 2:43 to 2:50 p.m., replaced defective tube." Typical base station log entries might show: "4:30—contacted mobile unit aboard helicopter for preliminary check. Inter-

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mittent short transmissions giving cues and orders to mobile unit until 6:05 p.m." If the base station had an antenna that was required to be painted and lighted, a log entry would be made of each daily inspection of the lighting and the periodic maintenance check. This requirement has nothing to do with the use of the transmitter. The antenna would be a hazard whether the transmitter were used or not. Short transmissions unrelated to each other should be logged separately. For example, if a roving mobile unit advises the base station that it is going out of service and some time later advised the base station that it is back in service, the transmissions should be logged separately, each with a single time entry; i.e., "12:30 p.m.—advised base station going out of service for lunch." "1:23 p.m.—notified base station—back in service."

4. The petitioner in this case has offered no valid reason for further reducing the logging requirements for remote broadcast pickup stations and its petition must be denied. However, an amendment of section 74.481 to clarify the requirements of the present rule will prevent misunderstanding that may lead to infractions on the one hand or keeping unnecessarily complicated and burdensome records on the other hand. Various licensees of remote broadcast pickup stations have inquired as to whether logs for the mobile station may be kept by the operator at the base station. It is claimed that the operator in the mobile unit is unable to keep a neat and accurate log because of preoccupation with other duties. The amendment adopted herein will make it clear that there is no objection to that practice if adequate precautions are taken to insure that transmissions by the mobile units which are not observed by the operator at the base station, are properly logged. This is accomplished by requiring the operator in the mobile unit to keep a record of transmissions which are not acknowledged by the base station. The amended rule also permits the operator in the mobile unit to keep a rough log, making the entries in the permanent log at the station at the end of the tour of duty.

5. Accordingly, pursuant to the authority contained in sections 4(i) and 303(j) of the Communications Act of 1934, as amended, *It is ordered*, That, effective November 19, 1968, section 74.481 of the Commission Rules *Is amended*. The changes are intended to clarify the requirements of the present rule and are therefore interpreted as declaratory in nature, and prior notice of proposed rulemaking, and the usual waiting period following publication in the Federal Register, are not required.

6. *It is further ordered*, That the petition of Pacific FM, Inc. (RM–1246), filed January 22, 1968, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1089

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Petition of MIDWEST TELEVISION, INC. (KFMB-TV), SAN DIEGO, CALIF., PETITIONER For Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations Into the San Diego Area MISSION CABLE TV, INC., EL CAJON, CALIF.; SOUTHWESTERN CABLE CO., SAN DIEGO, CALIF.; PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIF.; TRANS-VIDEO CORP., EL CAJON, CALIF.; RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIF.; ESCONDIDO COMMUNITY CABLE, INC., ESCONDIDO, CALIF.; VISTA CABLEVISION, INC., VISTA, CALIF., RESPONDENTS	Docket No. 16786

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND WADSWORTH DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it for consideration: (*a*) Six petitions for reconsideration of the decision of June 26, 1968, herein (13 FCC 2d 478), filed by the city of Imperial Beach and the city of National City on July 25, 1968, and by the city of Chula Vista, the city of El Cajon, Southwestern Cable Co. (Southwestern), and Vista Cablevision, Inc. (Vista Cablevision), on July 29, 1968; (*b*) a joint opposition to the petitions of the cities, filed by Midwest Television, Inc. (Midwest), and Western Telecasters, Inc. (Western Telecasters), on August 8, 1968, and their joint response to the petitions of Southwestern and Vista Cablevision, filed on August 13, 1968; (*c*) comments of the Broadcast Bureau on each of the petitions for reconsideration, filed on August 13, 1968; (*d*) a reply to the pleadings of Midwest, Western Telecasters, and the Broadcast Bureau, filed by Southwestern on August 23, 1968; and (*e*) a reply to the comments of the Broadcast Bureau, filed by Vista Cablevision on August 19, 1968.

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2. The petitions for reconsideration request the Commission to reconsider its decision to the extent that carriage of Los Angeles signals is prohibited in the cities of Imperial Beach (5,625 homes), National City (population 46,629, or approximately 15,500 homes), Vista (7,000 homes); in portions of the cities of El Cajon (an additional 3,912 homes) and Chula Vista (an additional 2,000 homes and 120 acres with an unspecified number of homes); and in that portion of Southwestern's franchise area consisting of the communities of La Jolla, South Clairmont, and Mission Beach (totaling approximately 20,000 homes). Southwestern also seeks reconsideration of the entire decision on legal grounds.

3. In support thereof, the four petitioning cities state that they have granted franchises to the systems involved upon a finding that cable television service, including Los Angeles signals, is in the public interest; and that the Commission's order will deprive residents of service which they desire to receive and which is received in other parts of Chula Vista and El Cajon, as well as cause a loss of potential revenues to the cities and undercut city programs for placing utilities underground. In addition, the cities of National City, Chula Vista, and El Cajon request that the matter be set for further evidentiary hearing in the city of San Diego, to receive testimony and views from local governmental authorities and private persons. Vista Cablevision claims that the city of Vista presents a situation similar to Escondido and should be granted a like exception (decision, 13 FCC 2d 478, 502–503). Southwestern asserts that it should be permitted to expand into La Jolla, South Clairmont, and Mission Beach because the potential additional subscribers (estimated by Southwestern to approximate 6,000) would not add significantly to Los Angeles signal operations in the San Diego market or bring the total close to a 50-percent penetration. It also contends that these communities are within the predicted grade B contour of some of the Los Angeles stations and some portions receive Los Angeles signals loud and clear, the San Diego UHF stations would benefit from carriage in these communities, and Southwestern is as deserving of special treatment as Rancho Bernardo or Escondido. Southwestern's threshold challenge to the validity of the decision consists of contentions that the Commission committed prejudicial error by treating the proceeding as rulemaking rather than adjudication, by taking official notice of the KAAR transfer application, and by relieving Midwest of its burden of proof. Southwestern also asserts that the order is violative of the first amendment insofar as it prohibits carriage of television broadcast signals if the system originates advertising material.

4. Western Telecasters, Midwest, and the Broadcast Bureau urge that the petitions of the cities are deficient under section 1.106(b) of the Commission's rules and should be dismissed for failure to show good reason for not participating in earlier stages of the proceeding. In the alternative, it is asserted that the cities' petitions should be denied on the merits because they raise matters of record and arguments which have either already been considered and decided by the Commission or which present no basis for reconsideration. With

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respect to the Southwestern and Vista Cablevision petitions, they urge that the Commission's decision is valid and justified by the record, that Southwestern has not shown any circumstances materially different from other CATV systems covered by the order prohibiting extension of Los Angeles signal carriage, and that Vista Cablevision has failed to show any special circumstances distinguishing Vista from other communities in the area, requiring treatment comparable to Escondido, or warranting an exemption. Western Telecasters and Midwest further urge that there is no constitutional bar to the order relative to CATV origination of advertising material.

I. *The Requests for Special Treatment*

5. We conclude that the petitions of the cities are subject to dismissal for failure to show good reason for not participating as parties in earlier stages of the proceeding, as required by section 1.106(b) of the rules. The cities of Imperial Beach, Chula Vista, and El Cajon give no reason. National City states only that it did not fully appreciate the seriousness of the proceedings and would have appeared as a party had it done so.[1] The requests for further hearing are also deficient under section 1.106 (c) and (l) of the Commission's rules and section 405 of the Communications Act, since they do not claim that the evidence sought to be presented is newly discovered or has become available only since the original taking of evidence, or even indicate the specific nature of the evidence. The record adequately reflects the views of the cities (Mission Cable TV, Inc., exhibits 33–36), and we cannot determine that a grant of their belated proffers of more evidence is required in the public interest or would comport with the proper dispatch of the Commission's business (Secs. 4(j) and 405 of the Communications Act).[2]

6. Moreover, apart from procedural deficiencies, we would deny the petitions of the cities on the merits, for the reasons set forth below. Preliminarily, we note that none of these petitioners has pointed to any error in the decision or raised anything which would cause us to alter our determination as to the overall public interest in the San Diego area, a determination made in the exercise of our responsibilities in the television broadcast field and conclusive as to this Federal interest. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

7. In our judgment, the public interest requires denial of all of the petitions for reconsideration on the merits. Southwestern, Vista Cablevision, and the four cities each seek relief on an individual basis, urging—either expressly or by implication—that an exception would benefit subscribers in the particular community without adding significantly to the Los Angeles signal service authorized by the decision

[1] We affirmed (13 FCC 2d at 512) the order of the Chief Hearing Examiner (67 M–354, Mar. 3, 1967), refusing to move the hearing to San Diego following the direct cases of the parties. While such a move would have facilitated the participation of the cities, we note that the city of Escondido did participate in the hearing before the examiner and in the pleadings filed and oral argument before the Commission. Moreover, as the Chief Examiner noted (67 M–354), no persuasive showing was made that evidence from city officials and members of the public could not have been obtained by the parties through a deposition session in the vicinity of San Diego, pursuant to the then existing provisions of secs. 1.311–1.319 of the Commission's rules (47 FCR 1.311–1.319, rev. Jan. 1, 1968).

[2] See also, *Kidd* v. *Federal Communications Commission*, 302 F.2d 873, 874 (C.A.D.C.); *Colorado Radio Corp.* v. *Federal Communications Commission*, 118 F. 2d 24, 26 (C.A.D.C.).

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or causing any substantial additional impact on the development of San Diego UHF. Viewing each request in isolation, it may be that carriage of Los Angeles signals in any one of the communities involved would not be a matter of great consequence insofar as undercutting our decision is concerned. But, cumulatively, these eight communities represent a sizable number of additional homes (over 50,000) and a significant portion of the San Diego area, particularly when added to the grandfathered areas and the potential for new subscribers in such areas. We see no equitable basis for distinguishing among these communities or for differentiating between them and other communities similarly situated in the San Diego market where carriage of Los Angeles signals is prohibited.[3] None of the petitioners has made any showing of exceptional circumstances, not previously considered by the Commission, which might warrant special relief.

8. We did not determine in our decision that the public interest would be served by authorizing each CATV system in the San Diego market to carry Los Angeles signals to a limited number of subscribers, or to the same number as another system, so long as the total falls short of a 50-percent penetration (13 FCC 2d at 491, footnote 16, 498, 501). Our basic conclusion was that carriage of Los Angeles signals in the San Diego market is not in the public interest or consistent with the Commission's allocations policies. Any exemption granted tends to undercut this determination, and the inroad is aggravated as exceptions accumulate. We recognize that our disposition of this proceeding has resulted in the rather unsatisfactory situation that carriage of Los Angeles signals is permitted in some communities, or portions of some communities, and not in others. In view of our findings and conclusions, we would have preferred to make a blanket prohibition against carriage of Los Angeles signals in all areas within the core of the San Diego market, and would have done so had this been a market where the public interest questions were resolved prior to the commencement of service. But this clean-cut course was not realistically available in view of the impracticability of withdrawing service to the public. Accordingly, we decided to grandfather the relatively small existing Los Angeles service of the CATV systems.

9. The requests for special treatment on reconsideration appear to have been inspired by our further action in making exceptions for the Rancho Bernardo and Escondido systems and the stated reasons therefor (13 FCC 2d at 502–503). There may be some factors in common, though all of the communities except Vista are located farther from Los Angeles and closer to the city of San Diego; none of the petitioners has made a showing comparable to Escondido as to separate isolated location, exceptional terrain, and substantial construction; and none of

[3] Vista is located farther from the city of San Diego than the other communities, and Southwestern claims that Los Angeles signals are better received (and San Diego UHF signals more poorly received) off-the-air in La Jolla, South Clairmont, and Mission Beach than in other areas in the San Diego market. These factors were considered in the decision (13 FCC 2d at 489, 495–496, 500–501, 503, footnote 25). While Los Angeles signal carriage is grandfathered in substantial portions of Chula Vista and El Cajon, these are discrete geographic areas and service to other areas would require an extension of trunk lines. The boundaries within these communities have been established since August 1966, and no compelling reason has been asserted for altering them now. The factor of partial grandfathering within a community also pertains to Mission's systems in the city of San Diego and La Mesa, where further expansion of Los Angeles signal service is prohibited.

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the requests is without objection from other parties as in the case of Rancho Bernardo. Moreover, at the time of the decision, Rancho Bernardo and Escondido were the only communities actively pressing for special relief on equitable grounds and a grant of these two requests entailed only a comparatively small increment to the unavoidable grandfathering. If the requests on behalf of the eight communities now seeking special treatment had also been before us then,[4] the Commission might have declined to make any special exception. For the cumulative effect of adding the additional areas in these 10 communities to the grandfathered areas is clearly substantial, and it is difficult to draw a line once an exception has been permitted. While it would be inequitable to overturn the Rancho Bernardo and Escondido exemptions at this point merely because of a belated assertion of equities by others,[5] we cannot conclude that further exceptions for the eight communities involved in the petitions for reconsideration would be in the public interest or consistent with the conclusions in the decision (13 FCC 2d at 498, 500–502). Our determination would be the same considering only the requests for the four communities involved in the Southwestern and Vista petitions. Moreover, in our view the grant of further exceptions would only compound the present unavoidable discrimination between areas in the San Diego market; indeed, it might logically lead to further requests for special relief. We adhere to our determination that the order of June 26, 1966, constitutes a fair practical compromise resolution of the issues in this case in the circumstances.[6]

Finally, we stated in the second report that we would revise our general rules as we gained experience. Any overall rule revision would also be applicable to the San Diego market, and the Commission would of course entertain petitions to modify the order in this case so that communities in the San Diego market are treated similarly to those in other major markets should such relief become appropriate in the light of a rule revision.

II. *Southwestern's Contentions with Respect to the Validity of the Decision*

10. Southwestern's contention that the Commission erroneously treated the proceeding as rulemaking rather than adjudication, is lacking in merit. In the first place, this is not "a case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing" (Administrative Procedure Act, 5 U.S.C. 554(a)). [Italic supplied.] As Western Telecasters and Midwest

[4] While Vista Cablevision sought special treatment in the proceedings before the examiner, it did not participate in the proceeding following the initial decision or press its case in pleadings or oral argument before the Commission.

[5] We note that none of the petitioners has requested that we do so. See, Vista Cablevision petition, p. 1.

[6] There is one minor respect in which modification of the order appears appropriate now. In grandfathering Los Angeles signals in the discrete geographic areas where they are being carried on trunk and feeder lines in existence on Aug. 23, 1966, we inadvertently overlooked an order of the Court of Appeals for the Ninth Circuit, issued on Oct. 24, 1966, which granted a motion of Southwestern and Mission for modification of the court's order of Aug. 23, 1966, in *Southwestern Cable Co. v. United States*, case Nos. 21183 and 21192 (C.A. 9). We will modify our order to grandfather service commenced pursuant to the court's order of Oct. 24, 1966.

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point out, the matter seems to fall within the definition of rulemaking contained in the Administrative Procedure Act, that is, process for formulating an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy (5 U.S.C. 551 (4) and (5)). In the *Second Report and Order in Docket No. 15971* (2 FCC 2d 725, 776, 781, 782), the Commission decided to utilize the evidentiary hearing procedure to explore the questions presented by CATV operations in individual major markets and to prescribe the future policy applicable to the particular market, and adopted procedural rules to this effect (secs. 74.1107 and 74.1109). An agency decision, embodied in its rules, to make use of the evidentiary hearing process in formulating a substantive rule of particular applicability, does not make this a case of adjudication or of rulemaking required by statute to be made on the record after opportunity for agency hearing or bring into mandatory operation all the requirements of sections 556 and 557 of the Administrative Procedure Act.

11. In any event, this proceeding was conducted in full accordance with the provisions of sections 556 and 557 of the Administrative Procedure Act, section 409 of the Communications Act, and sections 74.1107 and 74.1109 and part I of the Commission's rules (47 CFR 1.1 et seq., 74.1107 and 74.1109). In addition, the Commission accorded oral argument. Our decision was based on the record, and not on our own expert knowledge or factors not of record. Since the issues involved questions as to future probabilities and required a policy judgment, in light of the record, as to what future course would best serve the public interest in the San Diego market, we necessarily brought our expertise to bear in analyzing the record and in drawing reasonable inferences from the evidence compiled. But this would be proper for issues of this nature, in a case of adjudication or rulemaking required by statute to be conducted pursuant to sections 556 and 557 of the Administrative Procedure Act and section 409 of the Communications Act. See decision, 13 FCC 2d at 448–449.[7]

12. We note further that Southwestern asserts only two specific claims of procedural error: (1) That the Commission resorted to extra-record facts by taking official notice of the KAAR transfer application (decision, par. 37, 13 FCC 2d at 494–495) without according Southwestern cross-examination and rebuttal; and (2) that the decision relieved Midwest of its assigned burden of proof. Material facts in applications filed with and granted by the Commission are proper subjects of official notice. Southwestern has not made a timely request for an opportunity to show the contrary, as required by section 556(d) of the Administrative Procedure Act. The request for official notice was made in the proposed findings of Midwest and renewed in the exceptions of Midwest and Bass Bros. to the initial decision. Southwestern did not oppose the request or seek a reopening of the record

[7] We think that *State* v. *Weinstein*, 322 S.W. 2d 778 (Mo. 1959), upon which Southwestern relies, is inapposite. That case involved a State commission order directing a water company to relocate its water mains on a State owned highway right of way at its own expense. The court held that this constituted a modification of license for which State law required an adjudicatory hearing. Moreover, the State commission had not afforded that kind of hearing: "No witnesses were sworn and there was no evidence offered or notice of official notice of facts given by the Commission" (322 S.W. 2d at 785).

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for cross-examination or rebuttal in its reply to the Midwest proposed findings. Nor did it seek such further procedures in its reply to the exceptions, where it stated only that (Southwestern reply, note 19, p. 40): "Midwest's contention (Midwest Brief, note 1, p. 24) that the examiner was required to make findings upon the basis of material contained in the transfer application is plainly erroneous. The contention merits no further discussion." And while Southwestern now claims entitlement to cross-examination and rebuttal on petition for reconsideration, it does not challenge the substance of the matters officially noted or give any indication of what it might show to the contrary. In the circumstances, we decline to reopen the record.[8]

13. Contrary to Southwestern's further assertion, we did not relieve Midwest of its burden of proof. We stated in paragraph 26 of the decision (13 FCC 2d at 489): "On the basis of the record as a whole and for the reasons set forth below, we believe that Midwest has met the requisite burden here." See also, paragraphs 28–50 of the decision, 13 FCC 2d 490–501. The circumstance that we disagreed with the examiner in this respect does not establish that our evaluation of the record is erroneous. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 496. Southwestern's contentions concerning specific evidentiary items and the weight of the record as a whole are essentially repetitive of arguments fully considered in the decision. We reaffirm our substantive findings and conclusions for the reasons there stated (13 FCC 2d at 487–503), and reject the claims of procedural invalidity.

14. Southwestern's final argument is that the order prohibiting carriage of television broadcast signals if the system originates advertising material, is violative of the first amendment and beyond the Commission's statutory authority. It is asserted, first, that the practical effect of this indirect approach is to prohibit the origination of advertising material by any of the respondents operating as a CATV system. If Southwestern means to imply that the condition on carriage of broadcast signals is invalid as an indirect abridgement of a constitutional right to present advertising material, we reject the contention. Since advertising, although not wholly beyond the first amendment, enjoys less protection than other speech,[9] the Commission's power to regulate advertising by persons subject to its jurisdiction may be broader than it is with respect to other programing. Cf. *Head* v. *Board of Examiners*, 374 U.S. 424, 437–441. A direct prohibition against, or regulation of, advertising is not violative of the first amendment if based on grounds reasonably related to the public interest and the Commission's statutory responsibilities. For example, the Commission has long prohibited commercials by educational radio and television stations (see, e.g., sec. 76.621 of the Commission's rules), and it has never been suggested that this prohibition is constitutionally infirm. See, also, section 392 of the Communications Act. The

[8] Southwestern's petition for reconsideration does not challenge our further action in taking official notice of the construction permit granted on Sept. 11, 1967 (file No. BPCT–4011), or the circumstances pertaining to Jack O. Gross which we officially noticed at the request of the CATV systems (decision, par. 43, 13 FCC 2d at 497).

[9] See *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Valentine* v. *Christensen*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Beard* v. *Alexandria*, 341 U.S. 622, 641–643.

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indirect prohibition against commercials in CATV originations rests on equally valid public interest grounds not related to the content of the commercials (decision, par. 63). Moreover, Southwestern remains entirely free to present any advertising material that it chooses if it ceases carrying broadcast signals.

15. Southwestern claims further that the condition abridges its right under the first amendment to receive and distribute broadcast signals. We find this contention lacking in merit for the reasons stated in paragraphs 58–59 of the decision. Cf. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, 387 F. 2d 220, 225 (C.A.D.C.); *Black Hills Video Corp.* v. *United States*, 399 F. 2d 65, 69 (C.A. 8). We also reject Southwestern's argument that the Commission's statutory and constitutional authority in this area arises only by virtue of the limitation on available spectrum space and does not extend to CATV operations that do not use the frequency spectrum over which the Commission has licensing jurisdiction. "The Commission's effort to preserve local television by regulating CATV's has the same constitutional status under the first amendment as regulation of the transmission of signals by the orginating station" and it is "irrelevant to the congressional power that the CATV systems do not themselves use the air waves in their distribution systems" (*Black Hills Video Corp.*, supra). The Commission's statutory "authority over 'all interstate * * * communication by wire or radio' permits the regulation of CATV systems" to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157). We think that the condition on carriage of broadcast signals, based on the grounds set forth in paragraph 63 of the decision, is within that authority.

III. *Miscellaneous*

16. The Commission in the decision accepted an offer by Mission and Midwest to conduct tests and studies to identify and eliminate the causes of degradation of the KFMB–TV signal on the Mission systems, and directed our engineering staff to furnish such assistance as might be requested. We deferred a resolution of issue 2 in this proceeding pending receipt of their report as to the results of the tests and studies. Since no report has yet been submitted to the Commission, we are not in a position to resolve that issue now. However, in view of the considerable time that has elapsed since our decision of June 26, 1968, we shall require Mission and Midwest to file a report concerning the progress of their efforts within 30 days from the issuance of this order and shall direct the Commission's Chief Engineer to submit written comments on such report within 20 days thereafter. Pending consideration of the progress report and comments, we shall retain jurisdiction over issues 2 and 9 in this proceeding.

17. Accordingly, *It is ordered*, That:

(1) The petitions for reconsideration filed by the cities of Imperial Beach, National City, Chula Vista, and El Cajon on July 25 and July 29, 1968, *Are dismissed.*

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(2) The petitions for reconsideration filed by Southwestern Cable Co., and Vista Cablevision, Inc., on July 29, 1968, *Are denied.*

(3) Respondent CATV systems *Are authorized* to continue to carry Los Angeles signals in the discrete geographic areas where such service was commenced pursuant to the court's order of October 24, 1966, in *Southwestern Cable Co.* v. *United States*, case Nos. 21183 and 21192 (C.A. 9).

(4) Midwest Television, Inc., and Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. *Are directed to file* with the Commission, on or before December 9, 1968, a report as to the progress of their tests and studies to ascertain and eliminate the causes of the degradation of the signal of station KFMB–TV; and the Commission's Chief Engineer *Is directed to file* written comments on such report on or before December 30, 1968. Pending consideration of such report and comments the Commission will retain jurisdiction as to issues (2) and (9) in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONERS ROBERT T. BARTLEY AND JAMES J. WADSWORTH

This case involves the first Commission decision in an evidentiary hearing on the respondents' importation of distant television signals into the San Diego market pursuant to section 74.1107 of our CATV rules.

Only two Commissioners voted for the decision itself. One Commissioner concurred in the result; one Commissioner concurred in part of the result; and three Commissioners dissented.

In our dissenting opinion (joined by then Commissioner Lee Loevinger) 13 FCC 2d 478, at 512, we stated:

> This case was set for hearing on 10 specified factual issues. An extensive hearing was held on all of these issues before an experienced and competent hearing examiner, who made careful findings on each of the issues after hearing the witnesses, reviewing the exhibits, weighing the evidence, and considering the arguments of counsel. The Commission now reverses substantially all of the findings and conclusions of the hearing examiner without any additional or different evidence before it.
>
> Having heard oral argument and examining the evidence of record, we are of the opinion that the Commission's holding of adverse impact on UHF stations in San Diego is unsupported.
>
> As the majority opinion states (in par. 27), the Commission decision is, in effect, based upon the Commission's supposed "expertise" and its "judgment as to substantive policy." However, the Commission's expertise is supposed to be derived from experience with the facts disclosed in cases before it, and this is the first case of this kind in which the Commission has made a full factual inquiry. In any event, we believe that factual issues should be decided on the basis of the evidence contained in the record before the Commission rather than on the basis of preconceptions, assumptions, and theoretical views as to the desirable result. The reasoning of the majority seems to us to be hypothetical and illusory. Accordingly, we dissent.

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The memorandum opinion and order here denying reconsideration of the said decision states that "our decision was based on the record, and not on our own expert knowledge or facts not of record" (par. 11). Yet, in the same paragraph, it is admitted that "we necessarily brought our expertise to bear in analyzing the record and in drawing reasonable inferences from the evidence compiled." We reiterate the contention in our dissent that the findings and conclusions were not based on the record. Rather, we believe, they were based upon inferences not reasonably related to the evidence compiled; upon substituting expertise for facts of record; and upon analyzing facts of record to reach a predetermined policy.

The memorandum opinion and order here denying reconsideration seems to argue that this was a rulemaking proceeding not required by statute to be determined on the record, and, thus, extra-record material could be considered. We reject that argument. The order setting this matter for evidentiary hearing neither stated nor implied that this was a rulemaking proceeding. To the contrary, the said order stated, in paragraph 16, "We think Midwest [petitioner] has presented a classic case for a hearing with respect to the general issues of expansion of *respondents' CATV systems* throughout the San Diego market area" (italic added). Thus, the proceeding was to determine whether the respondents' CATV systems should be allowed to bring in Los Angeles signals. In short, it was to adjudicate Midwest's claim against those systems and not to establish a definitive rule allowing or barring all systems, now or at some future date, to import distant signals from whatever source.

Importantly, if this case were considered to be a rulemaking proceeding as indicated by the Commission majority, other parties interested in establishing CATV systems carrying distant signals into the San Diego market lacked adequate notice or opportunity to be heard. The proceeding was not opened to all who may have had an interest in the outcome of such a rule. To the contrary, the proceeding was restricted to the parties specified in the hearing order.

This case was, in our opinion, an adjudicatory proceeding on the merits of Midwest's petition to preclude the respondents from carrying Los Angeles signals on their CATV systems in the San Diego market and, accordingly, the decision should have been based on the record made and not on Commission speculation, expertise, and inferences.

Further, the decision here involved is farreaching in its effects and in the policies it establishes. In our opinion that decision, supported by only two Commissioners, should be reconsidered and reversed.

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FCC 68–1070

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In re
LICENSEE RESPONSIBILITY AS TO POLITICAL BROADCASTS

(October 28, 1968)

The Commission, by Commissioners Bartley (Acting Chairman), Cox, Wadsworth, and Johnson, approved the following Public Notice, released October 29, 1968.

The Commission has received information indicating that some licensees have policies proscribing or severely limiting political broadcasts over their facilities. In view of the limited time left for the campaign, the Commission, without focusing on particular matters or stations, wishes again generally to call licensees' attention to the desirability of making their facilities effectively available to candidates for political office even though this may require modification of normal station format. See Public Notice of August 22, 1968, FCC 68–860. Specifically, the licensees' attention is directed to the 1960 decision of the Supreme Court of the United States in *Farmers Educational and Cooperative Union of America, North Dakota Division* v. *WDAY, Inc.*, 360 U.S. 525, in which the Court stated, in part, that:

> * * * [T]he thrust of section 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcast a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit.

In short, the presentation of political broadcasts, while only one of many elements of service to the public (see *Report and Statement of Policy re Commission En Banc Programing Inquiry, 1960*, FCC 60–970; see also *Commission Memorandum to House Subcommittee on Communications and Power on H.J. Res. 247*, FCC 63–412), is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic.

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FCC 68–1086

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In re Complaint of
DAVID DICHTER, ATLANTIC CITY, N.J.; CONCERNING SECTION 315 POLITICAL BROADCAST

(October 31, 1968)

DAVID DICHTER,
1607 Atlantic Avenue, Atlantic City, N.J.:

The Commission has ruled upon your complaint against station WOR–TV, New York, N.Y. The complaint alleges that the station presented Representative Charles Sandman, your rival for the office of Congressman from New Jersey's Second Congressional District, on October 27, 1968, on the news interview show, "New Jersey report," and that it has refused to afford you an opportunity to appear. The station has responded that the program on which Representative Sandman was interviewed was a bona fide news interview show and thus an exempt one under section 315(a)(2); that Representative Sandman was interviewed on the current New Jersey bond referendums since he was "a vocal opponent" of the bond issue and that a proponent of the bond issue had previously appeared on the same news interview show. The station further states that your congressional district, the Second Congressional District of New Jersey, lies outside the coverage area of WOR–TV. On these bases, the station declines to afford time.

The Commission agrees that the equal-opportunities clause of section 315(a) is inapplicable, since the appearance of Representative Sandman was on an exempt program. As to the remaining question of the applicability of the concluding proviso of section 315(a), the Commission finds that on the showing before it, and particularly the station coverage aspects of the matter, it cannot conclude that the judgment of the licensee was inconsistent with the Fairness Doctrine.

Chairman Hyde absent. Commissioner H. Rex Lee not participating.

By direction of the Commission,

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

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FCC 68-1065

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In re Complaint of
SOCIALIST WORKERS PARTY; CONCERNING
EQUAL-TIME PROVISIONS OF SECTION 315

(October 23, 1968)

WILLIAM S. GREEN, Esq.,
Pierson, Ball & Dowd,
1000 Ring Building,
Washington, D.C. 20036.

DEAR Mr. GREEN: This refers to your letter dated October 15, 1968, as counsel for the licensee of station WOR-TV, requesting a ruling from the Commission based upon the following stated facts:

> On September 23, 1968, Mr. Paul O'Dwyer, the Democratic candidate for U.S. Senator from the State of New York, appeared on the WOR-TV (channel 9) television program entitled "Sound Off With Malachy McCourt."
>
> The station thereafter received a letter dated September 23, 1968, from the Socialist Labor Party requesting "equal time" for Mr. John Emanuel, its candidate for U.S. Senator from the State of New York. The station acceded to the request; and Mr. Emanuel appeared on WOR-TV for a half hour broadcast on October 13, 1968.
>
> On October 10 or 11, 1968, WOR-TV received a letter dated October 9, 1968, from the Socialists Workers Party requesting that it make available to Miss Hedda Garza, its candidate for U.S. Senator from the State of New York, "equal time" by reason of the time furnished by the station to Mr. John Emanuel.

You contend that Miss Garza is not entitled to equal opportunities since the time was made available to Mr. Emanuel because "of the time originally given to Mr. O'Dwyer on September 23, 1968, and the timely requests submitted to the station by the Socialist Labor Party on Mr. Emanuel's behalf"; that Miss Garza's request was not made " 'within the 1-week period referred to in section 73.120(e) of the Commission's rules,[1] but was made prior to the beginning of that week; that is, while the Emanuel broadcast took place on October 13, 1968, the Garza request was dated October 9, 1968." Furthermore, you state that "even if such request had been made 'within 1 week of the day on which' the Emanuel broadcast took place, we submit that Miss Garza nevertheless is not entitled to 'equal time.' We believe that 'the prior use' contained in section 73.120(e) refers to the original Paul O'Dwyer broadcast. To reach any other conclusion would make possible a chain of

[1] Sec. 73.120(e) is applicable to standard broadcast stations; sec. 73.657(e) is applicable to television stations.

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'equal time' requests which would go on and on, each succeeding request triggered by a preceding grant of 'equal time,' and would negate completely the 1-week cutoff which obviously is the underlying reason for section 73.120(e)."

The statute provides that where one candidate is permitted to use the station's facilities, the licensee "shall afford equal opportunities to all other such candidate for that office * * *." The Commission, pursuant to section 315(c), has adopted the 7-day rule in order to permit orderly planning of station activities in political broadcast situations (e.g., candidate A might use many hours of time over an extensive period, with his rival, B, waiting until the last week to claim his "equal time" and thus taking up a very considerable part of the station's hours of operation in that last week). Whether Miss Garza is to be denied "equal opportunities" in this case thus turns initially upon construction of section 73.657(e) as urged by you. The rule reads in terms of a request being submitted "to the licensee within 1 week of the day on which the prior use occurred"; to have the restrictive effect urged by you, the rule would have to be explicitly worded in terms of "the prior first [or initiating] use."

As to the policy consideration raised in your letter, we recognize the desirability of affording orderly procedures in this area, so that, as stated, the licensee may engage in appropriate planning of its schedule; otherwise, some licensees might have a tendency to avoid, to some degree, the presentation of political broadcasts—a tendency which would not serve the public interest. See *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1958). Section 73.657(e) generally affords such a degree of orderly planning. It is, of course, fully effective in the two-candidate race, and, as a practical matter, would appear to be effective in all races, since candidates usually desire time and do not let their section 315 rights depend on the actions of their rivals (e.g., C usually will not depend upon B asserting 315 rights as to A, the first user). Further, the licensee may seek to have reasonable accommodations with candidates as to the time of presentation of their broadcasts.

As to your final contention concerning section 73.657(e), the Commission has always recognized as valid and appropriate a request for equal opportunities made prior to a section 315 broadcast if it is directed to a specific future section 315 use which was then known or announced prior to the actual broadcast.

Accordingly, under the facts set forth in your letter, Miss Garza would be entitled to equal opportunity pursuant to section 315.

Commissioners Hyde (Chairman); and Cox absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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FCC 68-1071

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In re Complaint of
SOCIALIST LABOR PARTY; CONCERNING EQUAL-TIME PROVISIONS OF SECTION 315

(October 28, 1968)

VICTOR E. FERRALL, Jr., Esq.,
Koteen & Burt,
1000 Vermont Avenue, N.W.,
Washington, D.C. 20005

DEAR MR. FERRALL: This refers to the request timely made to your client, station WGR-TV, Buffalo, N.Y., on behalf of Socialist Labor Party presidential candidate, Henning A. Blomen, for opportunities equal to those granted Hubert H. Humphrey. By letter dated October 24, you state that during Mr. Humphrey's visit to Buffalo on September 17, 1968, WGR-TV broadcast a 30-minute "press conference" during which the Vice President was interviewed on problems of particular interest to the city of Buffalo by three persons selected by the news department of WGR-TV; namely, the mayor of Buffalo, the associate dean of international studies at the State University of New York at Buffalo, and a member of the New York City Board of Education. You state that the questions asked were selected by the interviewers and that Mr. Humphrey had no advance knowledge of the questions and no opportunity to make statements other than in response to the questions.

You contend that because of the importance and news value of the event, the broadcast constituted on-the-spot coverage of a bona fide news event and therefore, under section 315(a) of the Communications Act, was not a use of the station.

You also contend that the program consisted of a bona fide news interview under section 315(a). You state that you are aware that the congressional conference report interpreting that portion of section 315 related to regularly scheduled news interview programs and that the Commission's decisions have relied upon that legislative history, but you state that the statute itself does not limit the exemption to regularly scheduled news interviews; that it was the intent of Congress not to exempt interviews which are under the control of the candidate, and that the Humphrey news conference broadcast on September 17 was not controlled by him, and therefore it should be deemed a bona fide news interview.

We have carefully considered the reasons set forth for your position. However, the interpretation of section 315 urged by you is contrary to

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the Commission's long-established definitions of both bona fide news interviews and bona fide news events for the purposes of that section.

As to whether the broadcast of the interview with Vice President Humphrey constituted on-the-spot coverage of a bona fide news event, we ruled under analogous circumstances that a debate between the two principal candidates for the office of Governor of California, was not a bona fide news event within the meaning of the statute, because neither the language of the amendment, its legislative history nor subsequent congressional action indicated a congressional intent to exempt such an event from the "equal opportunities" provision of section 315. The Commission further stated that the bona fides of the licensee's news judgment was not the sole criterion to be used in determining whether section 315(a)(4) had been properly invoked. (See letter to NBC and CBS, Oct. 26, 1962, 40 F.C.C. 370, summarized in question and answer 26, sec. III. C. Political Broadcast Primer, Public Notice of Apr. 27, 1966, 31 F.R. 6666.) In a more recent ruling on this point, we have similarly held that a "Presidential press conference" by an incumbent who was a candidate for reelection, is not exempt under section 315(a) (2) or (4). (See letter to CBS, Sept. 30, 1964, *ibid.*, question and answer 27.) These rulings, and our ruling in this case, are compelled by a commonsense construction of the statute, since the contrary interpretation of section 315(a)(4) would mean that Congress, instead of adopting but four limited exemptions, had in effect, largely repealed the equal-opportunities provision of section 315. (See letter to NBC and CBS, 40 F.C.C. at p. 371.)

Similarly, on the basis of the legislative history of the amendment to the act, the Commission has consistently held that in order to qualify as a "bona fide news interview" the program must be regularly scheduled. (See, ibid, questions and answers 6–14, sec. III. C.) Congress was at pains to specify this requirement in the legislative proceedings leading to this revision (H. Rept. No. 1069, 86th Cong., first sess., p. 4, "the intention of the committee of conference is that in order to be considered "bona fide" a news interview must be a regularly scheduled program"), proceedings in which this agency participated fully. The criterion of "regularly scheduled," as a crucial element to come within the exempt "bona fide news interview," has therefore constituted the contemporaneous and consistent construction of the Commission, which was specifically charged with the issuance of rulings in this area. (See Rept. No. 562, 86th Cong., first sess., p. 12.)

Accordingly, we rule that the appearance of Vice President Humphrey on WGR–TV on Sept. 17, 1968, constituted a use of the licensee's facilities within the meaning of section 315. You are therefore directed to accord "equal opportunities" to Mr. Blomen in accordance with the statute.

Chairman Hyde and Commissioners Robert E. Lee and H. Rex Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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FCC 68-1093

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
TROPICAL RADIO TELEGRAPH CO.
Proposed tariff revisions providing for the pickup and delivery of international messages and the furnishing of customer tielines within the "metropolitan areas" of New Orleans, La., and Miami, Fla.

Docket No. 18372

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it: (*a*) Proposed revisions to Tariff FCC No. 60, issued by Tropical Radio Telegraph Co. (TRT) on September 27, 1968, now scheduled to become effective on November 8, 1968, providing for the pickup and delivery of international telegrams and the furnishing of customer tielines within the "metropolitan areas" of New Orleans, La., and Miami, Fla.;[1] (*b*) a petition filed by The Western Union Telegraph Co. (Western Union) to reject or suspend and investigate TRT's revisions;[2] and (*c*) TRT's reply, filed on October 28, 1968, to Western Union's petition.

2. TRT presently serves directly only customers located within the corporate limits of New Orleans and Miami. By its tariff revisions it would expand its service area to the "metropolitan areas" of these cities. By the terms of the proposed revisions the metropolitan area of Miami would include the corporate limits thereof and Coral Gables, Goulds, Hialeah, Kendall, Miami Beach, Miami Shores, Miami Springs, North Miami, North Miami Beach, South Miami, Surfside. The following communities, in addition to New Orleans proper, would be included within the New Orleans metropolitan area: Ama, Arabi, Avondale, Belle Chasse, Bridgedale, Bucktown, Chalmette, Gouldsboro, Green Ditch, Gretna, Hanson City, Harahan, Harvey, Kenner, Marrero, Meraux, Metairie, Shrewsbury, Southport, Violet, Waggaman, Westwego, Willswood.

3. Western Union alleges that TRT's tariff offering would encroach upon its area of domestic operations, jeopardize and dilute its revenues,

[1] The specific tariff pages at issue are 102d and 103d revised, p. 1; seventh and eighth revised, p. 2; eighth and ninth revised, p. 9; fifth and sixth revised, p. 10; original and first revised, p. 10A; and original and first revised, p. 10B.

[2] Western Union submitted a telegraphic request on Oct. 18, 1968, which was confirmed by a petition in the usual form filed on Oct. 21, 1968.

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and engender a wasteful and uneconomic duplication of facilities without any offsetting benefits to the public. It contends that such revisions are contrary to the international formula for the distribution of outbound international traffic as well as violative sections 201(b), 202(a), and 222 of the Communications Act, and that TRT lacks section 214 authorization to provide the proposed service.

4. Western Union's request for rejection is apparently based upon its section 214 contention. In this regard, however, it has not indicated that TRT would have to extend its lines in a manner requiring section 214 authorization in order to provide the services offered by the tariff revisions. Western Union's request for rejection cannot therefore be granted.

5. On the other hand, substantial questions are presented as to the lawfulness of TRT's revisions. At present, the international record carriers, with certain recognized exceptions, confine their operations to the corporate limits of the gateway cities in which they maintain public offices. The pickup and delivery of international messages outside the gateway cities, i.e., in the hinterland, are provided by Western Union. We have previously stated that we "recognize that as the carrier obligated to provide a nationwide telegraph service, Western Union should be afforded the opportunity to provide pickup and delivery service for international messages in the hinterland so long as it does so in a manner to meet the legitimate requirements of users, unless there are other special considerations which indicate to us that the public interest might be served by permitting other carriers to provide this service" (*Press Wireless, Inc.*, 21 FCC 511, 528 (1956).) TRT has not demonstrated by the pleadings before us that the legitimate requirements of the users in the suburban communities which it desire to serve are not being met by Western Union or that special considerations exist which indicate that the public interest would be served by permitting it to serve these communities directly. Accordingly, we are unable to determine at this time that the charges, classifications, regulations, and practice contained in TRT's proposed tariff revisions are or will be just and reasonable and otherwise lawful within the meaning of sections 201(b) and 202(a) of the Communications Act. Until the lawfulness of its revisions are determined through the hearing process, we do not think that TRT should commence this service, which it later may be directed by the Commission to terminate. We will therefore grant Western Union's request that TRT's revisions be suspended for the full statutory period.

Accordingly, *It is ordered*, pursuant to the provisions of section 4(i), 201, 202, 204, 205, and 403 of the Communications Act, That an investigation is hereby instituted into the lawfulness of the tariff revisions specified in footnote 1 hereinabove;

It is further ordered, That, pursuant to the provisions of section 204 of the Communications Act, such tariff revisions are *Hereby suspended* until February 8, 1969, and that during that period no changes shall be made in such tariff revisions except as authorized or directed by the Commission;

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It is further ordered, That, without in any way limiting the scope of the proceeding, it shall include inquiry into the following:

1. Whether Western Union is meeting or is able to meet the legitimate needs of users of international record services in the suburban communities to be served pursuant to the subject tariff revisions;
2. Whether TRT's proposed revisions would result in the duplication of services and facilities presently being provided by Western Union; and, if so, the extent of such duplication of services and facilities;
3. Whether TRT's proposed revisions would result in a diversion of revenues from Western Union for the landline handling of international traffic; and, if so, the extent of such diversion of revenues;
4. Whether any special circumstances exist which would indicate that it would be in the public interest to permit TRT to serve the suburban areas of New Orleans, La., and Miami, Fla., as proposed in its tariff revisions;
5. Whether, in the light of all the evidence including that adduced in reference to the foregoing issues, the charges, classifications, regulations, and practices contained in TRT's proposed revisions are or will be lawful under sections 201(b) and 202(a) of the Communications Act; and
6. Whether the Commission should prescribe just and reasonable charges, classifications, regulations, and practices to be hereafter followed with respect to the service under investigation; and, if so, what charges, classifications, regulations, and practices should be prescribed.

It is further ordered, That a hearing be held in the proceeding at the Commission's offices in Washington, D.C., at a time to be specified in a subsequent order and that the hearing examiner designated to preside at the hearing shall certify the record to the Commission for decision without preparing either an initial decision or a recommended decision, and that the Chief, Common Carrier Bureau, shall prepare and issue a recommended decision, which shall be subject to the submittal of exceptions and requests for oral argument as provided in section 1.276 and 1.277 of the Commission's rules (47 CFR, secs. 1.276 and 1.277) after which the Commission shall issue its decision as provided in section 1.282 of the Commission's rules (47 CFR, sec. 1.282);

It is further ordered, That TRT is hereby made party respondent to this proceeding and that Western Union is hereby granted leave to intervene in this proceeding provided that not less than 20 days from receipt of a copy of this order it files a notice of intention to intervene;

It is further ordered, That the petition of Western Union to reject or suspend TRT's tariff revisions *Is granted* to the extent indicated hereinabove and in all other respects *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1098

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WATR, INC. (WATR-TV), WATERBURY, CONN. For Construction Permit To Change Facilities of Existing Television Broadcast Station	Docket No. 18376 File No. BPCT-3888

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSTAINING FROM VOTING; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has before it for consideration : (*a*) Application captioned above filed November 17, 1966, as amended; (*b*) petitions to deny filed by Connecticut Television, Inc., licensee of station WHNB-TV, channel 30, New Britain, Conn., and Impart Systems, Inc., permittee of station WTVU, channel 59, New Haven, Conn.; and (*c*) various related pleadings.[1]

2. WATR, Inc., presently operates with a visual effective radiated power of 200 kw in the horizontal plane (398 kw maximum at 1° tilt) with an antenna height above average terrain of 510 feet at a location of 0.2 miles south of Waterbury. The proposed operation specifies a horizontal visual effective radiated power of 792.5 kw (1,000 kw maximum at 0.7° tilt) with antenna height above average terrain of 1,240 feet a location approximately 8 miles southeast of the present site.

3. Connecticut Television, Inc. (hereinafter Contel), claims standing pursuant to section 309(d) of the Communications Act of 1934, as amended, and in support alleges that WATR would, in the event of a grant, be direct competition for audience and revenues, that both stations are affiliates of same network and the resulting duplication will cause a reduction of rates, and that as a result the petitioner will suffer economic injury and would otherwise be adversely affected. We find that Contel's allegations of fact are sufficient to support its claim to standing as a party in interest. *Federal Communications Commission* v. *Sanders Brothers Radio Station* 309 U.S. 470.

4. Impart Systems, Inc. (hereinafter Impart), filed its petition to deny on March 18, 1968, approximately 16 months after the filing date of the application. The contention is made that since Impart was not at the time the permittee, it could not have filed a petition; however, the applicant points out that after Impart's interest ripened it never-

[1] These pleadings are listed in an attached appendix.

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theless did not file until 7 months after that date and it has not justified the late filing. Applicant contends therefore, the Impart petition is hopelessly untimely and must be dismissed. Impart argues that it has standing and that it would have standing to file a petition for reconsideration in the event of a grant and should therefore be given standing to file at this time. We agree with the applicant that the petition is not timely and that no justification for filing long after its interest ripened has been submitted. We must conclude, therefore, that Impart has not asserted its claim timely. The fact that Impart may at some time in the future have standing to file a petition for reconsideration does not operate to make its petition timely. However, the allegations are quite similar to the Contel's petition and, therefore, we will treat the Impart pleadings as informal objections pursuant to section 1.587 of the rules and consider them on the merits.

5. Contel and Impart urge denial of the WATR application because the proposal is allegedly inconsistent with the provisions of section 73.685 (a) and (b) of the rules [2] and would result in a loss of service to the people of Waterbury; that a grant would have an adverse impact upon UHF development in that it would foreclose the activation of station WTVU in New Haven; and that a grant would effect a de facto reallocation of channel 20 inconsistent with the provisions of section 73.606, of the Commission's rules. The foregoing are the "major defects" according to Contel and Impart.

6. In addition, it is asserted that the applicant has failed to comply with Commission requirements necessary to qualify for favorable consideration. In this latter connection it is asserted that:

(*a*) The applicant has not established its financial qualifications.

(*b*) Has not made a sufficient study of programing needs of those residing [3] in the proposed service area.

(*c*) The applications specification of an ABC rather than an NBC affiliation is a misrepresentation as to programing.

(*d*) The applicant failed to comply fully with the public notice [3] requirements of Section 1.580 of the Commission's rules.

(*e*) The applicant has not demonstrated likelihood of appropriate zoning for proposed site.

(*f*) The applicant has not demonstrated the continued availability of the NBC affiliation.

(*g*) The applicant has failed to seek waiver of section 73.613(a) of the Commission's rules relative to the main studio.

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[2] Sec. 73.685 provides that a minimum field intensity of 80 dbu will be provided over the entire principal community to be served, channels 14–83.

Sec. 73.685(b) provides: "Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the intensity of the stations' signals. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available. To provide the best degree of service to an area it is usually preferable to use a high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path. The antenna must be constructed so that it is as clear as possible of surrounding buildings or objects that would cause shadow problems. It is recognized that topography, shape of the desired service area, and population distribution may make the choice of a transmitter location difficult. In such cases, consideration may be given to the use of a directional antenna system, although it is generally preferable to choose a site where a nondirectional antenna may be employed."

[3] In response to a Commission letter adopted Jan. 4, 1968, requesting a further survey and new publication, the applicant submitted a new survey and perfected publication. The Commission is of the view that the applicant has made an adequate survey of the programing needs of those within its service area and that its programing is responsive to those needs. No further challenge with respect to these matters has been made by petitioners.

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7. In asserting that from the proposed site WATR will not place a minimum signal of 80 dbu over Waterbury, Contel and Impart have attacked applicant's technical showing which is based on "A Method of Predicting the Coverage of a Television Station," by J. Epstein and D. W. Peterson (Epstein-Peterson), and allege that the Epstein-Peterson method has been superseded by more recent studies. Contel, instead uses a different method, the La Grone analysis, and states that based upon the La Grone method 60 percent of Waterbury would lie below line-of-sight as compared with 17 percent from the present site, and that this will result in severe shadowing so that there will be a marked deterioration of service to Waterbury. Under these circumstances, Contel contends that there is no compliance with section 73.685(b) of the rules and that a grant would be inconsistent with the public interest citing *Television Corporation of Michigan, Inc.*, v. *Federal Communications Commission* 111 U.S. App. D.C. 101.

8. Contel next argues that given failure to provide a city grade signal over Waterbury, the location of the proposed site closer to New Haven than to Waterbury and the fact that a predicted city grade signal will be provided to all of New Haven for the first time it is clear that WATR is seeking to become a New Haven station thus effecting a de facto reallocation of channel 20 inconsistent with the provisions of section 73.607 of the rules. *St. Anthony Television Corporation*, 10 R.R. 2d 38. Moreover, Contel contends that the Commission's decisions in the *Triangle* cases [4] which denied a similar move by station WHNC–TV, channel 8, New Haven (UHF impact), demonstrated a concern for the delicate balance of TV allocations in the area and that the principles enunciated therein are equally applicable to the case at hand.

9. In support of the contention that grant of the WATR application may foreclose activation of station WTVU, it is alleged that at the present time WATR, despite a predicted signal over New Haven, does not provide a quality technical service to New Haven. Under these circumstances, the argument is advanced that if the WATR application is denied, WTVU may obtain the NBC network affiliation without the establishment of a viable operation is doubtful and that, conversely, a grant will preclude such an affiliation since WATR is presently an NBC affiliate. Impart similarly attacks the WATR proposal, but its conclusions as to failure to comply with the minimum city signal requirements are grounded upon calculations described in the National Bureau of Standards (NBS) publication, Technical Note 101 (revised Jan. 1, 1967). Impart concludes that based on NBS procedures 36.5 percent of the city of Waterbury would not receive a city grade service. Moreover, Impart asserts that the move would result in a de facto reallocation of the channel to New Haven and would therefore preclude, for the foreseeable future, institution of service on channel 59. In addition, Impart claims that there is a substantial question as to whether WATR will be able to obtain the necessary zoning approval for the proposed site.

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[4] *Triangle Publications, Inc.*, 17 R.R. 624; aff'd. 110 U.S. App. D.C. 214 (1961) *Triangle Publications, Inc.*, 3 R.R. 2d. 37.

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10. Waterbury is located in New Haven County and is a part of the Hartford-New Haven market also known as the Hartford-New Britain-New Haven-Waterbury market, ARB rank No. 14. There are two VHF stations assigned to the market: Station WTIC–TV, channel 3, Hartford (CBS), and station WHNC–TV, channel 8, New Haven (ABC). Additionally two UHFs, Contel's station WHNB–TV, channel 30, New Britain (NBC) and WATR–TV, channel 20, Waterbury (NBC) also serve the area. The broadcast revenues for the four stations [5] in 1967, show a total of $14,644,000, expenses of $7,552,000 and income before Federal taxes of $7,112,000. The net weekly circulation figures as of March 1967 for each of the stations are: WTIC–TV, 819,000; WNHC–TV, 683,000; WHNB–TV, 346,000; WATR–TV, 29,000. The network hourly rates for the four stations are: WTIC–TV, $2,500; WNHC–TV, $2,250; WHNB–TV, $650; WATR–TV, $200. Both UHF stations, WHNB–TV and WATR–TV, have been in operation since 1953.

11. WATR, in support of its proposal, argues that despite the proposed move it will continue to provide the degree of signal required by the rules and that any slight lessening of signal over Waterbury is more than offset by the very substantial gains, particularly in the New Haven area, where NBC programing will be available for the first time. Moreover, the proposal would enable WATR to become fully competitive in its "metro" area and would thus serve the public interest. *New Orleans Television Corp.* 23 R.R. 1113. *Television Broadcasting, Inc. (Beaumont, Tex.)*, 4 R.R. 2d 119. In this latter connection, WATR points out that it has in its years of operation, accumulated a deficit of more than $125,000 and that its position is precarious and continued operation under the present conditions cannot be guaranteed. In opposing the Contel and Impart contentions, WATR asserts that in the *Triangle* cases [6] the Commission found that WNHC–TV, New Haven, a VHF station, was seeking to expand its primary service area to include an entirely separate all UHF market, whereas WATR is proposing to improve and expand in its own market. WATR also points out that the Commission found a loss of service to part of the New Haven market and that WNHC–TV could not make a showing that the change was necessary to its continued operation.

12. With respect to the asserted reallocation of channel 20 to New Haven, WATR contends that neither of the petitioners has alleged facts which raise a substantial question. WATR contends that the reallocation contention is grounded upon the asserted failure to provide a city grade signal over Waterbury as required by the rules and that without that contention this argument wholly fails. Thus, WATR argues that since it has demonstrated compliance, and since it proposes no changes in its main studio it is clear that grant of its application will not result in a de facto reallocation.

13. Concerning the allegation of adverse impact upon UHF development, WATR argues that such a claim is based upon two premises, neither of which is correct. One, that an NBC affiliation is available to

[5] No reported earnings for the experimental pay or operation WHCT–TV, Hartford.
[6] Footnote 4 supra.

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a channel 59 operation in New Haven, and the other, that it cannot reasonably be expected that channel 59 will be activated absent such an affiliation, since a viable operation is contingent upon this fact. In the first instance, WATR asserts that NBC has in the past refused an affiliation to channel 59, at a time prior to WATR's receiving the affiliation and that statements that such an affiliation could be expected if the WATR proposal is denied are speculative. As to the second point, the petitioners have not supported the conclusion that an NBC affiliation is the only guarantee for an economically viable operation with any facts, particularly since the market is the 14th largest (ARB) market in the country.

14. As to the question of zoning, WATR contends that it has a reasonable assurance that its zoning application will be approved and in support submits a letter from David Dodes, planning director for the town of Hamden until early 1968, to this effect. Moreover, WATR points out that Mr. Dodes in his letter clearly states that various proposals for zoning by other broadcasters were turned down to prevent proliferation of radio towers throughout the area and that the zoning board was interested in the development of an "antenna farm" and had initially, on its own motion, designated such an area. However, this was withdrawn when the property in question was determined to be unavailable at a reasonable price and because the FAA would not permit sufficient height to accommodate all prospective users. The letter also states that the zoning board withdrew its proposal for an antenna farm in order to permit WATR to develop its own area as an antenna farm and that upon formal presentation to the Commission it would approve.

15. We are of the view that substantial and material questions of fact have been raised which require resolution in an evidentiary hearing. With respect to whether the WATR proposal will comply with the provisions of section 73.685(a) of the rules, it is true that utilizing the Commission's existing television curves that there would be compliance; however, the intervening terrain between the proposed site and Waterbury is severe and in such circumstances the rules do provide for alternative methods of calculating shadow losses. Therefore, the parties must be given an opportunity to make their offers of proof. Accordingly, an appropriate issue will be specified.

16. The allegations of de facto reallocation are grounded on the section 73.685(a) argument referred to above. Thus, it is contended that failure to comply with the principal city signal requirements coupled with the fact that the proposed transmitter site is closer to New Haven than to Waterbury raises a question of fact as to whether WATR–TV is seeking to become a New Haven rather than a Waterbury station. Under these circumstances we believe that an issue as to de facto reallocation is warranted.

17. The zoning question presented is whether there is a reasonable likelihood that the proposed site will receive a variance from the authorities. Ordinarily, we rely on the good faith of the applicant's statements that it has reasonable assurances as to zoning and leave the zoning question for the local authorities. However, since the

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application will require a hearing on other grounds, and since the petitioners have submitted some evidence that a "zoning" variance may not be forthcoming, we will put the question into issue.

18. Turning next to the contention that a grant of the WATR–TV application will have an adverse impact upon UHF development, we note that the argument is novel in that, historically, the impact question has been framed in terms of VHF vis-a-vis UHF. Here we are concerned with two UHF stations one of which has an affiliation which the other is seeking to share. While this Commission cannot determine who shall receive an affiliation, it is clear, under the present circumstances, that grant of the WATR proposal would result in that station placing a high quality useable signal over New Haven for the first time, thereby increasing the competitive impact to station WTVU. Consequently, an issue will be specified to determine whether a grant would foreclose the development of a local outlet on channel 59 in New Haven.

19. Concerning the financial qualifications question, we find that WATR, Inc. is qualified to construct and operate as proposed. The application specifies construction costs of $150,000, estimated annual operating expenses of $229,000 and estimated annual revenues of $313,000. The applicant's cash needs for construction and operation of the station as proposed amounts to $132,550 consisting of a downpayment on equipment of $30,000 (no equipment payments for 1 year); interest on equipment for 1 year $4,800; principal payments on bank loan for 1 year of $30,000 and interest of $10,500 and working capital of $57,250.[7] To meet these costs the applicant relies on a bank loan of $150,000 and cash in excess of current liabilities in the amount of $58,075 for a total of $208,075. We find, therefore, that the applicant has sufficient funds to construct and operate the station as proposed.

20. Petitioners also contend that the applicant's failure to advise the Commission of the fact it was seeking a possible site in Bethany during the pendency of its application raises a question as to the good faith of the applicant and constitutes a misrepresentation of a material fact. The contention is without merit. Certainly, the Commission has not been misled and since, in fact, the "Bethany site" is not available, it is not relevant to our disposition of the case. We are here considering the "Hamden site," our determination is limited to that site, and petitioners have not shown that the applicant has no intention of utilizing that site.

21. It has been alleged that since the proposed operation would extend the contours of WATR–TV in areas where there is presently service from the New York owned and operated NBC station that WATR will not be able to retain its network affiliation. The short answer to this is the recent extension of the contract for a period of 2 years. It has also been alleged that the applicant has misrepresented facts to the Commission since it did not disclose in its application that it was an NBC affiliate. Inasmuch as the information had already

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[7] Inasmuch as we are here dealing with an operating station with an established revenue picture we apply our former 3-month standard and do not apply the Ultravision test (*Ultravision Broadcasting Co.*, FCC 65–581, 5 R.R. 2d 343. See *Soler Broadcasting Co. (WBEL) et al.*; 6 FCC 2d 809, *Orange Nine, Inc., et al.*, 7 FCC 2d 788.

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been filed with the Commission in compliance with our rules, the failure in our view was merely inadvertence. This view is reinforced since there is no apparent reason or motive to withhold such information nor could it in any way be material to a determination on the application and we find no misrepresentation. The asserted failure to request waiver of section 73.613(a) of the rules, is a rather novel argument but has no foundation either in the rules or logic. Section 73.613(b) of the rules provides that an applicant must make a showing if it is proposed to locate a main studio outside the principal community and no waiver is required. In the instant case, the applicant does not propose any change in its studios and a proposal to change transmitter location does not require a de novo determination as to main studio. We find, therefore, that no material question relative to main studio has been raised. The applicant filed a minor modification to its application on October 1, 1968, which requires airspace clearance. Since clearance has not yet been received, we are specifying an appropriate air hazard issue.

22. Finally, we note that this case has been pending since November of 1966 and that under these circumstances, considerations of equity dictate that the matter be resolved expeditiously, consistent with the requirements of due process.

Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned application of WATR, Inc., *is designated for hearing* at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine whether the proposal will comply with the provisions of section 73.685(a) of the rules and place an 80 dbu signal over the principal community.
2. To determine if issue 1 be answered in the negative, whether good cause exists for a waiver of section 73.685(a) of the rules.
3. To determine whether a grant of the proposal would constitute a de facto reallocation of channel 20 from Waterbury to New Haven.
4. To determine whether grant of the proposal will have an adverse effect upon the development of channel 59 in New Haven.
5. To determine whether there is a reasonable likelihood that the proposed site will receive a zoning variance.
6. To determine whether the proposed antenna system and site would constitute a hazard to air navigation.
7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience, and necessity.

It is further ordered, That Connecticut Television, Inc., and Impart Systems, Inc., are made parties to this proceeding.

It is further ordered, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues 1 and 4 is placed upon the parties respondent and the burden of proceeding with the introduction of evidence and the burden of proof with respect to the remaining issue remain upon the applicant.

It is further ordered, That such hearing shall be expedited by the hearing examiner and by the Review Board if exceptions are taken to the initial decision.

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It is further ordered, That, to avail themselves of the opportunity to be heard, WATR, Inc., Connecticut Television, Inc., and Impart Systems, Inc., pursuant to section 1.221(c) of the Commission's rules, in person or by attorney shall, within 20 days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicant herein, shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX

1. "Petition To Deny" filed on January 20, 1967, by Connecticut Television, Inc.
2. "Opposition of WATR, Inc., To Petition To Deny," filed March 10, 1967.
3. "Reply To Opposition To Petition To Deny," filed March 31, 1967.
4. "Supplement To Petition To Deny," filed on June 23, 1967, by Connecticut Television, Inc.
5. "Opposition of WATR, Inc., To 'Supplement To Petition To Deny,'" filed July 17, 1967.
6. "Reply to WATR, Inc., Opposition," filed by Connecticut Television Inc., on August 1, 1967.
7. Letter from Connecticut Television in connection with amendment of WATR, Inc., in response to Commission letter re perfection of publication and survey submitted February 7, 1968.
8. "Petition To Defer Action," filed February 29, 1968, by Impart Systems, Inc.
9. "Petition To Deny," filed March 18, 1968, by Impart Systems, Inc.
10. "Opposition of WATR, Inc., to the 'Petition To Deny' of Impart Systems, Inc.," filed on March 21, 1968.
11. "Reply To Opposition To Petition To Deny," filed on April 4, 1968.
12. "Supplement To Petition To Deny," filed by Impart Systems, Inc., on June 5, 1968.
13. "Opposition to Impart Systems, Inc., 'Supplement To Petition To Deny,'" filed June 17, 1968.
14. "Reply to Opposition," filed June 28, 1968, by Impart Systems, Inc.

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FCC 68-1096

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHBL, INC., SHEBOYGAN, WIS. Requests: 97.7 mcs, No. 249; 3 kw; 241 ft. For Construction Permit	Docket No. 18374 File No. BPH-6111

ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: CHAIRMAN HYDE CONCURRING IN THE DESIGNATION FOR HEARING BUT WOULD HAVE FAVORED A CONDITIONAL GRANT; COMMISSIONERS ROBERT E. LEE AND WADSWORTH DISSENTING; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has under consideration the above-captioned application for authority to construct a new FM station in Sheboygan, Wis., and related correspondence.

2. Because of common ownership interests in the applicant corporation (licensee of AM station WHBL in Sheboygan), and the publisher of the Sheboygan Press, the Commission in a by-direction letter indicated that this application for the only FM channel available for use in Sheboygan raised a question of possible concentration of control over local communications media. In the applicant's response to this letter it stated that the station and newspaper were not under common control. This it states is the case because the president and majority stockholder in the applicant corporation has no interest in the newspaper and Mr. and Mrs. Werner, who control the newspaper have only a minority interest in the applicant corporation. In addition, applicant states that as a result of the removal of Mrs. Werner as a director, neither of the Werners is an officer or director of the applicant corporation.

3. After consideration of the applicant's response and other pertinent information, the Commission has concluded that serious questions continue to exist and that a hearing is required to determine whether grant of this application would tend to create an undue concentration of local media control and whether the interests of the Werners diminish the freedom of the station and newspaper to compete commercially or to take differing editorial positions. In reaching this determination, the Commission carefully considered the information provided by the applicant in an effort to show that the station and newspaper are not under common control but instead compete commercially and take different editorial positions. However, in view of the substantial nature of the Werners' interests in the station, the Commission does not believe that this information is sufficient to resolve the concentration question

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without hearing, particularly since the applicant's assertions dealing with the competitive situation are principally based on non-local competition. As to the matter of editorial positions taken by the station and newspaper, we do not believe that the examples submitted by the applicant are sufficient to demonstrate that their editorial positions are unaffected by the holdings of the Werners so as to obviate the need for an issue on this matter.

4. *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the application *Is designated for hearing*, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine whether the stock interests of the Werners diminish the freedom of the two media to compete and/or impinges on their ability to take differing editorial positions.
2. To determine whether a grant of this application would tend to create an undue concentration of control of local communications media in Sheboygan, Wis.
3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience, and necessity.

5. *It is further ordered*, That to avail itself of the opportunity to be heard, the applicant, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within twenty (20) days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

6. *It is further ordered*, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1090

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST THE FOLLOWING CATV OPERATOR: WILLMAR VIDEO, INC., OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT WILLMAR, MINN.	Docket No. 17604

MEMORANDUM OPINION AND ORDER

(Adopted November 6, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. Before the Commission for consideration are: Its decision FCC 68-219, released March 7, 1968; its memorandum opinion and order, FCC 68-439, released April 26, 1968; a motion to seek enforcement of the cease and desist provisions of the decision and appropriate monetary fine filed by Central Minnesota Television Co. (Central), licensee of television broadcast station KCMT, on June 12, 1968; an opposition to and comment upon Central's motion filed by Willmar Video, Inc., on June 24, 1968; a reply filed by Central on June 27, 1968; a supplement to Central's motion of June 12, 1968, filed on July 3, 1968; comments by Willmar Video on Central's supplement, filed on July 16, 1968; a request for immediate ex parte temporary relief and clarification of the Commission's decision released March 7, 1968, filed by Central on October 1, 1968; and an opposition filed by Willmar Video on October 16, 1968.[1]

2. The crucial issue is whether, as Central has alleged (and Willmar Video has denied), there has been a failure to provide program exclusivity protection as directed in our decision released March 7, 1968. This has become a bitter dispute. There is, we think, little profit in going over either the past or the present details. Rather, we seek here to take action which will end this dispute fairly with respect to all parties, insure full and immediate compliance with our rules and order, and clarify the obligations of both the broadcaster and the CATV operator in this area.

[1] The latter pleadings allege material degradation in quality of its signals by Willmar Video. We did not deal with this aspect of the matter in our cease and desist proceeding, since no issue was there presented in this respect. This is thus a separate issue which will be separately considered. However, we would urge now, without consideration of the merits, that the parties work together to effect promptly a reasonable good faith settlement. See par. 9, infra.

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3. In our first report and order in Dockets Nos. 14895 and 15233 where we were dealing with a 15-day nonduplication requirement, we stated (38 FCC at p. 734):

> * * * the searching out of duplicating programs in the schedules of competing stations can impose some burden on the CATV operator—especially with regard to syndicated and feature film programs, which may be scheduled in different markets on widely varying dates with little regular pattern, and particularly where he is required to protect more than one station. We think this task should properly be undertaken by the broadcaster requesting protection; i.e., that he should specify both the program to be protected and the program against which he desires protection. For the most part this burden will be minimal—particularly in relation to regularly scheduled network programs. Where it is more than minimal, we think the broadcaster should bear it unless the CATV operator would prefer to do so himself * * *

In the second report and order, we further stated (2 FCC 2d at pp. 751–52):

> * * * we think that the broadcaster should afford the CATV sufficient advance notice of nonduplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switching device only once for the entire week. Accordingly, we shall amend sections 21.712(h), 74.1033(f), and 91.559(f), to require that the station, upon request of the CATV operator, shall give notice under these sections at least 8 days prior to the broadcast to be deleted. Since same-day nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the network season, this amendment should pose no difficulty for the station. Indeed, in most instances it would appear that such notice could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

See also *Buckeye Cablevision, Inc.*, 10 FCC 2d 575 (1967).

4. Under these rules, the broadcaster has the responsibility to specify the particular program to be deleted, with the times of their presentation on the CATV and the stations whose signals are to be deleted. To do this and to give the 8-days notice, local broadcaster must have the cooperation of the CATV operator and possibly the broadcast licensees whose distant signals are being carried on the cable system. The CATV operator must cooperate by keeping the licensee fully and currently informed concerning his plans as to the signals to be carried, and, if he knows, the program schedules of these stations. If the CATV operator does not have current or complete information on the latter score, and if trade or general publications cannot be appropriately used, either because of inaccuracies or publication dates which would not accommodate the 8-day notice requirement, the broadcaster should then obtain the necessary information directly from the distant or lower priority licensee. We herewith stress that the latter are to cooperate with the local broadcaster in order to further the public interest goals of our rules. Finally, we note again that the same-day nonduplication requirement has application almost exclusively to network programs, and that the local broadcaster can therefore specify the programs (and times) to be deleted at the beginning of each season, with notice of changes to be made only when there has been a revision either in the network programing of the local station or of the distant

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or lower priority station (which, if it has been so requested, should immediately inform the local station of such a change). In the event of specials scheduled with little notice, cooperation among the above interested parties should still permit the affording of the 48 hours notice specified in the rules; further, as we stated in the first report (38 FCC at pp. 734–35), "* * * we also expect the CATV system to afford reasonable cooperation in case of shorter notice."

5. With this as background, we turn to the present dispute. It appears from the pleadings now before us that KCMT did not at all times fully discharge its responsibility, since it frequently simply specified the network program to be protected and the time it was being presented on KCMT, without specification of the time distant stations were also carrying the program. The difficulty with this method is that where the distant station is carrying the program at a different time than KCMT (which was the case in some instances), a deletion of the distant signal at the only time specified would be wholly inappropriate; the CATV is thus called upon to check the KCMT program times in the notice against the times of these programs on the distant stations—a burden which is one for the broadcaster requesting nonduplication. Stated differently, in view of the fact that it is same-day rather than simultaneous nonduplication protection which is being sought, it was incumbent upon KCMT to specify the programs which it wishes to be protected and the times of their presentation on the distant station which carries the duplicating program.

6. On the other hand, the CATV system appears to have seized upon a few errors as an excuse for affording no protection at all. Most important, the recent notification procedure of KCMT is in accord with the rules and fully meets its burden. It is described, in a letter of September 20, 1968 from the president of the licensee of KCMT to Willmar Video, in the following terms:

> On the attached pages, we have listed in the column on the left, the time of each program to be carried by KCMT from October 5, 1968, through October 11, 1968, for which nonduplication is requested. In the column on the right, we have listed the time when a station of a lower priority than KCMT to our best knowledge and belief, is carrying a program for which KCMT is entitled to nonduplication. You are required to delete from your CATV system each of the stations listed in the right-hand column, as provided by section 74.1103 of the FCC rules. We also request that the signal of KCMT not be degraded in quality by your CATV system. All programs listed on this attachment are transmitted in color or black and white as originated and delivered to KCMT.[2]

In spite of the above fully correct notification procedure, there is no indication that Willmar Video is meeting its obligations under the rule and our order herein.

7. As stated at the outset, we do not intend to pursue this matter further. KCMT is to make its notification requests in the above form, and to strive conscientiously to avoid errors. Upon the receipt of such notifications, Willmar Video is to afford immediate same-day non-

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[2] The only way in which this form could be made more explicit—though it is now quite clear—would be by designating the indicated times as a.m. or p.m. and by captioning the column on the right "Duplicating Programing."

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duplication protection. If an occasional error occurs on KCMT's part, which Willmar Video itself recognizes as a normal possibility, Willmar Video is not to cease affording nonduplication protection. We expect such errors to be rare; if they occur with any significant frequency, the CATV system may bring the matter to the attention of the Commission, and we shall take appropriate remedial action to deal with any unjustifiable inconveniencing of the viewing public.

8. As to the most recent allegation concerning material degradation, we did not deal with this aspect of the matter in our cease and desist hearing, since no issue was there presented in this respect. However, here again, we seek to deal shortly and quickly with this aspect of the case. We have provided that broadcast stations must operate in accordance with certain standards, and that the CATV system must carry local signals without material degradation. No showing has been made either that the local station is not operating consistently with our engineering standards or that any deficiency in the picture on its assigned channel on the cable system is due to the functioning of the system. Willmar Video, which can apparently carry distant signals with technical proficiency, should be able to carry the local signal without material degradation. We expect, again, prompt compliance with this requirement of our rules.

9. Finally, we stress, as we have done in our rulemaking reports, that what is required is the good faith, reasonable cooperation of the broadcaster and the CATV operator, for the common good of the parties and of the viewing public in their communities.

10. We accordingly direct that Willmar Video, upon receipt of the currently correct form of notification (see par. 6), shall immediately afford same-day nonduplication protection, and that it shall submit a report of its actions in this respect by November 18, 1968, to the Commission. Central's motion is denied except as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in the finding that KCMT did not fully discharge its responsibility, but dissent to the Commission's bootstrap method of using this hearing case to bypass rulemaking and enlarge the requirements of sections 21.712(h), 74.1103(f), and 91.559(f) of the rules. The onerous burden placed on CATV's is, in my opinion, unreasonable, unworkable, and one more step to aggravate the administrative quagmire we now have on CATV matters as a result of our ill-advised CATV rules.

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FCC 68–1112

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 21 OF THE COMMISSION'S RULES WITH RESPECT TO THE 150.8–162 Mc/s BAND TO ALLOCATE PRESENTLY UNASSIGNABLE SPECTRUM TO THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE BY ADJUSTMENT OF CERTAIN OF THE BAND EDGES	Docket No. 16778

ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has under consideration the application of its cut-off rules (secs. 1.227(b)(3), 21.26(b) and 21.27(f)) with respect to applications filed in the above-entitled proceeding and placed on public notice on September 9, 1968 (rept. No. 404, mimeo. 21474, 33 F.R. 12930).

2. By *Order* released October 18, 1968 (FCC 68–1031) the Commission extended the cut-off date for a period of 51 days from September 30 (the date the Court of Appeals for the Second Circuit denied the request of Radio Relay Corp. for a stay) up to and including November 20, 1968, determining essentially that this period equitably accommodated interested parties seeking to file applications to be considered with those placed on public notice on August 28, 1968. It appears that a similar accommodation is warranted of an additional 9-day period with respect to those applications placed on public notice on September 9, 1968.

3. Accordingly, *It is ordered*, that applications filed on or before November 29, 1968, will be considered with those applications placed on public notice of September 9, 1968 (rept. No. 404, mimeo. 21474), and appropriately acted upon pursuant to Commission rules if found to be mutually exclusive.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1109

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of BAY VIDEO, INC. (WBVI-TV), Panama City, Fla. For Modification of Construction Permit	Docket No. 18301 File No. BMPCT-5724

ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration: (*a*) a petition for expedited proceeding filed by Bay Video, Inc., on October 1, 1968; and (*b*) the Broadcast Bureau's comments, in opposition to the petition, filed October 8, 1968.

2. By *Memorandum Opinion and Order*, 14 FCC 2d 339, released August 29, 1968, the application of Bay Video, Inc. (Bay Video), for an extension of time to construct the facilities of television broadcast station WBVI-TV, channel 13, Panama City, Fla., originally authorized on February 6, 1961, was designated for hearing on issues to determine, pursuant to section 319(b) of the Communications Act and section 1.534(a) of our rules, whether the failure to construct that station has been due to causes not under the control of Bay Video, whether there are other matters sufficient to justify a further extension of time, and finally, whether a grant of Bay Video's application for extension of its construction permit would serve the public interest, convenience, and necessity.

3. Bay Video now requests that the examiner be instructed to expedite this proceeding and to issue an *Initial Decision* ahead of other pending cases on his calendar. The petitioner further requests that the Commission specify that it will review this case directly or, in the alternative, order that the Review Board expedite its own review, if any, of the examiner's decision. In support of these requests, Bay Video alleges that a prompt determination of its application for an extension of time to construct the authorized station is essential. According to Bay Video further delay, caused by lengthy hearings and appeals to the Review Board and the Commission, will allow the intervenor, Herald Publishing Co., licensee of WJHG-TV, to continue its monopolistic television position in Panama City and will deprive the community of a competitive television service which has already been long delayed.

4. In view of the protracted history of this matter and the questions which we have specified for hearing in this proceeding, we are not

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persuaded that Bay Video has presented sufficient reason to cause us to depart from the normal procedures of the hearing process.

5. Accordingly, *It is ordered*, That the petition for an expedited proceeding filed October 1, 1968, by Bay Video, Inc., *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

15 F.C.C. 2d

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FCC 68-1127

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CONTINENTAL BROADCASTING, INC., NEWARK, N.J. For Renewal of License of Station WNJR, Newark, N.J.	Docket No. 16050 File No. BR-174

APPEARANCES

Paul Dobin and *Martin J. Gaynes, Esqs.*, on behalf of Continental Broadcasting, Inc.; and *Joseph Stirmer* and *James K. Edmundson, Jr., Esqs.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted November 26, 1968)

COMMISSIONER WADSWORTH FOR THE COMMISSION: CHAIRMAN HYDE DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS COX AND H. REX LEE NOT PARTICIPATING.

1. This proceeding involves the application of Continental Broadcasting, Inc. (Continental or WNJR), a wholly owned subsidiary of Rollins, Inc.,[1] for renewal of license of AM station WNJR, Newark, N.J. Continental's renewal application[2] was designated for hearing by Commission order (FCC 65-514, released June 10, 1965) following a field investigation into the operations of the station which raised a number of questions bearing upon whether Continental possessed the requisite qualifications to remain the licensee of WNJR. The following issues were specified for hearing:

1. To determine whether in its written response to the Commission's Notice of Apparent Liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor;

2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 "contracts" submitted to the Commission's staff during the course of an investigation of

[1] Rollins, Inc., is a public corporation with its stock being listed on the American Stock Exchange. O. Wayne Rollins, the president of Rollins, Inc., and also of the licensee corporation, has owned about 48 percent of the voting stock in Rollins, Inc., since 1960, and together with his family has voting control of the corporation by virtue of their combined 67-plus percent ownership of the voting stock. The Rollins home office is in Wilmington, Del. Through direct ownership or control of wholly owned subsidiaries, Rollins, Inc., operates seven AM, three TV, and two FM stations.

[2] The license for station WNJR was last renewed on Feb. 8, 1961, for the period ending June 1, 1963. An application for renewal of license was filed on Mar. 13, 1963.

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WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during "Celebrity Time"; or whether such "contracts" were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants;

3. To determine whether the principals of the applicant have exercised adequate control or supervision over the operation of WNJR in a manner consistent with the applicant's responsibility during the period of the applicant's most recent license renewal.

4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317 (a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the Commission's rules;

5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity.

2. The *Initial Decision* of Hearing Examiner Isadore A. Honig (FCC 67D–26, released June 23, 1967) would grant WNJR's application and renew the license for a period of 1 year. The Commission's Broadcast Bureau filed exceptions to the *Initial Decision* and urges denial of the application. WNJR filed no exceptions but filed a reply to the Bureau's exceptions and urges that the examiner's decision be affirmed. The Commission heard oral argument on June 4, 1968. The examiner's findings have been considered in light of the exceptions and they are adopted with the modifications contained in this decision and in our rulings on the exceptions as set forth in the appendix. Since we do not agree with the examiner's ultimate conclusion that the application for renewal of license should be granted, the conclusions of the *Initial Decision* are adopted only insofar as they are consistent with this decision and our rulings on exceptions. We do not adopt the examiner's conclusions in paragraphs 33 through 43.

3. Our review of the record evidence and the examiner's findings of fact and his subsidiary conclusions compels us to conclude that the applicant has not reflected the necessary qualifications to continue to be the licensee of WNJR and that a grant of the application would not serve the public interest.

4. It is unnecessary to restate in detail the examiner's extensive findings of fact. It is clearly established in the findings [3] that during an official Commission investigation of station WNJR on March 6, 1963, the manager of the station, Leonard Mirelson, was asked by Commission investigators to produce the documents relating to the pro-

[3] See findings of the *Initial Decision*, pars. 68–71.

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gram, "Celebrity Time." The manager made available to them only eight of 147 documents in the "Celebrity Time" program file and deliberately did not bring to their attention any of the remaining pertinent documents in his possession. The effect of the manager's conduct in selecting and handing over for inspection the small number of documents the investigators saw was to give them a distorted and misleading view of the manner of the operation of the program from the standpoint of control and the time-brokerage implications and to misinform them as to the arrangements with sponsors for the program in actual practice. The examiner concluded [4] as follows:

> Thus, the examiner concludes that the manager's action on the occasion in question in not making available to investigators for inspection the entire file of the 147 documents for "Celebrity Time" constituted a serious lack of candor by an executive employee of the licensee in connection with an official Commission investigation.

5. As indicated by the findings,[5] on January 22, 1964, the Commission issued to the licensee of WNJR a notice of apparent liability for forfeiture, charging in essence that a Commission investigation of WNJR revealed the broadcast by the station for a period prior to March 9, 1963, of a program "Celebrity Time" pursuant to time brokerage contracts with an advertising agency, Celebrity Consultants, and that copies of the contracts with the time broker had not been filed by the licensee with the Commission within 30 days of execution as required by section 1.613(c) of the rules. The licensee filed a response and opposition to the notice on March 16, 1964,[6] contending in effect that the arrangement for the "Celebrity Time" program with the agency did not involve a time brokerage contract. Moreover, the response stated that in July 1962, station WNJR required the agency to enter into individual contracts with the station on behalf of each sponsor; that these contracts had been examined by the FCC staff when it investigated this matter; and that the contract itself showed that the station had dealt with the agency as a regular advertising agency which was paid a commission and, therefore, not as a time broker. In footnote 5 to the response it was stated that the station considered its earlier agreement with the agency terminated in July, 1962. The examiner concluded [7] as follows:

> Unquestionably, however, the evidence developed in the hearing shows (par. 84, of findings, supra) that the factual representations set forth in the sworn response and opposition to the Commission's notice of apparent liability for forfeiture, signed by O. Wayne Rollins as the licensee's president and filed with the Commission on March 16, 1964, were largely inaccurate.

The examiner also concluded (par. 4) that the inclusion of erroneous statements in the response as to when contracts with Celebrity Consultants had terminated involved negligence on the part of Rollins' associates.

6. Moreover, it is also clearly established [8] that on April 15, 1964,

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[4] See conclusions of the *Initial Decision*, par. 3.
[5] See findings of the *Initial Decision*, pars. 77, 82–84.
[6] By a letter dated June 24, 1964, the licensee withdrew its response and opposition and also submitted a check in payment of the forfeiture.
[7] See conclusions of the *Initial Decision*, par. 4.
[8] See conclusions of the *Initial Decision*, pars. 5–6.

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Commission investigators again visited station WNJR and asked to look at the contracts for advertising on the "Celebrity Time" program, concerning which documents there had been representations made in the licensee's response of March 16, 1964. The WNJR station manager thereupon produced for inspection some 147 documents as being original contracts which had been executed between the station and the advertising agency on behalf of various sponsors on the "Celebrity Time" program during the period from July 1962 to March 1963. Only eight of these documents (those on top of the pile and white in color) were authentic and original contracts (WNJR Ex. 5, pp. 140–147) as represented by the licensee in its response. The remainder (139 documents on goldenrod-colored paper received in evidence as WNJR Ex. 5, pp. 1–139) were not the actual or original documents which had been drawn up as contracts for advertising between WNJR and the advertising agency, Celebrity Consultants (WNJR Ex. 6, pp. 1–143). Instead, these 139 documents were fabricated or false contracts which had been prepared by a WNJR salesman at the direction of the station manager. The examiner concluded [9] as follows:

> In sum, the evidence does require the conclusion, in response to issue 2, supra, that: (1) the WNJR station manager falsely represented to the Commission's staff that the 139 documents turned over to them on April 15, 1964, during an investigation of WNJR were the actual documents received from Celebrity Consultants; and (2) that the 139 documents were falsified by a WNJR salesman, at the direction of the station manager, in order to conceal the actual facts of the relationship which existed in the period July 1962 to March 1963 between the applicant, its employees, and Celebrity Consultants.

7. We adopt the foregoing conclusions of the hearing examiner and further conclude that the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee. *Eleven Ten Broadcasting Corp.* (KRLA), 32 FCC 706, 22 R.R. 699 (1962), reconsideration denied 33 FCC 92, 22 R.R. 702n (1962), affirmed *sub nom. Immaculate Conception Church of Los Angeles, et al.* v. *FCC*, 116 U.S. App. D.C. 73, 320, F. 2d 795, 25 R.R. 2128a (1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 FCC 1039 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), cert. denied 380 U.S. 910 (1965).

8. The examiner found [10] that Wayne Rollins, president of Rollins, Inc., and of the licensee corporation, relied upon Al Lanphear, vice president in charge of radio, and Tim Crow, director of quality control, to effectuate supervision and control of the operations of the various Rollins radio stations, including WNJR. The findings and conclusions demonstrate that Rollins, Crow and Lanphear, the so-called home office officials in Wilmington, Del., failed to exercise adequate control and supervision over the operation of WNJR and the "Celebrity Time" program in particular. The station manager's lack of candor and misrepresentations in dealing with Commission in-

[9] See conclusion of the *Initial Decision*, par. 6.
[10] See findings of *Initial Decision*, par. 140; conclusions, par. 24.

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vestigators on March 6, 1963, the misstatements of fact in the opposition to the notice of forfeiture filed March 16, 1964, and the spurious documents furnished to the Commission's investigators on April 15, 1964, all involved the so-called agency show, "Celebrity Time," and the contracts for the program. However, despite the fact that the "Celebrity Time" program and the manner in which it was conducted was brought to the attention of the Rollins home office on several occasions, the home office officials at no time conducted a thorough or meaningful investigation of the matter.

9. The findings [11] show, for example, that on September 26 and 27, 1962, Crow and Frank Minner, the Rollins controller, visited station WNJR for the purpose of examining the operation of the station from the standpoint of observing the broadcast of programs on the air and of checking various records maintained at the station. On the evening of September 26, they monitored WNJR programs, including the broadcast of "Celebrity Time." The next day Minner compared the September 26 program logs with station contract files and noted that for some announcements on the agency shows the station did not have individual contracts. Crow was told by Minner that there were some documents missing from several agency shows (Tr. 4715–16), but Crow did not look at any contracts or agency orders and did not examine the "Celebrity Time" contracts file. On his return to Wilmington, Crow wrote Rollins a report which made clear that a substantial number of clients were on the air without any contracts to cover them and which also raised questions concerning the "Celebrity Time" show (WNJR Ex. 44). Rollins discussed the matter with Lanphear. Lanphear visited WNJR on October 10 and 11, 1962, and questioned Mirelson as to whether he had the contracts for the individual sponsors, and Mirelson's reply indicated to Lanphear that he was obtaining them, but Lanphear did not examine any of the contracts for the special agency shows, including "Celebrity Time" (Tr. 5741–2).

10. The findings [12] also show that in August 1963, the Commission sent Norman King of Celebrity Consultants a letter (Br. Bur. Ex. 31) which made reference to a discussion by King with members of the Commission's staff during the week of July 21, 1963, concerning the former "Celebrity Time" program on station WNJR. A copy of the letter was given by King to Mirelson, who in turn brought it to the attention of Crow at the home office soon after August 8, 1963. The examiner found (par. 74) that "Crow saw the letter but made no inquiry of Mirelson at the time regarding the manner in which the 'Celebrity Time' program had been conducted or the other matters raised in the letter to King." Lanphear also saw the Commission's letter to King sometime in August 1963.

11. It is also noted that no investigation of the "Celebrity Time" program and contracts was made by the officials in the Rollins organization in Wilmington before making the sworn representations to the Commission in the response and opposition to the Commission's

[11] See findings of the *Initial Decision*, pars. 56–48, 76, 157.
[12] See findings of the *Initial Decision*, par. 74.

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notice of apparent liability of January 22, 1964. The findings [13] show that Mirelson, the station manager, was never provided with a copy of the notice and neither read the document nor discussed it with anyone from the Rollins home office. He was not consulted as to whether the licensee should oppose the forfeiture but was merely requested by Crow to forward to him representative contracts pertaining to "Celebrity Time." The findings (pars. 86–87) show that Mirelson was not afforded an opportunity to read the response and opposition before it was filed with the Commission on March 16, 1964. Mr. Rollins assumed that Lanphear would discuss the proposed opposition and the charges in the notice of apparent liability with Mirelson since they pertained to the operation of, and directly affected, station WNJR, but he never inquired whether Lanphear had in fact done so. Furthermore, he did not instruct anyone to go and look at all of the contracts for "Celebrity Time" at station WNJR because of his confidence in Mirelson,[14] and because he had received from Crow three documents which the latter characterized as typical contracts for "Celebrity Time."

12. We believe that the examiner properly concluded (par. 29) as follows:

> At no time, however, was there any reasonably careful inspection of the "Celebrity Time" documents file made by the home office to ascertain if WNJR was obtaining contracts for "Celebrity Time" in the form required under the home office instructions. In September 1962, the quality control director was shown some of the documents for the so-called agency shows which the Rollins controller had found were "not complete and accurate." There is no evidence to establish that such documents were part of the "Celebrity Time" file.[15] In any event, if Crow had made a review of the entire "Celebrity Time" file at that time, the variety of information in the documents representing advertising obtained by the freelancers and the pronounced difference in appearance between them and the eight contracts in proper form obtained by the station manager from the Celebrity Consultants agency head would immediately have signalled to him that the home office instructions had not been followed. Certainly he could not have failed to see, too, that the WNJR manager's signature did not appear on a single contract form. So far as appears from the record, the Rollins' home office did not examine the "Celebrity Time" contracts file for any purpose after September 1962.

13. It is obvious that a minimal degree of responsible supervision either during the period the "Celebrity Time" program was broadcast or following its termination could have averted the unconscionable fraud which Mirelson perpetrated on the Commission on April 15, 1964, as well as the misrepresentations of fact in the licensee's opposition to the Commission's notice of apparent liability filed March 16, 1964.

14. WNJR contends that its license should be renewed because the station manager's misconduct was committed without the knowledge or approval of the Rollins' home office officials, the manager misled

[13] See findings of the *Initial Decision*, pars. 81, 85–87.
[14] On Jan. 21, 1963 (approximately a month and one-half before termination of the "Celebrity Time" program on Mar. 9, 1963), Mirelson had stated in a letter to Crow that "we now have separate contracts with all clients" (WNJR Ex. 49, examiner's findings, pars. 59, 81).
[15] The examiner found (par. 56) that "neither Minner nor Crow recalled at the hearing whether these deficiencies detected by Minner on Sept. 27, 1962, related to 'Celebrity Time.'"

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both the licensee and the Commission, and his transgressions occurred in spite of attempted controls in the operation of the station.

15. In denying an application for renewal of license in the *KRLA* case, supra, we considered and rejected the licensee's contention that lack of knowledge absolved it from responsibility for the fraudulent conduct of its station manager. We said:

> Inherent in such contention, however, is the view that a licensee who delegates to persons it deems responsible, authority to operate and manage a station cannot be held responsible for their activities if it is unaware of them. This is, of course, a completely untenable view. Retention of effective control by a licensee of the station's management and operation is a fundamental obligation of the licensee, and a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. (Citing *Mile High Stations, Inc.* (KIMN), 20 R.R. 345 (1960)).

16. In the instant case, the examiner concluded (par. 32) that the licensee did not exercise adequate control or supervision over the operation of WNJR in a manner consistent with the licensee's responsibility during the most recent license renewal period (1961–64). We adopt this conclusion because it is supported by the record evidence and the examiner's findings of fact. We do not share or accept the examiner's view (par. 42) that the licensee's deficiency on this score was not characterized by lack of interest in or lack of concern for, the proper conduct of the station's affairs.

17. The examiner's findings and conclusions clearly show that the principals of the licensee failed to exercise minimal, let alone a reasonable degree of care in determining the status of the "Celebrity Time" contracts file and the manner in which the program was conducted. It is evident that the station manager was able to conduct the "Celebrity Time" program in the haphazard manner shown by this record because of the detachment and indifference of the Rollins' home office officials.

18. The record and the examiner's findings and conclusions [16] show that the control measures utilized by the home office in Wilmington consisted of periodic monitoring (22 monitors between February 1961 and October 1964) of WNJR broadcasts by a person not employed within the Rollins organization, and comparison by Crow of the data compiled with the program logs. In addition to these monitors, the record shows that between September 1962 and December 1964, Crow personally conducted only three operations audits of WNJR, involving taping of programing, examination of logs and contracts files. Lanphear, the operational head for radio stations, made only periodic visits to confer with the WNJR station manager. Wayne Rollins occasionally called the WNJR manager on some particular matter of concern to him.

19. The examiner himself concluded (par. 28) that the above-described control and supervisory activities of those in the Rollins home office did not suffice to prevent serious violations of Commission's *Rules* and Rollins' policies as well as misconduct by station employees which reflect adversely upon the renewal applicant.

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[16] See conclusion of the *Initial Decision*, par. 26.

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20. We agree with the examiner's following statement in his conclusions (par. 32):

> It is not enough that a licensee should issue instructions, detect infractions, make occasional visits, and engage in endless correctional correspondence with its station manager. The licensee of a broadcast station has the paramount obligation to apply effective measures to forestall violations and, in those instances where they nevertheless do happen despite reasonable preventive measures, to take additional steps as required to assure against any recurrences. This obligation the licensee herein obviously failed to discharge. In this connection, the examiner is constrained to point out that the evening hours period of operation at station WNJR received not alone from the station manager but also from the principals of the licensee far less direct supervision than was required in order to maintain proper control.

21. WNJR contends that the Rollins home office, through its regular control procedures, would have discovered the true facts concerning "Celebrity Time" and its contracts before the Commission investigation if the manager had not withheld this information from the home office. This contention is not supported by the record. As shown above, the home office was on notice as early as September 1962, that not all contracts for the agency shows were in the files, it was on notice that the logging procedures for the "Celebrity Time" program were not being followed, and it was on notice that other questions concerning the manner of operation of the "Celebrity Time" program had been raised, but, as stated by the examiner, "at no time, was there any reasonably careful inspection of the 'Celebrity Time' documents file made by the home office."

22. WNJR also contends that the *KRLA* and the *KWK* cases, supra, are not applicable here because those cases are based on licensee indifference to control of station operation, whereas in this case there was no such indifference on the part of the licensee. In the *KRLA* case we said that a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. In the *KWK* case we said [17] that because of the licensee's "detachment, if not indifference" to the details of the treasure hunts involved, it was evident that the station manager was able to move unrestrained in his fraudulent hiding of the treasures. We believe that the record in this case clearly shows that it was the licensee's detachment and indifference and its failure to exercise adequate control and supervision over the operation of the station that permitted the station manager to perpetrate a gross and willful fraud on the Commission during the course of an official investigation.

23. The cases cited by WNJR, *Mark Twain Broadcasting Co.*, 21 R.R. 238 (1960), and *Washington Broadcasting Co. (WOL)*, 8 R.R. 2d 1267 (1966), are inapposite to this proceeding. In the *Mark Twain* case, which involved an application for renewal of license, the examiner concluded that there was no intent to deceive the Commission, and that the discrepancies in the transmitter logs filed with the Commission were of an engineering nature and not readily discernible by the principal officer and stockholder who had only limited technical knowledge. No exceptions were filed in that case and the Broadcast Bureau filed a statement in support of the *Initial Decision*. The Com-

[17] 34 FCC 1039, at 1042.

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mission, by order, made the *Initial Decision* effective immediately (29 FCC 1313 (1960)). In the *WOL* case, which involved an assignment of license, the proposed assignee filed with the Commission as part of its application a program survey containing falsehoods of an employee that a certain person had been interviewed in connection with the survey. The examiner concluded that the misrepresentation made to the Commission through the employee did not attach to the principals of the assignee, because the latter were not negligent concerning the conduct of the employee and "took immediate steps to investigate all the facts surrounding the matter" as soon as a question was raised (8 R.R. 2d 1267 at 1291). In the instant case, the licensee was repeatedly on notice but made no meaningful investigation to determine the facts.

24. In evaluating the responsibility of the licensee for the actions of its manager, the examiner stated in paragraph 34 of his conclusion that while "the licensee here cannot avoid responsibility for the misconduct of its station manager in dealing with the Commission. Nevertheless, in making a judgment as to the licensee's qualifications to retain the status of a licensee, it is important to bear in mind that the WNJR manager was not a 'principal' of the licensee." The Broadcast Bureau contends that Mirelson, the station manager, should be considered a principal of the licensee rather than a mere employee. We note that in reaching his conclusion that Mirelson was not a "principal" of the licensee, the examiner found that his stock ownership in Rollins, Inc., the parent corporation of the licensee, never exceeded 5,100 shares (less than two-tenths of 1 percent of the total ownership); that he was never an officer or director of the licensee corporation or of Rollins, Inc.; and that whatever policy functions he exercised as manager had in effect been delegated to him by the Rollins home office in Wilmington. We also note that the examiner found Crow to be a principal, although he was neither an officer nor director and owned less than 2,500 shares in Rollins, Inc. (less than one-tenth of 1 percent ownership interest).

25. We believe that there are compelling facts of record which indicate that the station manager, in effect, was a principal of the licensee and not a mere employee. The record clearly establishes that Mirelson was the general manager of station WNJR and as such was the individual charged with full responsibility for directing the day-to-day operation of the station. He had a compensation arrangement whereby, in addition to salary, he shared on a graduated basis in the net profit of WNJR. He owned stock in Rollins, Inc., the parent of the licensee, and his stock holdings exceeded that of Crow and Lanphear who were found to be principals.[18] Even after the Rollins home office became fully aware of his gross fraud on the Commission, he nevertheless continued in his same capacity and under the same financial arrangements for over 7 months, at which time he was made regional sales manager of WNJR, the position he now holds. We believe that these facts are fully consistent with the conclusion that

[18] During oral argument counsel for the Broadcast Bureau and counsel for WNJR made reference to Mirelson's stock ownership as being worth a third of a million dollars (Tr. 6828 and 6832). We do not, however, accept this valuation as an established fact of record, and, therefore, give it no weight.

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Mirelson was a principal and not a mere employee. We have held that the fact that a station manager is not an officer or director of a licensee is irrevelant in determining the licensee's responsibility for his conduct. See *Eastern Broadcasting Corp.*, 8 FCC 2d 611 (1967). We do not base our decision on a determination that Mirelson is a principal of the licensee. We hold that the licensee must be held responsible for the gross misconduct of its station manager under the circumstances shown in this case where it has been clearly established that the licensee failed to exercise adequate control and supervision over the operation of the station consistent with its licensee responsibilities.

26. In addition to the foregoing misrepresentations and fraud practiced on the Commission, there are other examples of what occurred as a result of the licensee's failure to exercise an effective sense of responsibility for station operation and management.[19] The examiner found (par. 137) that as early as December 1961, the Rollins' home office became aware, through an examination of the WNJR program logs by Crow, that the log had not been maintained for over one-half hour during the period the "Celebrity Time" program was broadcast on November 30, 1961. The examiner further found and concluded (pars. 17 and 28) that during the succeeding 9-month period between January 1 and September 25, 1962, there were 64 days (or 28 percent of the time) when the program log during the "Celebrity Time" program was not maintained. Moreover, during this same period, there were numerous instances when no elapsed time for commercial announcements on "Celebrity Time" was shown but only the beginning thereof. This particular logging violation was committed on 103 of the "Celebrity Time" programs. Furthermore, between January 1962 and March 1963, there were many occasions when a contemporaneous program log for the "Celebrity Time" program was not maintained.

27. We also rest our denial of the renewal application on the licensee's lack of licensee responsibility as evidenced by its inattention to the station and the operation thereof in violation of sections 73.111 and 73.112 of our rules concerning proper maintenance of program logs (issue No. 4). The examiner concluded (par. 16) that during the license period under consideration, the Rollins' home office was repeatedly made aware that accurate program logs were not being maintained by WNJR. The examiner concluded in this regard that his findings demonstrate numerous instances where the lengths of commercials were incorrectly reported in the WNJR program logs; instances where commercial announcements were not logged; instances where announcements were logged at times other than the actual times of broadcast; and instances (two) where the logs contained a forged signature

[19] The examiner concluded (par. 31) that the listening public was not assured of a desirable broadcast service from several aspects of the manner of operation of WNJR in the period under consideration. The examiner concluded, in part, as follows:

"Finally, the nadir in programing service emanating from WNJR appears to have been reached when the identical half-hour program was broadcast five evenings in the same week. It is questionable whether the service provided by the station was much better when 3-hour programs broadcast on Wednesday and Thursday were again repeated on tape on Friday and Saturday of the same week. Moreover, despite an understanding between the station manager and the announcer on the program not to repeat such program more than one time, a particular 3-hour program was not only rebroadcast on Nov. 25, 1964, but also repeated on Nov. 26 and 28, and Dec. 1."

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in the operator's column. The examiner further concluded (par. 16) that "the aforementioned logging infractions were committed between August 1961 and December 1964 and require the conclusion that the licensee repeatedly failed to comply with the provisions of section 73.111 [20] and 73.112 of the rules due to the failure of WNJR properly to maintain program logs." The examiner also concluded (par. 17) that the logging deficiencies which occurred in the "Celebrity Time" program "constituted further violations of sections 73.111 and 73.112 of the rules."

28. In addition to the foregoing, the examiner also concluded (par. 15) in response to issue No. 5, that "the licensee entered into five time brokerage contracts between May 1963 and March 1964," and that "the licensee wilfully and repeatedly violated section 1.613(c)[21] of the rules by failing to file each of these contracts with the Commission within 30 days of its execution."

29. The examiner concluded (pars. 20, 21 and 22) that no violation of section 317(a)(1) of the Communications Act and section 73.119 (a) and (b) of the rules occurred by reason of WNJR's failure to broadcast sponsorship identification announcements in the case of those free-lancers who appeared on "Celebrity Time" and made payments indirectly to the station for program time, and in the case of those time brokers who made payments to WNJR for program time out of their own pockets when they did not receive sufficient revenue from sponsors. The examiner was of the view that the payments made by the free-lancers in connection with their appearance on "Celebrity Time" was not made for the broadcast of "matter" within the sponsorship identification provisions of the act and the rules since, at most, they were interested in obtaining personal exposure on the air. The examiner also concluded that in the case of Joe Craine, one of the parties to a time brokerage arrangement with WNJR, no sponsorship identification announcement was required because the only "benefit" he derived from his broadcast was his exposure as an announcer.

30. The Broadcast Bureau has excepted to the examiner's above conclusions as an erroneous interpretation of the law and contends that it should be concluded that an individual or agency purchasing broadcast time under the circumstances shown must be announced as a sponsor pursuant to section 317(a)(1) of the act.[22] We agree with the Bureau and, therefore, do not adopt the examiner's conclusions in paragraphs 20, 21, and 22. Section 317(a)(1) of the act provides that all matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid the station so broadcasting, by any person, shall, at the time the same is so broadcast, be announced as paid for by such person. Section 73.119 of the rules implements this statutory provision. The language of the act is clear and includes "all matter" broadcast for which payment is made to the station. The "benefit" derived by the purchaser of the broadcast time is not the determinative factor as to whether an announcement

[20] The reference in par. 16 of the conclusions to sec. 73.113 of the rules is an obvious typographical error, and this reference should read sec. 73.111.

[21] The reference in par. 15 of the conclusions to sec. 1.316(c) of the rules is a typographical error, and this reference to the rules should read sec. 1.613(c).

[22] 47 U.S.C. sec. 317(a)(1).

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should be made. In the *Matter of the Liability of United Broadcasting Co. of New York, Inc.*, 4 R.R. 2d 167 (1965), the Commission held that where a time-broker arrangement was contemplated, but the purchaser of the time never sold it and, during the broadcast period involved, the time was the exclusive property of the purchaser, an appropriate announcement was required by section 317 of the act and rule 73.119.

31. WNJR contends that the questions raised by the Bureau concerning sponsorship identification appear to be ones of novel impression which, it feels, have been correctly decided by the examiner, but that if the Commission should hold the examiner in error, the rulings should be given prospective effect only and not applied retroactively. We believe that the language of the act is clear and that the questions raised are not novel. Although we find that WNJR failed to make proper sponsorship identifications, we reach our ultimate determination in this case without reliance on these violations of the act and the Commisson's rules.

32. As we have indicated above, the Commission must insist upon the effective exercise by the licensee of actual control over station operation and management, and it is only by holding the licensee accountable for the operation and management of the station that there can be any assurance that the operation and management will be responsible. The degree of responsibility imposed and the standard of conduct required are the same for all licensees, irrespective of their form or the relative size of their operations. (See *Prattville Broadcasting Company*, 4 FCC 2d 555 (1966), citing *KWK Radio, Inc.*, supra, and *Eleven Ten Broadcasting Corp.*, supra.) A multiple station owner, or an absentee owner, is subject to the same degree of responsibility for adequate supervision and control over station operation as a local station owner who is integrated in ownership and management. To hold otherwise would result in giving an added benefit to absentee ownership as compared to local ownership.

33. It appears that in reaching his conclusion (par. 43) that a renewal of license for a period of 1 year would be appropriate, the examiner may have been influenced by the fact that the licensee has now taken certain corrective measures to forestall the recurrence of the filing violations as well as the misrepresentations to the Commission and has acted "to clear the Augean stable at Newark." However, a renewal applicant must be judged even more on the basis of its past than on its promises for the future. We must look to that record in determining whether the applicant herein has reflected the necessary qualifications to continue to be a licensee. Viewing that record in a light most favorable to the applicant, we are compelled to conclude that it has not reflected the necessary qualifications to continue to be the licensee of station WNJR.

34. The facts as found in this case are irreconcilable with a public interest finding. We have carefully examined the entire record in this proceeding, and we are unable to find any mitigating circumstances which would justify a grant of a renewal of license even for a period of 1 year. While nonrenewal of the license is a severe sanction, we have reached this decision only after a thorough consideration of the entire fact situation. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

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35. Accordingly, *It is ordered*, That the above-captioned application (BR–174) of Continental Broadcasting, Inc., for renewal of license of Station WNJR, Newark, N.J., *Is denied;* and

36. *It is further ordered*, That in order to enable Continental Broadcasting, Inc., to wind up its affairs, *It is authorized* to operate station WNJR until 12 midnight December 31, 1968.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

RULINGS ON BROADCAST BUREAU'S EXCEPTIONS TO INITIAL DECISION

Exception No.	*Ruling*
1, 5	Granted to the extent indicated in the decision and denied in all other respects as being unnecessary for the purposes of the decision.
2	Granted as indicated in par. 9 of the decision.
3, 6	Denied as being unnecessary for the purposes of the decision.
4	Granted as indicated in par. 11 of the decision.
7–9	Granted as indicated in pars. 30–32 of the decision.
10	Granted as indicated in pars. 8 and 13 of the decision.
11–17	Granted as indicated in the decision.

DISSENTING STATEMENT OF CHAIRMAN ROSEL H. HYDE

I believe there should be a substantial penalty but that denial of license and deletion of the station is not warranted.

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FCC 67D-26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CONTINENTAL BROADCASTING, INC., NEWARK, N.J. For Renewal of License of Station WNJR, Newark, N.J.	Docket No. 16050 File No. BR-174

APPEARANCES

Paul Dobin and *Martin J. Gaynes, Esqs.*, on behalf of Continental Broadcasting, Inc.; and *Joseph Stirmer* and *James K. Edmundson, Jr., Esqs.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued June 21, 1967)

PRELIMINARY STATEMENT

1. Continental Broadcasting, Inc. (Continental) seeks the renewal of its license for station WNJR, Newark, N.J., in this proceeding. By an order of the Commission (FCC 65-514) released June 10, 1965, Continental's license renewal application for WNJR filed March 13, 1963, was designated for hearing following a field inquiry by the Commission's staff into the operations of this station which, according to the designation order, raised a number of serious questions bearing upon whether Continental possesses the requisite qualifications to remain the licensee of WNJR. The following issues were specified for the hearing:

> 1. To determine whether in its written response to the Commission's notice of apparent liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor; [1]
>
> 2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 "contracts" submitted to the Commission's staff during the course of an investigation of WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of

[1] A notice of apparent liability for forfeiture in the amount of $1,000, based on allegation of failure to file copies of a time brokerage contract with the Commission within 30 days of execution thereof in violation of sec. 1.613(c) of the rules, was transmitted to the licensee of station WNJR on Jan. 22, 1964. The licensee filed a response and opposition to the notice on Mar. 16, 1964. By a letter dated June 24, 1964, Continental withdrew its response and opposition and also submitted a check in full payment of the forfeiture.

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each sponsor who advertised during "Celebrity Time"; or whether such "contracts" were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants.

3. To determine whether the principals of the applicant have exercised adequate control or supervision over the operation of WNJR in a manner consistent with the applicant's responsibility during the period of the applicant's most recent license renewal and up to the present; [2]

4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317 (a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the Commission's rules;

5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity.

The Commission's designation order provided that, upon request, the Broadcast Bureau should furnish Continental with a bill of particulars setting forth the basis for these issues. On July 20, 1965, counsel for the applicant filed a request specifying the information desired from the Bureau with reference to the issues numbered 1 through 5 above. The Bureau supplied the bill of particulars on August 25, 1965. Thereafter Continental submitted to the Bureau on September 1, 1965, a request to make bill of particulars more definite and certain. The Bureau's reply to this further request for information was furnished on September 17, 1965.

2. The applicant complied with the requirements of section 311(a)(2) of the Communications Act and section 1.594 of the Commission's regulations by publishing the prescribed notice of designation of its renewal application for hearing in the Newark Evening News on June 24, 25, 29 and 30, 1965, and broadcasting such notice on June 21, 22, 23 and 24, about 9 a.m., over station WNJR, and by transmitting notification thereafter to the Commission of these accomplishments.[3] No resident of the Newark area or the New York metropolitan area nor any other member of the general public not called as a witness by the parties sought to present evidence in this proceeding.

3. Prehearing conferences were held in Washington, D.C., on July 28 and September 10, 1965. Next there was released on September 13, 1965, a *Memorandum Opinion and Order* of the hearing examiner (FCC 65M–1173) wherein a motion to clarify issues filed August 12,

[2] The license for station WNJR was last renewed on Feb. 8, 1961.
[3] The examiner ruled at the prehearing conference of Sept. 10, 1965, that the applicant had complied with the local notice and notification provisions of the act and sec. 1.594 (Tr. 68).

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1965, by Continental was granted to the extent that it requested the issues be construed to authorize the alternative sanction of a short-term renewal of license (i.e., for less than 3 years) and was denied insofar as it requested these issues also be construed to authorize imposition of an alternative sanction of monetary forfeiture under section 503(b) of the Communications Act. In ruling that the issues did not empower him to impose a monetary forfeiture in this proceeding, the examiner also denied a request of Continental that the question of authorization to impose the alternative sanction of monetary forfeiture be certified by him to the Commission's Review Board for modification of the issues.

4. The hearing commenced on October 8, 1965, in Washington, D.C., at which place also the second hearing session was held on November 24, 1965. This phase of the hearing was concerned with the identification and introduction of stipulations and certain applicant's exhibits, with no oral testimony being heard. Hearing sessions for the introduction of evidence through witnesses as well as documentary sources were then held in Newark, N.J., between November 30 and December 17, 1965, with an adjournment taken on the last-mentioned date subject to resumption of the hearing pursuant to further order of the examiner. Following a hearing conference held in Washington, D.C., on January 13, 1966, the hearing was reconvened there on February 14, 1966, by direction of the examiner for completion of the applicant's direct case,[4] and hearing sessions were thereafter held in Washington on various dates between February 14 and March 16, 1966. Further hearing sessions were held in Washington on April 12 to receive evidential stipulations and on May 3, 4, and 5 for the introduction of additional evidence by the Broadcast Bureau. Upon petition filed by the Bureau, a hearing session was held in Newark, N.J., on May 18, 1966, for presentation of further rebuttal evidence by the Bureau, and thereafter the concluding hearing session was held in Washington, D.C., on June 15, 1966, on which date also the record was closed. By order of the hearing examiner issued September 6, 1966, the record was reopened to incorporate rulings of the examiner on certain exhibits not shown by the transcript of hearing, and the record was again closed in the same order.[5] The parties filed proposed findings and conclusions by October 14, 1966, and each filed replies by November 4, 1966.

FINDINGS OF FACT

Rollins, Inc.

5. Rollins, Inc., is a public corporation with its stock listed on the American Stock Exchange. As of July 31, 1966, shares issued and outstanding totalled 3,117,783. The Rollins family held 2,098,135 shares, representing 67.238 percent of the corporate voting stock (ownership

[4] By an *Order* (FCC 65R-53), released Feb. 8, 1966, the Review Board denied an appeal, filed Jan. 20, 1966, by the Broadcast Bureau, from the hearing examiner's order (FCC 66M-103) removing, on his own motion, the place of hearing from Newark, N.J., to Washington, D.C. for resumption of hearing on Feb. 14, 1966.

[5] Corrections to the transcript were made by an order of the examiner (FCC 66M-1428, released Oct. 24, 1966) pursuant to a joint correction motion filed by counsel for the parties on Oct. 17, 1966.

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form 323, filed Sept. 23, 1966, Ex. B) (official notice taken). O. Wayne Rollins, president and chairman of the board, has held 48–49 percent of the voting stock since 1960 and together with his family has effective control of the corporation.

6. The officers and directors of Rollins, Inc., are as follows (form 323, supra):

O. Wayne Rollins, president-director.
Henry B. Tippie, executive vice president—finance, treasurer.
R. Randall Rollins, executive vice president—Media, assistant secretary.
Earl F. Geiger, executive vice president—Orkin.
Madalyn Copley, executive vice president, secretary.
Albert R. Lanphear, executive vice president—radio.*
Frank H. Minner, Jr., assistant treasurer.
John W. Rollins, director.
Jarvis J. Slade, director.

7. The Rollins home office is in Wilmington, Del. Through direct ownership or control of wholly owned subsidiaries, Rollins, Inc., operates the following broadcast facilities (Tr. 4505–06, form 323, supra, Ex. A):

AM (7)	*TV* (3)
WAMS, Wilmington, Del.	WCHS–TV, Charleston, W. Va.
WBEE, Harvey, Ill.	WEAR–TV, Pensacola, Fla.
WCHS, Charleston, W. Va.	WPTV–TV, North Pole, N.Y.
WGEE, Indianapolis, Ind.	
WNJR, Newark, N.J.	*FM* (2)
WRAP, Norfolk, Va.	WGEE, Indianapolis, Ind.
KDAY, Santa Monica, Calif.	Permittee, Charleston, W. Va.

Continental Broadcasting, Inc.

8. Station WNJR was purchased by Rollins Broadcasting, Inc. (now Rollins, Inc.), from the Evening News Publishing Co. in October 1953 (official notice taken). The license was thereafter assigned to Continental Broadcasting, Inc., a wholly owned subsidiary. Continental's stock is voted 100 percent by O. Wayne Rollins (form 323, supra). WNJR programing is directed toward the Negro audience in the New York-New Jersey metropolitan area.

9. From the beginning of the WNJR renewal period in February 1961 through the date of designation (June 10, 1965) the officers and directors of Continental were as follows (official notice taken):[6]

O. Wayne Rollins, president-treasurer-director.
Henry B. Tippie, vice president-director.
Madalyn Copley, vice president-secretary.
Albert R. Lanphear, vice president.
John W. Rollins, director.

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*By letter dated Sept. 21, 1966, Rollins informed the Commission that at the annual meeting held on Aug. 23, 1966, Lanphear was not reelected and that no replacement was elected to the office formerly held by him.

[6] As of Sept. 21, 1965, R. Randall Rollins (son of O. Wayne Rollins) was elected executive vice president-treasurer, and James Roddy was elected vice president-outdoor. Otherwise the structure of the applicant remained the same as above (form 323, filed Oct. 25, 1965).

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Rollins' chain of authority

10. During the period pertinent to the issues in this proceeding, i.e., February 1961–June 1965, the high-level executive positions within the Rollins organization remained relatively constant. O. Wayne Rollins (Wayne Rollins) was the chief executive officer and, as such, devoted 90 percent of his time to general station affairs until December 1964. At that point, he began to devote less time to broadcasting, and the duties and functions which he formerly performed with respect to the broadcasting operations were assumed by his son, R. Randall Rollins (Randall Rollins).

11. Albert R. Lanphear, vice president in charge of radio, was operational head of the Rollins' AM stations from 1960. He was responsible for radio sales, programing, labor negotiations, engineering, acquisitions and modifications. He reported directly to Wayne Rollins from 1960 to 1965. Lanphear was personally hired by Wayne Rollins to manage station WNJR when it was acquired in 1953. As of April 30, 1966, Lanphear owned 1,950 shares of Rollins, Inc. (form 323, filed May 19, 1966).

12. Prior to June 1961, Howard Tim Crow was director of public relations for Rollins. In June 1961, Wayne Rollins created the quality control and program development department and appointed Crow as director because he deemed him best qualified for the position. Crow's function is to supervise program content and to insure conformance with Commission rules and company policy. He is independent of any supervision by Lanphear, having formerly reported directly to Wayne Rollins and now to Randall Rollins. Since August 1962 Crow has held between 50 and 2,400 shares of Rollins, Inc.; at the time of hearing he held 2,100 shares.

13. Leonard Mirelson was general manager of WNJR from 1960 until mid-December 1964. He was completely in charge of the day-to-day operations of the station. As such, Mirelson was responsible for programing the station, supervising sales, obtaining revenue, and making collections. Mirelson was personally hired as an account executive by Lanphear in 1954 when the latter was general manager of WNJR. Upon the recommendation of Lanphear, Rollins promoted Mirelson to general manager in the fall of 1960. When he was the general manager of WNJR, Mirelson reported directly to Lanphear. While employed as station manager, Mirelson held between 800–5,100 shares of Rollins, Inc.; at the time of hearing, he held approximately 5,800 shares. In December 1964 Mirelson was relieved of his duties as the general manager of station WNJR and was installed as the regional sales manager of WNJR.

The "Celebrity Time" program

14. The first two issues set forth above (preliminary statement, par. 1) concern questions of misrepresentations by the applicant to the Commission, lack of candor on applicant's part, and also falsification of documents submitted to the Commission's staff. Both of these issues revolve around a program called "Celebrity Time" which was presented on station WNJR from the fall of 1957 until March 1963 during the time period running from 11 p.m. to 12 midnight, Monday

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through Saturday. The genesis and subsequent history of this program are discussed below.

15. Since 1957, Mr. Norman King who resides in Manhattan, N.Y., has been involved in the broadcasting industry as a public relations consultant and the head of an advertising agency. He is the president of Celebrity Consultants Ltd., a New York corporation, which company operates as an advertising agency to place advertising on radio and television stations for a number of advertisers, creates copy for them, and does sales promotion and publicity work for these clients. The record evidence warrants the inference that the corporate entity known as Celebrity Consultants is the alter ego of Mr. King in practical operation (Tr. 866–867).

16. Sometime in 1957, Norman King approached Leonard Mirelson, then employed as a salesman with station WNJR, concerning the possibility of producing, and placing advertising in, a program to be broadcast over that station. King had been involved through his agency in the production and broadcast of a program over station WAAT under the title of "Celebrity Time", or some similar name, on weekday evenings from 11 o'clock to 12 midnight. King informed Mirelson that the program in question would be going off the WAAT schedule, and it is clear from the record that King was seeking to have this show continued on the air as part of the WNJR schedule. Mirelson then discussed King's proposal with Al Lanphear who at the time was managing station WNJR, and with Lanphear's approval accepted the program. Agreement was reached between King and Mirelson for the broadcast of the "Celebrity Time" program over station WNJR each evening except Sunday from 11 o'clock until midnight.[7]

17. The original arrangement between Celebrity Consultants Ltd. and station WNJR for the broadcast of "Celebrity Time" is not evidenced by any document in the record. King's testimony (Tr. 876) points to the likelihood that there was some form of written contract drawn up for this program in 1957, but its terms are presently ascertainable only from the testimony of the negotiators thereof and by reference to written contracts for the same program drawn up in later years.[8] The financial arrangement agreed upon with respect to the broadcast of the "Celebrity Time" program was that the station would receive from King's agency a weekly gross revenue of $300, commissionable to the agency at 15 percent, or the net payment of $255 after deduction by the agency of its commission.[9] Under its agreement with WNJR, King's agency obtained the right to place advertising announcements for various clients within each nightly 1-hour broadcast period. Originally King planned that 5-second announcements would be aired in accordance with a sales approach he called impact advertising. No maximum amount of time within each

[7] King considered this late evening hour in the broadcast schedule of the radio station to be "marginal air time" for advertising purposes as differentiated from the more desirable "station prime time" (Tr. 900).

[8] King confirmed that the written agreement covering "Celebrity Time" dated Dec. 29, 1961 (WNJR Ex. 3), carried forward the terms of his early arrangement with WNJR (Tr. 880). WNJR exhibit 3 extended for a year the terms of a prior written agreement (WNJR Ex. 2) dated Dec. 30, 1960.

[9] As King explained the financial arrangement at one point (Tr. 870): "* * * I bought the time and it was $300 agency gross, $255 net."

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1-hour program to be allotted to the agency for the broadcast of commercial announcements of its clients was spelled out although King believed, according to his testimony (Tr. 936), that the airing of an excessive number of spot announcements through the agency would have resulted in WNJR's calling a halt to the practice. According to King, the agency never reached a saturation point to require his being told by the station that "the complement of time" permitted the agency under the agreement had been used up. He believed in this connection that a radio station operates under some time limitation on the commercial content aired within a 15-minute broadcast segment. The station reserved the right under the 1957 arrangement with King's agency to broadcast commercial announcements of its own sponsors within the "Celebrity Time" hour. King was not instructed by WNJR as to what amount he could charge for commercial announcements placed through his agency nor was he required by the station to follow its rate card in determining the amounts charged to the agency clients for spots although he used the rate card "as a basis for creating his sales approach."[10] Under the arrangement with WNJR, King's agency was obligated to remit to the station the fixed sum of $255 for each week the "Celebrity Time" program was broadcast irrespective of the extent of the sponsorship obtained by the agency.[11] Mirelson, as the station's salesman on the account, received a commission based on this figure. It was anticipated by Mr. Lanphear, WNJR's manager, that the gross revenue for advertising which would be placed on "Celebrity Time" by King's agency would not exceed $300 per week (Tr. 5526).

18. King was the "packager and producer" of the "Celebrity Time" show—he created the idea and the approach for the broadcast of this program over station WNJR. In his own words, he "put it all together." As more particularized in King's testimony, his activities in this regard included respresenting the advertising agency and obtaining the sponsors for the program, purchasing the time for the production of, and signing the contracts with WNJR for, "Celebrity Time," and hiring the announcer and on-the-air producer, one Bill Carlton, King often wrote commercial continuity for the show on behalf of his clients.

19. As noted above, Bill Carlton, a "freelance announcer" (i.e., not employed as a staff member of station WNJR) was hired and paid by King to produce the show, which meant taking care of the day-to-day details of putting a program on the air, and also to act as the announcer on the program. King would occasionally listen to the show but in general did not concern himself with the entertainment content for which Bill Carlton was made fully responsible. He often conferred with Carlton about the program, mainly about the "economics" of the

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[10] King declined to answer the question put by the examiner as to whether he adhered strictly to the rate card (Tr. 933) but indicated previously (Tr. 932) that he performed "many services for these clients besides giving them air time," for which he charged. In this connection he stated too (Tr. 933): "Well, I performed many services as part of the single operation—the broadcast of the spot on the air may well have included merchandizing in the store, the creation of the air copy, some publicity, some sales promotions, depending on the individual client and the situation and time of the year." As shown by the evidence, King also hired and paid an individual for several years to act as producer and announcer on "Celebrity Time" (Tr. 869).

[11] King refused to accept the examiner's characterization of his arrangement as a "percentage agreement" with the station, and stated instead: "* * * I had a very static sum agreed on." (Tr. 1046.)

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show, but did discourage "general chatter" on "Celebrity Time" by Carlton since he wanted to enhance the entertainment appeal of the show. Carlton whose experience in radio dated from 1948 as an announcer and disk jockey on station WCAP, had previously been associated with King, first as an announcer and later as the producer in full charge of the prototype of the "Celebrity Time" program when it ran on station WAAT.

20. King knew that WNJR "was a negro oriented station" because it advertised itself as such in promotional material and in Standard Rate and Data. He was not aware of the particular music policy of the station. But it was always his understanding that WNJR "had full right and control of all content and programing" aired over the station. King understood too that as a "packager and producer" of a program being broadcast by this station he was "subject to the field, to the climate of the approach of the station" (Tr. 886). At some time during his relationship with WNJR, he was told by the station that he could not put some kind of program on the air because it did not fit clearly within the station's programing concept. On "a couple of times" too, King was turned down by the station manager with respect to sponsors who did not meet the station's "minimum requirements" (Tr. 900). King placed no limitations on Carlton with respect to the content of the "Celebrity Time" program except for keeping "within the bounds of good taste." King understood that Carlton was aware of an obligation on his own part to "stay within the confines of the station rules and regulations" in order for the program to be carried by WNJR.

21. At the outset, the "Celebrity Time" program consisted of playing records, broadcasting 5-second spot announcements, and interviewing contemporary motion picture stars or other celebrities who appeared as guests. Carlton was in complete charge of the day-to-day details of the show. His duties included selecting the music played on the program, broadcasting the program, and maintaining the program logs. He prepared a list of the records to be played on each evening's program. His selections were guided by the "musical format" of station WNJR, "rock-and-roll music" at that time. If a celebrity guest appearing on the program had made any records which were currently popular and Carlton had that album, he would play several cuts from the album. On several occasions he went over his planned program format with Mr. Lanphear, then station manager. Carlton did not sell time, nor did he write the commercials aired on the program. He was paid a salary by King computed at the AFTRA (union) rate for each hour of air time.

22. A staff announcer employed by station WNJR was always on duty during the airing of the "Celebrity Time" program under Carlton's tenure. Charles (Charlie) Green was prominent in Carlton's mind as the WNJR staff announcer on duty at the station during his years of association with the broadcasting of "Celebrity Time." From the standpoint of directly exercising any authority over Carlton or interfering with his presentation of the show on the air, Green never supervised the program while Carlton was doing it. It was Green's responsibility, however, as the "standby" or staff announcer on duty to

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watch over the program as it was being broadcast to make sure that the content was "in good taste" and that the "program was being broadcast in accordance with (station) policies" (Tr. 3632–33). He had the authority and the responsibility to cut the show off the air if he observed something objectionable being broadcast. There is no evidence that Green found any occasion to cut into Carlton's programs or admonish Carlton about any offensive matter in the "Celebrity Time" program. Green did not maintain the WNJR program logs for him, nor did he give Carlton any instructions concerning maintenance of the program logs. Green had been instructed that Carlton would maintain his own logs and he (Green) did not, therefore, concern himself in the least with the log keeping for "Celebrity Time" when Carlton was on the air. Green did announce the introduction to the "Celebrity Time" show. There were occasions moreover when Green appeared on the program in Carlton's absence but this happened only toward the end of Carlton's connection with "Celebrity Time." Before that time, when Carlton was not present for his program, a taped show prepared by him had been aired by the station.

23. After Mirelson became general manager of WNJR in the fall of 1960, the first written contract for the "Celebrity Time" program which appears in the record (WNJR Ex. 2) was executed by King, on behalf of Celebrity Consultants, Ltd., and by Mirelson, on behalf of WNJR. A standard WNJR contractual form for agreements with advertisers captioned "Order for Broadcasting" on the front page and having also "Contract" printed at the upper left corner thereof was utilized on the agreement. This written contract, dated December 30, 1960, became effective January 1, 1961. The agreement in question carried forward the essential terms of the arrangement between the parties thereto under which the "Celebrity Time" program had been broadcast over WNJR from its inception in 1957. It provided that the "Celebrity Time Show" would be broadcast from 11 p.m. to 12 midnight, Monday through Saturday, at the station's "Rate" of "$300 per week." The specified sum of $300 represented the "gross" charge for the time, with King's agency being obligated to turn over $255 "net" to the station each week; the difference between the gross and net figures was attributable to the deduction of "a commission" from the gross by the agency. The agency's obligation to the station for the sum of $255 each week without regard to the actual revenues obtained from agency advertisers for any particular week was continued under the written agreement (Tr. 1049). The written agreement did not specify the rates to be charged to individual sponsors, and in fact the station was not aware of the rates charged by King (Tr. 1051). In the written agreement appeared the following parenthetical text which was drafted by King and Mirelson jointly (Tr. 3452):

> This show is produced and packaged by Celebrity Consultants Ltd., outside and independent radio show packagers and producers. WNJR does not directly participate in the programming of this show, or deal in any way with the sponsors of the packager. Celebrity Consultants will provide their own announcer and any talent for this show.

The second sentence in the above-quoted phraseology was inserted at the insistence of King as a protective measure to guard against

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the station's pirating away from the agency any clients whose advertising it placed in "Celebrity Time." On the reverse side of the written agreement (WNJR Ex. 2) were printed in fine type a considerable number of standard detailed provisions below the heading: "This Order is Subject to the Following Conditions." The first condition (1.(a)) read in part as follows:

> The advertiser agrees to pay, and the broadcasting station agrees to hold the advertiser liable for payment, for the broadcasting covered by this agreement. Where agency alone signs contract, the contract is binding upon the advertiser as well as the agency * * *

Another of the provisions stated (2.(a)):

> The station has the sole right to determine whether or not program and/or copy therein is in the public interest, convenience and necessity and the station may in its sole discretion immediately terminate the agreement * * *

The above-described written agreement was not intended to supersede the previous understanding between the parties that the station would have the right to insert an unspecified number of spot announcements for its own clients in the "Celebrity Time" show. That the station chose to exercise this right is established by King's testimony (Tr. 902) but the record does not reflect when or the extent to which WNJR did so. No reduction in the agency's weekly obligation to the station was contemplated if WNJR availed itself of the right to insert spots for sponsors obtained by the station. There was no specific understanding as to the "amount of spots" that the agency could broadcast during the one-hour program, the only limitation on the volume of such commercial content being that imposed by the station's general policy in regard to overcommercialization.

24. Mirelson, WNJR's manager, considered the written agreement (WNJR Ex. 2) to be "an agency arrangement" or "agency contract" because "the billing was on the gross and a net amount was remitted less 15 percent (the) standard agency commission" (Tr. 4234–35). This 1960 contract was "T.F." (i.e., it was to remain operative until either of the parties canceled). According to accepted trade practice, a "T.F." contract is generally considered to be operative only for a period of 52 weeks. Therefore, 1 year later (December 29, 1961) a similar contract effective January 1, 1962 (WNJR Ex. 3) was entered into which was virtually identical in form and substance, and which also contained the same standard provisions on the back. Mirelson did not inform the Rollins home office in Wilmington of the existence of these written agreements with King's agency, nor did he send copies to the home office. Mirelson was not required to send advertising to the Wilmington home office and it was not his practice to do so. Although no subsequent written agreement was executed for "Celebrity Time," it was understood by King and Mirelson that the contract intended to run during 1962 in fact remained in force through March 1963, when the program was canceled effective March 9 by Mirelson's notifying King of this action. Because King's agency had fallen into arrears on its payments to the station, Mirelson voluntarily reduced the weekly "gross" figure stated in the 1962 contract (referred to by

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him as "the weekly minimum guarantee") from $300 to $200 by December of 1962.

Duke Baldwin

25. Carlton was the only individual King paid to broadcast "Celebrity Time" and, until 1959, apparently was the only one who did the program. In June 1959, King, on behalf of Celebrity Consultants, Ltd., entered into a written contract with one Duke Baldwin (WNJR Ex. 114). At the time Baldwin made the agreement with King's agency in 1959, he was operating a school known as Duke Baldwin's Dance Studios. In prior years he had arranged for students from his school ("talent") to appear on various New York area radio and television programs, and had personally participated in those shows as a guest in connection with the appearances. It was through an assistant of King that Baldwin was offered an opportunity "to go into radio" on station WNJR. Baldwin understood he was to produce a musical show one evening each week and would be required to pay King's agency $50 for a half-hour period. He would be afforded the opportunity of placing advertising from sponsors he solicited in the half-hour program. No specific amount of advertising was solicited but it subsequently developed that Baldwin was permitted to broadcast five or six spots of either 60 seconds or 30 seconds duration each in each broadcast period. Baldwin was to have no obligation to pay the agency any money collected from sponsors in excess of the $50 weekly obligation for the program. Baldwin never paid any money to WNJR.

26. Under the terms of the written agreement (WNJR Ex. 114), Baldwin agreed to pay King's agency $50 weekly, cash in advance, for one-half hour participation (11 to 11:30 p.m.) each Monday night in the "Celebrity Time" broadcast period on station WNJR. King was constantly seeking additional sponsorship for the "Celebrity Time" program; he considered a "freelancer" like Baldwin who appeared on the "Celebrity Time" show under the above-mentioned contract in the role of disc jockey to be "a talent for the show" and the advertisers that Baldwin brought to the show "as sponsors," (Tr. 1048). Baldwin's contractual one-half hour was identified in the agreement (WNJR Ex. 114) as the "Good Time Show" starring Duke Balwin and Billy Glover. It was stated in the contract that "Celebrity Consultants Ltd. has prior and final approval of your sponsors and may reject any sponsor." Another provision read: "This is a contract with 'Good Time Show' and is not an agreement with the station. The station has full control of this show and its content and its talent and can change or discontinue this show without reason and without notice." The agreement provided too that Baldwin and Glover "must be acceptable AFTRA members and as responsible producers of this independent half-hour must pay themselves AFTRA scale * * *" Station WNJR was not a signatory to this agreement and did not participate in the negotiation or formulation thereof. The contract with Duke Baldwin (WNJR Ex. 114) was to run for a period of 13 weeks. Glover, who was associated with Baldwin in this initial period, withdrew from the program. Baldwin's original agreement with King's agency was extended by oral understanding and it continued under

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the same financial arrangements and other terms until December 1962. Baldwin never paid any money to WNJR. There were some occasions between 1957 and 1962 when Baldwin did not have the $50 cash payment in hand and he did not go on the air with his weekly program at those times. Baldwin did not consider himself to be an advertising agency.

27. Duke Baldwin, when he first began his program on WNJR, was told by King to report to Bill Carlton at the station. He understood that Carlton was "King's man" there. Carlton instructed Baldwin with respect to the station's music policy and the permissible length of spot announcements. Baldwin drew up the commercial continuity for the sponsor's spots, and then consulted with King about the continuity, or else with Bill Carlton or Charlie Green, the staff announcer on duty at the station. So far as Baldwin was aware, Green was "in charge of the station" and he understood that Green was "listening to or checking" his program while Baldwin was on the air. When Baldwin first started at WNJR, Carlton maintained the program logs for Baldwin's show. But when Calton was absent and after he left "Celebrity Time," Charlie Green did the logkeeping for Baldwin's program. A few times Baldwin kept his own logs under Green's supervision by way of learning how to perform the function. Baldwin consulted with either Carlton or Green concerning any questions he had about his program, depending on which of them was nearer to him at the moment. Before each program went on the air, Baldwin furnished to the station's engineer and showed to Carlton, and later Green, copies of a so-called preparation sheet drawn up by Baldwin in which were listed the proposed order of presentation of commercials and records, the names of the sponsor and the performing artist and related title for each record to be played on the program. Baldwin sought advice on the acceptability to the station of certain prospective sponsors and on the quality of his program and his own performances from Mr. Joseph ("Joe") Soriano, a salesman for station WNJR. Baldwin had many conversations with Soriano who was present in the station frequently when Baldwin's program was broadcast. At the time Baldwin thought Soriano was "one of the owners" of the station because of the latter's authoritative conduct although no orders were issued by him to Baldwin. In general, Baldwin selected the music to be played on his programs from the station's own music library, using master music lists compiled by the station in making up the preparation sheets for his programs. He also played the records of artists interviewed on his program; either they brought the records with them or Baldwin obtained such records from one of his sponsors. When Baldwin was promoting an outside show and gave a commercial announcement about it on the air, he would then play a record of an artist to appear on that show if he had one available. Baldwin was not instructed that this practice was contrary to Rollins' policy as set forth in its operating manual (sec. 4.17(e)).

Al Browne

28. Prior to 1961, Carlton and Baldwin were the only individuals who conducted programs on "Celebrity Time." As noted above, King's

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agency was obligated to pay station WNJR a weekly sum of $255 under the agreement concerning this program. King gradually fell behind in meeting this financial commitment to the station. Sometime in 1961, King informed Mirelson, who was then general manager of WNJR, that some persons in his organization previously engaged in bringing in advertising for "Celebrity Time" had left the agency, and that he was having a problem in obtaining enough sponsors for the show to keep it going. King then stated to Mirelson he understood that Joe Soriano, a full-time WNJR salesman, had "all kinds of contacts with people like Duke Baldwin who like to be on the air and get sponsors of their own." Next, King asked Mirelson if there would be any objection on the latter's part to King's calling Soriano for assistance in bringing such persons into the program and indicated that if the station was not going to "use any of these people or any of this advertising revenue during the day," then King's organization could "use these people to bring in revenue for (his) show" (Tr. 3671). Mirelson did not speak to Soriano immediately after his discussion with King. But when King again spoke to Mirelson about his problems with "Celebrity Time" and said he was thinking of calling Soriano, Mirelson replied that he wanted to discuss the matter with Soriano first.

29. At this point it should be noted that the "Celebrity Time" program, during the several years it was broadcast, was not the only program on which freelance (i.e., nonstaff) announcers appeared on entertainment shows pursuant to an arrangement with WNJR for the placement of sponsors' advertising in a program under a guaranteed particular amount of revenue to the station. Other such programs broadcast were the "Clint Miller Night Club" show, the "Mr. Blues" show featuring Harold Ladell, a polka show featuring Bernie Witkowski, and a gospel show featuring Joe Crane. The Witkowski and Mr. Blues shows were legacies from the prior licensee of WNJR and had been continued. The Clint Miller and Joe Crane shows, as well as "Celebrity Time," were begun during a period when Al Lanphear had been general manager of WNJR. However, there had developed a firm policy at station WNJR under Mirelson's management against accepting any new freelance announcers and, when Soriano would present for his approval contracts from freelancers, such proposals had been rejected by Mirelson. Thus, when King in 1961 broached the subject to Mirelson of Soriano's securing persons like Duke Baldwin for the "Celebrity Time" program, Soriano had no freelancer accounts on the station's schedule. After learning that King was thinking of calling Soriano, Mirelson approached Soriano and asked if he had any freelancers for the "Celebrity Time" program. In view of this inquiry it was quite obvious to Soriano that the policy against permitting no freelancers to appear on the station would not apply to the "Celebrity Time" program. In discussing with Soriano the possibility of having additional freelance participation in "Celebrity Time," Mirelson noted that King's agency was in arrears and was having problems meeting the weekly payments and it would be a help to King if he had additional freelance announcers who could also bring in business. There was precedent for the appearance of freelance announcers

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on the show under an arrangement with the agency in the persons of Bill Carlton and Duke Baldwin, and Mirelson observed that their broadcasting on this basis had not created any problems. Mirelson specifically instructed Soriano that he did not want any advertising placed on "Celebrity Time" that could otherwise be placed on the station. Soriano understood by this that freelance announcers who had their own sponsors could appear on "Celebrity Time" by arrangement with King's agency but could not have their "business" accepted by WNJR under a freelancer's contract made directly with the station. Mirelson told Soriano that he could expect a call from King.

30. Very soon thereafter King did call Soriano and asked if he had any business to place on "Celebrity Time." Soriano replied that he had none at the moment but it was likely that somebody would turn up, and that he would take up the subject of obtaining freelancers for King with Mirelson. King then offered Soriano a 30-percent sales commission on whatever revenues he would bring to the "Celebrity Time" program through freelancers. If Soriano placed any commercial announcements through freelancers in time segments of "Celebrity Time" they appeared on, he was to remit the proceeds therefrom less his 30-percent commission to King's office. Soriano reported his conversation with King, including the percentage offer, to Mirelson who indicated that he would go along with King's proposal to have additional freelancers obtained through Soriano appear on "Celebrity Time." As will be shown below, Soriano was instrumental in bringing a number of freelancers into the "Celebrity Time" program. At some time not specified in the record, King asked Soriano what he thought they "could get" for freelancers' segments of either 15 or 30 minutes. Soriano wanted to charge something which was low enough so that it could be attractive, and reasoned that if he reduced the usual rate charged by the station for a 30-minute program segment to as low as $30 or $25, there would be a good chance of obtaining participation of freelancers. Agreement was reached between Soriano and King as to the amounts which were to be charged for either 15 minutes or half-hour freelance segments of program time. The station did not participate in the financial arrangements made between King and Soriano with reference to the freelance segments. Soriano's arrangement with King as to the charges to be made or his commission therefrom had no reference to the sale of individual spot announcements to sponsors since this type of transaction apparently was not contemplated by them.

31. Al Browne probably was the first freelancer for whom Soriano arranged to broadcast on "Celebrity Time." Browne is employed full time as an investigator for the city of New York. He is also a band leader, a music composer and arranger, and a music teacher. Browne was a listener of station WNJR, which he regarded as "a very popular station," and he heard a broadcast by Duke Baldwin whom he knew from the entertainment field. Upon inquiring of Baldwin how he had secured his program on the station, Browne was informed that "they had some free time for freelance disc jockeys" and he could call the station about a program of his own. Browne then phoned the station and was referred to Joe Soriano who confirmed Baldwin's advice and

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arranged for an appointment with himself at the station. After meeting with Soriano, Browne obtained a 15-minute segment in "Celebrity Time" for which he was to pay $25. Soriano gave Browne a WNJR rate card showing the station's rates for spots of different lengths of time, and told Browne that his announcements should not be "too long." Soriano called King after his meeting with Browne to alert him that there would be a quarter-hour program in which Browne would appear. Browne's program first ran on station WNJR from March until June 1961, and again during part of 1962 when he had a half-hour program for which he paid $50. He in turn charged sponsors between $5 and $10 for 10- or 15-second spots, and wrote his own commercial continuity. Whether Browne actually made a profit from his freelance participation in "Celebrity Time" is problematical; he claims not to have done so. Browne prepared a list of the records to be played on his program from a station master list but included on his list at least one record recorded by himself; sometimes his own records were among the "hits" on the station's list. Soriano had told Browne to take up with Charlie Green any questions he might have about the presentation of his program. Green was always in or around the studio when Browne was on the air, and he maintained the logs for Browne's programs.

Parade of the freelancers on "Celebrity Time"

32. When Browne discontinued his program in June 1961 because of the press of other activities, he was asked by Soriano if he knew of any other persons who were interested in getting on the station. Browne approached a number of persons, aroused an interest in them to appear as freelancers on WNJR, and referred most of these individuals to Joe Soriano. He explained to them what was involved in gaining access to "Celebrity Time" hour (i.e., obtaining the sponsors for a program and making the specified payment for the time), introduced them to Soriano at the station, helped them prepare their material for the shows, and remained at their side to lend them confidence and give them advice during their first several programs until they became accustomed to working on the air. In three cases, Browne paid to Soriano the sum of $25 for 15-minute programs of freelancers (Edwina Dyer, Tr. 1427; Anthony Crews, Tr. 1439; and Don Norman, Tr. 6624) and in turn received $35 from the freelancers concerned. However, Browne did incur certain expenses in collecting and remitting payments for the programs involved and in traveling to and from station WNJR.[12] It can reasonably be inferred that he made some profit in another instance where he collected $70 from two freelancers who jointly shared the charge for a half-hour program while remitting but $50 to Soriano (Tr. 6627; 6634).

33. While some of the freelancers who purchased segments and appeared in the "Celebrity Time" program on WNJR were referred to Soriano by Al Browne, others learned of its availability through freelancers already broadcasting within the program. Still others were known to Soriano personally or were referred to him by Mirelson.

[12] Upon discovering that Browne had been collecting from him a sum in excess of the rate Soriano was charging, one of the freelancers withheld the final $35 payment from Browne (Tr. 6635).

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By and large, the freelancers had no previous training or experience in the field of radio.[13] Moreover, they were not auditioned prior to their initial broadcast although Soriano did discourage prospective participants whom he deemed unsuitable. Soriano generally talked with the freelancers before they first went on the air and he was with them on their first night of broadcast. But at least three of them did not speak with him at all until after they had been broadcasting over WNJR. Soriano estimated that he was at the station during the 11–12 p.m. segment 3 or 4 nights a week.

34. The number of different freelancers who broadcast within "Celebrity Time" varied from day to day and week to week. At first, only one or two would appear, but as time went on, more and more freelancers started participating. The record reflects that nearly 30 different freelancers appeared on "Celebrity Time" between 1961 and March 9, 1963. Some of these freelancers would also bring guests who appeared on the program. The principal prerequisites for a freelancer's gaining access to the WNJR microphone were the availability of time within the "Celebrity Time" hour and payment of $25 per quarter hour. The freelancers received supervision in varying degrees from the staff announcer on duty during the evening hours, usually Charlie Green. It was his duty to listen to the freelance programs, to check the commercial continuity they had prepared and the music to be played. Green played records with which he was unfamiliar to see that they were in good taste. He also edited and timed copy and examined new copy to see that nothing presented was fraudulent, obscene, or illegal. Green did not know when a new freelancer would be on the air until the night such person actually arrived at the station. It was difficult for him to keep up with who was to come in each night. Soriano introduced most of the freelancers to Green on the occasion of their first participation in the "Celebrity Time" program, would inform them that Green was the staff announcer, and would tell the freelancers they would be responsible to Green so far as the commercial copy and musical content of their shows were concerned. Green conceded in his testimony (Tr. 2414) that there were times when copy was read over the air that he had no opportunity to see first; and that prior to September 26, 1962, he had no responsibility for keeping the station's logs on "Celebrity Time" because this function was the obligation of Bill Carlton, and that he was aware that Carlton was not always maintaining the logs. Nor did the staff announcer on duty always give full-time attention to the programs on "Celebrity Time" as they were being broadcast since he was attending college during the period from September of 1960 to June of 1963 and, whenever he could seize upon an interval while at the station to study, he did so.

35. There is no doubt that the overwhelming desire of the freelancers on "Celebrity Time" was to break into radio and gain practical experience in the field. Some of the freelancers adopted names for their respective programs. For example, Don Norman called himself the "Rock N' Robin"; Lord Bobby and Gene Edwards, who played

[13] There were, however, several exceptions: Browne had broadcast while in the Army; another had 6 years broadcast and supervisory experience; and a third had broadcast for 17 years in Panama.

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calypso music, identified their program as the "Caribbean Holiday Show"; Chris Coles and Doris Williams called their show "Spotlight Chamber"; Ben White and Lou Parks called their program the "WNJR Penthouse Show." These programs were sometimes identified on the air as segments of "Celebrity Time." However, at other times "Celebrity Time" was in no way identified as the program then on the air. The freelancers sold commercial spot announcements (and in one instance a quarter-hour segment) for whatever rates they were able to charge the individual sponsors they obtained. Several of the freelancers sometimes had difficulty selling enough advertising to cover the $25 per quarter hour weekly charge. Others more or less broke even. None considered the sale of advertising to have been a profitable activity. In those instances where freelancers were in fact paying for all or part of their broadcast time, there were no announcements made on the air of their sponsorship. Some of the freelancers delivered spot announcements promoting or advertising their own business ventures such as "Talent Searches," sponsorship of dances, and acting as master of ceremonies for clubs. At Al Browne's suggestion, one freelancer played a Browne record as his program ending theme, and another made an announcement (unpaid) concerning an appearance of Browne's band at a dance.

36. The freelancers selected the music played on their programs, supplying the station in advance of the programs with lists of the records they intended to play. The music policy of the station was to broadcast "rhythm and blues" or "rock and roll" record selections. The station had a select library of records to be played and which the freelancers were permitted to utilize until sometime in 1962. Most of the freelancers adhered to the station's music policy, but others were left free to, and did play, whatever style of music they desired: (1) folk music, ballads, and jazz; (2) calypso and Latin American; (3) standards; and (4) gospel. In contrast with the freedom of choice in regard to the type of music played which was allowed to freelancers, the staff announcers or disc jockeys of WNJR were required to adhere to the station's music policy. Some of the freelancers obtained their records from sponsoring record shops or from their own private collections.

Celebrity time financial picture from 1961

37. Mirelson was not aware of the specific financial arrangement which Soriano had made with King but acknowledged at the hearing that he "assumed Soriano would not do this for nothing" and he "figured it would be some type of commission arrangement" (Tr. 3675). He did not know how much Soriano was charging for time segments on the "Celebrity Time" program and did not get involved in that. Admittedly he did know there were individuals appearing on this program who were "buying time" from Mr. Soriano, as King's representative. From time to time Soriano mentioned to Mirelson he had various people "that were representing King and were getting sponsors and were appearing on his show ('Celebrity Time') as talent." As Mirelson viewed the freelancers' financial participation in the program, "Soriano was getting advertising revenue for King

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and was acting as King's agent, similarly that these people were acting as King's agent" (Tr. 3676). Occasionally, Mirelson listened to the "Celebrity Time" show, and he heard the freelancers on the air from time to time.

38. Pursuant to Soriano's arrangement with King, Soriano initially collected the money from the freelancers, deducted his 30-percent commission, and periodically remitted the balance to King. Because King was going through a difficult financial period and was beset by financial obligations from several quarters, he did not always use this money to satisfy his agency's weekly commitment to the station and, in consequence, the unpaid balance due WNJR continued to mount. Sometime in 1962, with King's consent, Mirelson instructed Soriano to thereafter turn directly over to him the money received from the freelancers that would otherwise have been sent to King. Mirelson, in turn, deposited with the station either in cash or by his (Mirelson's) personal check, the moneys received from Soriano, to be credited to the King agency account. Mirelson's personal reasons for permitting the arrangement for the "Celebrity Time" program with King's agency to continue, even though the weekly payments for the show were in arrears, were that if the show would be taken off the air, he would have problems in collecting from King and in explaining the big unpaid balance to the Rollins home office and, too, that because of the lateness of the hour (11 o'clock to 12 midnight), it would be difficult to get revenue for the time and "a difficult time to sell profitably" (Tr. 3678). Of course, so long as the "Celebrity Time" program remained on the air, there was a continuing source of revenue for the station from the program as a result of the payments the freelancers were making to Soriano in connection with their appearances on the program.

39. Between September 1962 and the end of March 1963, Mirelson turned over $3,130 "* * * plus considerable cash * * *" to the WNJR bookkeeper to be credited to King's agency account. These remittances represented revenues derived from the freelancers and the "Celebrity Time" show, after deduction of Soriano's commission by himself. In excess of $4,000 owed to the station by King's agency after the termination of "Celebrity Time" on March 9, 1963, was still unpaid at the time of hearing. Mirelson made payments from his own pocket on April 29 and May 31, 1963, totaling $280 to station WNJR to be applied against the unpaid balance of March 9. Mirelson made these payments in the effort to relieve some of the pressure placed upon him by the Rollins home office to collect on the outstanding balance for the "Celebrity Time" show, and after having told Lanphear he would still get some money on the King account. Mirelson did not divulge to the station's bookkeeper or to the home office that the two payments came from his personal funds.

The individual contracts for "Celebrity Time"

40. As noted above, in December 1961, station WNJR had executed a written contract for the "Celebrity Time" program with King's agency, Celebrity Consultants Ltd. (WNJR Ex. 3). Until July 1962, this was the only written contract in existence to which the station was

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a party either with regard to the "Celebrity Time" program or indeed any of the so-called freelance programs which were broadcast under arrangements not related to "Celebrity Time." On July 5, 1962, the Commission issued a public notice (Report No. 4254) announcing inter alia a notification to the licensee of station WBNX, New York City, that it was apparently liable for a forfeiture of $10,000 for various violations of the Commission's broadcast rules. Specification of the violations in the public notice included broadcast by the station of "foreign language programs for time brokers without filing copies of such contracts." The public notice of July 5, 1962 (WNJR Ex. 40, p. 2) was received by Tim Crow, the director of the Rollins Quality Control and Program Development Department, whose responsibilities include "seeing to it that the (Rollins) stations complied with the policies of the company and the FCC rules and regulations." Crow, after reading the public notice concerning WBNX, immediately called Rollins' communications counsel, indicated that he (Crow) was not completely familiar with the regulatory aspects of time brokerage and did not fully understand what was signified in this public notice. He asked counsel for an explanation of what a time broker was and asked about the requirement of filing copies of time brokerage contracts with the Commission. Crow believed at this time (1962) that if a brokerage contract existed, some special FCC form was required to be filed. He had no experience before this time in the brokerage area. After receiving information from counsel about time brokers and the Commission's requirements concerning filing brokerage contracts (including the advice that there was no special form to be filed if they existed), Crow then discussed the above-mentioned public notice with Al Lanphear, Rollins vice president in charge of the radio stations' operations and also at that time serving as general manager of Rollins station KDAY in Santa Monica. Crow asked Lanphear if he had any reason to believe that any kind of time brokerage such as was dealt with in the notice could possibly exist in any of the Rollins stations. Prior to making this inquiry of Lanphear, Crow had nothing to do with WNJR's contracts (Tr. 4691). Lanphear's reply was that he did not believe there was any time brokerage but suggested that there were some agency shows on station WNJR Crow "might want to talk to Rollins' communications counsel about" (Tr. 4681; Tr. 5550).[14]

41. The "agency shows" to which Lanphear referred were several programs then being broadcast over station WNJR under: (1) oral agreements with different individuals (namely, Clint Miller, Bernie Witkowski, and Joe Craine) each of whom WNJR "recognized" as an advertising agency (Tr. 5551); (2) an oral agreement with the "Jay Cee Advertising Agency" which was a "house agency" of Essex Record Distributors utilized by Essex to secure an advertising "commission" or "discount" (Tr. 2112); and (3) the December 29, 1961, written agreement (WNJR Ex. 3) with Celebrity Consultants Ltd., the King agency, which concerned the arrangement for the "Celebrity Time" program. Each of these agency shows involved an arrange-

[14] Lanphear stated to Crow about the "agency shows" (Tr. 5550): "You take a look at them and then talk to our attorneys and see if there is any cause for problem." Lanphear personally believed these programs did not involve time brokerage contracts (ibid).

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ment with station WNJR for the airing of a program running for a period of time such as a half hour or an hour and for which the station received a stipulated sum per program or weekly run of the program, with the other party to the agreement having the right to place in the program commercial announcements on behalf of sponsors obtained by it. In each instance, the program was conducted on the air by a freelance announcer (an outside individual not employed as a staff announcer by the station). As Lanphear explained at the hearing (Tr. 5499–5514) with reference to the arrangement entered into with Clint Miller for the charge made by the station for his programs, the station determined the revenue it would want to receive for the particular half hour and this became the "gross amount" charged by the station from which Miller received or retained a 15 percent "agency commission." According to Lanphear, Miller was limited as to the amount of gross revenue that he could obtain from the program (Tr. 5511) and the station wanted to have Miller's "agency" responsible for a certain amount of revenue per week—"we put the onus on him to come up with it, and we expected the guarantee * * *" (Tr. 5513). With reference to the method of determination by the station of the amount of advertising Miller could place in a half-hour program and the revenue to be derived by the station therefrom, the station management "figured up the number of minutes of advertising he (Miller) would be able to have in there and the appropriate rate and revenue which the agency would get and we would get the same amount" (of gross revenue) (Tr. 5509).

42. There was subsequent discussion about the WBNX matter and brokerage between Crow and Lanphear; they particularly discussed the possibility of "our particular programs on any of the (Rollins) stations coming into this domain" (i.e., brokerage). In again talking about the "agency programs," they discussed "the fact that these programs were run through advertising agencies," and Lanphear who was familiar with the arrangements for them as the former manager of WNJR, stressed this point in order to allay any fears Crow might have about whether WNJR was skirting the brokerage issue (Tr. 5552). Lanphear informed Crow that the station had always recognized the "Clint Miller Agency" as an advertising agency and that each of the similar arrangements for programs (the "Mr. Blues Show" through Jay Cee advertising agency; the Bernie Witkowski ("Wyte") polka show; and "Celebrity Time" through Celebrity Consultants Ltd.) was "an agency program" (Tr. 5551–52). Wayne Rollins also had a discussion with Lanphear about the "brokerage question," asked Lanphear if "we had any brokerage" and was told "no," and also asked him "if we should have brokerage" and was advised by Lanphear that he "did not see any reason why we should have brokerage programs" (Tr. 5552). Crow was not a party to the last-mentioned discussion, and he had a separate conversation with Wayne Rollins during the course of which he asked whether or not the Rollins organization "would ever at any time entertain the prospect of dealing with brokers." Crow was told in reply to this question that Mr. Rollins did not want any agreements with time brokers since he "did not need time brokers" and "saw no reason why our company should relinquish

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any control of the program to any such person as a time broker." (Tr. 4682.) Crow understood from this discussion that it was the policy of the Rollins corporation not to have any arrangements with any time broker, and if Crow found an agreement with a time broker in existence it would be his responsibility to make sure it was immediately terminated.

43. Crow in the course of his discussions with Lanphear had been told that station WNJR recognized King's agency and the others with whom there were the existing special program arrangements, described above in paragraph 41, as advertising agencies (Tr. 4696). Since it was Crow's understanding that there were no brokerage agreements in connection with these arrangements, the question did not come up in July 1962, as to whether the agreement with Celebrity Consultants Ltd. would be filed with the Commission as a time brokerage contract. Crow had conversations with counsel at that time about the legal relationship "between a station, an advertising agency, and a sponsor," and it was his understanding that whereas a "time broker" acted on his own behalf, an advertising agency that deals with a station acts in behalf of "sponsors" or "clients" (Tr. 4695) as their "representative" (Tr. 4697). The upshot of Crow's conversation with counsel was that he was instructed with respect to all of those programs on WNJR for which there was an agency representing the clients (advertisers) "an individual contract (be) drawn up between the client and the station, so that there would be a contractual arrangement between these two parties." (Tr. 4685.) Crow understood that there would not be "brokerage" if there was a "contract arrangement between the station and the advertising sponsor (Tr. 4686). Acting on the advice which he had received from counsel, Crow in turn instructed Mirelson, WNJR's manager, by telephone call made before July 9, 1962, that he would need "individual contracts" for the advertising sponsors on "the agency shows" (Tr. 4698–99). In a memorandum to Mirelson dated July 9, 1962 (WNJR Ex. 41), Crow confirmed his previous instructions. The memorandum stated as follows:

> In accordance with our telephone call of last Friday night, this is to confirm that contracts for all clients which are on freelance programs on WNJR shall be drawn between the clients and WNJR. In each case the client is not a freelance announcer but all those who buy broadcast time on the program.
>
> The freelance person is treated as a salesman, a representative, or an agency and shall make the collections and pay WNJR.
>
> If there are any questions about this policy please let me know and in any event I should like to hear when your records show that all such clients mentioned above are under contract with WNJR.[15]

44. Although counsel instructed Crow that individual contracts were to be obtained for the agency shows, Wayne Rollins had been assured by counsel that station WNJR "had no contracts that were interpreted as brokerage contracts" (Tr. 6299). But he was advised that "it would be better" as a protective measure if there were contracts "with the sponsors directly with the station," and that these "would also be

[15] The memorandum drew no distinction between the "Celebrity Time" and "Mr. Blues" shows where the station's agreement for the program was not with the freelancers doing the program and the Clint Miller type of situation where the freelancer appearing on the program was a party to the agreement therefor through his station-recognized agency.

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helpful" in relation to any question of double billing (Tr. 6299). Lanphear did not personally believe that such individual contracts were necessary since in his opinion the existing arrangements with the agencies had already created for the station a sufficient contractual relationship with the sponsors. He did not voice objection to Rollins or Crow against the instructions to obtain the individual contracts for "the special agency shows," as he termed them, since he understood that the procedure had been recommended by counsel for Rollins, and since too, from his standpoint, the definition of brokerage "was not 100 percent clearly defined," and hence this procedure was a further safeguard to cement the relationship between the ultimate advertiser and the station (Tr. 5553–55). Mirelson also did not understand the necessity for such individual contracts, and thought they were being required "possibly from some control point of view." In fact, prior to the time in July 1962, that Crow first instructed Mirelson as to the need to have contracts for the individual sponsors station WNJR did not have contracts with each of the sponsors on the agency shows and Mirelson had so informed Crow just before the latter told him to get them.

45. Even after Crow issued the instructions to Mirelson to obtain individual contracts with sponsors, it was Wayne Rollins' understanding that station WNJR then had outstanding no time brokerage agreements. This view was derived mainly from his reliance upon counsel's opinion which Rollins understood was in turn based on a consideration of the information about contracts of WNJR furnished counsel by Crow with Mirelson's assistance. Rollins believed that the station was supposed to have individual contracts for all programs, and at the time the question of time brokerage contracts came up in July 1962, his attention was not particularly focused upon "freelance programs." He understood "freelance programs" to mean shows that other announcers than "our staff announcers" did. He was "more concerned with the fact that we did not have contracts" whether or not they were "on this program or any program," and he "concerned himself with the fact that (he) thought they were taking telephone orders (at WNJR) for business and running it without contracts" (Tr. 6122). Rollins was aware that "we had people who had been on there (i.e., station WNJR) for periods of time" as freelance announcers (Tr. 6119), and it was his understanding they would receive compensation "in the way of talent from the sponsor who wanted them to conduct the program." He was not aware in July 1962, that freelancers were appearing on the "Celebrity Time" programs (Tr. 6119), nor did he understand then that there were freelance announcers appearing on the station who were obtaining spot announcements from advertisers for their programs, or that any freelance announcers had agency relationships with the station, or that there were freelancers appearing on WNJR under agreements providing for a stated gross amount of revenue to the station (Tr. 6123). Crow understood that "the agency shows" as to which he first gave instructions orally to Mirelson for securing "individual contracts," used freelance announcers (Tr. 9699); he also understood that some of the freelancers "were connected with the agencies in-

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volved" (Tr. 4700). But he did not consider that the participation of a freelance announcer as the talent on an agency show had any relationship to brokerage (Tr. 4699).

46. Upon receiving Crow's July 9 memorandum about obtaining the individual contracts (WNJR Ex. 41) Mirelson was uncertain as to the advertising rates to be shown in these contracts with the sponsors. He therefore dispatched a memorandum to Crow on July 11, 1962 (WNJR Ex. 42) reporting that WNJR was "having all contracts for accounts or their agencies drawn directly with the station," and stating further with reference to these contracts: "The one question I have on this is in regard to the fixed rate for each client on these freelance programs." [16] He then asked: "In your opinion, should these contracts reflect the actual amount that the freelancers collect from the customer each week, or should these contracts be set up that altogether they come to the sum total of what the freelancer is paying us weekly for the time?" Crow was absent from the Wilmington home office when Mirelson's inquiry was received there and Wayne Rollins himself responded to Mirelson's question by telephone and indicated that the rate to be shown on the individual contract should be "the actual gross rate that the particular advertiser was paying," or "that the agency contract indicated (to WNJR) that the particular advertiser was paying" (Tr. 3803). Crow later acknowledged Mirelson's inquiry, to which Rollins had orally replied, in a memorandum to Mirelson dated July 13, 1962 (WNJR Ex. 43) stating his (Crow's) understanding "that contracts with clients are drawn for the gross amount at all times."

47. On July 30, 1962, Crow sent a memorandum of instructions, with an attached copy of the WBNX notice, for all of the Rollins' station managers (WNJR Ex. 40). This memorandum stated as follows:

> Attached you will find FCC's public notice dated July 5, 1962. Please pay particular attention to the paragraph marked in red pencil.
>
> That part which refers to contracts with time brokers being filed with the FCC is extremely important. Our company policy precludes contracts between our stations and time brokers. You must have a separate contract with each client for whom broadcast matter is carried on the station.
>
> "It is not permissible to sell a block of time to an individual or an organization and allow them to resell the time to others on their own—it is required that you have a separate contract with each and every client for whom such matter is broadcast."
>
> If you have any questions about this, please get in touch with me.
>
> This should be included in your looseleaf binder along with earlier public notices and FTC advertising alerts as a permanent record for your station.

48. The individual contracts required by Crow's instructions to Mirelson in July 1962, were to be prepared on the standard form of contract with sponsors then being employed by the station; this standard contract form could be signed either by an agency in the

[16] Crow's July 9 memorandum (WNJR Ex. 41), quoted above in par. 43, contained a postscript that advised Mirelson: "Pursuant to your phone call of this afternoon, it is necessary to have a fixed rate for each and every client on your freelance programs. There is no other way to handle this." By the term "fixed rate" Crow meant a rate that would be "established" by negotiation between the sponsor and the station, whether for a spot announcement or a program (Tr. 4701). More to the point, he was by this term instructing Mirelson that an individual contract had to include as one of its terms "a specific rate."

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sponsor's behalf or by the sponsor itself. The standard WNJR contract (WNJR Ex. 117) consisted of a five-sheet set, each sheet (copy) being of a different color and intended to be issued as follows: The white copy represented the original which would go into the station's files; the second copy (greenish blue) would be the copy kept by the advertiser or agency; the pink copy would go to the traffic department so that they could prepare the program logs; the yellow copy would go to the station's salesman who serviced the account; and the last copy (blue) would be sent to the accounting department. Each of the five copies was identical in form except that the white copy (original) and two of the other copies had printed on the back of each certain standard contractual provisions designed inter alia to create contractual liability of the sponsor to the station for advertising broadcast under the agreement and to make the contract binding upon the sponsor also where the agency alone signed the contract. In addition, the station used another form identified as the start order form, goldenrod in color and blank on the reverse side. This single copy goldenrod form was identical in every respect (except for the blank reverse side) with the standard contract form but was designed for internal station use only as a start order, change order, or stop order. Thus, its intended function was to notify the traffic department of any changes in scheduling of a sponsor's advertising. However, because of the identical nature of the face of the goldenrod form and the five-sheet standard contract form, the salesmen at the station often used the start order form for advertising orders in lieu of the standard contract form, and this was particularly true of orders which were phoned in to the station either by agencies or by sponsors known to the station salesmen. In Mirelson's view, an order written on a start or change order form (goldenrod form) and countersigned or initialed by him to indicate the station's acceptance of the order constituted an agreement or contract between the station and the advertiser for the broadcast of the advertising covered by the particular form. Mirelson had no objection to the use of the goldenrod form by WNJR salesmen to place business on the station (Tr. 3901–03).

49. After Mirelson received instructions from Crow in July 1962 to secure individual contracts, he carried these instructions out in different ways, depending upon the program and account involved, although he never considered the fact of obtaining these contracts as changing the nature of the arrangement which had long been established with regard to each of those programs. In the case of Clint Miller, Bernie Witkowski, and the Jay Cee Agency, Mirelson himself asked Miller, Witkowski, and Harold Ladell, who was the freelance announcer for the Jay Cee Agency show, to get these contracts with the advertisers on their respective shows. Witkowski, who already had "contracts"[17] for his program drawn directly with sponsors but on a WNJR form different from those described above and captioned "Order for Broadcasting," obtained additional "contracts" using the same form; the newer "contracts" were signed by the individual spon-

[17] The term "contracts" (i.e., in quotes) is used to identify those documents which were not signed by Mirelson to indicate acceptance of the advertising arrangement by the station.

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sors and by himself but no one signed them for the station (WNJR Ex. 144, pp. 1–26). Clint Miller also drafted "contracts" with his sponsors but on the standard WNJR contract form; Miller signed his name opposite the word salesman on most of the forms and signed nearly all of these forms as representative of the Clint Miller Agency. Less than half of the forms were signed by the sponsors, and none of them were signed by the WNJR station manager as accepted by the station. The charges for spot announcements varied generally with the advertiser, the length of the announcement and the frequency of the announcement during the broadcast week (see WNJR Exs. 128, 129; stipulations 4 and 5). In the case of the Jay Cee Agency, Harold Ladell drew up standard contract forms for each sponsor on the Blues Show, wrote in the name of the advertiser or its representative, and signed his own name opposite the word "salesman." No one signed the forms on behalf of the station to indicate acceptance of the arrangement by the station (see WNJR Ex. 136). All of the forms supplied by Ladell and appearing in the record were dated November 5, 1962. For the Joe Craine program, Mirelson asked Soriano to obtain the required contracts since Soriano was the salesman on the account, and Soriano did so. The individual contracts for Craine's show obtained in October 1962 were actually drafted by Soriano on "Order for Broadcasting" forms, using information given to him by Craine, and Craine then signed as representative of "Joe Crane Adv." agency (WNJR Ex. 139). Soriano, too, signed these contracts as the station's salesman.

50. In the case of the individual contracts for the "Celebrity Time" program, Mirelson implemented Crow's instructions through a combination of procedures. With respect to advertisers that were immediate clients of King's agency, Mirelson personally went to King's office and they executed the contracts covering all of these sponsors who were advertising on the program. The station actually prepared the contracts, using the standard contract forms with the standard provisions on the back. Each contract showed the sponsor's name, and listed the commencement date (all were shown as July 23, 1962), the rate per broadcast, and the fact that there would be five-second announcements. The contracts were each signed by King on behalf of his agency, Celebrity Consultants Ltd. and were also signed by Mirelson to indicate acceptance of the orders by the station. None were signed by an advertiser or an employee thereof. These contracts covered eight different sponsors (see WNJR Ex. 5, pp. 140–147).

51. With regard to those advertisers on "Celebrity Time" who had been placed on this show through the efforts of the freelance announcers, Mirelson indicated that he would also need contracts for them signed by an authorized representative of King's agency. Thereupon, King suggested Soriano, who "is over there at the station and is handling these people for me", as the person who should obtain the contracts for the clients of the freelancers. Mirelson acted upon this suggestion, and instructed Soriano to get contracts "for each one of these individuals" and these "should be signed by the client or an authorized representative of the agency for the client" (Tr. 3810). The primary concern of Mirelson, which he indicated to Soriano, was to have information as to the names of all the clients on the show, and

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he did not give Soriano detailed instructions as to the form or content of the contracts for which he was making Soriano responsible. Since Soriano had been a station salesman for many years, Mirelson assumed Soriano would know the type of contract that he wanted. For his part, Soriano did not see any practical purpose these contracts would serve and he thought they were entirely unnecessary. No billing was ever sent by the billing department to the individual sponsors because the financial arrangements being carried out between Soriano and the freelancers were never reflected on the station's books, and no bills were ever sent to the sponsors of a freelancer on the "Celebrity Time" show. Moreover, the contracts were not needed, in Soriano's view, for traffic purposes since the traffic department would fill in the program log based upon instructions from Soriano, written notification handed to Soriano by the freelancers, and, in some instances, last minute sponsors would be written in on the log by Soriano himself. Nevertheless, Soriano undertook to follow Mirelson's instructions, and he decided to use whatever forms were readily available "just to keep as a matter of record or to satisfy Mr. Mirelson's wish." Mirelson never gave him a particular form to follow, and some of the forms Soriano actually used to fulfill Mirelson's request were quite obsolete. Soriano handed out contract forms to the freelancers and himself used contract forms regardless of their color in order to save paper. He gave instructions to the freelancers as to how to fill out the contracts, in triplicate, themselves, since he was annoyed at what seemed to him an apparently pointless task and he did not wish to be burdened with filling them out personally.

52. The record reflects that at least 56 contract forms for sponsors of the freelancers on "Celebrity Time" were turned in to WNJR between the time Soriano first asked for them in July and the end of October 1962. These documents were in most instances written almost completely by the freelancers themselves, and the only material other than the freelancers' handwriting on the forms was the signature of Leonard Mirelson which sometimes was later inserted by him on behalf of the station,[18] and also material which was occasionally written by Soriano on that portion of the contract form marked "For office use only" to complete the form; the material added by Soriano was based upon information appearing above the line (see, for example, WNJR Ex. 6, p. 5). All of these documents, although varying as to the form and extent of presentation of detailed information, indicated the name of the sponsor, his address, the time period in which the announcement would be placed, the price per week, and whether or not the arrangement was "T.F.," meaning "till forbid" (i.e., to remain in force until terminated by either the sponsor or the station). Some of the contract forms were signed by the sponsor. Most of them were signed by the particular freelancer involved. In addition, many of the freelancers signed their names on the line identified by the word "agency." In several cases the contract forms were actually drafted by Soriano so as to aid the particular freelancer although in these

[18] Mirelson admittedly did not place his signature on any of the freelancers' contract forms (exhibit 6) before Mar. 6, 1963 (Tr. 3470).

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instances the latter signed his name on the "agency" line. After the forms were completed they were turned over to Soriano or left in a receptacle at the station for him. He in turn then placed the documents (various components of WNJR Ex. 6) in a drawer at the station.

53. Between November 1, 1962, and the termination of the "Celebrity Time" program on March 9, 1963, an additional 86 contract forms reporting arrangements of freelancers with various sponsors for placement of advertising on this program were prepared and became part of Soriano's file (WNJR Ex. 6). At this point it is pertinent to call attention to four particular contract forms which were signed by one of the freelance disc jockeys, Al Browne. As has been previously found, Browne, who was a professional entertainer with extensive contacts, had referred to Soriano a number of the other freelancers appearing on "Celebrity Time." The four documents in question (WNJR Ex. 6, pp. 47, 48, 49 and 50) were signed by Browne on behalf of another freelancer about November 14, 1962, below the line indicated as the place for the signature of the station manager. Because this freelancer left the station without signing the particular forms and Browne had referred him to Soriano, in the first place, Browne was asked by Soriano to sign them, and he did so, following affixing the signature "Al Browne." Browne, however, did not fill out or sign the required forms for his own sponsors concerning whom there were an indeterminable number of documents written up and placed in Soriano's file (WNJR Ex. 6) between November 1, 1962, and March 9, 1963.[19] Although Browne was told by Soriano that a "contract" for each of his sponsors was required, he never completed any. His explanation at the hearing for failing to do so was that he had been told the station was out of forms and that he should "send in" the information about an arrangement with a sponsor "in typewritten form" and leave it in Soriano's office or give it to him in person (Tr. 1269). Soriano, on the other hand, had no explanation for Browne's not filling out the forms other than the one that he was too busy. In any event, Soriano, who was under instructions from Mirelson to obtain a contract for each sponsor from all the freelancers on "Celebrity Time," did not insist that Browne write up the forms and instead undertook personally to complete them for each of Browne's sponsors. Soriano received all of the information which he placed on these forms from Browne himself. In addition, Soriano wrote Browne's name on the forms so that they would be complete. He spelled the last name as "Brown" in inserting Al Browne's name opposite the words "Agency" and "Per" (see Ex. 6, pp. 14; 58). He did not write in Browne's name with any motive of creating the impression that Browne personally signed the forms. Soriano did not look upon these documents as obligating either Browne or his sponsors to pay anything, nor did he consider them as serving any other purpose than constituting records prepared merely to satisfy Mr. Mirelson's request for them since they did not go anywhere but only remained in Sori-

[19] The examiner counted over 50 documents which were identified only with the name of Al Browne (WNJR Ex. 6). But the record shows (Tr. 3199) that Browne's name was used even on forms reflecting the sponsors of other freelancers in some instances.

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ano's drawer to be made available to Mirelson if the latter wanted to see them (Tr. 2846–52).

54. Although Browne testified that "he never gave Soriano any authority to sign his name on the contractual forms (WNJR Ex. 6), it is clear Browne was aware that Soriano was preparing the forms containing information regarding Browne's arrangements with his own sponsors. For Browne was physically present and seated beside Soriano when these forms were being written up by Soriano from information contemporaneously being supplied by Browne (Tr. 2861–63). Since Browne observed the preparation by Soriano of such forms containing his name written out on one or two lines (either on the "Agency" line or the "Per" line, or both lines), it must be inferred that he had actual knowledge of the fact that his name was being inscribed on those forms. It is true that Soriano incorrectly spelled his last name by omission of the letter "e" but Browne at no time objected to what Soriano was writing on the forms relative to his own sponsors including the use of the name "Brown" which, under the circumstances, could only be construed as referring to himself, Al Browne. There is no evidence that Soriano expressly asked Browne if his name could be written on the contractual forms (WNJR Ex. 6). On the other hand, the circumstances under which Browne's name was placed on such forms with regard to his own sponsors require the finding that Browne tacitly consented to the practice followed by Soriano of employing his name on the forms with reference to his sponsors. In a substantial number of instances, the name "Al Brown" also appears on forms unquestionably reflecting arrangements between other freelancers and their sponsors. For example, eight forms dated as early as July 17, 1962, and pertaining to Duke Baldwin's sponsors also had written on them "Al Brown" (see WNJR Ex. 6, pp. 85, 88, 89, 91, 93, 96, 100 and 102). Another eight forms dated July 21, 1962, and relating to sponsors of freelancer John Budd (WNJR Ex. 6, 111 through 118) similarly carried the name of Al Brown. Soriano placed this name on forms connected with other freelancers as a means of identifying the particular advertising with "Celebrity Time." Some of the other freelancers on whose forms the name Brown appeared had been referred to Soriano by Browne; in the case of Duke Baldwin, however, there was no such relationship and he in fact appeared on the show long before Browne. Because Soriano had written Browne's name ("Brown") on many of the forms, he did so on Baldwin's forms through force of habit, inserting the name some months later than July 1962. One freelancer, Robert Jenkins, wrote the name of "Brown" on several of his own forms at Soriano's direction (Tr. 1197). Soriano believed that he could use Browne's name for any of the freelancers whom Browne referred to him, since he assumed Browne was aware this was being done by Soriano at times inasmuch as he was standing close by while forms were being filled out for others and Browne's name was being written thereon (Tr. 2862). Altogether, the name of Al Browne spelled either correctly or without the final "e" appears on over 90 of the 141 documents constituting WNJR exhibit 6 (or on approximately two-thirds of these "Celebrity Time" freelancers'

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forms which found their way into Soriano's file and ultimately into the record).

55. During the period when Soriano was collecting the forms for individual sponsors (WNJR Ex. 6) from the freelancers on "Celebrity Time," Mirelson would occasionally inquire of Soriano whether he was securing the "contracts" and whether they were "in good order." Soriano would reassure Mirelson that he was obtaining the required documents, and Mirelson would sometimes ask for Soriano's folder and glance at a few of the forms in it. At some time around November 1, 1962, Mirelson looked at the documents then in the "Celebrity Time" folder and expressed to Soriano his dissatisfaction with their appearance, stating "they didn't look very businesslike, they were scribbled, they were in various colors, they were in various handwritings," were not identifiable as relating to "Celebrity Time," and "there were too many different names on these contracts." (Tr. 3195–97). Mirelson also complained about such matters as the fact that some of the freelancers were writing commercial continuity directly on the contract forms, which was improper, and some were signing their names in spaces intended for the signatures of the station manager or the station's salesmen. As a result of Mirelson's critical comments, and particularly Soriano's impression therefrom that Mirelson "wanted one name because he didn't want too many names appearing" (Tr. 2868), Soriano wrote in the name "Al Brown" on forms for other freelancers than Browne. He used this name because Al Browne had referred "the majority" of the disc jockeys appearing on "Celebrity Time" to Soriano and was at the station so often. On many of the Time" to Soriano later filled in the words "Celebrity Consultants" or "Celebrity Time" sometime after the documents had been originally drafted in order to provide the program identification which Mirelson had indicated was desirable. Soriano told Mirelson that he was using one name on the forms, and that the name of Al Browne was appearing on them. Mirelson had not specified that he wanted Browne to sign his name personally on such forms, nor did Soriano state to Mirelson that Browne was himself writing the name "Al Brown" on them. The record makes clear that all of the documents obtained by Soriano for "Celebrity Time" (WNJR Ex. 6) were drafted (including any later additions Soriano made on them) before the program left the air on March 9, 1963. No changes whatsoever were made on the original "Celebrity Time" forms (WNJR Ex. 6) after the program left the air.

56. Subsequent to the issuance of the instructions to Mirelson in July 1962, by the Rollins home office requiring him to obtain individual contracts for the sponsors on the "agency" shows, Crow and Frank Minner, the Rollins controller, made an unannounced visit to station WNJR on September 26 and 27. The general purpose of their trip was to conduct "a station audit," an examination of the operation of the station from the standpoint of observing the broadcast of programs on the air and of checking various records maintained at the station. On the evening of September 26, they monitored WNJR programs, including the broadcast of "Celebrity Time," from a motel in the area. On the morning of September 27, they arrived at the sta-

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tion where Minner compared the September 26 program logs with station contract files to determine the following matters: (1) Whether the WNJR bookkeeping department had, as required, a broadcast order or a contract to authorize billing all clients for whom commercial announcements were broadcast on September 26; and (2) for Crow's information, whether there was similar written evidence (broadcast order or contract) for every sponsor on an agency show for whom a commercial had been aired during that day. The individual broadcast orders or contracts between the station and the sponsors for which Minner was to check at Crow's request were of no accounting significance to Minner since they were not used for billing purposes; the billing was made directly to the agencies such as Celebrity Consultants with whom a master contract existed (see, e.g., WNJR Ex. 3). Minner was able to find "paper work" authorizing the billing for the specific agencies. But he was told by the WNJR bookkeeper that it was the station manager's function to maintain records for the individual sponsors on these various agency shows. Minner then requested the bookkeeper to make those documents available to him. He asked for them because Mr. Crow had indicated he (Crow) wanted to know about the existence of such documents for the individual sponsors on the agency shows. Minner received from the bookkeeper a quantity of records maintained in separate agency show folders and relating to the sponsors of spot announcements in each show, and he checked them against the spots listed on the program logs. During this investigation, Minner noted that some of the individual documents for the agency shows had not been completely filled out with all the necessary accounting information, and that for some announcements on the agency shows the station did not have any individual documents. He reported this information to Crow who did not personally examine all the documents Minner had received. Crow was shown some of the documents which Minner had ascertained were not complete and accurate; also, Crow was told by Minner that there were some documents missing from several agency shows (Tr. 4715–16). Neither Minner nor Crow recalled at the hearing whether these deficiencies detected by Minner on September 27 related to "Celebrity Time." The names of eight sponsors appear on the "Celebrity Time" program portion of the September 26 log for which contracts are presently available. These are the eight individual contracts executed by King. None of these contracts contain broadcast instructions below the double line for office use only (WNJR Ex. 5, pp. 140–147).

57. Before leaving WNJR on September 27, Crow called Mirelson's attention, among other results of the audit, to Minner's discovery that not all sponsors on the air "had been put on contracts." Mirelson assured Crow that he would have "every client under contract within a very short time since it was a matter of catching up" (WNJR Ex. 47). Upon returning to Wilmington, Crow on September 29, 1962, submitted a written report on the WNJR audit to Wayne Rollins (WNJR Ex. 44) in which he incorporated Minner's findings with reference to the agency shows, as follows:

> (g) Despite our instructions to have separate contracts for all clients on freelance programs, it was observed that a substantial number of clients

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were on the air without any contracts to cover them. In addition, of those contracts written many were incomplete and contained no broadcast instructions nor any indication of the broadcast charges to be made.

Crow noted also:

There are spot announcements being broadcast on freelance programs that are not entered on the program log. These were permitted notwithstanding the absence of a contract. * * *.

58. The assurance which Mirelson had given Crow during the station audit in September 1962, was reaffirmed in a memorandum (dated October 19, 1962) in which Mirelson stated (WNJR Ex. 46):

We are insisting that our freelancers give us contracts on every account they run in their shows and we are double checking to see that they do this.

In the last-quoted statement, Mirelson was referring to his effort to obtain individual contracts for the various sponsors on the agency shows (Tr. 3813). His actions in this area consisted of: (1) speaking to the individuals most directly involved; and (2) circulating under date of October 24, 1962, a memorandum to all of them. The memorandum was sent to Clint Miller, Harold Ladell, George Hudson, Bennie Witkowski, Joe Craine, Danny Stiles, and Joe Soriano.[20] Essentially the memorandum was a reminder to its recipients that the station was required to have "regular station contracts for all your contracts now on the air," and that those concerned should not "make any additions or changes on your show without a contract or a start order at the station." Copies of the memorandum were individually initialed by Soriano, White, Danny Stiles, and Clint Miller and then returned to Mirelson, pursuant to his request in the memorandum that this be done. Prior to the issuance of his October memorandum, Mirelson was questioned by Lanphear as to whether he had the contracts for the individual sponsors, and Mirelson's reply indicated that he was obtaining them (Tr. 5742). Lanphear did not ask to see any contracts at the time. Nor did Crow personally look at any contracts or broadcast orders on the occasion of the September 1962 WNJR station audit.

59. Crow continued to recall that Mirelson did not have all sponsors "under contract" when the September 1962 station audit was made, and he determined to elicit a definitive report in writing from Mirelson on the subject of the contracts. He looked upon this inquiry as an attempt to insure that Mirelson would achieve full compliance with the directive to obtain individual contracts with all sponsors. Accordingly, on January 15, 1963 he wrote Mirelson a memorandum reiterating his July 1962 instructions that WNJR obtain separate contracts for each and every sponsor on the air and that it would not be permissible to draw up a contract with a single individual or orga-

[20] George Hudson and Danny Stiles have not previously been mentioned herein. Hudson, a staff announcer employed with WNJR, was also associated as a freelance announcer with an agency program then being broadcast over this station (WNJR Ex. 44, par. (j); Tr. 4734). Danny Stiles, then a relief announcer for WNJR, was also appearing as a freelance announcer on an afternoon program for which he received as compensation the proceeds from the sale of four spot announcements to his own sponsors. The Stiles program was not an "agency" arrangement since it did not involve a guarantee of specific revenue to the station or any deduction of a percentage from the stated gross revenue for the benefit of the freelancer.

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nization who would in turn broker out the time. Crow's communication concluded:

> Can you state now that you have your system functioning and that you do have all clients on individual contracts as you proposed on July 9, 1962? Please advise (WNJR Ex. 47).

Upon receipt of the January 15, 1963, memorandum, Mirelson spoke to the various individuals who were engaged in obtaining the required contracts with sponsors on the agency shows under his personal supervision and told them that the station "must have all contracts." He also spot-checked their files to see that the contracts were there. Mirelson particularly asked Soriano if he was obtaining contracts for the Joe Craine show and the sponsors on the "Celebrity Time" show, and was assured that Soriano "had the contracts" (Tr. 3852). Mirelson again circulated a memorandum (dated January 18, 1963) to all those involved in obtaining contracts with individual sponsors in connection with the agency shows, reminding them of the "extreme importance" of having "contracts in the station for every one of your accounts on the air." Each of these persons initialed and returned to Mirelson a copy of this latest communication. Mirelson then wrote to Crow on January 21, 1963, stating:

> This is in answer to your letter of January 15, 1963, on separate contracts for every client on WNJR.
>
> This will confirm that we now have separate contracts with all clients on WNJR. All freelancers and packagers on the station have given us individual contracts directly with the station on all accounts they are running.
>
> Also, we have our system set up so that no new account goes on the air without a contract signed by the account or the packager, freelancer, or salesman signing as the account's authorized representative or agency (WNJR Ex. 49).

60. It was Crow's belief, when he issued the original instructions in July 1962, to obtain individual contracts with sponsors, that the sponsors would be required to sign these contracts. Upon noting Mirelson's comment in the last-quoted paragraph of his July 21 memorandum (WNJR Ex. 49), Crow immediately wrote Mirelson on January 23 as follows (WNJR Ex. 50):

> * * * I have no recollection, however, of our discussing the acceptability of a packager, a freelancer, or a salesman being permitted to sign contracts as the authorized representative of a client. It seems to me that this procedure is unacceptable and does exactly what we are attempting to prevent, the brokering of time.
>
> Would you please tell me how this procedure came into being. Unless our attorneys come up with the approval of such an approach. * * * we are not carrying out the procedures laid down in previous correspondence. * * *

61. Mirelson in turn was confused by the above-quoted response from Crow since it was his own understanding from previous discussions about the contract instructions that it was permissible for an agency or representative of an agency to sign on behalf of a sponsor. The question as to whether someone other than the sponsor of a commercial announcement properly could sign an individual contract was soon clarified for Mirelson when he received a followup memorandum from Crow under the date of January 25, 1963, stating (WNJR Ex. 51):

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I have discussed with our attorneys this morning the acceptability of an agency signing a contract for a client in the case of advertisers who buy into the shows of freelancers.

They would approve this procedure if among the conventional conditions you include two others: (1) There can be no brokering of time and the agency may not buy a block of time for more than one client to advertise in; (2) separate contracts for each piece of business shall be drawn up with the station and the station shall maintain full control of the program and all the material broadcast thereon.

* * * * * * *

Mirelson acknowledged Crow's memorandum of January 25, in a reply of January 29, 1963 (WNJR Ex. 52), wherein he stated, in pertinent parts:

I understand the two conditions that must be enforced in addition to the conventional conditions of our contract and, in practice, we have already been enforcing these conditions.[1]

* * * * * * *

If the above conditions are carried out in addition to the conventional conditions, an agency may then sign a contract for a client placed in a freelance show.[2]

62. In writing his reply memorandum of January 29 (WNJR Ex. 52), Mirelson was confirming his understanding of what the policy of the Rollins Co. was with respect to forestalling the brokering of time. He did not consider that the agencies were engaging in this practice because in his view they were not buying time from WNJR for resale but were placing advertising clients on programs under a guarantee of revenue to the station. Also, he believed that the brokering of time was not present because the station was maintaining control of the programs by various means which included obtaining separate contracts with sponsors and the review of commercial continuity and musical content for the agency shows. After Mirelson transmitted his January 29 memorandum, no further question was raised by Crow or the home office concerning the practice of having someone other than a sponsor sign a contract on the advertiser's behalf.

63. That the name "Celebrity Consultants," which was King's agency, was a late addition to a majority of the contract forms subsumed under WNJR Ex. 6 is admitted by Soriano and is also self-evident from examination of the original exhibit. That these additions occurred subsequent to January 26, 1963, may be inferred from the following circumstances: Soriano filled out 19 contract forms bearing seven different commencement dates in January 1963, inclusive of January 26. On each of these forms "Celebrity Consultants" or "Al Brown, Celebrity Consultants" appears to have been inserted in an otherwise completed document, after the date on which the document itself was originally filled out. These words were written with a different pen, i.e., darker ink or heavier imprint. It is most improbable that Soriano would have simply forgotten to make these additions on 19 different occasions during 7 different days in a single month. Since

[1] Mirelson at this point proceeded to quote in full the two numbered conditions that had been specified in Crow's memorandum of Jan. 25, 1963 (WNJR Ex. 51).

[2] The interchange of memorandums regarding signing the individual contracts that began with Mirelson's communication of Jan. 21, 1963, to Crow (WNJR Ex. 49) was accompanied by the transmission of a copy to Wayne Rollins in each instance.

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the additions were effected by Soriano no earlier than late in January 1963 and were made by him upon instructions from Mirelson, the examiner finds that their inclusion on the documents in question was prompted by the information received from Crow and contained in his January 25, 1963, memorandum (WNJR 51) relative to the acceptability of an agency signing for a client. The addition of "Celebrity Consultants" also served to identify the particular document in which it was written with the "Celebrity Time" program.

Cancellation of the "Celebrity Time" program

64. It is clear that Mirelson in his own mind sometime in the summer of 1962 had considered taking the "Celebrity Time" show off the air. The contract with Celebrity Consultants (WNJR Ex. 3) was to expire in December 1962.[23] The account was seriously in arrears, a fact which particularly troubled Mirelson because he took pride in a good record with regard to collections, and he feared that the existence of the sizable deficit with Celebrity Consultants would impair his standing with the home office which had a strict policy against bad debts. Secondly, Mirelson had heard rumors that Norman King was possibly engaging in "double billing" [24] and this too concerned him since, even though he knew the station in no way was involved in such practices, Commission policy did not approve of "double billing." Finally, he was unhappy over Soriano's involvement with the "Celebrity Time" show since Mirelson had not divulged to the Rollins home office Soriano's role of helping sell for King, an activity of which the home office might not approve. Mirelson was deterred from making a decision to cancel the show immediately by the thought that he should try to get as much of the money still owed by King as was possible before he actually took "Celebrity Time" off the air. However, when December 1962 arrived, which would have been the normal period to draft another contract with Celebrity Consultants, he did not do so since he had by then decided to cancel the program. Mirelson knew that the program would be taken off the air certainly before the end of the 1962–63 fiscal year (April 30, 1963), and Mirelson determined to collect as much money as he still could from King and take the program off sometime after January 1, 1963.[25] The final decision to cancel the program was made in late January 1963 and the target date was the end of February. He informed Lanphear of his decision and the reasons therefor, and Lanphear told him to use his own judgment on the matter. Mirelson had the authority to take a program off the air even without prior approval from his superiors, though as a matter of practice he usually consulted them before doing so.

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[23] This contract was a "T.F." contract which was entered into in December 1961 and according to trade practice would expire in a year (Tr. 4241) unless canceled by either party sooner (Tr. 3455).

[24] As stated in the Commission's *Report and Order* in doc. No. 15396 (FCC 65–951) released Oct. 22, 1965, adopting rules to prohibit certain billing practices, "The main ingredient of the practice (known as double billing) is the furnishing of false information concerning broadcast advertising, to any party contributing to the payment of such advertising, the purpose being to induce such party to pay more than the actual (station) rate for the advertising."

[25] Mirelson also reduced the Celebrity Consultants revenue guarantee from $300 per week to $200 per week for the reason that this might help his standing in Wilmington vis-a-vis the large King debt. Mirelson reasoned that the smaller guarantee would mean a smaller debt figure on the books and thus the program's arrears might not look as imposing.

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65. In mid-February 1963 he then informed Norman King of his decision. King requested to be allowed to continue the arrangement, but Mirelson was adamant and, finally, King requested at least 2 weeks' notice so he could notify his sponsors and make other arrangements for them. Mirelson granted him the postponement and set the termination date as March 9, 1963, which was the day the show actually left the air. On March 5, 1963, Mirelson wrote a letter to Wayne Rollins (WNJR Ex. 4) with copies to Crow, Lanphear, and Minner informing them of his decision, and stating the reasons for it. He made no reference in his letter to King's debt or the "double-billing" matter, and he couched his statement of the reasons in general terms which noted that "the agency is not living up to their promises to us, not playing it square with us, etc.", and "the agency is not following our directives and controls". Mirelson also notified Soriano of the specified termination date.

66. Mirelson did not take the program off the air because of any reason relating to its program content. During Mirelson's entire tenure as the WNJR manager, he never received a single complaint from the public, from any sponsors, or from any of the freelance talent who participated in "Celebrity Time." Moreover, he was convinced in his own mind that the program was popular and well received because of the results of Pulse surveys which he read. Once a year Pulse, Inc., a national survey organization, takes a survey of the Negro audience (to which the station's programing is mainly directed) throughout the New York metropolitan area. WNJR used these ratings as guides to determining its strong and weak program areas. Mirelson studied the reports on the Pulse surveys for November 1961 and October–November 1962 which to him indicated that during the "Celebrity Time" period WNJR had either the highest or the second highest share of the Negro audience of any of the other stations ranked.[26]

67. Finally, it is clearly evident from the record that Mirelson had made a final decision to terminate the show, had chosen the final termination date, and had mailed the letter to Wayne Rollins notifying the home office of Mirelson's decision to terminate the show as of March 9, 1963, before he was aware that Commission investigators were visiting the station in March 1963.

The Commission investigation—March 1963

68. In March 1963, two Commission investigators, Louis C. Bryan and George Oliviere of the Complaints and Compliance Division, Broadcast Bureau, conducted a field investigation concerning possible double billing practices by radio stations in the New York metropolitan area. On the morning of March 6, 1963, Bryan and Oliviere visited station WNJR. Their purpose was to obtain information concerning double billing practices, if any, involving that station or persons doing business with that station. They were particularly interested in the activities of the Celebrity Consultants agency in relation to the

[26] In the 1961 Pulse report WNJR had 26 percent of the audience for the 11–11:30 time segment and station WADO had 29 percent. The third-ranking station had 15 percent. During the 11:30–12 midnight segment WNJR had 30 percent, WADO had 30 percent and the third-ranking station only 14 percent. In the 1962 Pulse report during the 11 to midnight segment WNJR had 21 percent and WADO had 21 percent (WNJR Ex. 164, pp. 2–3).

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"Celebrity Time" program which was then being broadcast over WNJR. Upon arriving at the station, the investigators asked to see the station manager, and after being told he was not available at the time, they had a conversation with the program director concerning the staffing of the station and its programing. When Mirelson became available, they spoke with him in his office and first discussed the nature of the advertising carried on the station (the kinds of accounts and sponsors) and the general programing. They then asked to see the program logs for every other month falling within the year preceding March 1963. The Commission representatives next examined some of these logs to obtain the names of advertisers on the "Celebrity Time" program and finally compiled a list of more than 15 5-second spot advertisers on "Celebrity Time" who appeared on the May 14 and May 17, 1962 logs. Having examined the logs for perhaps 45 minutes, they again spoke to Mirelson and requested that he locate the documents relating to the "Celebrity Time" program concerning the arrangements with the agency involved under which this program was operated by the station (Tr. 6567).[27] They informed Mirelson that they would talk to him after their return from lunch about the information on the program logs and about the documents he was to produce (Tr. 6566). Mirelson indicated that he would attempt to comply with their request.

69. After the investigators went to lunch, Mirelson got out the contracts for individual sponsors which he and King had signed (WNJR Ex. 5, pp. 140–147). He also procured from Soriano a folder containing the remainder of the "Celebrity Time" documents (WNJR Ex. 6). The forms Mirelson received from Soriano pertained to advertisers placed on "Celebrity Time" through freelancers; these documents were required to be signed by the station manager of WNJR on a line beneath the printed statement: "Accepted by radio station WNJR." Since Mirelson had not previously countersigned these documents on the appropriate line to indicate station acceptance, he now hurriedly began filling in his signature on them. He was able to complete only about half of them before the Commission investigators returned to the station because, among other matters, he wanted to inform the Rollins home office that Commission representatives were visiting WNJR. Upon their return from lunch, the Commission investigators asked Mirelson what documents he had located concerning the "Celebrity Time" program and Mirelson then produced some of the documents from a pile which he had assembled during their absence, stated that these documents related to the program, and handed them over for examination (Tr. 6568). He had arranged the pile of documents by placing the eight contracts he had received from King (WNJR Ex. 5, pp. 140–147) on top of the approximately 140 documents (WNJR Ex. 6) he obtained from Soriano during the absence of the investigators (Tr. 3496). Mirelson handed over for inspection several (from six to

[27] As Bryan testified concerning the particulars of the request (Tr. 6567): "We asked Mr. Mirelson to locate the documents relating to the program known as "Celebrity Time," concerning the arrangements relating to that program with Celebrity Consultants, the agency involved. * * * I do not recall limiting our requests to contracts. I recall that we asked for a documentation, anything in writing that pertained to the operation of this program and the final agreements and cost and so forth * * *."

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eight) documents taken by him off the top of the pile which he had assembled during the luncheon period. His selection was therefore necessarily limited to the small group of contracts he had personally obtained from King and included none of the freelancers' documents (WNJR Ex. 6) he had been given by Soriano.

70. The pile of documents from which Mirelson took several off the top and passed them over to the investigators was in a folder on or near his desk. Mirelson "was not anxious" to have the investigators see the contract forms that Soriano had collected from the freelancers (WNJR Ex. 6), and although he was prepared to turn them over to the investigators upon request he was "not about to volunteer" to do so (Tr. 4213). At that time he considered the bulk of the documents acquired by Soriano to be "in terrible shape" since he observed they had different (freelancers') names, various colors, and were illegible in places (Tr. 3895). The investigators looked at the contracts which Mirelson had given them and then passed the forms back to him. There is conflicting evidence in the record as to what transpired at this point. According to Mirelson, he asked the two investigators if they wanted to see additional contracts and when they responded in the negative he did not pursue this subject further (Tr. 4215). It is Bryan's recollection, however, that Oliviere asked whether the documents handed them by Mirelson was "all of the documentation covering the arrangements with Celebrity consultants" and that Mirelson responded these were "all of the documents available to him at that time" (Tr. 6571). The examiner finds no basis in the record for preferring the recollection of either witness over that of the other on the point at issue. Observation of both witnesses while testifying did not afford any reason to infer either was not being truthful in giving his account of what took place on March 6, 1963. Moreover, Bryan's recollection is not reinforced by his contemporaneous notes since they are silent on the particular question. In any event, the employment of the term "documentation" in Oliviere's reported question creates some ambiguity as to the thrust of this inquiry (i.e., was he inquiring as to the existence of some other kind of contractual document?). As for Mirelson's testimony, while he admittedly was not going to produce the other documents in his possession unless required to do so by the investigators, the examiner does not perceive how an assertion on his part of their unavailability or nonexistence, notwithstanding his dissatisfaction with the manner of their preparation, would have been desirable from Mirelson's point of view. From the posture of the record as the examiner views it, it can only be found that Mirelson turned over several or all of the King contracts but purposefully did not bring the existence of the other documents to the attention of the investigators. The available evidence is in such dubious state as to preclude the further finding that Mirelson told the investigators he had no additional contracts, or even that he was asked if there were more contracts.

71. During the March 1963 visit by Commission representatives, Mirelson described to them how the "Celebrity Time" program was conducted. Mirelson stated that "Celebrity Time" was handled by an advertising agency called Celebrity Consultants; that Norman King

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was the agency's principal and the station's main contact at Celebrity Consultants; that there was no written agreement with the agency then in effect concerning the arrangement for the program and that the parties were operating on an informal and oral agreement basis; that the program was carried from 11 p.m. to 12 midnight; that the agency had provided Bill Carlton as announcer for the program; that Carlton had formerly done the program 5 nights a week; and that recently the staff anouncer had been doing the program almost all the time because Carlton had not been available. Mirelson further stated that WNJR maintained control over the program time; that the station provided the "Celebrity people" with a list from which to select records and that the selections made were approved in advance of broadcast by the program director. Mirelson further stated the station did control the "Celebrity Time" broadcasts by having WNJR engineers and announcers monitor the program during air time. He also told the investigators that "guest talent" provided by King appeared on the show. He did not tell them that there were freelance announcers appearing on "Celebrity Time" nor did he mention the financial arrangements connected with their appearances on this program.[25] The investigators were not shown the written agreement between WNJR and Celebrity Consultants (WNJR Ex. 3) which had been in force until the end of December 1962.

72. A number of other matters were also covered during the investigation in early March 1963. The investigators asked Mirelson about the method of billing on the "Celebrity Time" program, they asked about the amount of WNJR religious commercial versus religious sustaining time, they asked if the station "brokered" time, they asked about copy used on the "Celebrity Time" program, about the possibility of payola, about invoices and accounts receivable, and they requested station rate cards and program schedules. The investigators kept certain documents, i.e., they retained station rate cards, a station payola affidavit form, a master music list, a WNJR program schedule, sample copy for "Celebrity Time" and a form letter which the station sends to record distributors indicating, among other things, that station management chooses all the music which is heard on the station. They did not take with them any contractural documents or orders for broadcasting.

73. Mirelson indicated to the investigators, when questioned about invoices and accounts receivable, that the financial records on these matters were not at the station but could be found in Wilmington. Actually the information was available at WNJR as well as the home office. Mirelson gave this answer because he believed such information should be released to the investigators by authority of an officer or director of the licensee or its parent company, and Mirelson at no time was an officer or director of either the licensee or its parent. He told them that the station did not broker time. He also told the Commission representatives that the station did not engage in the practice of double-billing, and that he had refused to provide Celebrity Consultants with inflated bills. Lastly, Mirelson told the Commission

[25] As Mirelson explained his silence on these two matters (Tr. 4218): "I didn't get into that, and they didn t ask me and I didn't volunteer."

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investigators that the "Celebrity Time" program was being terminated at the end of the week and that he had written a memorandum to this effect to the Rollins home office. The Commission investigators visited the Wilmington office of Rollins on March 11, 1963, and at that time were furnished a copy of Mirelson's memorandum of March 5, 1963, reporting to the home office his decision to terminate the "Celebrity Time" program. At the Wilmington office, the two Commission representatives sought further information for the purpose of determining whether station WNJR had engaged in double-billing, and it does not appear that any question was raised there about time brokerage. The information and documentation concerning the "Celebrity Time" program which the investigators obtained at station WNJR and the Rollins home office in Wilmington were sufficient to satisfy their needs so far as the accomplishment of their mission was concerned. Thus, they were able to carry out their purpose which had been to determine whether the licensee of WNJR had knowingly or unknowingly engaged in double billing. After obtaining the information concerning billing and other matters which was available in Wilmington the investigators did not find it necessary to return to WNJR for more information about the double-billing question (Tr. 6604–6606).

74. In August 1963, the Commission sent Norman King a letter (Br. Bur. Ex. 31) which made reference to discussion of the former "Celebrity Time" program on station WNJR by King with members of the Commission staff during the week of July 21, 1963. This letter stated in part: "It is understood that you paid $300 per week for the 1 hour per night, 11 p.m. until midnight, Monday through Saturday." The communication raised a number of questions concerning the program including the matter of the King agency's billing procedures for this program, and cited a provision in "Your contracts with the station" that "WNJR did not participate in the programing of the show or did not deal in any way with the sponsors. * * *" A copy of this letter was given by King to Mirelson, who in turn brought it to the attention of Crow at the home office soon after August 8, 1963. Crow saw the letter but made no inquiry of Mirelson at the time regarding the manner in which the "Celebrity Time" program had been conducted or the other matters raised in the letter to King. He understood that King had declined to answer the Commission's letter. Lanphear also saw the Commission's letter to King sometime in August 1963, and considered it to be informative from the standpoint of indicating the Commission's further investigation subsequent to the March 1963 visit to WNJR into King's billing practices with regard to his "Celebrity Time" clients. Lanphear noted particularly reference in the Commission's letter to the use of a particular billhead by King showing the prominent use of the WNJR call letters.[29] Although King no longer had a program on WNJR, Lanphear spoke to Mirelson about this and was told that Mirelson would take care of it and talk to King about the use of such a billhead with the WNJR call letters since Lanphear strongly objected to the practice. However, Lanphear did

[29] The letter (Br. Bur. Ex. 31, p. 2) inquired of King: "Did the station voice any protest over your use of their call-letters at the tops of your invoices? Was the station aware that you were selling the spots in "Celebrity Time" at a considerably higher price than they would sell the spots to the same advertisers?

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not receive a report from Mirelson on any discussion he may have had later with King about this matter.

75. At no time either prior to, during, or even soon after the Commission's investigation of the "Celebrity Time" program in March and April 1963, did either Soriano or Mirelson indicate to any of their superiors at the Rollins home office in Wilmington, particularly to Tim Crow, the head of the Rollins quality control department, Al Lanphear, the Rollins vice president in charge of all of the Rollins radio facilities, or O. Wayne Rollins, the president of the licensee and of Rollins, Inc., the nature of the arrangements between Soriano and King, nor did they indicate to these persons in any way the manner in which the freelancers appeared on the "Celebrity Time" program. Moreover, as Mirelson's testimony makes quite clear, he deliberately withheld such information since he was embarrassed about the particular arrangements on this program; in his own words, he "had gotten into a bind on the show" because, when King fell into arrears, he had permitted Soriano, at King's suggestion, to bring on additional freelancers to act as salesmen for the program and as talent on the air. As the show continued on WNJR under these conditions, the situation with respect to King's indebtedness had not improved and Mirelson was thinking of taking the program off the air. Under the circumstances, he followed a policy of giving the home office as little information regarding the program as he could (Tr. 3663–3665). Even after the show had been terminated Mirelson used his own funds to reduce the unpaid balance on King's obligation without disclosing this anomalous action.

76. Mirelson's concealment of the nature of the arrangements is further reflected by the fact that although Mirelson had ample opportunity to explain these arrangements to the home office, he deliberately failed to do so. Thus, for example, on and shortly after September 27, 1962, Tim Crow (the head of the quality control department) raised certain questions about the show following an extensive audit which he made of the station's operations on September 26 and 27. Mirelson at that point could have told Crow about the existence of these arrangements, but he specifically refrained from doing so, and when asked by Crow who certain individuals appearing on the show were, he identified them to Crow only as King's talent. After this audit, Crow wrote reports to O. Wayne Rollins and to Mirelson which raised certain questions concerning the mechanics of the "Celebrity Time" show, among them an apparent failure to keep logs during the show for several days, that a personality named Tiny Gray (whom Crow characterized as a rank amateur) appeared on the program and seemed to be doing a show for the Jewish audience, that another person named Eddie Williams (whom Crow also termed a rank amateur) appeared on the show, and that, based upon slips of paper attached to the log, four "separate groups" appeared to have been presented on the show (WNJR Ex. 44, p. 2, WNJR Ex. 45, p. 1; Tr. 5157–60, 6182–83). Mirelson admittedly could have told Al Lanphear, the Rollins vice president in charge of radio (with whom he discussed the September 26 and 27 audit) about the nature of these arrangements, but he did not do so. Moreover, a second specific opportunity arose

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in January 1963 where Crow, in a routine monitoring operation pointed out that on January 29 three announcements promoting Fort Lauderdale, Fla., had been broadcast which were too long (see WNJR Ex. 70). In response thereto, Mirelson stated "We have checked with the representative of this (the "Celebrity Time") show and find that these spots were run by his announcer" (WNJR Ex. 71). In actual fact, Mirelson had checked with Soriano, and the reference to "the representative of this show" was an oblique reference to Soriano. Mirelson deliberately avoided stating Soriano's name in response since, if he had done so, he might have had to explain that Soriano was working with freelancers on the show and acting as King's agent and representative, a fact of which the home office was totally unaware (Tr. 3795–97). Misleading also was Mirelson's reference to the announcer of the agency since Bill Carlton had left the program in the fall of 1962.

The WNJR forfeiture re "Celebrity Time"

77. By letter dated January 22, 1964, the Commission issued to the licensee of station WNJR a notice of apparent liability for forfeiture of $1,000 for violation of the reporting and requirements of section 1.613(c) of the rules.[30] The Commission's notice stated (WNJR Ex. 166):

> A Commission field investigation into the operation of station WNJR revealed that for at least several months prior to March 9, 1963, the program "Celebrity Time" was broadcast by station WNJR Mondays through Saturdays pursuant to oral or written contracts for sale of broadcast time for a flat rate to Celebrity Consultants. Celebrity Consultants, a New York advertising agency, acting as time brokers, resold the time in question, supplied talent as well as advertising continuity to WNJR and collected proceeds from the sale of time while WNJR received in return only a flat weekly rate from Celebrity Consultants. Copies of the contract for the sale of broadcast time to the time broker for resale were not filed with the Commission, within 30 days of execution thereof in violation of section 1.613(c) of the Commission's rules.

* * * * * * *

78. Upon receipt of the notice, Wayne Rollins immediately called Washington counsel. Rollins was disturbed because he could not understand why, after having followed counsel's instructions as to the preparation and handling of contracts, the station was being cited for violation of the rules in the notice. Counsel was of the opinion that, based on the facts he then had, there was some mistake on the Commission's part and that brokerage by the station did not exist. He advised Rollins to have someone gather all the facts with regard to the "Celebrity Time" program and send them on to Washington before further discussion of the notice with Rollins. Rollins then instructed Tim Crow to get the facts pertinent to the notice and to report back to him by written memorandum. Crow spoke to Mirelson by telephone and requested the latter to send him typical or representative contracts for individual sponsors who had advertised on "Celebrity Time"; he also asked for any contracts between

[30] Sec. 1.613(c) requires a licensee to file within 30 days of execution thereof copies of "Contracts relating to the sale of broadcast time to 'time brokers' for resale." The substance of oral contracts also must be so filed.

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WNJR and Celebrity Consultants that Mirelson could find. In response to Crow's requests, Mirelson transmitted three of the individual contracts executed by King (WNJR Ex. 5, pp. 140, 141, and 142) and the two overall master contracts drawn up between Celebrity Consultants and WNJR (see WNJR Exs. 2 and 3). Before this time, Crow had never seen the master contracts. Mirelson selected the three individual contracts because he believed they might possibly be the basis for some question inasmuch as these were documents the Commission investigators had seen in March 1963. Mirelson had been told by Crow that counsel wanted to see representative contracts in connection with a notice of forfeiture or fine (Tr. 5007–5008). Crow understood from being told so by Mirelson that the three individual contracts he received were typical of all the individual contracts Mirelson had in the station files for "Celebrity Time." Crow also asked Mirelson to have an examination made back over the WNJR program logs for the 6 months prior to the visit of the investigators in March 1963, to determine the extent to which any spots on behalf of WNJR sponsors had been broadcast during "Celebrity Time" programs. Mirelson reported that none had been found.

79. Crow prepared a memorandum report to Rollins, dated February 4, 1964, "* * * concerning matters relevant to the Commission's proposed forfeiture at WNJR" (WNJR Ex. 55). Essentially, the report described the March 1963 investigation as contemporaneously detailed by Mirelson orally and written down in notes made by Crow at the time (WNJR Ex. 53). It indicated that the FCC investigators had examined, but did not keep, samples of the individual contracts for "Celebrity Time." The report also attached copies of "typical contracts deployed on the 'Celebrity Time Show,'" music sheets, sample copy, sample invoices, and the Commission letter which had been directed to King (WNJR Ex. 55). The attached contracts were three of the white King contracts (WNJR Ex. 5–140–42) which Crow stated were "actual contracts from the (WNJR) files." The report did not include the overall King contracts (WNJR Exs. 2 and 3) and Rollins had no recollection at the hearing of having seen them before (Tr. 6012). The financial terms of the overall contracts (except for 15 percent deduction from the gross) were mentioned in the Commission's letter to King (Br. Bur. Ex. 31) which, as noted above, was attached to Crow's report (WNJR Ex. 55). Again, however, Rollins had no recollection at the hearing of ever having seen the King letter before (Tr. 6183–84), nor, except for the fact that "typical" individual "contracts" were attached, did he recall, having seen the other attachments mentioned in Crow's memorandum (Tr. 6006, 6185). Crow's memorandum mentioned two separate visits made by the investigators in 1963 to Norman King, "the agency man, Celebrity Consultants".

80. Wayne Rollins read the report, and particularly noted the attached copies of the "Celebrity Time" individual contracts which he understood were typical of those being used for this program. He believed that contracts similar to the three specific individual contracts which were attached existed for all the agency shows on station WNJR

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(Tr. 6006) and that all of the individual contracts for the "Celebrity Time" program were "in order" (Tr. 6016). Crow's information about the March 1963 visit of the investigators to WNJR and the contracts attached to his report to Rollins were turned over to Washington counsel, and Rollins had further discussion concerning the notice of apparent liability with counsel as well as with Crow and Lanphear. It was counsel's conclusion that the licensee was required to contest the notice since, in his opinion, the station was complying with the Commission's rules and should not have a fine on its record. Based on counsel's recommendation, and upon his own inspection of the sample contracts attached to Crow's report to him, as well as the assurance afforded by Mirelson's reports to Crow that the contracts were in proper form and in use at the station, Wayne Rollins personally made the decision to contest the forfeiture. Before arriving at this decision, Rollins had determined to his own satisfaction, and had then received the opinion of counsel to the same effect, that the contracts for "Celebrity Time" which he had seen did not reflect time brokerage agreements.

51. Counsel thereafter prepared a response and opposition to the proposed forfeiture, and a draft of this document was circulated to Wayne Rollins, Crow, and Lanphear. Rollins read the draft and believed that the information in it was true and correct. Before signifying his approval of the contents, he checked with Crow and Lanphear to ascertain that they each had also read it and to elicit their views as to the truth of the statements contained therein. Neither called any inaccuracy in the document to his attention. Lanphear indicated to Rollins that he concurred completely with the statements in the opposition (Tr. 5704). Crow found nothing factually incorrect in this document when he reviewed it (Tr. 4855). Rollins assumed that Lanphear would discuss the proposed opposition and the charges in the notice of apparent liability with Mirelson since they pertained to the operation of, and directly affected, station WNJR, but he never inquired whether Lanphear had in fact done so. He did not instruct anyone to go and look at all the contracts for "Celebrity Time" at station WNJR mainly because of his confidence in Mirelson, a trustworthy veteran employee with the licensee (Tr. 6017), who had reported on January 21, 1963, that by then he had "separate contracts with all clients on WNJR" (see WNJR Ex. 47). Furthermore, he did not consider it necessary to issue such an instruction since he had received from Crow the documents characterized by the latter as "typical contracts" for "Celebrity Time" (Tr. 6017). Rollins knew of no reason to suspect that the individual "Celebrity Time" contracts might not all be in existence or in proper order, and he was willing to subscribe his oath to the statements contained in the draft of the opposition prepared by counsel. Having received the reassurances of Crow and Lanphear as to the factual accuracy of the contents and acting in the light of his own understanding of the facts, Wayne Rollins signed the affidavit attached to the "Response and Opposition of Continental Broadcasting, Inc. to the Commission's Notice of Ap-

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parent Liability for Forfeiture" [31] and this document was filed with the Commission on March 16, 1964.

82. The response and opposition (WNJR Ex. 167) stated in pertinent part (i.e., pp. 11–12):

> * * * station WNJR considered the advertiser as a principal in behalf of whom Celebrity Consultants, Ltd., purchased time on station WNJR as an agent for the advertiser. It always recognized the original sponsor as being liable equally with the advertising agency for payment of the time charges involved. In July 1962, upon the advice of counsel, it required Celebrity Consultants, Ltd., to enter into individual contracts with the station in behalf of each sponsor.[5] These contracts were examined by the FCC staff when it investigated this matter. Each contract showed who the advertiser was and showed the agency as Celebrity Consultants, Ltd. Moreover, this contract expressly stated that the advertiser agreed to pay and the station agreed to hold the advertiser liable for payment for the broadcasting covered by the agreement * * *. Under the terms of the individual contracts, both the advertiser and Celebrity Consultants, Ltd., were liable for the payment for the time. Not only does the contract itself demonstrate that the station dealt with Celebrity Consultants, Ltd., as a regular advertising agency, but it also always paid the advertising agency a regular 15-percent commission which was deducted by Celebrity Consultants, Ltd., when it remitted the guaranteed revenue for the advertising involved. In other words, although the flat rate of the revenue guaranteed by Celebrity Consultants, Ltd., was $300 per week and this was the amount billed to the agency each week, the agency remitted only $255.[32]

83. In light of the foregoing, Continental contended that WNJR did not sell time to Celebrity Consultants; that the agency did not resell the time to sponsors; and that, therefore, the agreement between WNJR and Celebrity Consultants was not subject to the filing requirements of section 1.613(c) of the rules as a time brokerage contract for the resale of time (WNJR Ex. 167, pp. 12–14). Continental asserted too in its response that, in view of its above-noted contentions, on the advice of counsel, contracts such as those entered into with Celebrity Consultants had not been filed with the Commission (WNJR Ex. 167, p. 13). In discussing the character of the arrangement between Celebrity Consultants and WNJR, it was also stated in the response (WNJR Ex. 167, p. 14) that "WNJR maintained complete control over all programs since the contract (with Celebrity Consultants) provided that the station had the sole right to determine whether or not all programs or copy were in the public interest", and that "WNJR retained the right to place additional spots during the time period involved."

84. The factual representations in the response which have been set forth above (pars. 82–83) were largely inaccurate. First, WNJR did not require Celebrity Consultants, Ltd., to enter into individual contracts with the station in behalf of each sponsor broadcasting

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[31] The affidavit averred that Rollins had read the response and opposition, and that the facts therein relating to the arrangements between WNJR and Celebrity Consultants were true and correct. It was his normal practice to sign such affidavits if his trusted employees told him the facts contained therein were true, and he had no reason to doubt them and was satisfied as to the accuracy of the statements made (Tr. 6059–6060).

[5] The station considered its earlier agreement with Celebrity Consultants, Ltd., terminated at that time. The earlier agreement certainly terminated by December 1962, and was not in effect during the period pertinent to the notice of apparent liability for forfeiture. The $300 weekly guarantee was continued by oral agreement. (WNJR Ex. 167, f.n. at p. 11).

[32] Rollins understood the reference in the response to the examination of contracts by the FCC staff in the context of Crow's report to him that the investigators had looked at "samples" of the individual contracts (Tr. 6206).

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on "Celebrity Time." Except for the eight contracts which Mirelson personally obtained from King at the agency (WNJR Ex. 5, pp. 140–147), a number of freelancers were providing the station with documents that, with some few exceptions, at best constituted memorandums of their own arrangements with the sponsors to whom they sold advertising time. In numerous other instances, Soriano filled in contract forms reflecting arrangements of the freelancers with sponsors. It would not be possible to apply the term "contracts" to these documents either since they were not executed by Mirelson, the station manager, until sometime after they had been written up by Soriano who was certainly not the authorized representative of WNJR for the purpose of entering into written advertising contracts for "Celebrity Time." Indeed, Mirelson never got around to signing the so-called contracts relating to the sponsors of freelancers until the program was about to go off the air. Moreover, the Commission investigators did not examine any of the approximately 140 documents for freelancers' sponsors which documents had not been supplied to the station by Celebrity Consultants nor even shown to the investigators (WNJR Ex. 6). Thus, it was an incorrect assertion to say that "these contracts were examined by the FCC staff" in March 1963. Further, there were numerous instances where a "contract" did not show "Celebrity Consultants" as the agency. In addition, because Soriano made liberal use of forms which did not contain standard contract provisions printed on the back, only 32 of the 150 documents involved "expressly stated" that the advertiser agreed to pay and the station agreed to hold the advertiser liable for payment of the matter broadcast. For the same reason, nearly 80 percent of the "individual contracts" did not by their terms hold both the advertiser and Celebrity Consultants liable for the payment for the time (WNJR Ex. 6). Again, absence of the standard contract provisions from these contracts made incorrect the statement (WNJR Ex. 167, p. 14) that the contract in each instance contained a provision indicating "WNJR maintained complete control over all programs."

Finally, as for footnote 5 to the response, there is no evidence that the station considered its written agreement with Celebrity Consultants (WNJR Ex. 3) as "terminated" in July 1962. Rather, because of the T.F. termination provision, Mirelson believed that the contract expired after the end of 1 year, or the end of December 1962. In any event, the contractual arrangement was continued by mutual understanding of Mirelson and King beyond December 31, 1962, and until the show went off the air on March 9, 1963, pursuant to Mirelson's notification to King. In this connection, it has been found (f.n. 25, supra) that the weekly guarantee was reduced from $300 to $200 in December 1962, so that the footnote reference in the response to $300 as being the weekly guarantee after December 1962 was also in error. Although Lanphear was told by Mirelson sometime before "Celebrity Time" went off the air about a reduction having been made in the weekly guarantee, there is no evidence that Rollins or Crow were told about this change. Lanphear did not examine any of the contracts for the special agency programs including "Celebrity Time" on his visits to WNJR prior to the filing of the response and opposition. Sometime in October 1962, he

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had inquired of Mirelson if the station had the individual contracts that quality control instructed Mirelson to obtain, and he understood from Mirelson's reply that Mirelson then had some of them and was in the process of obtaining others.[33] As applied to the three contracts from among the eight that Mirelson obtained from King and which three contracts Crow sent to Rollins as being "typical" of those obtained by WNJR for the "Celebrity Time" program (WNJR Ex. 5, pp. 140–142), the representations in the response concerning the contents and provisions of the individual contracts and the requirement by the station that Celebrity Consultants Ltd. enter into them with the station on behalf of the sponsor concerned were of course true. Nor was it inaccurate to assert too that these three contracts had been examined by the investigators.

85. Mirelson believed, when he first learned of the forfeiture matter in late January 1964, that a fine had already been levied against the station in connection with the show "Celebrity Time." He was never provided with a copy of the notice of apparent liability (WNJR Ex. 166), and neither read the document nor discussed it with anyone from the Rollins home office. He did not initiate any discussion of the forfeiture with the home office because he had assumed that the fine would be paid and that would be the end of the matter. Mirelson did not know specifically what the fine was about but was not concerned on this score since the "Celebrity Time" show had been off the air for many months and he believed that he was following the instructions of the home office on the contractual and other aspects of handling the special agency shows still being carried by WNJR. He was not consulted as to whether the licensee should oppose the forfeiture but was requested by Crow to forward to him representative contracts pertaining to "Celebrity Time" and was told counsel desired to see these in connection with a forfeiture.

86. The evidence in the record is not persuasive that Mirelson was afforded the opportunity to read the response and opposition (WNJR Ex. 167) before it was filed with the Commission on March 16, 1964. Mirelson testified that he did not read the opposition document prior to the time it was filed but saw it shortly thereafter (Tr. 3448, 3894–3895). Lanphear, on the other hand, testified that he showed Mirelson a copy of the opposition prior to the time it was filed (Tr. 5575, 5709), although he admitted he could have done so as late as March 18 or 19, 1964, which would have been after the document was filed (Tr. 5576). Lanphear testified too that, although he received no express instruction to show the opposition to Mirelson, Rollins "knew" that Lanphear was going to do so (Tr. 5710), and that he (Lanphear) had intended to show it to Mirelson some time before the filing but he did not make a special trip to do so and took the document up from Washington when he made a regularly scheduled trip (Tr. 5712). At one point in his testimony, Lanphear also stated he had a discussion with Mirelson subsequent to the drafting but prior to filing of the opposition, "Presumably so that if there were any changes after Mirelson had seen the

[33] On Jan. 29, 1963, there were three announcements broadcast on "Celebrity Time" which were not logged (WNJR Ex. 70). In a memorandum to Crow dated February 14, 1963 (WNJR Ex. 71), Mirelson explained this discrepancy and reported that a contract with the sponsor covering the spots had now been obtained.

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opposition I could give them to our counsel" (Tr. 5904). Lanphear had some recollection of having informed either Crow or Rollins that he had shown a copy of the opposition to Mirelson (Tr. 5716).

87. In view of the conflict in the testimony discussed above and Lanphear's admission that he could have shown the opposition to Mirelson on a date subsequent to its filing (i.e., March 18 or 19) it can only be found that Mirelson was shown a copy of the opposition soon after its submission to the Commission. On the occasion when Mirelson was shown the document in question by Lanphear, he was told that Rollins was going to oppose the forfeiture. Lanphear showed Mirelson a copy of the opposition because he wanted Mirelson to be aware of the facts stated therein and the legal arguments concerning brokerage. He did not give Mirelson any instructions when he handed the document over and he did not ask Mirelson specific questions about it. In the presence of Lanphear, Mirelson looked through the document. He did not point out anything in the opposition to Lanphear and made no significant comment about it while reading it. Mirelson then returned the document to Lanphear without comment and without indicating any inaccuracies in it.

88. When Mirelson read the opposition, he inwardly became "panicky" because it appeared to him that a part of the argument advanced by Rollins in the document indicated WNJR had a "perfect" and complete file of individual contracts for the "Celebrity Time" show. The particular passage in the opposition which disturbed him stated as follows:

> **In July 1962, upon the advice of counsel, it required Celebrity Consultants, Ltd., to enter into individual contracts with the station in behalf of each sponsor. These contracts were examined by the FCC staff when it investigated this matter. Each contract showed who the advertiser was and showed the agency of Celebrity Consultants, Ltd. (WNJR Ex. 167, p. 11).**

From reading the above-quoted passage Mirelson drew the inference that the Rollins' home office believed that the individual contracts for "Celebrity Time" were all in perfect shape—"all perfectly executed and all had the proper information and so on" (Tr. 4168). He had doubts as to whether the contracts for "Celebrity Time" in the station's files were in the shape described in the opposition (Tr. 4170) and he was concerned over whether the station did have the contracts in good order as represented by Rollins in the statement he read (Tr. 4169). He did not voice his apprehension to Lanphear. When Mirelson came to the station the next morning after his meeting with Lanphear, he asked Soriano for the file of the individual "Celebrity Time" contracts (WNJR Ex. 6) and started looking through these documents. He observed that they were in extremely poor shape, that they were not at all uniform, that they had many different names on them, and that they had been written up on different colored forms. He found the forms to be confusing because there were many names signed in different places, often erroneously, and the role and identity of Celebrity Consultants was not clearly indicated. In short, the forms were not as clear in setting out the relationships between the parties as the opposition had indicated. Mirelson's inspection of the file of contracts left him with the conclusion that they were "in terribly sloppy shape" and he "just couldn't

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understand them" himself (Tr. 4170). He was quite upset over the condition the documents were in, and his reaction to them was "that if Wilmington saw these, they would probably fire me" (Tr. 3896). He envisioned this prospect because he had not followed home office instructions, and the condition of the contract file would indicate that he had failed to adequately supervise the obtaining of contracts in proper form.[34] He was also concerned over the fact that he had allowed Soriano to work for King without the knowledge or approval of the home office. At this time, too, Mirelson was under great emotional stress arising from what shortly proved to be the terminal illness of his mother; the effect of this distressing situation was even more intensified by the circumstance that plans and arrangements for his wedding had already been made and were inevitably complicated by the critical development. Thus, it was in the period when Mirelson was being beset by these personal problems that it was brought home to him the licensee had placed its reliance on a file of documents at WNJR which fell far short of the representation as to their form and content stated in the opposition and submitted to the Commission.

89. Mirelson called in Soriano and expressed his belief that the "Celebrity Time" documents (WNJR Ex. 6) "should be done over" (Tr. 3258) and indicated further that he wanted Soriano to execute this task (Tr. 2928). When asked why these documents had to be redone, Mirelson replied that someone from the Wilmington office might wish to see them and if this were to happen, he "wanted something that looked more presentable, more businesslike" than what he then had. He gave Soriano specific instructions that the documents which Soriano was to prepare should show the name of Celebrity Consultants as the agency, and contain the signature of an authorized representative of the agency (one name). Mirelson also said that he wanted them to look uniform. Soriano reluctantly acquiesced in Mirelson's project since he saw no purpose to be served by redoing the contracts for a program that had been off the air for a year. He proposed to Mirelson that WNJR "start order" forms of which plenty were available in pads of one color (goldenrod) should be used. Soriano also suggested that the forms to be filled in could be mailed to Al Browne, whose name spelled as "Brown" appeared on many of the original documents (WNJR Ex. 6), for his signature. He assured Mirelson that this was a "good name" to use, and although he was not sure that Browne would sign the new forms and was not anxious to talk to Browne about it, he told Mirelson he would call Browne. Soriano delayed making a telephone call to Browne and he procrastinated in starting work on the forms to be written up. Only after repeated inquiries from Mirelson as to how the undertaking was progressing did Soriano finally start and complete the task at home evenings by devoting several late-hour sessions to it.

90. Soriano filled out in longhand a new set of 139 documents containing the information requested by Mirelson except for the signature of a representative of Celebrity Consultants. However, he still had not

[34] Mirelson's concern over the required contracts for "Celebrity Time" was indicated by his comment to Soriano: "Suppose Wilmington comes in and looks at what we have here? What will they think of me?" (Tr. 2928).

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spoken to Al Browne about signing these forms as the agency's representative and knew it would be imposing on Browne to ask the latter to do so. Nor did Soriano want to make a trip to Brooklyn to see Browne for the purpose of obtaining his signature to the pile of documents. He noted from several of the original documents that Browne had signed his name on them with the letter "e" in it, and decided that if he put down the name "Brown" on the new set of forms as had been done on many of the originals by Soriano himself this would not be harmful to Browne since it was not a forgery of his signature and would make no difference from the standpoint of the purpose to be served by the documents. Soriano considered that there would be no obligation on the part of anyone to pay any money as a result of the existence of the new forms, that Mirelson would probably never ask him about the authenticity of the signature, and that maybe Wilmington would never ask for the forms and "they would be buried there" among the WNJR files (Tr. 2935–2936). With these thoughts in mind, Soriano signed the name "Al Brown" to the new documents but without telling Mirelson he had done so. He then presented the completed documents to Mirelson who looked at a few of them, then indicated to Soriano they were satisfactory, did not ask if the name sign (Al Brown) on the forms was Browne's signature, and kept the new set as well as the original set of documents. Mirelson assumed that Al Browne had personally signed the new forms, and had no suspicion that the signature "Al Brown" was not genuine (Tr. 3915). Mirelson was told by Soriano that Al Browne had been authorized by King to sign contracts for individual sponsors and that Soriano could get Browne's signature on the copies when the preparation of a new set of forms was first discussed (Tr. 6963).

91. The new documents prepared by Soriano differed from the originals in several respects. Perhaps the most significant difference was the complete absence of any reference in the new documents to the various freelance announcers whose names and signatures appeared in the originals. Furthermore, the rates appearing in some of the new forms differed from those found in the originals where Soriano thought the rate as first written was incorrect. Also, the commercial continuity appearing in some of the originals was not reproduced in the new forms. Moreover, the new documents uniformly indicated the agency as Celebrity Consultants whereas the originals contained various other names as either an agency or salesman. In short, many of the new documents were different in various respects from the originals, as would be evident upon a point-by-point comparison of the related documents in each set. No changes were made by Soriano, however, with respect to the name of the sponsor, the date of the announcement, and the length of the announcement. Soriano occasionally wrote out matters in full on the copies rather than in the abbreviated form sometimes used on the originals, and he occasionally filled in information on copies where he believed the originals to be incomplete.

92. Sometime after the issuance of the Commission's January 22, 1964 notice of apparent liability, Mirelson mentioned to Soriano that a fine had been imposed against the licensee company of WNJR as the result of an investigation conducted in March 1963. Soriano was not

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told what violations were involved in the fine, and it was merely indicated to him that there were problems. Mirelson did not identify any programs in connection with the problems, and Soriano was unaware that the fine was related to the "Celebrity Time" show (Tr. 3252). Soriano was never told by Mirelson, as a reason for the preparation of the new set of documents, that he wanted the contracts redone "because someone from the FCC might want to look at them" (Tr. 3270). In this connection, the examiner fully credits Soriano's testimony, emphatically stated (Tr. 3270), that if he had known the new documents (WNJR Ex. 5), were to be shown to Commission representatives he never would have prepared them.[35]

93. Mirelson was not oblivious to the possibility that the Commission would want to see the contracts referred to in the response and opposition to the forfeiture filed by Rollins on March 16, 1964 (Tr. 6518). But, he was not apprised until April 3, 1964, that an inspection of such documents would in fact be made; on that date Crow spoke to Mirelson on the telephone and indicated that Commission personnel were coming to the station on April 15, 1964, for the purpose of examining documentary material including the contracts for "Celebrity Time" (Tr. 4225–4226). In a memorandum written to Mirelson on April 3, 1964 (WNJR Ex. 146), Crow confirmed the telephone message and returned the three individual "Celebrity Time" contracts (WNJR Ex. 5, pp. 140–142) and the contracts with the King agency (WNJR Exs. 2 and 3), documents which figured in the preparation of the opposition (WNJR Ex. 167). In the same memorandum Crow also informed Mirelson that Washington counsel, Crow and Lanphear would meet with Mirelson on April 14, to go over the documents and would stay over to be with Mirelson the following day. Crow closed his memorandum with the following comment: "In the meantime, let me know as soon as possible about any areas of concern that you may have, so that they can be explored fully by us without delay." It is not clear from the record that Mirelson received the new set of documents (WNJR Ex. 5, pp. 1–139), from Soriano before Crow's telephone call on April 3, 1964, and Mirelson has even conceded that "It is entirely possible that his actual turning over of the documents to me might have been after I learned of the FCC visit" (Tr. 4181). But the examiner is persuaded that Mirelson, as he has indeed testified (Tr. 4183), asked Soriano to prepare the new documents before learning of the forthcoming April 15, 1964 visit of the Commission investigators. This finding derives from Soriano's testimony: as to the delaying tactics he engaged in before making up the new set of documents (Tr. 2933), that Mirelson at first told Soriano to take his time (ibid.), and that it was "2 or 3 weeks" after Mirelson's request that he turned them over (Tr. 3277); and from Mirelson's testimony that there was a period when he had the contracts (Tr. 4181–4182) and

[35] Observation of Soriano while testifying and the inherent credibility of this statement viewed in the context of what little, if anything, he personally had to gain from redoing the documents impels this finding in favor of his credibility on the point involved. Soriano's disavowal at the hearing (Tr. 3334), on the ground of inadvertence, of his prior contradictory unsworn statement (Br. Bu. Ex. 19) is accepted by the examiner as worthy of credence from the standpoint of his demeanor on the stand, and as being supported by a reasonable explanation under oath of the original mistake which he was now correcting.

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"maintained" them with the knowledge the Commission personnel were going to visit the station (Tr. 4182).[36] The time span covered by their combined testimony clearly points to the making of the decision by Mirelson to have the contracts redone at some time earlier than April 3; had the determination been made by Mirelson on that date only 11 days would have elapsed between the request that they be prepared and the time they were shown to counsel and Crow—an interval too brief to square with the above-stated credible testimony of Soriano and Mirelson in this area.

94. Of foremost concern to Mirelson after he read the response and opposition to the forfeiture was the question of the reaction of the Wilmington home office if it should learn that the individual contracts mentioned in that pleading were not (except for some few of them) in the form described therein. His state of mind at the time in this respect is mirrored by his following testimony (Tr. 3896): "I thought that if Wilmington saw these they would probably fire me." He had no knowledge then that the Commission was going to make a further inquiry about the matter although he was cognizant of the possibility there might be an inspection desired by Commission personnel of the entire file of individual contracts for "Celebrity Time." However, the form of the contracts which they had seen in March 1963, afforded no reason for the investigators to question the shape in which the other individual contracts might be in. In view of the above matters the examiner finds it improbable that the primary motive Mirelson had for requesting Soriano to prepare the new documents was "that someone from FCC might want to see them."[37] Mirelson's own statement given to Commission investigators prior to hearing (Br. Bu. Ex. 21) did state that "my basic reason for having the new contracts made was to present to the Commission contracts which were in better form than the original."[38] But at the hearing Mirelson repeatedly indicated by his testimony (Tr. 3896, 4175, 6453, 6509) that in initial thinking about the documents he already had focused upon the anticipated attitude of the home office. As Mirelson stated it on the witness stand (Tr. 6509): "Prior to finding out the FCC was coming, I was not thinking really in terms of FCC. I was really thinking in terms of Wilmington." The examiner does not disbelieve Mirelson's sworn testimony on the point, and is in agreement with the contention of counsel for the licensee that the weight of the evidence in this regard favors Mirelson's version—that his fear of the home office originally inspired the redoing of the "Celebrity Time" documents. However, when he later learned that the Commission representatives were coming to the station in April, he clearly had an additional motive for redoing the documents if the new set was not in his hands by that time.

[36] The specific time period in which Mirelson had possession of the new documents was estimated by him as "at least a week and probably more" * * * "it was not a couple of days or anything like this" (Tr. 6503).

[37] Soriano's unsworn statement to Commission investigators (Br. Bu. Ex. 19) in this regard was in effect corrected by him at the hearing to indicate that Mirelson's thoughts were directed to the home office.

[38] The presence of counsel and Rollins' officials at the interrogation leading to the signed statement of Mirelson did not ipso facto guarantee the accuracy of its contents, and the hearing process is a more satisfactory device on the whole for probing the recollection of witnesses.

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In any event, he had decided prior to April 15 to show the new set to the Commission investigators, and this decision was reached by him after he received Crow's alerting memorandum of April 3, 1964 (WNJR Ex. 146). Moreover, it would have been a natural development for the Commission's manifest interest in examining the entire file of contracts to loom increasingly larger in Mirelson's mind as the visit of the investigators came closer and therefore for him to attribute greater significance to this event as a reason for preparation of the new set than in March 1963.

95. On the evening of April 14, 1964, the day before the scheduled Commission inspection, Crow, Lanphear, and Rollins' communications counsel arrived in Newark and met with Mirelson at station WNJR. Crow had previously indicated to Mirelson that they would want to see the contracts for the "Celebrity Time" program. Their purpose in looking at the contracts was that they wanted to see for themselves "the shape these documents were in" since they felt certain the investigators would ask for them (Tr. 4865). Counsel (who did most of the interrogating of Mirelson that evening) asked Mirelson for the contracts. Mirelson, however, did not show them all the original documents (i.e., the contracts which originally were drafted in 1962–63). Instead, he took the eight original "King" contracts (WNJR Ex. 5, 140–147) (some of which he had previously sent down to Crow in January 1964 and which Crow had returned to him on April 3), placed these originals on top of the WNJR exhibit 5 series (i.e., the 139 documents which Soriano had recopied within the few weeks prior to April 14, 1964) and showed this entire pile to them as being all of the originals. He told them the documents represented all of the individual contracts on "Celebrity Time" and he did not tell them there were in existence original documents from which all but a few of the documents in the pile before them had been recopied. He was asked why the contracts on top of the pile (i.e., seven of the eight King originals) were white, why one of the King original contracts was blue (WNJR Ex. 5, p. 147) and the rest were goldenrod. Mirelson's response was that he obtained the white and blue ones from King personally, and that the balance (the 139 goldenrod documents) had been obtained by Soriano who he indicated, was "servicing the show and helping supervise the show." Mirelson stated too that he had assigned to Soriano the job of obtaining these contracts at night from the clients of Norman King, and that Soriano dealt with a Al Browne in the preparation of these contracts. Mirelson indicated that he had given these duties to Soriano because the program was in the late evening and Soriano was usually around the station at night, a fact of which Lanphear was aware since this had been Soriano's "pattern" during Lanphear's tenure as general manager of WNJR. Although Mirelson indicated that Soriano was helping to obtain the contracts, he did not tell them that Soriano was involved in the sale of time on the show. Also, while he mentioned there were "freelancers" on the show when it had been on the air, Mirelson did not explain the arrangement between the freelancers and King or between Soriano and King, nor did he elaborate on any of the other

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duties which Soriano had been performing on the show.[39] Mirelson explained the reason for the use of the goldenrod color forms as being merely a matter of convenience—these forms appeared to be more convenient in the evening hours because they were not in sets of five copies. Mirelson was asked who "Mr. Brown" was (since Browne's name appeared on most of the WNJR exhibit 5 series), and he replied by stating that Soriano dealt with Browne in helping obtain the contracts for the station (Tr. 4411), that Browne was a representative of Norman King, and that Browne "who was getting business for the show and worked on the show" ("Celebrity Time") (Tr. 3923), had authority to sign the individual contracts on King's behalf (Tr. 4870, 5579). This was the only extent to which Mirelson indicated Browne's connection with the program. Mirelson gave no indication that Soriano was deriving revenue personally from "Celebrity Time" nor did he impart any information to afford an understanding that Soriano was being compensated for whatever he was doing in connection with this program.

96. No one at the April 14 meeting at WNJR questioned the authenticity of the copy documents (WNJR Ex. 5, pp. 1–139) which Mirelson produced that evening for inspection. Crow glanced at them but did not examine them closely, and he was aware of no reason to believe that these documents were not the originals. He had previously seen some of the originals (three white contracts from among the eight documents signed by King and identified as WNJR Ex. 5, pp. 140–147), and Mirelson's explanation as to why the goldenrod documents were that color and why they had the signature "Al Brown" left no suspicion in his mind that the responses of Mirelson about these matters were incorrect. Lanphear too had no reason to believe the contracts shown them did not represent original documents, and they were the only individual "contracts" for "Celebrity Time" of which he was aware at the time. All of the facts which Mirelson told the three men were consistent with the facts concerning the documents as they understood them. The fact that the contracts were on forms of different colors did not raise any suspicion in Lanphear's mind once Mirelson had explained that this was a matter of mere convenience. Lanphear knew that the only difference between the different colored forms was the fact that some of these colored forms did not have printed provisions on the back. This distinction held no particular significance for him, however, since he knew that in the past the goldenrod forms were used indiscriminately in connection with shows other than the "Celebrity Time" program. He had not seen the "representative" white contracts which had originally been sent in to the home office by Mirelson. Mirelson's own signature signifying acceptance of each sponsor's advertising appeared on all of the new set of forms which Lanphear and the other two men were shown on April 14.

[39] The new set of "contracts" which Mirelson showed to the three men on Apr. 14, 1964, did not indicate that the freelancers were involved in the business arrangements for the program. Mirelson's reference to "freelancers" made no particular impression on Lanphear at the time since Lanphear, who knew of Bill Carlton's participation in this capacity, had no question on this aspect of the program at the time (Tr. 5583). Lanphear, who looked at the documents a minute or two, recognized some of the handwriting on the forms (WNJR Ex. 5) as that of Soriano, did not recognize the signature "Al Brown" as being Soriano's writing, and he assumed it was in fact Browne's own signature (Tr. 5585).

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The second Commission investigation—April 1964

97. The following day (April 15, 1964) two Commission investigators came to station WNJR and asked, among other things, to see the "Celebrity Time" contracts. Mirelson thereupon showed the investigators the identical pile of papers which he had the day previously shown to Rollins' counsel, Crow, and Lanphear, i.e., a pile with the recopied goldenrod contracts on the bottom and the authentic "King originals" on the top. Since he had the night before deliberately misrepresented the entire pile to be originals to his superiors, he felt impelled to continue the deception so that Rollins would not discover that he "had not properly supervised his (managerial) duties" (Tr. 6524). Secondly, since he believed that the information on the copies was substantially identical to the information on the originals and since he also believed that the Commission investigators were interested in the substance of the contracts and the nature of the arrangements, he could not see the difference between showing them the originals or the copies. Finally, Mirelson did not believe the investigators would keep the documents now being shown to them because in March 1963, the investigators had not kept any of the contracts but had merely looked at them. He considered the investigation was generally about the control which was exercised on the program and the names of sponsors on the contract and not about what Mirelson considered to be an internal business matter. At that point he gave no indication either to Crow, Lanphear, or Rollins' counsel that all but a few of the documents he was turning over were not original documents, and again no one questioned their authenticity.

98. Mirelson also mentioned during this meeting with the investigators that a "salesman" (identifying him as Soriano) had helped him obtain the contracts for, and helped supervise, the "Celebrity Time" show (Tr. 3927). But at no point did Mirelson indicate, during this meeting, Soriano's arrangements with King with respect to the freelancers or the full extent to which Soriano had participated in the program, nor did he mention the arrangements whereby Soriano had turned over funds for King's account through Mirelson. When asked by an investigator if the station was paying a commission to any salesman or anyone on this ("Celebrity Time") account, Mirelson replied that it was a "house account" and thus the station was not paying a commission to any salesman. Mirelson looked for Soriano in the station while the investigators were there because he thought perhaps either they or the Rollins' representatives might want to ask Soriano some questions. But Mirelson learned that Soriano was not on the premises and presumably was elsewhere on business. The investigators asked no questions about Soriano to elicit information beyond that which Mirelson told them as mentioned above, nor did they seek to interrogate Soriano. Mirelson identified Browne to the investigators as a representative of Celebrity Consultants. Both Crow and Lanphear were present during the investigation and heard the questions asked by the investigators and the responses made by Mirelson. All of the answers which Mirelson gave the investigators accorded with the information which he had given the previous evening, and also accorded with the facts as Crow and Lanphear then understood them to be.

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Neither Crow nor Lanphear heard Mirelson give any answer which either of them believed to be erroneous or incorrect, and nothing which was discussed with Mirelson on April 14 was withheld from the investigators by him in responding to their questions. Neither Crow nor Lanphear was questioned during the meeting, and neither injected himself into the interrogation of Mirelson. Rollins' counsel was of course present during this investigation. It was made apparent to all three that the investigators did not want their interrogation interrupted by Rollins' officials or counsel. The discussion conducted by the investigators was mainly concerned with the contracts themselves and not the manner in which the program was conducted. The investigators, upon concluding their visit to WNJR, took away with them the documents (WNJR Ex. 5) which Mirelson had produced for their inspection. Even then he did not inform his superiors of the bogus nature of 139 of the documents that had been carried away.

99. Crow and Lanphear returned to Wilmington and one of them gave Wayne Rollins an oral report of their trip and of the Commission's investigation on April 15. The report did not go into detail on what had transpired on April 14 and 15 but merely indicated that everything went satisfactorily and they saw no particular problems. He was informed that the Commission investigator had taken the "Celebrity Time" contracts, and no concern about this was expressed by his informant. Wayne Rollins, himself, gathered from this report that there was not "anything unusual" which had resulted from Mirelson's interrogation (Tr. 6053), and he believed that the documents taken by the investigators were of "the same type of contracts" as those which he had seen prior to the time it was decided to oppose the forfeiture (Tr. 6056). He was not told at this time that all but seven of the 147 documents taken away were goldenrod in color, nor did Crow or Lanphear express any concern to Rollins that the documents in question were nearly all goldenrod in color as opposed to the remaining white contracts. Rollins had not attached any great importance to the April 15 visit of the Commission investigators in the first place because, as he saw it, "we had nothing to hide from the Commission," and "I didn't think they would find anything when they went back" (Tr. 6055).

The Commission's letter of April 23, 1964

100. On April 23, 1964, the Commission sent a letter to the licensee of station WNJR in Wilmington (WNJR Ex. 165) requiring answers to a number of questions concerning the documents (identified in the letter as 139 "orders for broadcasting") which the Commission investigators had obtained from WNJR on April 15. The following statement preceded the questions:

> According to your representatives who were present at the April 15 meeting at WNJR, the 139 documents represented all of the "individual contracts" which Continental Broadcasting, Inc., required Celebrity Consultants, Ltd., to file with WNJR on behalf of each sponsor who advertised during the "Celebrity Time" show broadcast by WNJR from July 1962 to March 9, 1963.

Then came questions which inquired whether each of the 139 "contracts" had been written on the dates stated thereon, whether each of

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the documents was signed by the representative of Celebrity Consultants (Norman King or Al Brown), and whether each was signed as accepted by the WNJR manager within 30 days of the indicated date of execution. The Commission requested, too, that an affidavit be furnished as to whether on March 1, 1963, the 130 documents were in the station's files. Among additional questions were those which requested explanations "as to why less than 10 copies of the 139 documents were shown by WNJR officials to Commission investigators in March 1963 * * *," why only the copies which were on white paper and with certain contract provisions on the reverse side were produced for examination at that time, and why the remainder of the 139 documents "which were on yellow paper with no contract provisions on the reverse side" were not then produced. Finally, the letter asked for identification of the persons "who filled out in long-hand any portions of the yellow 'orders for broadcasting'."

101. After receiving the Commission's April 23 letter, Wayne Rollins discussed it by phone with Al Lanphear (who was in Los Angeles on business), with Rollins' communications counsel, and he discussed it in person with Crow. Counsel indicated the Commission obviously desired certain additional information, but that the matter was routine in nature. None of them felt any particular apprehension concerning the letter since they believed the answers were readily obtainable, and that an appropriate reply could be prepared and filed within the 15-day period indicated in the letter. He expected either Crow or Lanphear to collect the information which was required for the reply to be prepared by counsel. Since neither Crow nor Lanphear had sufficient personal knowledge of all of the facts, it was decided between them that Lanphear should travel to Newark to obtain the required data. They thought that it would be better if Lanphear, who was responsible for station operations to which the Commission's letter was directed, were to get the information since Mirelson's relationship with Crow as head of the quality control department had been somewhat strained. Because Lanphear did not consider the matter pressing and believed that, if necessary, counsel could request additional time, it was decided that his visit to Mirelson could wait until after he returned from the west coast on May 2, 1964. On May 4, 1964, Lanphear called Mirelson from Wilmington to inform Mirelson that he was coming to the station the next day to get the answers to the questions in the Commission's April 23 letter. It was during this phone conversation that Mirelson for the first time stated that there were other documents in existence than those previously turned over to the Commission investigator.[40]

102. When Lanphear called Mirelson on May 4, 1964, he stated that the licensee had received a letter with questions therein from the FCC and he read the contents of the April 23 letter to Mirelson. The WNJR manager realized immediately that it was his obligation to make a full disclosure of all the facts in connection with the "Celebrity Time" show and the individual contracts to Lanphear. He informed Lanphear during the telephone conversation that the copies which he had turned

[40] Based upon a notation made by Lanphear at some time subsequent to May 4, 1964, he testified (Tr. 5857): "When I called Mirelson he surprised me by stating that there were other types of agreements he had not told me about before."

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over to the Commission investigators were not original documents, and that he would check on the question of whether the signature written as "Al Brown" on the documents in the Commission's possession was genuine. The fact that the Commission was raising this question created doubt in Mirelson's mind whether the signature on those documents was actually that of Al Browne.

103. Mirelson immediately spoke to Soriano, told him that the recopied documents had been turned over to the Commission (a fact of which Soriano was totally unaware prior to this time), that the Commission was raising questions concerning the authenticity of these documents, particularly whether the name "Al Brown" on them was the signature of Browne. Soriano then informed Mirelson that Browne had not signed the documents (WNJR Ex. 5, pp. 1–139), and that he (Soriano) had written Browne's name on them because that was the "easiest way for me to do it" (Tr. 3396). Soriano was upset over the revelation that they had been turned over to the Commission, and told Mirelson he had no right to do so without first checking with Soriano about the authenticity of the signature since Soriano had understood the only reason for the preparation of the new documents was for them "to serve as a record for the Wilmington office" (Tr. 3402).

104. Lanphear went to Newark on May 5, the day after his telephone conversation with Mirelson, and asked for an explanation of the bogus documents. At this point, Mirelson made a clean breast of the affair. He handed over the original documents and explained that he had them recopied because he felt, after having read the opposition to the proposed forfeiture, that the original contracts were not in the good shape that the Wilmington office seemed to think they were, and that he had become panicky over the poor form and confused state the documents actually were in. He admitted the words "Al Brown" had not been written on the recopied documents by Browne himself, and he also told Lanphear that he (Mirelson) had not been aware that Browne's signature was not genuine. Moreover, he told Lanphear for the first time of Soriano's actual role as King's "representative" on the "Celebrity Time" program, the arrangements between Soriano, King, and the station, and the fact that Soriano had been making payments to Mirelson for King's account on a commission basis. He further indicated that persons other than Bill Carlton (as distinguished from occasional guests) were doing the "Celebrity Time" program on a regular basis, that the freelancers were acting as "King's representatives," that after King had fallen behind in his obligations to WNJR, cash was thereafter being paid over to Mirelson by Soriano, and that Mirelson was in effect turning this cash over to the WNJR bookkeeper for King's account through the device of drawing his personal checks monthly for the sums he had received from Soriano.

105. After receiving the original documents for "Celebrity Time" from Mirelson and learning of Soriano's role in the preparation of the new set of documents and of his participation in the selling of time on the show as King's representative, Lanphear questioned Soriano about the freelancers whose names appeared on various of the original contracts (WNJR Ex. 6). Soriano gave him a list of the

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freelancers on the show, and indicated which of them had been connected with Browne and which had been connected with King. Soriano explained that the recopying had been ordered by Mirelson because of his (Mirelson's) fear of the home office (i.e., the home office believing the contracts to be in good shape while they were not). Soriano identified Al Browne to Lanphear and verified that he, Soriano (and not Browne) had signed Browne's name; he also told Lanphear that the name "Al Browne" did not represent Browne's true signature and was never intended to do so, and that the licensee should have never turned the new contracts over to the Commission without checking with Soriano first since it was he who had been in charge of their preparation.

106. What Lanphear heard from Mirelson and Soriano on May 5, made him realize that the licensee had been placed in an untenable position by their previously undisclosed actions which affected the representations about the "Celebrity Time" contracts that had been made by Rollins in the opposition to the forfeiture (Tr. 5608). He gathered up the original documents and returned to the Wilmington home office where he reported to Wayne Rollins the matters he had discovered at WNJR. Lanphear also related at this time Mirelson's explanation to him that the cause for the substitution of fabricated documents for the real documents and passing them off as the originals was fear on Mirelson's part that he (Mirelson) would lose his job if the true state of the contracts file for "Celebrity Time" came to light. Rollins, who was perturbed over Lanphear's findings and recognized that the big problem was that of the licensee's involvement "in giving false information" to the Commission,[41] then called counsel in Washington and informed him of the disturbing news Lanphear had brought back from WNJR. Counsel, after expressing his amazement over what Rollins told him, advised Rollins to gather any additional facts that were pertinent so that he could present the full story to the Commission. Rollins thereupon delegated the job of developing the facts to Crow and Lanphear for submission through counsel to the Commission. It was understood that the original documents as well as all the facts they could discover would be turned over to the Commission. Lanphear, accompanied by Crow, went to Washington the following day, May 7, and delivered the original contracts to counsel and relayed to counsel all of the information which he, Lanphear, had learned in Newark on May 5. Counsel then gave Lanphear a series of questions designed to elicit further information from Mirelson and Soriano on a number of matters concerning mainly the "Celebrity Time" program. Contemporaneous notes of these questions made by Lanphear (Tr. 5854–5856) indicate that the full story about this program in all its details was not known by the Wilmington management even after Lanphear's visit of May 5 to Newark. On May 13, 1964, Lanphear went to Washington for another conference with counsel and received still more questions, besides some Lanphear had been given by telephone after May 7, to which answers were required. On May 15, Lanphear went to Newark and met with Mirelson and Soriano to

[41] As Rollins himself testified (Tr. 6218): "• • • I never had anything like this to happen • • •."

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obtain from them the additional information counsel desired. Lanphear's interrogation of them on May 15, produced the further answers which were passed on to counsel (Tr. 5882; WNJR Ex. 170). Thereafter, counsel personally visited the Commission, explained that the documents which the investigators had received at WNJR on April 15 were not the original documents but only copies, and he handed over the original documents to the Commission. In early June 1964, Commission investigators visited station WNJR and interviewed Soriano and Mirelson and ascertained at first hand from them the facts about the "Celebrity Time" program and the "Celebrity Time" contracts and other documents which Lanphear had previously unearthed through his own investigation into station affairs between May 5 and June 1, 1964.

107. After their discovery of the above-discussed conduct of the two WNJR employees which had placed the home office in a most embarrassing position, Lanphear and Rollins discussed whether they should summarily discharge both Soriano and Mirelson. As Lanphear and Rollins viewed their actions, Soriano and Mirelson, at the very least, had misrepresented the facts to their own employer and their misrepresentations had led the home office ultimately to give the Commission inaccurate information in the opposition to the notice of apparent liability. Wayne Rollins at first was inclined to discharge them. Lanphear, however, was well aware of Mirelson's earlier serious and pressing personal problems at home (i.e., his mother's terminal illness and death), and informed Rollins of those problems. In addition, he pointed out that Soriano and Mirelson had been company employees for a long period of time and had in the past been regarded as trustworthy and successful employees.[a] In Mirelson's case this was looked upon as the first serious transgression he had ever committed, and in the case of Soriano it was recognized that his long service to the company put him close to having a vested right in the company's retirement plan, a right which he would absolutely lose if he were discharged at that time. In Soriano's case they also considered the fact that his activities had, in effect, been ordered by his superior and this was a mitigating factor. As a result of all these countervailing factors it was decided that both would be given another chance, despite the fact that communications counsel advised that the station would be in a better position vis-a-vis the Commission if Mirelson were discharged. Letters of reprimand (WNJR Ex. 75) were sent to each of them indicating that although they had failed to follow company procedures and policies and had also withheld pertinent facts from management, nevertheless, they would continue to be employed, primarily because of their long service to the company, but that any repetition of their misconduct would not be tolerated. The specific company procedures which had not been followed by Soriano were his unauthorized "moonlighting" for "Celebrity Time" and his recopying of the contracts (Tr. 5617–18, 5678–79A). In Mirelson's case, it had been his failure to make a complete disclosure of the facts, and the lax manner in which he handled the "Celebrity Time" contracts (Tr. 5623–24).

[a] Mirelson had been highly recommended by Lanphear as general manager of WNJR, and had been congratulated by Rollins himself in a June 1963, letter for "a very successful year."

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Payment of the forfeiture by WNJR

108. The licensee of WNJR submitted no written response to the Commission's April 23, 1964, letter of inquiry (WNJR Ex. 165) although the information requested therein was in effect communicated orally to the Commission by the licensee's counsel. After the existence of the bogus documents and the disclosures by Mirelson and Soriano of those facts concerning the "Celebrity Time" program previously unknown to Wayne Rollins were brought to the Commission's attention, Mr. Rollins consulted with Washington counsel on the question of what to do about the outstanding forfeiture matter. Rollins and counsel agreed in the view that the position of the licensee in resisting the proposed forfeiture had been very definitely weakened by the turning over to the Commission's investigators on April 15, of the substituted documents. Without altering their own belief that the contracts with Celebrity Consultants had not involved time brokerage, Rollins and counsel came to the conclusion that the chances of winning were lessened by the developments since April 15, 1964, and that WNJR should pay the forfeiture. Accordingly, by counsel's letter of June 24, 1964, the licensee corporation withdrew its previously filed opposition and transmitted a check for $1,000 in payment of the forfeiture.[48]

Time brokerage (issue No. 5)

109. Subsequent to the March 1963 visit of the Commission investigators to station WNJR, Wayne Rollins asked communications counsel to review the contractual arrangements of WNJR with advertisers to determine whether the licensee had anything that would be interpreted as time brokerage contracts. Rollins did not approve of the station's being a party to a time brokerage contract or of the licensee's even being on record with the Commission as participating in a brokerage arrangement. He was thereafter assured by counsel that the station had no contracts which were interpreted as constituting brokerage contracts (Tr. 6297). In a conversation with Crow after the March 1963 inquiry, counsel suggested to him that the individual contracts with each sponsor be discontinued and that this procedure be replaced by so-called master agency contracts which, in counsel's opinion, would spell out in greater detail "the kinds of protection * * * a station ought to have against both any risk of double billing" and "anyone entertaining the idea of brokerage outside of" (WNJR) (Tr. 4846–47). In accordance with this recommendation of counsel, these master contracts for the various agency programs were executed on the standard WNJR station contract form containing the standard printed contractual provisions on the back relating inter alia to the client-agency-station relationship. Two paragraphs of typewritten text appearing on the front page of each contract were drafted by counsel (except for the station rate, the number of announcements, and the program periods). Counsel advised Crow that all necessary

[48] The Bureau has conceded that the licensee's failure to file the contracts with Celebrity Consultants, Ltd. (WNJR Exs. 2 and 3) is not within the ambit of issue 5 (i.e., the issue concerning the alleged failure of licensee to file time brokerage agreements).

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provisions had been retained in these master contracts and Crow did not question his advice.

110. Master contracts were executed with the following on the dates indicated: Clint Miller on May 24, 1963; Levy Advertising Agency on May 24, 1963; Jay Cee Advertising Agency on May 23, 1963; Joe Craine on May 24, 1963; and Bernie Witkowski (Bernie Wyte) on May 24, 1963. (See WNJR Exs. 54C, 54E, 54F, 7B and 7C). In each instance, the written signature of a representative appeared on the line below the typewritten name of an indicated agency (e.g., Clint Miller signed for "Clint Miller Agency"—WNJR Ex. 54C). Each of the contracts was countersigned by Mirelson. The Miller contract, which is representative of the master contracts, contained the following typewritten provisions on the front page:

> Client agrees to purchase announcements for its advertisers in the 9:30–10:45 p.m. time segment, Monday through Saturday, and 2:15–5:30 p.m. Sunday time segment on WNJR so as to guarantee weekly revenue to WNJR in the amount of $714 produced by a guarantee of a maximum of 175 announcements in any given week, except that there shall be a maximum of 750 announcements in any calendar month. Even though client does not broadcast the maximum 175 announcements per week, the weekly $714 guarantee shall prevail. It is understood that client will not charge its advertisers for station time, in these time segments, in excess of the station time charged by WNJR.
>
> Station WNJR reserves the right to: (1) Approve or disapprove of all advertisers submitted for broadcast by the client. (2) Approve or disapprove of all continuity, including music, to be broadcast from 9:30–10:45 p.m., Monday through Saturday, and 2:15–5:30 p.m. Sunday. Such continuity shall be submitted to the station at least 24 hours in advance of broadcast. (3) Place advertisers of its own, without consideration to client, in the 9:30–10:45 p.m., Monday through Saturday, and 2:15–5:30 p.m. Sunday time segments. (4) Cancel this agreement on 1 week's notice.

Two of the aforementioned master contracts (Clint Miller and Levy Advertising Agency) were superseded in September 1963 by later contracts which were identical in form and substance with those replaced, except for changes in the guaranteed amount (see, WNJR Exs. 54D and 54G). The September 1963 master contract with Clint Miller (WNJR Ex. 54D) was changed by a subsequent contract of March 16, 1964, which effected a reduction in the specified maximum number of announcements per week and per calendar month (WNJR Ex. 7A). The aforementioned master contract with Jay Cee Advertising Agency executed May 23, 1963 (WNJR Ex. 54F) was superseded by a contract of July 27, 1964, specifying a different weekly guarantee (WNJR Ex. 7D).

111. The following master contracts were not filed with the Commission within 30 days of their execution:

> Clint Miller, March 16, 1964 (WNJR Ex. 7A)
> Joe Craine, May 24, 1963 (WNJR Ex. 7B)
> Bernie Witkowski, May 24, 1963 (WNJR Ex. 7C)
> Jay Cee Advertising Agency, July 27, 1964 (WNJR Ex. 7D)
> Levy Advertising Agency, September 5, 1963 (WNJR Ex. 54G) [44]

[44] Originally, the Bureau had cited in its bill of particulars the Kit Kat Klub contract (Levy Advertising Agency) dated Sept. 22, 1964 (WNJR Ex. 7E). This contract, if not "filed," was at least "lodged" with the Commission within 30 days of its execution. Therefore, by agreement between counsel, it was determined that the earlier agreement would be substituted in the charge.

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The record reflects, however, that on October 16, 1964, the master contracts then in force with Clint Miller, Joe Craine, Bernie Witkowski, Jay Cee Advertising, and Levy Advertising (WNJR Exs. 7A through 7E) were transmitted to the Commission by counsel for the licensee to be associated with the ownership files for station WNJR.

112. It was Crow's understanding that a specific provision in the master contracts[45] protected the station against "double billing" because it precluded the agency from charging more for the time than did the station. The same provision, according to Crow, protected the station against "brokerage" by requiring the agency to sell the time in accordance with the charge made by the station for it (Tr. 4848).

113. In March 1964, upon the advice of counsel, Crow of the home office instructed Mirelson to supplement the master contracts for the special agency shows with individual contracts for each sponsor signed by an agency representative. Counsel explained that the purpose in having the individual contracts was to provide the station with "double protection" against brokerage (Tr. 4854). Crow's memorandum to Mirelson, dated March 11, 1964, directed the institution by the station of the system of individual contracts without delay, enclosed a sample individual contract, and stated (WNJR Ex. 57):

> This will in no way change our procedure of maintaining the broader contract between the station and the agency to cover the time period in which the agency wishes to place advertising for its clients with guaranteed revenue on a weekly basis. The individual contracts will stipulate the rate structure that conforms to the overall contract with the agency, and in addition, it should be stipulated that the announcements for the individual client will be placed within the segment on a run of schedule basis.

The sample of the contract to be employed for the individual was drafted on the standard contract form of the station and contained the standard printed provisions on its back stating inter alia that where the agency alone signed the contract, "the contract is binding upon the advertiser as well as the agency."

114. The master contracts remained in effect and were supplemented by the "individual" contracts for the various sponsors on the special agency shows, with the numerous "individual" contracts being signed in almost all instances by the agency representative. Included in the body of these individual contracts were provisions similar to the following, the substance of which was prepared by licensee's counsel (WNJR Ex. 58, p. 9):

> Run of schedule announcements in the 9:30–11:00 p.m. time segments, Mondays through Saturdays, and 2:15 p.m.–5:30 p.m. Sundays, at $7.50 per announcement, and subject to discounts earned, as per agreement with Clint Miller Agency, dated March 16, 1964.[46]

The master agreement with Clint Miller mentioned in the above-quoted provision provided for a weekly guarantee of $790 to the station produced by a maximum of 250 announcements in any given week.

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[45] The particular provision to which Crow had reference reads: "It is understood that client will not charge its advertisers for station time, in these time segments, in excess of the station time charged by WNJR."

[46] The Mar. 16, 1964, WNJR agreement with Clint Miller appears in the record as WNJR Ex. 7A.

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Mirelson fixed the rate per announcement appearing in the individual contracts subject to the maximum weekly guarantee figure specified in the associated master contract (Tr. 4290). As explained by Mirelson, this meant that the agency could vary the rate charged per announcement from that specified in the individual contracts ($7.50, for example) consistent with the overall agreement for a maximum of 250 spots per week producing a guaranteed revenue of $790 to the station (Tr. 4289). The actual placement of 250 spots per week by the agency would, according to him, bring the "discounts earned" condition into play so as to result in a lower rate than $7.50 per announcement being charged by the agency (Tr. 4275). Mirelson understood that it was the agency's responsibility to see it was not charging sponsors more for the time in the aggregate than the weekly maximum charged by the station, and that it was incumbent upon the agency to "set up a sliding scale" to comport with this requirement (Tr. 4294). The station had no dealings or negotiations directly with the individual sponsors on the special agency shows, and WNJR did not know what each sponsor on these shows was in fact being charged for the announcements broadcast on his behalf (Tr. 4270).

The arrangements re the "special agency" programs

A. *Clint Miller*

115. In 1953 or 1954, Al Lanphear, then WNJR manager, had agreed that Clint Miller could have his own show on WNJR if Miller would join the union and bring in revenue through the sale of broadcast time. Miller orally agreed to guarantee the station $20 or $25 in revenue for a quarter hour segment in which spot announcements obtained by him would be placed, and he was to receive a 15-percent commission based on the guarantee figure. He retained any sum in excess of the guarantee collected by him from the sale of advertising time to sponsors. As time went on, and Miller acquired more sponsors, his arrangement was expanded to include more quarter hours of program time. Miller continued to receive a 15-percent commission from the station until the weekly amount he turned in to the station reached $320. From that point on, he only received a commission of 15 percent on $320 weekly, even though the revenue received from his programs exceeded this amount. Eventually Miller broadcast programs Monday–Saturday (9:30–11 p.m.) and Sunday (2–5:30 p.m.). From that time on, he remitted $790 weekly to the station, but still received as his commission per week 15 percent of $320.

116. Clint Miller conducted an entertainment record show on WNJR from 1954 or 1955 until December 1964. During this period Miller guaranteed WNJR a flat revenue for his program time and sold time spot announcements on his program to advertisers of his own selection. Miller wrote the copy aired on his program, selected music, maintained WNJR program logs, and personally broadcast his own program.

117. Miller adopted the name "Clint Miller Agency" when he became associated with WNJR so that he could collect his commission from the station. As Miller explained (Tr. 968): "Lanphear told me there would be no commission unless I made an agency and that is what I did."

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The Clint Miller Agency had no office outside of Miller's home, no employees except the help from Miller's wife, no telephone listing, or stationery, and no separate books, records or accounts. Other than on WNJR, the only media in which Miller has placed advertising have been publications advertising night clubs. He has also handled sales promotion activities and ply cards for WNJR.

118. Miller made "deals" with the sponsors he acquired, basing his charges on the individual advertiser's ability to pay for the time. While individual contracts with Miller's sponsors uniformly specified a rate of "$7.50 per announcement, and subject to discounts earned," Miller charged and received from his sponsors various amounts of money per spot announcement, some being more than $7.50 per spot and some being less than $7.50 per spot (Tr. 2031–2032). Miller did not recognize these "individual" documents (see, for example, WNJR Ex. 58, p. 9) as constituting an arrangement between the station and the sponsor (Tr. 2035). Under his arrangement of March 16, 1964, with the station (WNJR Ex. 7A), Miller made the fixed weekly payment of $790 to WNJR.

B. *Joe Craine*

119. Joe Craine first became associated with radio in 1954 when he conducted a half-hour gospel program over WNJR. By 1960, the program had increased to 3 hours. Craine had a guarantee arrangement for the program time with the station. He sold quarter-hour and half-hour segments of the program to churches, which generally taped services for late broadcast. In addition, he also sold a few spots to business concerns. As previously noted, Craine had a master contract with the station (WNJR Ex. 7B) executed in May 1963, under which he turned in $300 "net" per week after having deducted from his collections a "commission" ranging between 14 to 15 percent (Tr. 2568). On the few spots which he sold, he was paid a 15-percent commission. In March 1964, Craine executed individual contracts with the station on behalf of his various clients (see, for example, WNJR Ex. 58, pp. 5–6). The rates specified in the individual contracts (see, for example, Br. Bur. Ex. 17) did not always represent the amount which Craine collected from the sponsors shown therein (Tr. 2608–2612). Craine was always obligated to pay the station the guaranteed amount for his broadcast time whether or not he was able to sell the time and collect from his "sponsors" (Tr. 2565–2567). As a practical matter, Craine sometimes received less than $300 from sponsors in a given week and made up the deficit from his own pocket (Tr. 2613). In those instances, Craine made no announcement that he was a sponsor on the program (Tr. 2612). Craine was first recognized as an advertising agency by WNJR. His agency had no office other than his home, and no employees, telephone listing, stationery, separate books, records or bank account. He reported his agency income as "commissions" (Tr. 2576–2578).

120. Craine maintained the WNJR log for his program. At times, other individuals would broadcast Craine's program and also maintain the WNJR logs. In two instances, the individual who did the

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program for Craine signed Craine's name (as Joe Crane) in the operator's column of the logs (Tr. 2586–2587).

C. *Bernie Witkowski (Wyte)*

121. The "Bernie Witkowski Show" (also "Polka Fun"), another carryover program from the Newark News ownership era, was broadcast on station WNJR until August 1965. As in the case of other special agency shows, Witkowski also executed an overall contract with the station in May 1963. This contract was executed as follows: "Agency 'Bernie Witkowski' (Bernie Wite)" (typed), "Per /s/ Bernie Wyte." Witkowski understood he was an agent for the station. The agreement (WNJR Ex. 7C) guaranteed a weekly revenue to WNJR in the amount of $165 for his 1 hour Sunday program. From this specified amount, Witkowski was supposed to deduct approximately a 15-percent commission and remit $141.25 to the station (Tr. 3046). He conducted a polka program directed toward the Polish audience, and sold time in the form of spot announcements, catering usually to Polish advertisers. Witkowski had been an orchestra leader for about 25 years, and he was interested in having his program on the air, among other reasons, so that he could make announcements (paid for by the sponsor of the event) when and where his band would be playing. Witkowski wrote the copy aired on his show, selected the music, and usually taped the program in his home for later broadcast.

122. In March 1964, Witkowski executed individual contracts for the different advertisers on his program. These contracts (see, for examples, WNJR Ex. 145, p. 3) specified the rate per announcement was $9.70. Witkowski never charged the advertisers on his program $9.70 per announcement; rather his actual rates ranged from a $10 minimum to $16 (Tr. 3071–72). Witkowski usually derived more revenue from the sale of spots to advertisers than the $165 weekly gross amount he guaranteed the station for his programs (Tr. 3079).[47]

123. Witkowski's agency had no existence or name apart from its recognition and designation by station WNJR in contracts, no office, no separate books, no separate bank account, or telephone listing (Tr. 3077–80). He never dealt as an agency with anyone other than WNJR. Witkowski considered himself to have been an agency in dealing with the station (Tr. 3078).

D. *Jay Cee Advertising Agency ("Mr. Blues Show")*

124. The "Mr. Blues Show" (originally carried by WHBI in Newark) was first broadcast over WNJR in 1951, and was continued by Rollins after it acquired WNJR in 1953. Essex Records, a wholesale and retail record distributor, purchased a half hour segment of broadcast time from WNJR to broadcast a record show directed toward the Negro audience. Essex Records sold part of this time to participating sponsors in the form of spot announcements to help sustain the cost of the program. Since at least 1953, Harold Ladell, an employee of Essex Records, has broadcast the program. He was paid for this service an AFTRA talent fee by Essex Records until the end of

[47] Witkowski's arrangement with WNJR entitled him to retain a union talent fee in addition to the commission (Tr. 3063). But his records of payment to the station do not reflect that he in fact paid himself this fee (Tr. 3065).

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1964. Ladell wrote the commercial copy, selected the records played, and maintained WNJR program logs for his program.

125. In 1947–48, Essex Records created Jay Cee Advertising in order to take advantage of a 15 percent commission offered by publications in which Essex Records advertised. Jay Cee Advertising existed as a house organ only. It had no books, accounts, telephone listing, or employees separate and apart from Essex Records. When Essex initially bought time on WNJR, it did not deal with the station through Jay Cee Advertising, but rather as Essex Records. In 1960, Essex did place a request for advertising with WNJR on the Jay Cee order form which it had drafted to submit to mail order publications. The order was a proposal for five half hour programs at $150 net per week in which would be carried 1-minute announcements nightly for three sponsors including Essex (WNJR Ex. 135, Tr. 2118).

126. In May 1963 an overall contract was executed for the "Mr. Blues Show" containing the same pertinent terms as the Miller agreement quoted in paragraph 110, supra, except for the guarantee of weekly revenue, which was $150 per week, the number of announcements, and the broadcast time, which was 9:00–9:30 p.m., Monday–Friday. The contract was signed by one of the owners of Essex Records as the authorized representative of the Jay Cee Advertising Agency. Payments for broadcast time for the "Mr. Blues Show" were at all times made to WNJR by checks drawn against the account of Essex Records. The contract did not call for, and Jay Cee did not deduct, an agency commission (Tr. 2132–34). In order to provide for the payment of an agency commission to Jay Cee, a new contract, dated July 27, 1964, was drawn up by WNJR and executed by Ladell for Jay Cee, increasing the weekly guarantee from $150 to $177 (WNJR Ex. 7D). Essex deducted a 15 percent agency commission for Jay Cee and remitted $150.45 per week to the station for the broadcast time. Thus, under this 15 percent agency commission contract, Essex Records was required to remit to WNJR an additional 45 cents per week for the broadcast time.

127. In March 1964, individual contracts were executed by Harold Ladell for Jay Cee Advertising Agency on behalf of various sponsors containing terms similar to the Miller contract quoted at paragraph 113, supra (WNJR Exs. 137, 58, p. 7). These individual contracts all specified a rate of "$7.50 per announcement, and subject to discounts earned, per agreement with Jay Cee Advertising Agency, dated May 27, 1963." The rates charged by Ladell for spot announcements varied from sponsor to sponsor (Tr. 2248). In at least one instance, a sponsor on the "Mr. Blues Show" received a volume discount rate of less than $7.50 per announcement (Tr. 2238). Announcements on behalf of two sponsors on this show were placed through the efforts of Clint Miller (Tr. 2254); it is not clear from the record what was the amount per spot that Ladell received from Miller in these instances (Tr. 2253). While some revenue was received from other sponsors, enough money was never collected from such sponsors to offset the amount paid to the station by Essex Records per program (Tr. 2171, 2176). As a consequence, Essex Records underwrote the program for the deficit amount (which sum is not ascertainable from the record

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evidence) in order to promote the sale of records in the Negro market (Tr. 2171–2177).[46]

128. While the WNJR program logs at one time listed Essex Records as the overall sponsor of the "Mr. Blues Show," by October 1964, upon instructions from Crow (who understood only that Essex Records was supplying the records but did not know it was underwriting part of the charge for the show), the entry indicating sponsorship by Essex Records was deleted. Rather, a 5-second Essex Record disclaimer was broadcast at the end of the program stating that the records heard were furnished by Essex Records (Tr. 4889–4891, WNJR Ex. 77). Discussion between Crow and Mirelson before this change afforded Crow no clue that Essex Records was a sponsor or that the change in logging failed to reflect this additional aspect of Essex Records' relationship to the "Mr. Blues Show".

E. *Levy Advertising Agency*

129. In the spring of 1963, "The Kit Kat Club" program replaced "Celebrity Time" in the 11–12 midnight time slot, Monday–Saturday, on WNJR. The time was purchased by the Levy Advertising Agency, which is conceded to be a bona fide advertising concern, and which has been doing business with WNJR since about 1948. Levy entered into an agreement under which it undertook to purchase announcements for advertisers so as to guarantee the station $200 weekly gross revenue for the program. It deducted a 15-percent agency commission and remitted $170 net to the station (Tr. 1545–55); (WNJR Ex. 54E). In September 1963, the time was increased to 3 hours nightly (11 p.m.–2 a.m.) and the guarantee of weekly revenue to the station was increased to $360 gross per week (WNJR Ex. 54C). Levy hired an announcer (Danny Stiles) of its own selection to broadcast the show. It paid Stiles both a salary as talent and a commission on any spots he was able to sell (Tr. 1553–54, 1564–68). Levy was always obligated to pay WNJR for the program time the weekly guarantee amount whether or not the agency received sufficient revenue from advertising sponsors to meet the net figure (i.e., after deducting its 15-percent commission) (Tr. 1577, 1589). Mr. Levy, owner of the agency, regarded his above-described agreements with WNJR as arrangements by which he was permitted to broadcast a maximum number of spots in connection with paying so much per program (Tr. 1616). He believed his function with respect to his contracts with WNJR to be that of "a producer of a show for clients" which he defined as "the planning of a program and getting the sponsors for it" (Tr. 1610–1611); he never considered himself a time broker in dealing with WNJR (Tr. 1609), nor even a sponsor when his agency sustained a deficit under the guarantee to WNJR (Tr. 1589). Mr. Levy proposed the initial arrangement for an hour's program time to Mirelson, WNJR manager, because he obtained a better rate by buying "block time * * * and selling it in spots" (Tr. 1573). As explained by Levy in his testimony, sponsors are unwilling to pay advertising rates for spots on late evening hour programs that are more than approximately one-quarter

[46] A principal of Essex Records testified (Tr. 2177) that his firm underwrote quite a bit of the weekly charge for the "Mr. Blues Show."

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of daytime hour rates, and the stations' rates for spots are set up on rate cards in various classifications to reflect this demand differential. There are also "packages that all of these stations offer at night"; if an agency "wants to buy so many spots you can buy it at a package rate, like 20 spots a week which may even be less than 25 percent, * * *". Under a package arrangement there is always a risk assumed by the agency, since it has to pay for the time if it fails to obtain sufficient sponsors to place advertising on the program involved (Tr. 1574–1576). In the event Levy found himself with unsold spot time on "The Kit Kat Club" program, he would "throw in a couple of spots a night" for a client "for nothing" to "sweeten the deal" (Tr. 1590–1591).

130. Levy entered into the same type of written contractual arrangements with individual sponsors noted above which purportedly restricted it to charging but $3 per spot under a May 1963 contract (Tr. 1583–86; WNJR Ex. 54E) and to $2 per spot under a September 1963 contract (WNJR Exs. 54G, 58, pp. 3–4; Tr. 1587). To generate revenue for the program, Levy sold both spot announcements to advertisers and quarter-hour segments to record concerns. In addition, it engaged in per inquiry advertising for four accounts. Announcements were made on the program which invited listeners to solicit free home demonstrations of the sponsor's product. Levy was compensated on the basis of the number of inquiries received by the sponsor, i.e., so much per lead, not so much per spot. In this manner and further by charging for the services rendered by the agency, such as writing copy, the agency endeavored to sustain the program charges and make a profit under its arrangements with WNJR.

Discontinuance of the agency shows

131. Wayne Rollins understood that time brokerage arrangements are not prohibited under the Commission's rules but have to be filed with the Commission. According to Rollins, company policy prohibits Rollins' stations from entering into time brokerage arrangements. He understood too "that time brokerage (exists) if the person buys the time to resell it to a sponsor * * * but if they act as agent for a sponsor and buy the time for a sponsor it is not brokerage" (Tr. 6039). The reason for the Rollins policy against engaging in time brokerage arrangements is that he believes the licensee can have better control over the station; in his opinion time brokerage "can lend itself to not having as good a control over your programs" since the broker, having invested his money in the program time, has a tendency to want to tailor it to the way that he can sell it best and thus tries harder to get it by the station (Tr. 6040). Rollins explained that since the time broker "has no responsibility as such to the Commission," he doesn't have the same reason to be as diligent as the station licensee to observe station policies with respect to commercial content, and that the tendency would be for the time broker to be more lax (Tr. 6043). At the hearing Rollins indicated his understanding as of that time that "an advertising agency could be a time broker" if it engaged "in the buying and selling of time" rather than "buying time as the representative of a client" but "getting a commission from the station" for the time purchased (Tr. 6047). He was also of the opinion that merely calling a

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time broker an "advertising agency" does not avoid time brokerage where it does in fact exist (Tr. 6046).

132. Wayne Rollins had no personal knowledge of the arrangements WNJR had for the broadcast of the "Clint Miller Show," "The Mr. Blues Show," "The Bernie Witkowski Show," "The Kit Kat Club" and the "Joe Craine Show" (Tr. 6139–41). By December 1964 Rollins became aware of the guarantee provisions contained in the contracts under which these programs were carried by WNJR (Tr. 6269). After Mirelson was demoted from his post as manager in December 1964 and Al Lanphear assumed the general managership of WNJR, Rollins instructed Lanphear to terminate the contractual arrangements for the agency programs described above (Tr. 6269).[49]

133. "The Clint Miller Show" was continued after December 14, 1964, until April 1965, with Miller being employed by WNJR first as an announcer and then as a salesman. The advertisers on the Miller show dealt directly with the station. In April 1965 the program was taken off the air (Tr. 5645). Miller continued as a salesman until August 1965, when he was discharged as the result of a dispute with the station. Miller testified that he wanted to return to work for WNJR if monetary differences could be ironed out (Tr. 844–854). Subsequent to his testimony, Miller was again employed at the station (Tr. 4486).

134. The "Bernie Witkowski Show" was continued until August 1965. Witkowski conducted the program under a talent arrangement with the station after December 1964, and the station dealt directly with the sponsors. In August 1965, Witkowski's employment was terminated because his program did not fit into the station's format and for failure to observe station directives; at the hearing he questioned the validity of the second ground (Tr. 5642–48, 3081–86).

135. "The Joe Craine Show" was discontinued in December 1964, and at the time he testified, Craine had no connection with the station. Subsequent to his testimony, Craine was hired by WNJR to broadcast an all-night gospel program over the station as a staff announcer (Tr. 5648).

136. The remaining two shows, "Mr. Blues" and "Kit Kat Club," are still on the air. The announcers, Harold Ladell and Danny Stiles, are paid by the station. The guarantee arrangements under which these two programs were formerly broadcast, have been discontinued.

"Celebrity Time" program logs

137. Bill Carlton was responsible for maintaining the WNJR program logs for the "Celebrity Time" program until the fall of 1962. In December 1961, an examination of WNJR program logs by Crow revealed that on one occasion (November 30) the log had not been maintained between 11:03:15 to 11:40 p.m., the period "Celebrity Time" was broadcast (WNJR Ex. 63, 64). It was also ascertained by Crow that Carlton occasionally logged 1-minute announcements as 5-second

[49] Wayne Rollins issued instructions to Lanphear to clear out "anything the Commission would question or we thought they had even a chance of questioning because by that time (Rollins) was completely fed up with going over and over this same situation" (Tr. 6269). Rollins did not understand, however, that there had been at any time a brokerage contract in effect at WNJR (Tr. 6270).

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announcements (WNJR Exs. 63, 64). Mirelson testified that he warned Carlton concerning these matters and that, thereafter, he spot checked the logs to make sure Carlton had heeded the warning (Tr. 3626–29). Nevertheless, around January 1962, Carlton ceased maintaining a contemporaneous program log for the "Celebrity Time" program (Tr. 1323–24). From that point, he sometimes waited until after the program was completed to fill in the log; less frequently he filled it in the next day (Tr. 1316–21). Carlton estimated that he did not maintain a contemporaneous log perhaps as much as 50 percent of the time he was on the air after January 1962 (Tr. 1321–24).

138. During the period January 1, 1962, through September 25, 1962, the WNJR program log for which Carlton had responsibility was not maintained between 11 p.m. and 12 midnight on 64 days or 28 percent of the time (stipulation No. 11, Tr. 1338–39). Additionally, during this same period, on 103 broadcast days or 45 percent of the time, the WNJR program logs for "Celebrity Time" showed no elapsed time for a commercial announcement, e.g., a commercial would be recorded as having begun at 11:15 p.m. and as having ended at 11:15 p.m. (stipulation No. 11). Although Charlie Green, the staff announcer on duty, knew the program logs were not being maintained by Carlton for the "Celebrity Time" program, he did not undertake to make the required log entries himself since he understood this was not his responsibility. Nor did he tell anyone in management that the log was not being maintained for "Celebrity Time" because he assumed management was aware of this fact (Tr. 2496–2497).

139. Subsequent to September 25, 1962, Charlie Green was ordered to maintain the program logs (Tr. 3621–22). Green, however, did not always follow this instruction and he permitted some of the freelancers to keep the log for their segments on various occasions (WNJR Ex. 138).[50] Also, on occasions the log was in front of a freelancer during the program, and Green permitted the freelancer to note the beginning and ending times of his commercials on a separate piece of paper which was later handed over to Green who then made the log entries therefrom (Tr. 2488). At least four freelancers were involved in this procedure (Coles, Tr. 706; Segure, Tr. 1635–36; Norman, 1641–1642; and Dyer, 6733–6734). On October 17, 1962, the log for "Celebrity Time" reflects that Tiny Gray, a freelancer, recorded the beginning times of announcements, and Green recorded the ending times (Br. Ex. 13). Thereafter, Green was again ordered to maintain the logs himself and he complied from October 24, 1962, on (Tr. 2452; WNJR Ex. 69).

Supervision and control of WNJR by licensee

140. Essentially, Wayne Rollins relied on Al Lanphear, vice president in charge of radio, and Tim Crow, director of quality control, to effectuate supervision and control of the operations of the Rollins radio stations. In September 1961, Wayne Rollins introduced an operating manual at a home office meeting of Rollins' station managers. The manual is composed of an introduction and five sections: person-

[50] Green explained that he did this because it would more accurately reflect what occurred during the broadcast and because he wanted some time to himself (Tr. 2444).

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nel, accounting, technical, programing, and sales (WNJR Ex. 8). It contains detailed instructions, information, and forms for all station departments and personnel and has been kept current by the issuance of amendments thereto (WNJR Ex. 9). Mirelson had read it and understood he was to use it as a guide in operating the station.

141. The programing section of the manual was compiled by Crow. Therein section 4.1 in pertinent part provides:

> Control of station operation:
> Rollins' employees shall be aware that it is the responsibility of Rollins' Home Office to maintain full and complete control of every phase of station operations. * * * *This means that Rollins' Home Office shall maintain actual control over all material broadcast by your station.* This responsibility shall not be delegated to networks, agencies, advertisers, national representatives, program suppliers, etc. [Italic supplied.]

142. Quality control attempts to implement the foregoing requirement of the manual in several ways:

> (1) The station files a monthly public service report with the home office (WNJR Exhs. 37–39). The report, which is transmitted by the manager's memorandum emphasizing notable accomplishments, includes: (a) summary tabulation of monthly program and community service contracts; (b) letters of commendation from community leaders; and (c) daily tabulation of public service programs and spot announcements. The report provides precise information concerning the extent to which WNJR complies with the NCSA and nonentertainment percentage representations set forth in section IV(b) of the renewal application (WNJR Exh. 37–39).
>
> (2) Crow supplies the stations with selected FTC alerts and FCC public notices accompanied with explanatory memoranda, when he deems it necessary (WNJR Exhs. 10–11; Tr. 4547–59).
>
> (3) A periodic program monitor is conducted without advance knowledge of the stations on the average of four times per year. The monitor records the beginning and ending times of commercial and noncommercial announcements. Between February 1961–October 1964, 22 monitors of WNJR were conducted (WNJR Exhs. 12, 15, 141; Tr. 4561, 4599–4600). The monitoring usually involved a 16-hour period spread over 3 broadcast days between 6 a.m. to 10 p.m.
>
> (4) Quality control compares the data compiled by the program monitor with the program logs and reports the discrepancies disclosed by this review to the station manager. The manager, in turn, is required to investigate the matters raised by quality control and report any explanation he might have and what corrective action he proposes to take (Tr. 3496–97, 4599–4602; e.g., WNJR Exhs. 13–32).
>
> (5) Quality control also conducts occasional audits, consisting of a personal visit to the station by Crow to tape programing, examine logs and contract files, and otherwise inspect the operations of the station (WNJR Exhs. 44, 45, 76, 103).
>
> (6) To forestall the occurrence of "payola" at its station in the New York metropolitan area, a periodic monitor of music selections is conducted and monthly payola affidavits of air personnel are required (Tr. 4572; WNJR Exhs. 12, 33, 99).

The WNJR program monitors, 1961–64

143. The program monitor policy was established by Wayne Rollins even before the quality control department was created, and Crow as head of the department was instructed by Rollins from its inception to devote the major portion of his time to supervising the program content of the Rollins' stations. The importance of the monitoring reports emanating from Crow to the managers is reflected in a memorandum

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(WNJR Ex. 74) circulated by Wayne Rollins to station managers, emphasizing that the correction of deficiencies brought to their attention by quality control was as important a duty as a manager had. In the period from 1961 to 1964, Crow had station WNJR monitored by a person hired outside of the Rollins' organization who was employed to make a full report on all announcements broadcast, the period monitored usually being portions of each day over a 3-day period so as to constitute a composite broadcast day. Crow, after comparing the program logs for the days monitored with the monitor's report to determine whether there had been departures from company or FCC policies, would prepare a memorandum to the station manager on the discrepancies found, with carbon copies to Wayne Rollins and Lanphear. In the case of WNJR, Crow had seven separate program monitors taken in 1961; in 1962 there were six separate program monitors; in 1963 there were five separate program monitors; and, in 1964 there were four separate program monitors taken. The items covered in Crow's memoranda to Mirelson between 1961 and 1964 dealt with a wide variety of discrepancies. Two matters that required Crow's continuing attention in this period were: (1) Observance of section 4.8 of the Rollins manual, which in pertinent part provides: "Spot announcements on radio shall not exceed 1 minute in length"; and (2) compliance with the requirement of the Commission's rules that the duration of spot announcements be accurately recorded in the station's program logs. Whenever Mirelson received a monitor memorandum from Crow, he promptly attended to making inquiry at the station into the discrepancies cited in the particular report, and in almost all cases he made a written response to Crow within a few days, reporting corrective measures initiated. He called in the program director (operations manager) and reviewed the memorandum from Crow, looking towards the correction of any valid criticisms such as indicated inaccuracies in logging and lengthy spots. Also, Mirelson would go to the particular staff announcers involved and admonish them to correct the mistakes noted by Crow. As a matter of practice, Wayne Rollins did not see the program monitors but was furnished copies of Crow's memoranda about them to Mirelson.

144. In determining whether in a particular instance there had been compliance with the Rollins policy limitation of 1 minute on length of spots, Crow allowed a reasonable margin for error (i.e., 10 seconds). Thus, if an announcer read a scheduled 1-minute announcement within 70 seconds, he complied with Rollins policy. If he recorded the 50- to 70-second announcement as 60 seconds in the program log, the announcer complied with the Commission rules. Crow believed it necessary to allow the same 10-second margin for error on the part of the monitoring person. Thus, if the monitor timed an announcement as 50–70 seconds and it was logged by the announcer as 60 seconds in the log, Crow treated the monitor record and the logged entry as being in agreement.[51] The examiner finds the 10-second tolerances applied by

[51] While the Bureau asserted "there is nothing in law or in fact which would support Crow's supposition that it was necessary or reasonable to accord WNJR announcers a 10-second margin for error in reading and recording scheduled 1-minute announcements, still the Bureau has in effect conceded Crow's standard is acceptable for the purpose of this proceeding (see, Br. Bur. Prop. Fdg. 169, at p. 86 of Bureau's Prop. Fdgs. and Concls).

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Crow to be reasonable in this case [52] and has accordingly considered the discrepancies disclosed by Crow's comparison of station logs with the monitoring reports in light of such allowable deviations. Stated otherwise, errors in logging or in length of announcements not exceeding 10 seconds have not been counted as violations of Rollins policy or Commission rules.

145. In September 1962, Crow tested the accuracy of the WNJR monitoring person by listening and/or taping WNJR during a period when he knew this individual was also timing announcements. In a memorandum Crow submitted to Rollins soon after this check, it was reported as follows (WNJR Ex. 44):

> (a) Of some 65 entries of the person doing the monitoring that could be checked by tape recording, there were only three entries which were not sufficiently accurate to permit a dependable conclusion. All others were accurate virtually to the second.

In a subsequent communication to Mirelson (WNJR Ex. 45), Crow referred to the taping he had done "to view the efficiency of the monitoring person" and repeated the statistical data mentioned above. Crow's finding that the monitor's accuracy was open to question in but three out of 65 instances is deemed to warrant the examiner's treating the monitoring person's timing of WNJR announcements reflected in the reports submitted to Crow as being generally accurate.[53]

August 16–18, 1961

146. Monitoring of WNJR broadcasts in a composite 16-hour period from August 16 to August 18, 1961, revealed that there had been 16 announcements logged as 1 minute each which actually exceeded 70 seconds by the monitor's timing. Six of these announcements were timed as 1:19, 1:19, 1:25, 1:50, 1:51, and 1:55 respectively. In the same period, seven announcements logged as 30 seconds each, in fact, exceeded that time by intervals ranging from 11 seconds to 34 seconds. Again, a spot logged as 20 seconds ran for 59 seconds, and a 10-second spot was timed as 24 seconds by the monitor. The same monitor (WNJR Ex. 13) established on August 16, 1961, that three spots were broadcast in reverse order to that logged by the announcer, that there were no entries on the program logs for station identification between 12 midnight and 2 a.m., and that a 1-minute commercial spot was not logged.

147. Mirelson's reply on September 5, 1961 (WNJR Ex. 14) to Crow's memorandum of August 29, 1961, reporting to him the above-mentioned logging discrepancies stated that most of the spots "that show up as long on your monitor * * * are not much beyond the limits and are not the result of long copy in the book but the fault of

[52] Testimony by a WNJR staff announcer tended to establish that split second accuracy in the logging of spots is not practicable (Tr. 2373–74). Additionally, it is noted that present Commission rules (sec. 73.112, note 5) make accommodation for "varying reading speeds" in the computation or duration of spots.

[53] Of course, the monitor could not know that in a particular instance an announcement had been interrupted for repair of a broken tape at the station (WNJR Ex. 64). Where Mirelson has furnished plausible explanations on announcements reported by the monitor as having run in excess of 1 minute, these rightfully should not be counted as violations of Rollins policy.

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an announcer stumbling or dragging or repeating the copy, which we have again instructed them not to do." Mirelson's reply further reported: "We are taking your advice in now trying to time all our copy to our slowest reader."

October 30–31, November 1, 1961

148. The monitoring over these 3 days disclosed there were 39 spots logged at 60 seconds each which actually ran over 70 seconds (WNJR Ex. 15). In addition, a spot logged as 30 seconds was timed by the monitor as 1:38; a spot logged as 20 seconds ran for 1:45; and a spot logged as 10 seconds was timed as 1:17 by the monitor. Mirelson's reply to this monitoring report stated, among other things (WNJR Ex. 16):

> Now these are the steps we have taken to control our length of copy even further:
>
> (1) *I have spoken to and warned each announcer that he absolutely can not ad lib or repeat copy and that he can not give lead-ins or follow ups mentioning the sponsor's name on ET's*[84] *unless this is specifically logged.* Also, I have instructed each announcer to be sure and familiarize himself with each piece of copy in advance so that he can read it rapidly and smoothly. [Italic supplied.]
>
> (2) Wherever there is question of doubt, we are trimming copy even further throughout the copy book.
>
> (3) I have gone over this monitor with my salesmen and office girls and impressed upon them that we cannot take any chance of leeway on the lengths of copy and that if anything, our copy must run short of the prescribed time so as to allow for the slowest announcer.
>
> (4) All new copy and ET's are being carefully screened and timed before being aired.

January 15–17, 1962

149. Crow reported 10 announcements during this monitoring period exceeding 70 seconds in length which were incorrectly recorded on the WNJR logs as 1 minute or less (WNJR Ex. 17). Mirelson's reply (WNJR Ex. 18) noted that this report indicated "there are less spots running long on WNJR than in any previous monitor of the station." Mirelson added that the longest of the objectionable spots (1:42) was no longer on the air, and that four of such spots had been broadcast by an announcer on behalf of his own accounts, and this individual was now using a stopwatch after being admonished "he cannot get carried away with his own spots." About January 31, 1962, Mirelson instructed all the announcers (including freelancers Carlton and Baldwin) that if a commercial exceeded 1 minute when aired, the actual running time was to be logged.

February 28–March 1–2, 1962

150. Crow reported that the monitoring reflected 22 announcements which exceeded 70 seconds in length although logged as 60 seconds each. The longest of these ran 1:27. (WNJR Exs. 21, 21A). Crow, in indicating his dissatisfaction with the number of spot announcements that exceeded 1 minute in length, noted that if the announcements

[84] "ET's" refer to prerecorded announcements (electrical transcriptions).

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barely exceeding 1 minute in length were eliminated from consideration, there had been 39 announcements "that were both too long and not logged as having run over a minute." He then commented: "As a practical matter a projection of this practice over a period of a full week which you would be required to report to the Commission would mean that you would be reporting a total of 240 announcements that would exceed 1 minute in length, none of which would be reported on the log as such." (WNJR Ex. 21). A similar projection based on spots aired in excess of 70 seconds each would have resulted in 110 excessively long spots aired per week but not recorded as such on the WNJR program logs.

151. Mirelson's reply to the last cited monitoring report (WNJR Ex. 22) noted certain control measures being applied to "see that our copy is not read on the air as longer than prescribed." He contended that "only a few of the spots" monitored in January 1962, "could be considered unusually long." Mirelson also commented:

> We have complete control of all copy going into the studio and are sure all copy in the book is the right length. *It is the human element of the announcers that has to be controlled more, but we do feel through working with them we can improve their habits.* [Italic supplied]

April 23–25, 1962

152. Crow reported 18 announcements which exceeded 70 seconds in length, but were logged as having run a minute. Crow also reported two unlogged commercials of 15 and 24 seconds in length (WNJR Ex. 23). The program monitoring report indicates that the monitor had timed about 125 announcements 50 seconds over.

153. Mirelson replied that the operations manager was checking copy and electrical transcriptions; that announcers were using stop watches and learning to deliver the announcements better and to watch the studio clock; and that a big notice had been posted concerning watching the studio clock and accurately logging spots over 1 minute (WNJR Ex. 24). He attributed the longer spots on April 23 to a substitute announcer (Ibid.).

June 20–22, 1962

154. The monitoring of WNJR on June 20–22, 1962, revealed that among some 150 announcements 50 seconds or more, there were 40 announcements logged as being 60 seconds in duration but which in fact were longer than 70 seconds (WNJR Ex. 25). Four announcements were timed by the monitor as being over 2 minutes each. As Crow pointed out in his report to Mirelson, the number of spots exceeding 1 minute in length was double in June what it had been in April. Again, as in April, there were two announcements on the air which were not logged (WNJR Ex. 25). In view of Crow's latest report, the operations manager of WNJR checked on copy and ET's which ran on June 20–22 and then informed Mirelson in a memorandum of July 26, 1962 (WNJR Ex. 26) that in a number of instances (17 announcements were identified by Leonard) an electrical transcription had been involved in the monitoring done on those dates and

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the times reported by the monitor for the transcriptions in question appeared to be in error. He also observed in this July 26 memorandum that in some other instances "a live tag added to a 1-minute ET accounts for the spot running over." The operations manager suggested "that the person taking the monitor be more careful in timing the spots." Mirelson in turn wrote to Crow on July 30, 1962 (WNJR Ex. 27) and expressed the view of himself and the WNJR operations manager "that the person actually doing the timing for the monitor service this time (meaning June 20–22) was not accurate in most cases." In addition to questioning the reliability of the monitoring on which Crow's critical reports to him had been based, Mirelson also detailed some of the steps previously taken and further steps that were to be taken at WNJR to avoid discrepancies in logging and spots of excessive length. These included: the purchase by the station, and use in the studio by all announcers for timing their spots, of a table model stop watch; and stepping up of the periodic spot checks made by WNJR management through the device of taping for replay monitored announcements received on a radio set located in the station but outside the studio.

155. By a memorandum of July 31, 1962 (WNJR Ex. 28), Crow indicated his disagreement with Mirelson's belief that the person doing the monitoring had not kept accurate account of the length of the announcements which came under surveillance on June 20–22. He expressed in strong terms his dissatisfaction with the results of Mirelson's efforts to reduce the disturbing incidence of commercial announcements exceeding 1 minute in length. Mirelson replied to Crow's emphatic comments in a memorandum of August 2, 1962 (WNJR Ex. 29) insisting that he and Bob Leonard had "been very conscientious about the matter of long copy and instructing our announcers." Mirelson again declared the belief of himself and Leonard that "there have been countless discrepancies in timing copy on the part of the person doing the monitoring not only in this monitor but in the previous monitors." To resolve the sharp difference of opinion which had developed between Crow and the WNJR managership as to the accuracy of the monitoring by the outside person whom Crow had employed, Mirelson made the suggestion (WNJR Ex. 28) "that when the next monitor is taken that the person doing the monitoring please tape off-the-air the portions they are monitoring. You can then play these tapes back and check on the accuracy of the monitor and also the accuracy of our announcers."

September 26–27, 1962

156. As has been found above (par. 145, supra), Crow took action in September 1962 to settle the dispute as to the monitor's accuracy by tape-recording programs of WNJR while they were also being monitored by the person employed by him for that task. This procedure served to establish to the satisfaction of Crow that the monitoring person was performing the assigned function of timing WNJR spots with a measure of dependability that effectively refuted Mirelson's claim of numerous errors in past monitors (WNJR Ex. 44).

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Wayne Rollins did not disagree with Crow's conclusion as to the monitor's accuracy and, therefore, believed that "our problem was to correct the situation at the station" (Tr. 6077). The monitor's report (WNJR Ex. 141) showed that among approximately 55 entries for announcements of 50 seconds or over, there were 10 entries for announcements which exceeded 70 seconds each. On Wednesday, September 26, 1962, between 6:15 to 7 p.m., three announcements logged as 1 minute each actually were monitored as having run only 45 seconds, 35 seconds and 37 seconds, respectively (WNJR Ex. 45, p. 3). On the same date, there were seven announcements aired within a total broadcast time of 1¾ hours which, although logged by the announcers as 30 seconds each, were recorded by the monitor as running over 40 seconds in each case (WNJR Ex. 45, pp. 2–3). In the period from 6:37 to 6:48 p.m. on September 26, there were broadcast eight spots consisting of a triple spot, a double spot, and again a triple spot (WNJR Ex. 45, p. 3). At 6:25 p.m., there was also a triple-spot situation which, as Crow pointed out, "should be avoided."

157. In reporting to Wayne Rollins on his monitoring of WNJR on September 26–27, 1962, Crow noted the following occurrences (WNJR Ex. 44): that announcers were "logging announcements at times other than the time of broadcast; that there "were a number of occasions when no station identification was given"; that "there are spot announcements being broadcast on freelance programs that are not entered on the program log," and that "an examination of program logs for several days revealed that no logging at all had been done between 11:02 p.m. and 11:59:50 p.m." (the "Celebrity Time" program period). In making reference to his taping of the 1-hour program which was logged as "Celebrity Time" but was identified on the air for a 15-minute segment and a 45-minute segment as being the shows of two named freelancers, Crow commented: "As broadcasters, both of these 'personalities' are rank amateurs." The broadcasting of programs over station WNJR by persons who fell into the category of "rank amateurs" by Rollins home office standards was contrary to company policy (Tr. 6116). Wayne Rollins understood that the persons mentioned by Crow in his report (WNJR Ex. 45) were "guests" on the "Celebrity Time" show who had been allowed to perform by the staff announcer on duty at the time (Tr. 6118–19). Rollins' reaction to the September 29 report by Crow (WNJR Ex. 44) was that there were too many discrepancies in it, and he was "unhappy about this situation." He discussed the discrepancies with Lanphear and directed Lanphear to take the steps necessary to correct the undesirable deficiencies in operation at WNJR (Tr. 6114–6115).

158. Subsequent to the September 1962 monitoring and auditing of station WNJR, Mirelson issued an "official warning" in the form of a memorandum addressed to all staff announcers concerning log falsification, failure to give proper station identification, etc. Mirelson stated violators would "* * * be subject to immediate dismissal" (WNJR Ex. 67). About a month later, on November 28, 1962, Mirelson issued an additional memorandum of instructions to "all WNJR announcers and air personnel" which included some more points at the direction of the Rollins home office by way of taking a stronger position against in-

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fractions. Among the various requirements covered in the memorandum (WNJR Ex. 68) were: that there be no "ad libbing" of announcements beyond the scheduled time called for on the program log; that the beginning and ending times of announcements and programs must always be logged; that logging of pertinent times be done immediately after the broadcast of announcements, etc.; that any departure from what is called for on the program log must be logged as broadcast; and that "triple-spotting" and even "double-spotting" of announcements be prevented. The memorandum gave warning that any departure from the prescribed procedures therein "may subject you to immediate dismissal" and that a copy of "this warning" was being sent to the AFTRA representative.

January 28, 29, 31, 1963

159. Monitoring of WNJR broadcasts on these three dates disclosed that among approximately 110 announcements timed by the monitor as 50 seconds or over, there were 10 announcements over 70 seconds (Br. Bu. Ex. 72). However, the program logs failed to show that these 10 announcements exceeded 1 minute. Additionally, the logs failed to reflect the broadcast of two commercial spots of 30 seconds duration (WNJR Ex. 70). Mirelson's response (WNJR Ex. 71) to Crow's report of the aforementioned discrepancies asserted that "a combined total of 10 spots over the 3-day period monitored * * * is only a small fraction of what previous monitors show" and was not significant in view of the large volume of spots run during the 3 days involved. Mirelson noted too that "at no time do any spots appear on any of the 3 days of the monitor during strictly station billed time that were not logged."

Further 1963 monitors

160. Four further monitors of WNJR broadcasts were taken in 1963 during the following dates: March 20, 21, 28, and 29; June 26–28; September 16–18; and November 13–15 (WNJR Ex. 12). All or most of the monitors for these periods and much of the related memoranda were excluded from evidence as being outside the purview of the bills of particulars as to violations of Commission rules (issue 4). From the standpoint of the adequacy of control issue (issue 3) it is nevertheless possible to make pertinent findings from certain correspondence between the home office and Mirelson which grew out of the four monitors and was received in evidence.

Spring 1963

161. It may at least be found that in the spring of 1963, Crow shifted emphasis to three matters other than the length and accurate recordation of 1-minute commercials. First, Crow notified Mirelson that an examination of WNJR program logs for a 4-day period in March revealed that 30 announcements were recorded as having run considerably longer than the scheduled 30 seconds running time called for by the traffic department (Br. Bur. Exs. 35, 40). After having

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Leonard pursue the matter (WNJR Ex. 157), Mirelson replied on April 23, 1963 (Br. Bur. Ex. 25):

> Now, as to the spots that run over what traffic calls for * * * yet. are less than a minute * * * Bob and I have reviewed this copy closely. Perhaps, we have not been as diligent on the shorter spots with our announcers as we have on the minute spots in view of the fact that the previous emphasis, both from your previous monitors and ourselves, has been on spots running longer than a minute.
>
> We will make a special effort to also place the same emphasis with our personnel on all of our spots even if they run shorter than a minute.

162. Second, Crow pointed out (Br. Bur. Ex. 40) that the four logs examined disclosed an excessive concentration of six to nine announcements within certain 14½-minute periods. (The licensee had represented in its 1960 renewal application (sec. IV, par. 3(b)) that no more than five announcements would appear in a given 14½-minute period (official notice taken).) Specifically, it was found by Crow (Br. Bur. Ex. 40):

> 35 periods carried six announcements
> 17 periods carried seven announcements
> 6 periods carried eight announcements
> 1 period carried nine announcements

Mirelson responded on April 17, 1963, that Crow had examined, by far, the busiest days of the WNJR broadcast week and that when busy, the station attempted to limit commercial interruptions to five by double-spotting short spots (Br. Bur. Ex. 41).

163. Third, Crow called to Mirelson's attention (Br. Bur. Ex. 35) the extent to which in 21 instances the announcements as timed by the monitor fell short of the length called for by the traffic department. The deviations cited by Crow in this respect were each "quite substantial." Mirelson's explanation for the spots running shorter than scheduled was that the station had trimmed the length of spots down to its slowest reader and also that in some cases the announcers were reading spots faster (Br. Bur. Ex. 41).

June 26–28, 1963

164. In July 1963, Crow, in communicating to Mirelson the results of the monitoring of WNJR during portions of the 3 days in June, reverted to the problem concerning 1-minute announcements (Br. Bur. Ex. 36):

> We are faced with a persistent problem which apparently has not been corrected. There are a number of announcements that exceed 1 minute in length and which are not so logged by the announcers. In addition, there are a number of shorter announcements whose running time exceeds that which is shown on the program logs by the announcers.
>
> * * * * * * *
>
> Whatever methods have been deployed to control excessively long announcements and more accurate logging of announcements have apparently failed. If you have any other suggestions for dealing with this, you should begin using them. Failing this, serious consideration should be given to the dismissal of the parties responsible for these violations. Please advise.

165. Mirelson's response of July 19, 1963 (Br. Bur. Ex. 26) pointed out: that although WNJR's 3 busiest days had been moni-

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tored, there were almost no logging discrepancies other than the long copy the monitor showed; that a majority (22) of the discrepancies were traced to: (1) a summer replacement announcer on June 27 quite anxious to do a good job, and (2) a new show, the "Kit Kat Klub" on which the announcer "was trying to make the new show successful and the agency that places spots in that show happy"; that in a few situations the monitor appeared to have made an occasional "* * * error in timing although we are in no way implying that this is the rule rather than the exception"; that management was impressing upon announcers that short spots (10, 20, 30 seconds) must be logged as accurately as 1-minute spots; and that a 10-second margin for error should be taken into consideration for the announcers on busy days "when the announcer is reading and logging many commercials and doing his own news and trying to do an interesting and vital show as well." [55]

September 16–18, 1963

166. Crow reported, following the monitoring of WNJR on the above dates, that "A number of announcements exceeded the elapsed time indicated on the program logs, and in some cases exceeded the maximum 1 minute in length, contrary to company policy * * *" (Br. Bur. Ex. 42). Mirelson replied he noted from Crow's report that great improvement over the previous monitors had taken place in that among the total of 10 spots shown as long over this 3-day period only four exceeded 1:10, with the longest being 1:20 (Br. Bur. Ex. 43). He added: "* * * but we will intensify our controls of checking all copy and ET's before airing, reviewing instructions with our announcers, and so forth."

November 13–15, 1963

167. Crow agreed that, in light of the monitoring of WNJR on portions of these 3 days, "It would appear that you have made some very good inroads in many areas where previously the monitor indicated the need for attention" (Br. Bur. Ex. 44). Mirelson in turn pledged to continue his efforts to avoid losing the ground already gained, and observed that "the only discrepancies * * * a few long spots * * * was, indeed, not too damaging" (Br. Bur. Ex. 45).

1964 Monitors

January 27–29, 1964

168. Crow reported (WNJR Ex. 31) four long spots logged as 1 minute each, one long spot correctly logged as 1:20, and four shorter spots which ran longer than logged. He concluded that according to the monitor "you seem to have made tremendous strides in keeping your spot announcements within standards. Now that you have found out how to accomplish this, I entreat you to do all in your power to improve upon this record and not let it regress." The program monitor

[55] Reference to the monitor's timing of four spots on June 28 (Br. Bur. Ex. 36, top of p. 2) indicates that even if the suggested 10-second leeway were applied Crow still had cause to complain of long spots.

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for the 3 days in question (Br. Bur. Ex. 77) reflected five spots ran beyond 70 seconds among approximately 70 spots that were timed 50 seconds or more.

May 20–22, 1964

169. A program monitor of WNJR was conducted during May 20–22, 1964, as part of the continuing surveillance of the station's broadcasts maintained by Crow of quality control (WNJR Ex. 12). The program monitor records for this period (Br. Bur. Ex. 78) and memorandum related thereto (Br. Bur. Exs. 46–49) were excluded from evidence.

170. In June 1964, Crow issued a memorandum to all managers of Rollins' stations which stated in pertinent part (WNJR Ex. 76):

> In order to reassure you and us that all the operating procedures that exist at your station are being carried out, as indicated by company policy, *your station will, from time to time, be visited without advance warning, for purposes of inspecting all procedures.* This may well take the form of the kind of inspection to which your station would be subjected when you are visited by FCC inspectors, prior to license renewal time. *Included might be the taping of the station, the inspection of your station records* of such things as broadcast contracts, political broadcast files, program logs, music selection procedures, the permanent binders containing company directives, and so forth. [Italic supplied.]

July 15, 16, 18, 19, 21–23, 1964

171. In July 1964, Crow conducted an operation audit of WNJR at the request of Wayne Rollins. This inspection involved a visit to the station by Crow and Frank Minner, the Rollins' controller, on July 15–16 (Br. Bur. Ex. 82) and the monitoring of WNJR broadcasts over portions of a 7-day period totaling 21 hours, 45 minutes (Br. Bur. Exs. 39, 79). From monitoring data compiled over the 7-day period, Crow reported to Mirelson two unlogged commercials, 30 and 40 seconds in duration, and approximately 40 commercials which were incorrectly logged. Sixteen commercials logged as just 60 seconds each ran more than 70 seconds, and 28 commercials ran beyond 70 seconds each[54] although some of these were correctly logged (Br. Bur. Ex. 39). As Crow pointed out to Mirelson, "On the basis of our findings, a composite week which would be required to be filed with the FCC at renewal time, would show * * * almost 200 announcements * * * which exceeded 1 minute in length" (WNJR Ex. 30).

172. The July 1964 audit led to the discovery by the Rollins' home office of the repetition of nighttime freelancers' programs on a wide scale. As Crow described this situation to Lanphear (WNJR Ex. 81):

> * * * For some time, the "Clint Miller Show", 1½ hours in length on Tuesday nights, is a repeat of the Monday night program and the Thursday, Friday, Saturday shows are a repeat of the Wednesday program. The Tuesday, Wednesday, Thursday, and Friday programs of the "Mr. Blues' Show" are a repeat of the Monday night program. This is a half-hour program. The 3-hour "Danny Stiles" program on Friday night is a repeat of the Wednesday night program and the Saturday night program is a repeat of the Thursday show.

[54] The monitor's elapsed time for the first two commercials listed in Br. Bur. Ex. 39, i.e., Modern Stores and Hardy's Night Spots, was not 1:10, as stated by Crow, but 1:16 and 1:25, respectively (Br. Bur. Ex. 79).

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Repeat broadcasting of the "Clint Miller" and the "Mr. Blues" shows was a well-established practice at WNJR (see, stipulation 6) by the time Crow learned about it.

173. Crow advised Rollins that he had asked Lanphear to discuss with Mirelson "* * * the possibility of discontinuing this practice, if for no other reason than for the sake of the station's audience" (WNJR Ex. 82). For, as Crow had noted in this connection: "In the case of one show, the same program is heard Monday through Friday. In the case of other shows, we are talking about repeat broadcasts, in the same week, of programs that are almost 3 hours in length." (Ibid.) By memorandum of July 31, 1964, Mirelson reported to Crow that "* * * after extensive meetings with all the personnel involved * * *," it was agreed that Miller and Stiles would repeat broadcasts no more than once a week and Blues would never repeat broadcasts in any given week (WNJR Ex. 84).

October 19–21, 1964 [57]

174. Following a monitor of the station on the above dates (WNJR Ex. 12), Crow continued to express his concern to Mirelson about WNJR air personnel failing to log correctly the elapsed time of commercials, particularly those which exceeded 1 minute in length (Br. Bur. Ex. 29). Mirelson responded that the station was purchasing a new stop watch to replace the one out of service; that management had met with the announcers and advised them of the "extreme necessity" for logging accuracy; and that a notice to that effect had been posted and presented to each announcer. According to him, the announcers urged that "reasonable leeway" should be extended; he conceded, however, that the "10-second leeway" permitted by quality control in the past should ordinarily be sufficient (Br. Bur. Ex. 28).

December 3–4, 1964

175. In December 1964, quality control conducted a further operations audit of WNJR during portions of December 3 and 4 at the request of Wayne Rollins. At least 13 hours of the station's broadcasts on these 2 days were monitored by tape recording. Over this period, six announcements were first reported to have been over 70 seconds (WNJR Ex. 103, pars. J, O) and in a supplemental report (WNJR Ex. 104) there were three more announcements over 70 seconds each shown. Also, there were seven announcements logged as 30 seconds each which ran beyond 40 seconds. Two announcements logged as 60 seconds were only 30 seconds in duration; one spot logged as 30 seconds ran for 60 seconds; and an announcement not logged as having been broadcast was in fact delivered on the air as a 1:23 spot (WNJR Ex. 103). Since the announcers at WNJR were known by quality control to be using a stopwatch for timing commercials, the above-noted logging inaccuracies were considered by the home office as flagrant in nature (WNJR Ex. 104, par. A). In addition to the foregoing, it was also ascertained through the December audit: that

[57] The program monitor and related Crow-Mirelson memorandums were excluded from evidence (Br. Bur. Exs. 27, 37, 80).

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freelancer Danny Stiles continued to repeat programing more than one time in a week (his "Kit Kat Klub" program of November 25 was rebroadcast not only on November 26, but also on November 28 and December 1; and his program of November 27 was rebroadcast in the succeeding week of November 30) contrary to his agreement with Mirelson; that the program log entries for his repeat programs did not contain the word "tape" as required by the Rollins' home office to indicate the rebroadcast; and that the staff announcers on duty when his program was rebroadcast, instead of timing the spot announcements as the taped replays progressed, merely copied the times for them from the original broadcasts (WNJR Ex. 108, par. A). Quality control looked upon the last-mentioned practice as constituting a gross impropriety in logging and reminded Al Lanphear that it had been brought to the WNJR manager's attention before with reference to rebroadcasts of the same program (Ibid.).

176. It was at this point, following the December 1964 revelation of continuing derelictions in the operation of station WNJR, that Wayne Rollins made the decision which resulted in the demotion of Mirelson from general manager of WNJR to sales manager. At the same time, Rollins instructed Lanphear to take over as manager of the station until a suitable replacement could be found (Tr. 6026–6036). In a memorandum sent to all station managers on April 30, 1964, Rollins had sought to impress them with his own belief "that there is no duty that a manager has that I place greater importance on in the operation of the station than that carried by the monitor and quality control—so I ask you to examine your operation and see that this phase gets 100 percent cooperation from everyone in the station" (WNJR Ex. 74). In the face of the persistence of logging and other operational discrepancies at WNJR after such matters had been repeatedly brought to Mirelson's attention through reports to him on the periodic monitors taken, Rollins "knew that Mirelson had to be removed from the operation of the station." Wayne Rollins was aware too that WNJR was for the second time under investigation by the Commission, this time in connection with renewal of its license although this development was not a decisive factor in Rollins' thinking (Tr. 6028, WNJR Ex. 168). Wayne Rollins also took into consideration that logging irregularities and long spots were caused by the announcing staff's inattention to orders and that disciplinary action by management was hampered by the union's construction of the contract with the station covering the announcers[58] (Tr. 6031). It

[58] In a discussion with the AFTRA representative in 1962, Lanphear had indicated that some of the announcers might have to be discharged if logging inaccuracies and long spots continued. The union's representative in turn indicated that if the station attempted to do so, it would charge the station with unfair labor practice, asserting that the matters complained of by the station did not, under the terms of the employment contract with the announcers, constitute valid grounds for termination of their employment (Tr. 5559–5560). Lanphear was told too that "these men are human and you can't be leaning on them for this because they are doing announcements and cannot look at a clock at the same time. No other station has ever complained to the union about these logging inaccuracies by their announcers" (Tr. 5653). When the station did discharge an announcer in 1965 (after Mirelson's removal) for failing to log several announcements he gave promoting the forthcoming appearance of a performing artist (which announcements the management deemed to have been commercial spots requiring logging), the union supported his complaint of a wrongful discharge not authorized under the union contract. The matter was settled by a cash payment to the announcer after the union had indicated it would institute an arbitration action on his behalf (Tr. 5654–5657).

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was believed by Rollins and Lanphear that while Mirelson could not operate effectively as the manager, he could provide valuable service in the area of sales where his strongest ability lay (Tr. 5632). Reassignment to a lesser position was made in consideration of Mirelson's years of service to Rollins and by way of not imposing too severe a penalty against him (Tr. 6029). As general manager of the station, Mirelson had been paid a salary and in addition received a graduated percentage of net profits before taxes. When he was demoted to sales manager, a different financial arrangement was made with him calling for a weekly salary plus a lesser graduated percentage of the station's local billing (net). The change in plan of remuneration reduced the earning potential of Mirelson (Br. Bur. Exs. 50, 51) and resulted in a decrease in annual earnings to perhaps one-half of that previously received by him as an employee of the licensee (Tr. 6284).

Commission monitors of "Clint Miller" program

177. In the fall of 1964, Commission personnel monitored the "Clint Miller" program (9:30–11 p.m.) on September 12, 22, and 23. On these dates, Miller broadcast a total of five commericals promoting a dance to be held at the Terrace Ballroom on Friday, September 25, which featured the appearance of recording artists. Immediately before or after four of these commercials, Miller played a recording of one of the featured artists, using a transitory phrase, such as, "And now we hear from the Soul Sisters who you'll see Friday night at the Terrace" (stip. 3). This practice was in express violation of section 4.17(e) of Rollins policy, which provides in part that "Air personnel are expressly forbidden to associate any other matter with the spot announcement. This means that if a spot announcement concerned an event that included the appearance of an artist * * * it would be forbidden to play the artist's records within 2 minutes before or after the announcement" (WJNR Ex. 8). Rollins' policy against tying in records with commercials was designed to guard against a "double spot"—that is, the record becoming part of the commercial so as to extend the logged commercial of 1 minute to perhaps 3 minutes in effect (Tr. 6268).

178. During these same programs, Miller plugged the September 25 dance on 10 occasions by remarking, for example, "Here is B. B. King, the star you'll see Friday night at the Terrace" and thereafter playing the artist's record. This, too, expressly violated Rollins policy which provides that it is forbidden, when playing a record, to make any reference to an outside event in any way at any time, whether or not a schedule of announcements for the event is being carried by the station (WNJR Ex. 8, sec. 4.17(e)). Following one spot for a dance (September 12—10:32 p.m.), Miller tied in a record of a featured artist and during the play of the record, interspersed such comments as: "Newark's favorite," "Come on Shep," "Shep and the Limelights," "Saturday Night," "The Five Flames Lounge," etc. The total elapsed time for the commercial, the record, and the interspersed commentary was approximately 3 minutes (stipulation 3). Miller was never in-

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structed not to plug or tie-in records and he did not include the playing of the tied-in records in logging the duration of a commercial (Tr. 1951–54, 1980–81).

Green's absence from station on October 6, 1964

179. On October 22, 1962, Crow wrote a memorandum to Mirelson with reference to the steps being taken at WNJR "to eliminate some of the matters" about which the two men had been speaking since Crow's visit to the station on September 27, 1962. In this memorandum Crow made the following suggestion (WNJR Ex. 59):

> (*a*) To help insure that your announcer on duty between 12 midnight and 2 a.m. does not leave the premises, it would be wise to have him include an announcement of the exact time at the conclusion of his newscasts or station breaks, whatever the case may be.

On the evening of October 5, 1964, the station's staff announcer on duty at WNJR was Charles Green. He was scheduled as the staff announcer on duty to do the station-break announcement and the capsule newscast at 11 p.m. (Tr. 2510, WNJR Ex. 130). On that night a friend and former classmate visited him at the station until approximately 9:30 p.m. His friend was to have left the station and be driven to New York where she was employed as a switchboard operator. Just about the time she was to have departed from the station, she learned that the planned ride would not be available. If she attempted to rely on local public transportation, she would not be able to reach her job on time. Therefore, Green offered to drive her into Newark where she could pick up transportation and reach work on time. Green was not certain whether he could return to the station by 11 p.m. in time to do his scheduled newscast, yet he did not wish the log to indicate that another announcer signed the log as doing the newscast since he (Green) would have to explain to management why he did not do the show.[59] Therefore, he presigned the program log for 11 o'clock (indicating that he was doing the station break and the newscast, and would be on duty until 2 a.m.) although he was well aware that he had no authority either to leave the station or to presign the log. Green anticipated that Danny Stiles, who was to do the "Kit Kat Klub" show at 11:01 p.m., would do the station break and also the news in the event of his absence. He left the station at 9:40 p.m. which was exactly the same time that an FCC inspector was entering to make an official visit there. Green did not immediately realize who the inspector was. Outside the studio, however, Green saw the official FCC automobile and realized the inspector was at the studio. He therefore took his friend to the nearest bus line and returned a short time later, although he was embarrassed about the prelogging and he therefore stayed out of the inspector's way until after the latter had left (Tr. 2509–2518). In the meantime, Danny Stiles was already at the station when the inspector detected the fact that the logs had been presigned and he pointed out Green's logging entries to Stiles. Subsequently, Stiles saw Green

[59] By reason of the requirement that the staff announcer who did the show was required to keep the log, management could determine from review of the log whether the announcer was on duty (Tr. 2513).

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before 11 o'clock and informed him that the inspector had seen the prelogged entries (Tr. 1821, 2476).

180. Around 10:30 p.m., Green left the station to eat and did not return until after 11 p.m. (Tr. 2477). Danny Stiles did the station break and the newscast at 11 p.m. and so indicated on the program log (Tr. 1821). Stiles corrected the log by crossing out the notations indicating Green had done the 11 o'clock station break and newscast, and by inserting entries on the log reflecting what he had broadcast (WNJR Ex. 130). Stiles also called Mirelson the following day and informed him of the incident (Tr. 1829). Mirelson made a report on the incident to the home office (WNJR Ex. 90). The home office reacted to the report of this by directing that Mirelson take steps to prevent a recurrence of any announcer leaving the premises on his own initiative as Green had done (WNJR Ex. 91). As a result Mirelson issued strict instructions to the nighttime staff announcers that they were never to leave the WNJR premises at any time during their shift without advance permission of Mirelson or the operations manager, with the exception of a dinner break, and Mirelson further arranged the schedule of dinner breaks so that the station would never be left uncovered by a regular staff announcer (see WNJR Exs. 95, 96, 97, 98).

CONCLUSIONS

The issues

1. This proceeding involves the application of Continental Broadcasting, Inc., a wholly owned subsidiary of Rollins, Inc.,[60] for renewal of license of station WNJR (AM) in Newark, N.J. The Commission by order released June 10, 1965, designated the application for hearing on specified issues to determine: (1) whether the applicant misrepresented facts to the Commission and/or was lacking in candor in its written response of March 16, 1964, to the Commission's notice of apparent liability for forfeiture issued January 22, 1964, or in its oral statements to the Commission's staff; (2) whether the applicant falsely represented that the 139 "contracts" turned over to the Commission's staff on April 15, 1964, were in fact the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during "Celebrity Time" or whether such "contracts" were falsified to conceal or misrepresent the actual facts with respect to the relationship which existed between the applicant, its employees and Celebrity Consultants; (3) whether the principals of the applicant have exercised adequate control or supervision over the operation of WNJR since the last renewal of its license on February 8, 1961; (4) whether the applicant operated its station contrary to and/or inconsistent with the sponsorship identification provisions of 317 (a)(1) and (c) of the Communications Act and sections 73.111 (maintenance of program logs), 73.112 (log entries), and 73.119 (sponsor identification) of the Commission's rules; and (5)

[60] Rollins, Inc., is a public corporation with its stock being listed on the American Stock Exchange. Approximately 67 percent of its voting stock is held by O. Wayne Rollins and his family. The Rollins Corp., either by direct ownership or by control of wholly owned subsidiaries, operates seven AM stations, three TV stations, and two FM stations at various locations in the United States (see par. 7 of findings for the particulars as to Rollins' stations).

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whether the applicant failed to file agreements regarding the sale of time periods to time brokers, in violation of section 1.613(c) of the Commission's rules. The ultimate issues to be resolved are whether "the applicant has reflected the necessary qualifications to continue to be the licensee of WNJR" and whether a grant of its application would serve the public interest, convenience, and necessity. Since, at an early stage of this proceeding, the examiner ruled that the Commission's designation order herein does not contemplate as an alternative to denial of license the imposition of a monetary forfeiture, Continental's license for station WNJR is at stake. It may be noted that in June 1964 Continental elected to withdraw its opposition to a notice of apparent liability for forfeiture issued January 22, 1964, which involved the charge of failure of the licensee to file with the Commission time brokerage contracts relating to the WNJR program "Celebrity Time," and it paid a $1,000 forfeiture at that time. By agreement of the parties, the particular violations asserted in that notice are not encompassed by the hearing issues.

The hearing

2. The compilation of the record in this renewal of license proceeding (inclusive of formal hearing conferences) required a total of 48 days of hearing sessions. The official transcript of the hearing runs somewhat over 6,800 pages. The applicant's exhibits number approximately 170; those of the Broadcast Bureau total approximately 80. In a considerable number of instances, individual exhibits are multipaged. By way of example, two exhibits of the applicant alone involve 289 separate documents concerning advertising arrangements for sponsors; and another of applicant's exhibits consists of over 100 pages. Additionally, stipulations of the parties, some of them designed to reduce the volume of potential exhibits and transcript of testimony, comprise some 12 documents. Monitoring reports cover hundreds of commercial announcements over several years, and numerous program log entries during the same period have been covered also. While the issues are ostensibly directed to the operations of WNJR between February 1961 and December 1964, the evidence as introduced covers roughly a span of time in the station's affairs running between 1957 and 1965. The parties in their respective proposed findings and conclusions, which pleadings are indeed voluminous, present opposing viewpoints as to the credibility of key witnesses and differ sharply as to the inferences to be drawn from various portions of the evidence. As the Broadcast Bureau analyzes the record of operation of WNJR by the licensee since February 1961, a renewal of the station license must be denied. The licensee, on the other hand, asserts that a renewal of its WNJR license must be granted. The examiner's conclusions on the hearing issues in light of the extensive and complicated record, and the resolution on the ultimate renewal question are set forth below.

Issue 1—Misrepresentation and lack of candor

3. The record shows that on March 6, 1963, Commission investigators visited station WNJR in the course of their investigation of possible "double billing" practices by the station or persons doing

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business with it. The manager of the station was asked to produce the documents relating to a particular program, "Celebrity Time," and reflecting the contractual arrangements for the advertising. As has been found above (par. 70, findings), the manager produced for inspection no more than eight of the 147 documents covering arrangements for commercial announcements with various sponsors which were in his possession. This limited group of documents was confined to contracts for a number of sponsors which he had obtained from the representative of the advertising agency with which the station had an overall arrangement for the program. These eight documents were in good order and all signed by the station manager. However, he deliberately did not bring to the attention of the investigators any of the remaining pertinent documents in his possession. Since some of the latter were not executed by him, unlike those documents shown the investigators, they were not contracts in effect. More important perhaps was the further fact that the documents not handed over to the investigators contained a variety of names of freelancers who were obtaining their own sponsors for "Celebrity Time" and were also participating in the program as disk jockeys. There was also a striking lack of uniformity in the suppressed documents which was bound to suggest further inquiry to the investigators if seen by them. The effect of the manager's conduct in selecting and handing over for inspection the small number of documents the investigators saw was to give them a distorted and misleading view of the manner of operation of the program from the standpoint of control and time-brokerage implications and to misinform them as to the arrangements with sponsors for the program in actual practice. Thus, the examiner concludes that the manager's action on the occasion in question in not making available to the investigators for inspection the entire file of the 147 documents for "Celebrity Time" constituted a serious lack of candor by an executive employee of the licensee in connection with an official Commission investigation. Notwithstanding the inability of the investigators to acquaint themselves with the information contained in the documents they were not afforded the opportunity to inspect, it is clear from the record that, with additional information the investigators did obtain later from the Rollins' home office, they were nevertheless able to determine that station WNJR had not engaged in double billing, the immediate question to which their investigation at the station had been directed. In this connection it must be noted that the WNJR manager, in directing the Commission's investigators to the Rollins' home office in Wilmington for certain financial records, at the same time was guilty of a misrepresentation in stating these records were not at the station. His behavior bespoke ineptitude and was not prompted by any motive to conceal or withhold information from the investigators. In point of fact, the particular records were at both locations, and he failed so to state because he did not believe he was authorized to make the copies at the station available to the investigators. Under the circumstances, it was obligatory upon him, as a responsible employee of the licensee of a station, not to indulge in any false statement but rather to inform the Commission representatives of his problem candidly and to consult

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with the home office also. That his deception proved harmless in its ultimate effect affords no excuse for the misrepresentation made by him.

4. The record reflects that on January 22, 1964, the Commission issued to the licensee of WNJR a notice of apparent liability for forfeiture. The notice charged in essence that a Commission investigation of WNJR had revealed the broadcast by the station for a period prior to March 9, 1963, of a program called "Celebrity Time" pursuant to time brokerage contracts with an advertising agency, Celebrity Consultants. It was charged that copies of the contracts with the time broker were not filed by the licensee with the Commission within 30 days of execution as required by section 1.613(c) of the rules. As also indicated by the record, the licensee filed a response and opposition to the notice on March 16, 1964, contending in effect that the arrangement for the "Celebrity Time" program with the agency did not involve a time brokerage contract. Moreover, the response stated: That the agency had been required to enter into individual contracts with the station on behalf of each sponsor; that these contracts showed the station had dealt with the agency as a regular advertising agency which was paid a commission and, therefore, not as a time broker; and that the contracts supplied by the agency to the station had been examined by the Commission's staff when it investigated this matter. Unquestionably, however, the evidence developed in the hearing shows (par. 84, of findings, supra) that the factual representations set forth in the sworn response and opposition to the Commission's notice of apparent liability for forfeiture, signed by O. Wayne Rollins as the licensee's president and filed with the Commission on March 6, 1964, were largely inaccurate. A significant example of the misstatements made is contained in the examiner's finding that except in a few instances the station did not require the advertising agency to enter into individual contracts for each sponsor. Instead the station obtained documents from freelance announcers or prepared documents for freelance announcers on contract forms which were never signed to indicate acceptance by the station manager before broadcast of the advertising matter concerned. The untrue statements did not, however, constitute false representations since Rollins was unaware that WNJR had not obtained the contracts as represented in the response and believed all the assertions made in the response to be true and accurate when he executed the document, and he did not subscribe to the statements therein until after first obtaining confirmation by members of his home office staff as to their being correct. As was later ascertained, both his associates and Rollins were laboring under a misapprehension in believing that a few contracts for individual sponsors on the program "Celebrity Time," which documents Rollins saw before signing the response, were typical or representative of the entire file of documents in the station manager's custody at WNJR. Viewed from hindsight, the filing by the licensee of a document containing untrue statements as to the existence of a complete set of "Celebrity Time" contracts at the station could have been avoided by performing a detailed examination of the nearly 150 documents involved rather than relying on the station manager's assertion that three documents

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submitted to the home office were typical of the entire file. But, as Rollins has explained, this precaution did not suggest itself mainly because of his confidence in the trustworthiness of the station manager, a veteran employee at WNJR. Again, one may surmise that the station manager would have alerted the home office to the inaccuracies in the response if he had seen a copy of this document prior to its submission. But, the last is idle conjecture since he remained silent even after having been shown the document within a short time after it had been filed. A footnote statement in the response (namely, f.n. 5) as to when the arrangement with the advertising agency terminated is at odds with the facts as found by the examiner. It was incorrect to assert that the station considered its written contract with Celebrity Consultants had terminated by July 1962, and it was equally inaccurate to imply that the agreement at least as an oral understanding did not continue beyond December 1962. At least with respect to the last two matters, a measure of negligence on the part of Rollins' associates prevailed since the two statements should not have been made. Since the radio station's operations manager for Rollins had been informed by the WNJR manager of a reduction of the weekly guarantee to $200 weekly, the reference to the $300 figure in the footnote in question may be ascribed to inadvertence or faulty recollection (or perhaps even as a considered inconsequential error) on his part. At any rate, Rollins satisfied himself as to the accuracy of the statements in the response, had the document drafted by counsel, and only then subscribed to its contents. There is no evidence that either of the two other Rollins' home office officials (Crow and Lanphear) were aware of the true state of the entire file of "Celebrity Time" documents in the station manager's custody, or that they knowingly misled Rollins in assuring him of the accuracy of the statements in the document he signed. Accordingly, it is concluded that neither Rollins nor the other home officials were guilty of any intentional misrepresentation in connection with the submission of the response and opposition to the Commission.

Issue 2—The spurious documents

5. The findings of fact reflect that on April 15, 1964, Commission investigators visited station WNJR and asked to look at the contracts for advertising on the "Celebrity Time" program concerning which documents there had been representations made in the licensee's response of March 16, 1964, to the Commission's above-mentioned forfeiture notice issued in January 1964. The WNJR station manager thereupon produced for inspection some 147 documents as being original contracts which had been executed between the station and the advertising agency on behalf of various sponsors on the "Celebrity Time" program during the period from July 1962 to March 1963. Only eight of these documents (those on the top of the pile and white in color) were authentic and original contracts (WNJR Ex. 5, pp. 140–147) as represented in its response by the licensee. The remainder (139 documents on goldenrod colored paper received in evidence as WNJR Ex. 5, pp. 1–139) were not actual or original documents which were drawn up as contracts for advertising between WNJR and the

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advertising agency, Celebrity Consultants, Ltd. Instead, these 139 documents were fabricated or false contracts; they had been prepared at the behest of the manager by a WNJR salesman who had assisted the agency in obtaining advertising for the program in conjunction with a number of freelancers who also participated in "Celebrity Time" as diskjockeys. The 139 documents were based in part on original documents in the manager's custody (WNJR Ex. 6, pp. 1–143) insofar as the spurious documents duplicated the information on the originals with respect to the names of advertising sponsors, the date of the announcement, and length of the announcement. Various other items of information in the originals were changed. Moreover, the new documents were each signed by the WNJR salesman who inserted the supposed signature of a freelancer whose appearance on "Celebrity Time" had occurred with the approval of the agency. The WNJR manager did not know the signature of this freelancer was not genuine, but this is irrelevant since the documents in question were not contemporaneously executed with the making of the advertising arrangements they purported to show and were in no sense advertising contracts. The station manager's primary motive in having the new documents written up so as to conform with the representation in the licensee's response as to the existence of a proper and complete file of contracts between WNJR and the advertising agency was to forestall censure and perhaps even his discharge by the Rollins' home office if they were to learn the truth about the deception he had perpetrated on it with respect to "Celebrity Time." He had concealed from the officials in Wilmington and Wayne Rollins the fact that the WNJR station salesman had acted as a commissioned representative of the advertising agency in obtaining and supervising the activities of the freelancers on "Celebrity Time." He had not informed Wilmington of the transformation of the program from a so-called agency show broadcast by experienced freelancer announcers provided by the agency into a program on which appeared a host of freelancers shepherded by the station salesman. Furthermore, he had misled the home office as to the nature of the original contract file at the station for the "Celebrity Time" program and his assurance to the program quality department director, Crow, on this score had resulted in the misrepresentations made in the written response filed with the Commission. It must be noted at this point that the individual who wrote the 139 bogus documents did not prepare them with any expectation that they would be shown to Commission representatives. He was given to understand by the station manager that the documents were to be employed only if the home office wanted to see them, and he did not know that the response filed by the home office had misrepresented the state of the file of original "Celebrity Time" documents.

6. While the WNJR manager had been aware of the possibility that the Commission might want to look at the "Celebrity Time" contracts' file, he had no knowledge this would actually occur when he directed the preparation of the new documents. As has been stated above, the time came when he was requested by Commission representatives to produce the contracts file for "Celebrity Time." There followed then the wholly unexpected development—one he had never

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anticipated—that the investigators not only inspected but also carried the file of sponsors' documents away with them. But, even after this occurred, Mirelson did not enlighten the two home office officials and counsel for Rollins, who were present at the station when the investigators visited it in April 1964, that the 139 documents were not original documents. In this connection, it should be noted that the record warrants no valid inference any member of the Rollins' home office either knew or suspected the bogus nature of the 139 documents. While Lanphear admittedly recognized some of the handwriting on the documents, which he looked over for a minute or two as being that of Soriano, this circumstance does not prove that Lanphear knew more than this since he was told that Soriano, who was frequently at the station in the late evening, had assisted in obtaining the "Celebrity Time" contracts. In sum, the evidence does require the conclusion, in response to issue 2, supra, that: (1) the WNJR station manager falsely represented to the Commission's staff that the 139 documents turned over to them on April 15, 1964, during an investigation of WNJR were the actual documents received from Celebrity Consultants; and (2) that the 139 documents were falsified by a WNJR salesman, at the direction of the station manager, in order to conceal the actual facts of the relationship which existed in the period July 1962 to March 1963 between the applicant, its employees, and Celebrity Consultants. More particularly, the bogus documents were prepared to conceal: the participation of the freelance salesmen announcers on "Celebrity Time" and the further fact that contracts between the station and the advertising agency were not executed with respect to those sponsors obtained by the freelancers; the WNJR salesman's activities on behalf of the advertising agency in connection with the freelancers who appeared on the "Celebrity Time" program; and the station manager's role in having contributed sums from his own pocket toward reduction of the agency's indebtedness to the licensee but without the knowledge of the Rollins' home office.

7. Culpability for the preparation and misuse of the 139 documents palmed off on the Commission's investigators as original "Celebrity Time" contracts must be placed on the WNJR manager. However, the proper evaluation of his serious misconduct should take into account that in the period when he initiated the falsification of these documents and subsequently employed them as related above, he was subjected to severe emotional strain and confronted with the press of personal problems arising out of the extended terminal illness of his mother. Undoubtedly he had to cope with this very trying situation while at the same time endeavoring to discharge his manifold duties as the manager of a station serving the New York metropolitan area. On the grounds of common experience, one cannot ignore the probable effects of this distressing situation on the station manager's normal exercise of judgment. Indeed, as his own testimony makes clear, he immediately equated the anticipated reaction of the home office, in the event of its learning of the state of the original "Celebrity Time" contracts' file, with probable dismissal from his job. Moreover, he arrived at a curious and irresponsible judgment in deciding to replace the genuine documents, however imperfect they were, with a

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faked set of "contracts" which in effect were much less faithful to the truth than the originals and patently more mischievous in their consequences—the spurious documents only served to further disadvantage the licensee before the Commission. With full recognition of the personal troubles which beset the WNJR manager when the bogus file was made, there nevertheless remains for further consideration, from the standpoint of ultimate licensee responsibility, the indisputable facts that the 139 false documents were handed over to the Commission by this employee and that this was an act of misrepresentation which hampered an official investigation into the licensee's operation of WNJR.

Issue 5—Time brokerage

8. Section 1.613(c) of the rules provides that a licensee shall file with the Commission copies of "contracts relating to the sale of broadcast time to 'time brokers' for resale" within 30 days of execution thereof. The term "time brokers" is not elsewhere defined or mentioned in the rules. It was included in the provision in question, when section 1.613(c) was adopted by the Commission in 1953, to preclude the application of the filing requirement therein to "all agreements between the station and others concerning the sale of broadcast time." In the matter of amendment of section 1.342 of the Commission's rules, Docket No. 10409, 9 RR 1547, 1553. In adopting the rule in question, the Commission indicated also that the filing requirement therein "should not apply to those contracts between stations and agencies wherein the agency names specifically the company whose products will be advertised" (ibid. at p. 1554). A number of Commission decisions, especially pertinent rulings made since January 1965, have served to define what a "time broker" is and also to clarify what contracts are considered by the Commission to constitute brokerage arrangements within the intendment of section 1.613(c) which must be filed by the station within 30 days of execution. The tenor of the decisions in question is indicated by the quoted language therefrom which is set forth below.

9. The declared policy of the Rollins' corporation prohibits its stations including WNJR from entering into contracts which constitute time brokerage arrangements. As shown by the findings, supra, between May 24, 1963, and July 27, 1964, station WNJR entered into five separate contracts with individuals or agencies who were recognized or treated by WNJR as advertising agencies. One of these parties, the Levy Advertising Agency, was a bona fide advertising concern which has been doing business with the licensee of WNJR and the predecessor owner of the station for many years. Another entity, "Jay Cee Advertising," was created and existed only as a house organ of the Essex Records Co., a musical records merchandising organization, to take advantage of the standard commission arrangement customarily available to advertising agencies from the publishing and broadcast media. The remaining three parties to the contracts in question were individuals (Clint Miller, Joe Craine, and Bernie Witkowski or "Wyte") who dealt with WNJR under the style of an agency in each case (for example, "Clint Miller Agency") and thereby received the benefit of the usual advertising agency commission arrangement. Each of the

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five contracts covered a stated broadcast time segment (for example, the Levy agency arrangement was for the broadcast period 11 p.m.-2 a.m., Monday–Saturday); each expressed an agreement by the agency to purchase announcements for its advertisers in the specified time segment "so as to guarantee weekly revenue to WNJR" in a stated sum (e.g., $306) "produced by a guarantee of a maximum (specified number of) announcements in any given week," except that there would be a specified "maximum" number of "announcements in any given month; each provided that even though the agency did not broadcast the specified maximum number of announcements per week, nevertheless the weekly guarantee of revenue to the station "shall prevail"; and each provided too that the agency would not charge its advertisers for "station time" in the time segment involved, "in excess of the station time charged by WNJR." Under the various agency contracts, the agency party was authorized to retain a 15-percent commission from the specified weekly guarantee to the station mentioned in a particular contract. There was a clause in each of the five contracts reserving in the station the right of approval as to all advertisers and all continuity, including music, to be submitted by the agency, requiring the continuity to be submitted to the station at least 24 hours in advance of broadcast, reserving the right in the station "to place advertisers of its own, without consideration to" the agency, in the time segment covered by the contract, and authorizing cancellation of the agreement by the station upon 1 week's notice. There is no evidence that the station actually exercised its right under the five agreements to broadcast announcements on behalf of its own sponsors in any of the various time periods concerned.

10. In March 1964, upon the advice of Rollins' counsel, the home office instructed the WNJR manager to supplement the above-described "master contracts" with the agencies by individual contracts for each sponsor signed by an agency representative. These individual contracts contained a provision specifying a stated rate per announcement (e.g., $7.50) "subject to discounts earned as per agreement with * * * agency." This provision was construed by the station to place upon the agency the responsibility for not charging sponsors more for the time period in the aggregate than the weekly guarantee stated in the contract, and to require the agency to fashion a "sliding scale" of rates for announcements so as not to exceed this specified weekly sum. WNJR had no dealings with the individual sponsors and did not know what the actual charges paid by sponsors for announcements were. The evidence established that the various agencies did not always charge the rates specified in the individual contracts and in practice sometimes charged more than or less than these amounts. One of the so-called agencies (Witkowski) never charged his sponsors the specified rate of $9.70 per announcement. Another of the so-called agencies (Clint Miller) made "deals" with his sponsors; he charged either more or less than the specified rate of $7.50 per announcement in each individual contract. In the case of the "Jay Cee Agency," the rates charged varied from sponsor to sponsor.

11. The individuals or agencies who entered into the aforementioned five contracts with WNJR were responsible for: conducting the broad-

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casts; obtaining the advertising from sponsors; writing the copy; and billing and collecting from the individuals to whom they sold spot announcements and, in the case of Joe Craine who sold quarter-hour and half-hour segments of his program to churches, time segments. WNJR in turn received a flat rate for the broadcast time involved from the parties to the contracts irrespective of whether or not they were successful in realizing enough money from sales to sponsors to meet the stipulated weekly guarantee to the station less commission. In the case of at least two of the parties, namely, Joe Craine and "Jay Cee Advertising," each incurred deficits at times which were covered by their own payments to the station. As a principal for Essex Records (of which "Jay Cee" was a house agency) explained, his firm underwrote a substantial portion of the station's weekly charge for the show. A unique arrangement for payment to the station with respect to time purchased under one of the five contracts developed in the case of Clint Miller when, even after he was obligated to WNJR for weekly sums ranging above $320 and as high as $790, he still received as his commission only 15 percent of $320. Another individual, Bernie Witkowski, usually derived more revenue from the sale of spots than the weekly gross amount he was obligated to pay the station. In the case of the Levy agency, to generate revenue for its program, the agency sold both spots and quarter-hour segments to advertisers, and also engaged in per-inquiry advertising for several accounts for which it was compensated according to the number of "leads" resulting to a sponsor from announcements and not at a fixed rate per spot announcement broadcast.

12. The five agency arrangements (the so-called "master contracts") discussed above represented an historical evolution at WNJR from earlier oral or written arrangements for the purchase of broadcast time entered into by WNJR with Celebrity Consultants, Ltd., Clint Miller, Levy Advertising, Joe Craine, and Jay Cee Advertising. From the station's standpoint, the weekly guaranteed revenue figure under a particular contract was determined on the basis of the overall amount of revenue the station could expect to derive from the sale of time by it to various sponsors on the basis of the available advertising time in a given program time segment. Neither the operational executive for the Rollins' radio stations (Lanphear), nor the director of quality control at the home office (Crow), considered the master contracts to be time brokerage arrangements or violative of Rollins' policy. Wayne Rollins was not personally aware of the contractual arrangements for the five shows which the above-described master contracts covered. It was the view and advice of communications counsel for Rollins that none of these arrangements involved time brokerage contracts within the purview of section 1.613(c) of the rules. Accordingly, none of the five contracts in question were filed with the Commission within 30 days of execution. The significance of these arrangements to the operation of WNJR is seen from the fact that the station realized revenue under them totalling approximately $85,000 annually.

13. Commission decisions make it clear that WNJR's arrangements with Miller, Wyte, Craine, Levy Advertising Agency, and Jay Cee (which is Essex Records) were all time brokerage arrangements within

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the purview of section 1.613(c) of the rules and hence required to be filed with the Commission. *In the matter of liability of United Broadcasting Co. of New York, Inc., licensee of station WBNX, New York, N.Y.*, FCC 65–52, released January 21, 1965, the Commission, in considering whether certain agreements were brokerage arrangements, stated as follows:

> A time broker is simply one who buys time and then resells it to others. The time is the broker's to do with as he wishes and the risk is entirely the broker's since, if he cannot resell the time, he still is responsible for payment to the station of the agreed sum. Normally the broker has the entire responsibility for collection of money from the advertisers to whom he sells. In our opinion the contracts between the licensee and the individuals who broadcast the three foreign language shows in question reveal that these persons were time brokers. Each paid a certain sum weekly for the time involved, each used the time for presentation of programs prepared solely by him and each sought to make a profit by selling, receiving payment for and broadcasting commercial announcements for others. See *Metropolitan Broadcasting Corp.*, 8 FCC 557. The fact that the licensee appeared to retain (by contract) some vestiges of control over content of the programs is not controlling. *Metropolitan Broadcasting*, supra. It is of course, the licensee's obligation to retain control over program content at all times.
>
> Nor are we impressed by the other portions of the contract which tend to give the appearance of an employer-employee relationship between station and the time broker. A broker does not become an employee by a mere recitation of words. We are convinced that few if any of the essential elements of any employer-employee arrangement existed between the station and the individuals broadcasting the three foreign-language programs. The contract appears to be nothing more than an attempt, through manipulation of words, to avoid the requirements of former section 1.342(c).

14. In *liability of WGOK, Inc.*, 2 FCC 2d 245, 6 R.R. 2d 441, released October 29, 1965, the Commission was confronted with the question as to whether the practices of certain singing groups which broadcast over a station fell within the definition of time brokers as that term is used in section 1.613(c). It appears that the groups referred to in the WGOK matter were all composed of amateur singers who performed on weekends and Sundays as a hobby. These singing groups purchased the air time from the station not only for the air exposure but also to gain increased prestige and personal-appearance bookings. The method of payment for the air time varied but a substantial number of the groups paid the station a flat fee and resold a portion of their time to various advertisers. If a group of singers could not resell sufficient time to defray the cost of broadcast, the singers were required to make up the deficit out of their own pockets. In rejecting the licensee's contention that time brokerage is confined only to those instances where the broker expects to make a profit the Commission stated, in pertinent part (at p. 246):

> 6. In our opinion, the practices followed by WGOK fall squarely within the Commission's prior definitions of timebrokers. That the brokers might not always realize a direct profit from the resale of time does not alter our conclusion. The musical groups buy the time and resell it to others. Moreover, although the licensee alleges that it maintains complete control of the time brokered, such argument is of no decisional importance since it is the licensee's obligation to retain control over program content at all times. See *United Broadcasting Co., of New York, Inc.*, supra.
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> 7. In its response the licensee has advanced a number of arguments in mitigation, including the contentions that the licensee acted upon advice of

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counsel and that many other licensees are in violation of section 1.613(c) of the rules because of practices similar to those of WGOK. However, responsibility for compliance with the communications act and our rules rests upon each licensee.

15. The applicant here contends that Miller, Witkowski, Craine, Levy Advertising, and Jay Cee (Essex Records) were not time brokers but rather advertising agencies. It further contends that the agencies did not buy and resell time but rather purchased time on behalf of advertising sponsors. Moreover, the applicant relies on various provisions in the overall master contracts and the so-called individual contracts in endeavoring to sustain its claim that the various arrangements involved fall outside the realm of time brokerage. These and other contentions of the applicant cannot prevail when measured against the applicable principles enunciated by the Commission in the decisions on time brokerage cited above. As the Commission noted in effect in *United Broadcasting Co. of New York, Inc.*, supra, one who enters into an arrangement to pay a station a certain sum weekly for the time involved, who uses the time for the presentation of programs prepared solely by him, who seeks to make a profit by selling, receiving payment for and broadcasting commercial announcements for others, and is still responsible for payment to the station of the agreed sum if he cannot resell the time—he is a time broker. In the present case, the individuals and entities concerned did not deal with WNJR as agents buying time for others but as principals who initially purchased the time themselves. This is crystal clear from the fact that each party to an agreement with the station assumed the obligation to pay WNJR a fixed sum of money for a specific period of broadcast time and this obligation prevailed without reference to the extent of sponsorship that was actually obtained. The reference in each master contract to a "guarantee" of weekly revenue and the retention of a 15-percent commission based on the guarantee figure were illusory features of the arrangement from the standpoint of creating an agency rather than a time broker relationship. For, under a true agency arrangement, the commission would have applied equally to any excess revenue collected over the minimum guarantee. Secondly, the assumption of a fixed weekly obligation to the station by the so-called agency is wholly incompatible with the concept of an advertising agency in the accepted sense. In this connection, it is significant that WNJR never looked to any individual sponsor to pay it for advertising, and there is not a scintilla of evidence that the station regarded an individual sponsor as being obligated to it. Indeed, the specific rates stated in the so-called individual contracts were demonstrably fictitious in view of the testimony of Miller, Craine, Witkowski, and Ladell (of Jay Cee) that such rates were not observed by them. The circumstance that WNJR recognized the parties to the five contracts as agencies or even identified them as agencies in contracts did not, as the Commission emphasized in *United Broadcasting Co.*, with regard to an asserted employer-employee relationship there, make them something other than time brokers. In the Commission's words, "A broker does not become an (agency) by a mere recitation of words." Furthermore, maintenance of control by the station over program content "is of no

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decisional importance since it is the licensee's obligation to retain control over program content at all times." (Ibid.) Similarly, it is of no moment to the determination on the time brokerage question here that the licensee acted upon the advice of counsel in not regarding the arrangements under consideration herein as time brokerage. See, *WGOK, Inc.*, supra. Thus, the conclusion is inescapable that the licensee entered into five time brokerage contracts between May 1963 and March 1964. Moreover, the licensee wilfully and repeatedly violated section 1.316(c) of the rules by failing to file each of these contracts with the Commission within 30 days of its execution. It is not amiss to point out, as the Broadcast Bureau has done, that the introduction of time brokerage into the WNJR operation much before 1963, although not within the ambit of the violations of section 1.613(c) charged against the licensee in this proceeding, sowed the seeds for the difficulties which plagued the station as the result of the operation of the "Celebrity Time" program under such an arrangement. Indeed, had WNJR not engaged in time brokerage arrangements, there might well never have been a forfeiture proceeding or the instant renewal proceeding against the licensee. As the present case so well illustrates, while there is no illegality in time brokerage per se under the Commission's rules, a licensee which enters into a time brokerage arrangement should reckon the possible undesirable consequences from the standpoint of maintenance of the proper control over its station's affairs. In light of the ruling herein that the five contracts were time brokerage arrangements, it also follows that the similar agreements with Celebrity Consultants, Ltd., for the "Celebrity Time" program were of the same character.[61]

Issue 4—Logging and sponsorship identification violations

A. *Failure to properly maintain program logs*

16. Sections 73.111 and 73.112 of the Commission's rules require in essence that broadcast stations shall maintain accurate program logs in such detail that the data required for the particular class of station concerned is readily available. During the licensee period under consideration, the Rollins' home office was repeatedly made aware that accurate program logs were not being maintained by WNJR. This knowledge was acquired as a result of the periodic monitors made on the station's broadcasts and Crow's examination of WNJR program logs. The findings demonstrate: numerous instances where the length of commercials were incorrectly reported in the WNJR program logs (pars. 146, 148, 149, 150, 152, 154, 156, 166, 168, 171, and 175); instances where commercial announcements were not logged (pars. 146, 152, 154, 157, 159, and 175); instances where announcements were logged at times other than the actual time of broadcast (pars. 157, 175); and instances (two) where the logs contained a forged signature in the operator's column (par. 120). The aforementioned logging in-

[61] The examiner does not construe the arrangements entered into by Soriano with the freelancers on "Celebrity Time" as constituting additional time brokerage contracts made by WNJR since Soriano was dealing with them on behalf of Celebrity Consultants, Ltd., who had existing contracts with the station, either written or oral, at all times. The fact that Soriano collected funds from the freelancers which he turned over to the WNJR manager did not make the station a party to any time brokerage agreement with them since the agency head, King, authorized this procedure by Soriano.

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fractions were committed between August 1961 and December 1964 and require the conclusion that the licensee repeatedly failed to comply with the provisions of sections 73.113 and 73.112 of the rules due to the failure of WNJR to properly maintain program logs as described above.

17. Moreover, the findings show (pars. 137–138) that no logs at all were maintained for a substantial number of the "Celebrity Time" broadcasts. As early as December 1961, the Rollins' home office became aware that for over one-half hour the log had not been maintained for "Celebrity Time" on the date of November 30, 1961. Despite the manager's assurance that the log for the program would be maintained, for the succeeding 9-month period the program log was not maintained during the "Celebrity Time" segment on 64 days, for 28 percent of the broadcasts. Additionally, during the same period, on the logs for 45 percent of the "Celebrity Time" broadcasts no elapsed time was shown for one or more commercial announcements per program. Furthermore, the logs were not maintained contemporaneously with the broadcast during the period in question for about the same percentage of time as last mentioned. Even after the announcer to whom these logging derelictions were attributable was no longer responsible for logging duties at WNJR, there were several occasions in the succeeding month when no contemporaneous log of the commercial announcements broadcast on "Celebrity Time" was maintained (par. 139). The logging deficiencies detailed above constituted further violations of sections 73.111 and 73.112 of the rules.

B. *Failure to make proper sponsorship identification*

18. Section 317(a)(1) of the Communications Act of 1934, as amended, provides, in pertinent part, as follows:

> All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting from any person shall at the time the same is so broadcast be announced as paid for or furnished, as the case may be, by such person * * *

The Commission has expressed the rationale underlying the enactment of the above equated statutory provision requiring sponsorship identification as follows (28 F.R. 4732):

> With the development of broadcast service along private commercial lines, meaningful government regulation of the various broadcast media has from an early date embraced the principle that listeners are entitled to know by whom they are being persuaded.[62]

19. To implement the statutory policy, the Commission has adopted section 73.119 (a) and (b) of the rules which read as follows:

> (a) When a standard broadcast station transmits any matter for which money, services, or other consideration is either directly or indirectly paid or promised to, or charged or received by, such station, the station shall broadcast an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied * * *

[62] This statement appears in connection with the Commission's release of 36 illustrative interpretations with respect to the applicability of the sponsorship indentification rules (28 F.R. 4732 et seq.).

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(b) The licensee of each standard broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for broadcast, information to enable such licensee to make the announcement required by this section.

20. As noted in the findings (par. 35), some of the freelancers who appeared on "Celebrity Time" were in fact paying for all or part of the sums charged for their segments of broadcast time from their own pockets. But in these cases no announcement was made by the station to identify the individual who bore the burden of the deficit incurred for his time segment as a sponsor on the program. The Broadcast Bureau asserts WNJR was required by section 317(a)(1) of the communications act to announce that the freelancers who contributed toward payment of program time were sponsors. The Bureau's position apparently rests on its interpretation of the statutory provisions and regulation quoted above since no Commission decision or other source of construction has been cited by way of authoritative precedent. Viewing the question then as one of first impression, the examiner has great difficulty with adopting the Bureau's interpretation of section 317(a)(1) of the act as applied to the payments made by freelancers toward all or a portion of the station's charge for program time. Unquestionably, there was payment made indirectly to the station by various freelancers in connection with their appearances as announcers for "Celebrity Time" programs. However, the payment was not made for matter broadcast by WNJR (e.g., commercial announcements or the playing of some particular records in which there was a promotional interest). At most, the freelancers were interested in obtaining personal exposure on the air. Bearing in mind both the purpose of the enactment of section 317(a)(1) and considering its phraseology, the mere appearance and participation in diskjockey type programs by the freelancers do not in the examiner's view constitute the broadcast of "matter" which comes within the scope of the sponsorship identification provisions of the act and section 73.113(a) of the rules. Resort to the official interpretations of the pertinent statutory provisions and regulations (28 F.R. 4732) bolster this conclusion. Thus, it is stated in footnote 3 to the interpretations (28 F.R. 4733) that if there is payment to the broadcasting station for the exposure of service or property, a sponsorship identification announcement is required. Also, interpretation 20 (ibid.) indicates no such announcement is required where a well-known performer appears as a guest artist on a program at union scale because the performer likes the show, although the performer normally commands a much higher fee. Obviously, a performer appearing on any show is not wholly disinterested in the incidental benefit to be derived from exposure to a listening audience. The examiner concludes, from consideration of both the language of the sections of the act and rules on which the Bureau relies, that the appearances of freelancers on "Celebrity Time" programs under circumstances involving contribution by them, either in whole or in part, toward payment of the program time charge made by WNJR did not require sponsorship identification announcements by the station, and that no violations of the pertinent

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provisions of the act or rules resulted from failure to broadcast any such announcements.[63]

21. It has been further found that the parties to three different time brokerage arrangements with WNJR on some occasions also did not receive sufficient revenue from sponsors to cover the station's charge for program time (pars. 119, 127, and 129). When this happened, they *too* took care of the deficits incurred under their contracts with WNJR by making the required payments to meet their total weekly contractual obligations from their own pockets. In the case of Joe Craine, since the only benefit he derived from his broadcasts over WNJR when he personally contributed toward payment of program time was his exposure as an announcer, no sponsorship identification announcement by WNJR was required for the reasons indicated in the preceding paragraph herein. Similarly, in the case of the Levy Advertising Agency, under the examiner's construction of the sponsorship identification provisions of section 317(a)(1) of the act and section 73.119(a) of the rules, no sponsorship identification of Levy was required on those programs where this agency paid for a portion of the program time; no "matter" within the meaning of this term as employed in the act and rules was broadcast by WNJR on behalf of Levy. Here again, it may be added that it does not appear WNJR was aware Levy was underwriting a portion of the particular programs when this took place. Finally, in the case of Jay Cee Advertising (Essex Records), the examiner concludes that sponsorship identification of Essex Records by WNJR was required for those programs the charge for which was sustained in part by Essex. For Essex underwrote these broadcasts in order to promote the sale of records and supplied records of its own selection to be played on the air. Hence, Essex was in effect paying WNJR to broadcast records in the sale of which it was interested as a distributor. This situation was one in which, under the illustrative interpretations (i.e., interpretations 1 and 2, 28 F.R. 4733) issued by the Commission, Essex Records should have been identified on the air as a sponsor of the programs conceived. In fact, the record reflects (par. 128 of findings) that WNJR explicitly recognized the sponsorship role of Essex Records in the programs broadcast under the Jay Cee Agency contract with WNJR at least until July 1964, and made announcements thereof. However, it has also been found that upon instructions from Crow to the WNJR manager given in July 1964, the sponsorship identification was discontinued and a 5-second "disclaimer announcement" indicating only that the records heard had been furnished by Essex Records was made at the end of the broadcast. Since Crow, after having discussed the situation with the WNJR manager, was still unaware of the financial participation of Essex in its programs, any violations committed by reason of the omissions of the sponsorship identification announcements were patently unintentional. The further fact that a different announcement continued to be made—

[63] An additional consideration against holding that sponsorship identification of contributing freelancers appearing on "Celebrity Time" was required is that WNJR did not know to what extent, if any, these individuals were personally paying to appear on the air since their arrangements to participate in the program were made in effect with the Celebrity Consultants' agency which Mr. Soriano, a station salesman, represented. WNJR took no part in financial dealings with these freelancers and any payments made by them to Soriano or left with a station employee were credited to Celebrity Consultants.

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one at the end of each program identifying Essex as the source of the records played thereon, affords an additional reason for concluding that the violations of section 317(a)(1) of the act were inadvertent. The examiner concludes, moreover, that the discontinuance of the Essex sponsorship identification also did not involve a violation of section 73.119(b) of the rules which required licensee to exercise "reasonable diligence" to obtain either from its employees or Essex Records information that would have enabled it to continue to make the sponsorship identification of Essex. Since there were also other sponsors for the show, it cannot be found that Crow's directions to the station manager, based on Crow's discussion of the matter with him, resulted from the failure of Crow to exercise "due diligence" under the circumstances. Accordingly, the record does not warrant a holding that the licensee violated section 73.119(b) of the rules with regard to the "Mr. Blues Show" programs broadcast under the contract with Jay Cee (Essex Records).

22. The Bureau has also argued that the licensee violated the sponsorship identification requirements even in those cases where it does not appear that a freelancer personally paid a portion of the charges for broadcasting his shows. It is true that the examiner has held Clint Miller and Bernie Witkowski (Wyte) entered into time-brokerage arrangements with WNJR and purchased broadcast time as time brokers from the station. But this conclusion does not per se call for a further conclusion that they should have been announced as being sponsors of their programs. Indeed, the examiner perceives no basis in the provisions of section 317(a)(1) of the act or of section 73.119 of the rules for concluding, as urged by the Bureau, that the fact that Miller and Wyte were making payments to the station for the broadcast time afforded by WNJR for their programs in and of itself required an announcement thereof. Accordingly, it follows that there was no violation committed by WNJR in failing to make any such announcement in the case of the Miller and Wyte programs.

Issue 3—Adequacy of control exercised over WNJR by principals of licensee

23. In *Eleven Ten Broadcasting Corp.* 32 FCC 706 (1962), the Commission stated (at p. 708): "Only by holding a licensee responsible for the operation and management of a station, and only by insistence that the reins be held by the licensee, can there be reasonable assurance of responsible station operation and management." Moreover, as has been observed by the Review Board in *The Prattville Broadcasting Company*, 4 FCC 2d 555 (1966): "The degree of responsibility imposed and the standard of conduct required by the Commission are the same for all licensees, irrespective of their form or the relative size of their operations." We turn now to the question of whether the principals of the corporate licensee exercised adequate control or supervision over the operation of WNJR in a manner consistent with the licensee's responsibility during the most recent license period dating from February 1961.

24. It is beyond dispute that the corporate licensee instituted and maintained a variety of control measures in the effort to insure com-

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pliance by WNJR with Commission regulations and enunciated policies of the licensee. Wayne Rollins, the licensee's president, primarily relied on Lanphear, vice president in charge of radio stations operations for the Rollins' organization, and Crow, director of quality control for the Rollins' stations, to achieve the desired objective of proper operation by WNJR. Both Lanphear and Crow had backgrounds of experience in the radio broadcasting field. It is particularly noteworthy that Lanphear, who was appointed the operational head for the Rollins' AM stations in 1960, had himself previously served as the station manager of WNJR from the time of its acquisition by Rollins in 1953. Moreover, it was Lanphear who first hired and later recommended the managerial appointment of the individual who succeeded him as general manager at WNJR and held this position from 1960 until the end of 1964.

25. In May 1961 Wayne Rollins created a quality control department under the directorship of Crow. Crow was given specific responsibility for supervising program content of the Rollins' stations' broadcasts and for insuring adherence to Commission rules and Rollins' station policies by the Rollins' family of stations. Crow was instructed by Wayne Rollins to devote the major portion of his time to supervising program content of the stations. At Wayne Rollins' direction, Crow prepared an operating manual covering all facets of station operation in great detail and setting forth the Rollins' policies and standards of operation as well as pertinent Commission regulations and policies. This voluminous guidebook for the conduct of station affairs (WNJR Ex. 8 in the record) was distributed to all station managers in September 1961, and was thereafter updated by the issuance of revisions from time to time (WNJR Ex. 9). The Rollins' stations were also supplied by Crow with selected FCC public notices and FTC alerts, together with his explanatory memorandums, when he considered them necessary for the stations to have.

26. More direct control measures utilized by Crow were: the periodic monitoring of station broadcasts by a person not employed within the Rollins' organization and conducted without advance knowledge to the stations; comparison by Crow of the data compiled by the monitoring person with the program logs for the station: the reporting by Crow to the station managers of discrepancies disclosed by the foregoing procedures and investigation and reply reports to Crow (explanations of discrepancies and any corrective action proposed) by the station managers. Between February 1961 and October 1964, some 22 monitors of WNJR including, inter alia, recording the beginning and ending times of commercial announcements and the names of sponsors, each monitor usually involving a 16-hour composite period spread over 3 days, were conducted. In addition to this continuing monitoring program, Crow also personally conducted occasional "operations audits" of WNJR [64] involving taping of programing, examination of logs and contract files, and other inspection procedures applied to the station's operations. In addition to the above measures, to forestall

[64] The record shows that three such audits were conducted by Crow between September 1962 and December 1964. On at least two of the audits he was accompanied by the Rollins' controller.

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"payola" at WNJR, a periodic monitor of music selections was conducted and monthly payola affidavits from staff air personnel were required. The record indicates further that Rollins and Lanphear received copies of the reports on the monitoring results and of followup memorandums and other correspondence containing instructions sent by Crow to the WNJR manager, and that Rollins received copies of reply memorandums to Crow from the station manager. The operational head for radio stations, Lanphear, made periodic visits to confer with the WNJR station manager and also kept in touch with him by telephone. Occasionally, Wayne Rollins, himself, called the WNJR manager on some particular matter of concern to Rollins. Since Rollins had his office in the Wilmington headquarters close by Crow and Lanphear's quarters, they were readily accessible to him for consultation on station problems when desired.

27. The continuing monitoring and operations audit procedures employed by the licensee with respect to WNJR as control devices served to disclose the numerous logging violations committed by way of inaccurate reporting of the times consumed by announcements and the failure to report certain spots, and also the many infractions of licensee's policy of generally keeping commercial announcements within 60 seconds each. Armed with the knowledge secured by these means, Crow was unceasing in his efforts to correct these discrepancies. After a while, the constant prodding of the station manger who in turn resorted to various aids (e.g., a stopwatch for announcers and taping of some announcements) eventually resulted in a significant diminution of the inaccurate logging and excessive length of spots. Later, however, the situation showed a turn for the worse, at which point the manager was demoted. It is indeed ironic that the licensee's instruments of control produced the main body of solid and irrefutable evidence in the hearing as to the logging violations and lengthy spots as well as various other infractions of licensee policies (to give but one example of the last mentioned: triple spotting, or the broadcast of three commercial spots in a row). It was in the course of Crow's operations audits of WNJR too that the Rollins' home office first learned that there were persons broadcasting over WNJR whom Crow judged to be "rank amateurs"—a matter offensive to Rollins' policy (par. 157, supra), and that there was a well-established practice of broadcasting several repeats of previous shows including the repeat of a 3-hour nighttime program in the same week—practices which the Rollins' home office never authorized and would not countenance except to a limited extent (pars. 172–173, supra). Since there is no claim made as to any "payola" violations by WNJR, it must be inferred that the preventive and monitoring measures in this area were effective.

28. The above-described control and supervisory activities of those in the Rollins' home office did not suffice to prevent serious violations of Commission rules and Rollins' policies as well as misconduct by station employees which reflect adversely upon the renewal applicant. Thus, it has been found that on the "Celebrity Time" program there were 64 days between January 1 and September 25, 1962, when the WNJR program log was not maintained. Moreover, during this same period, there were numerous instances when no elapsed time for a

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commercial announcement on "Celebrity Time" was shown but only the beginning time thereof. This particular logging violation was committed on 103 of the "Celebrity Time" programs. Further, between January 1962 and March 1963, there were many occasions when a contemporaneous program log for the "Celebrity Time" program was not maintained. In 1964 it was ascertained through a WNJR station audit that the program log entries for repeat programs did not contain the word "tape" as required to indicate the fact of rebroadcast. For these same programs, the staff announcers on duty when there were repeat broadcasts failed to time the announcements as the tape progressed and merely copied the times shown for them on the log in connection with the original broadcast. This practice resulted in violations of the Commission's logging rules since it failed to reflect just when the announcements were delivered on the replay broadcasts. Such disregard for the requirement of accuracy in logging evinced an attitude of sheer indifference to the logging rules. Similar irresponsibility with respect to logging requirements under the rules is found in the act of a WNJR staff announcer who, in October 1964, prelogged entries in the program log one evening when he found it necessary to leave the station temporarily. The prelogged entries were detected the same evening by a Commission inspector who visited the station, and violations of the rules were narrowly averted when another announcer on the premises made the proper log entries in the absence of the staff announcer and crossed out the earlier entries of his colleague.

29. As has been found, the WNJR manager received a copy of the instructions sent by the quality control director to all Rollins' station heads directing that a separate contract for advertising be obtained with respect to each sponsor. The required contract could be signed either by a sponsor or by an agency in the sponsor's behalf and acceptance thereof was to be made by the station manager's signing it. The instructions of the home office were not followed in the case of most sponsors on the "Celebrity Time" program. The freelancers who obtained their own sponsors for the "Celebrity Time" show were permitted to submit contract forms written up in a bewildering variety of ways, and none of these documents were signed by the station manager to indicate acceptance of the advertising for broadcast until long after they had been turned in to the station. Thus, the documents were not contracts but at best memorandums of arrangements for advertising with sponsors. Moreover, the lack of uniformity and the improper manner of preparation in a good many instances subsequently led the WNJR manager to withhold the documents from Commission investigators and to have them redone at a still later time without the knowledge of the Rollins' home office. In addition, the manager represented to the home office that he had a complete file of contracts for "Celebrity Time," each in proper form as instructed, and Wayne Rollins in turn so represented to the Commission in a pleading filed in opposition to a proposed forfeiture. At no time, however, was there any reasonably careful inspection of the "Celebrity Time" documents file made by the home office to ascertain if WNJR was obtaining contracts for "Celebrity Time" in the form required

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under the home office instructions. In September 1962 the quality control director was shown some of the documents for the so-called agency shows which the Rollins controller had found were "not complete and accurate." There is no evidence to establish that such documents were part of the "Celebrity Time" file. In any event, if Crow had made a review of the entire "Celebrity Time" file at that time, the variety of information in the documents representing advertising obtained by the freelancers and the pronounced difference in appearance between them and the eight contracts in proper form obtained by the station manager from the Celebrity Consultants agency head would immediately have signaled to him that the home office instructions had not been followed. Certainly he could not have failed to see too that the WNJR manager's signature did not appear on a single contract form. So far as appears from the record, the Rollins' home office did not examine the "Celebrity Time" contracts file for any purpose after September 1962. In the case of documents representing advertising arrangements for sponsors on the Clint Miller, Witkowski, and Jay Cee Agency shows, the WNJR station manager similarly failed to sign the documents turned in to the station so as to indicate WNJR's acceptance of the advertising. Hence, those documents also were not contracts, as contemplated by the Rollins' home office in its instructions.

30. A number of violations of Rollins' station operating policies were disclosed through the monitoring of WNJR by Commission personnel in the fall of 1964. Specifically on the Clint Miller programs of September 12, 22, and 23, there were four infractions by Miller of the Rollins' policy which in effect prohibited the playing of records in association with spot announcements referring to the appearance of artists whose records were being broadcast on the program. It was also revealed by the Commission monitoring conducted on the same three dates that on 10 occasions Miller violated the Rollins' policy prohibiting reference to outside events when playing a record. The record also reflects at least one known instance on the "Celebrity Time" program when a freelancer made an unpaid announcement concerning an appearance of another freelancer's band at a dance, and another freelancer, at the suggestion of this bandleader played one of his records as a program ending theme. It appears moreover that while the station had a policy of broadcasting a certain type of music, which the staff announcers were required to observe in playing records on their programs, several of the freelancers on "Celebrity Time" were permitted to play whatever style of music they preferred.

31. The listening public was not assured of a desirable broadcast service from several aspects of the manner of operation of WNJR in the period under consideration. It has been shown that the changing parade of freelancers who appeared on "Celebrity Time" were not auditioned prior to their initial broadcasts and most of them possessed little or no previous broadcast experience. As was to be expected, the procession of neophytes was not calculated to provide the level of competence Rollins expected from its announcers and so the performances of at least two of them while on the air elicited from the

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Rollins' quality control director the dubious distinction of "rank amateurs," admittedly not a classification of performer acceptable under the Rollins' policy. It further appears that there were times when advertising copy was broadcast over WNJR on "Celebrity Time" programs which was not first examined by the staff announcer on duty to insure the material was in keeping with station policies on commercial content broadcast. Also, the inclusion of many commercial announcements of excessive length contrary to the station's own policy necessarily detracted from the entertainment value of programs on the station's schedule generally. Finally, the nadir in programing service emanating from WNJR appears to have been reached when the identical half-hour program was broadcast five evenings in the same week. It is questionable whether the service provided by the station was much better when 3-hour programs broadcast on Wednesday and Thursday were again repeated on tape on Friday and Saturday of the same week. Moreover, despite an understanding between the station manager and the announcer on the program not to repeat such a program more than one time, a particular 3-hour program was not only rebroadcast on November 25, 1964, but also repeated on November 26 and 28, and December 1.

32. The extensive catalogue of violations of Commission's rules and of the licensee's own rules, directives and standards in connection with the operation of station WNJR unfolded above and which events occurred during the period 1961–64 permit of but one conclusion. Notwithstanding those measures of control and supervision over the station's operations which were applied by the licensee, the unsatisfactory record of performance by the station as manifested in the derelictions shown in the way of misconduct of employees, the numerous violations of Commission's rules and the various transgressions of Rollins' policies require a finding that the licensee's principals did not exercise adequate control or supervision over the station in a manner consistent with the licensee's responsibility during the period under consideration herein. It is not enough that a licensee should issue instructions, detect infractions, make occasional visits, and engage in endless correctional correspondence with its station manager. The licensee of a broadcast station has the paramount obligation to apply effective measures to forestall violations and, in those instances where they nevertheless do happen despite reasonable preventative measures, to take additional steps as required to assure against any recurrences. This obligation the licensee herein obviously failed to discharge. In this connection, the examiner is constrained to point out that the evening hours period of operation at station WNJR received not alone from the station manager but also from the principals of the licensee far less direct supervision than was required in order to maintain proper control. A staff announcer on evening duty at WNJR was no adequate substitute for a station executive on the premises then; similarly, monitoring the station's broadcasts from a remote location could scarcely accomplish by way of effective supervision and correction what the presence of home office officials at the station itself for several days at a time would have done. From a consideration of the findings above, the examiner is left with an over-

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whelming impression, and indeed concludes, that the evening broadcast period of WNJR was in practical effect relegated by the licensee's principals to a position of minor importance in the station's operation and it did not receive from them that measure of attention it both deserved and required.

Issues 6 and 7—Qualifications and renewal questions

33. It must now be determined whether, in light of the conclusions reached above, Continental Broadcasting, Inc., has reflected the necessary qualifications to continue to be the licensee of station WNJR. Those conclusions reflect that the manager of WNJR evinced a serious lack of candor in not making available to Commission investigators for inspection during an official Commission investigation the complete file of "Celebrity Time" documents in his custody. On the same occasion, the manager was also guilty of a misrepresentation in stating to the investigators that certain financial records were not at the station. The untrue statement by him was harmless in ultimate effect since the manager, who believed he lacked authority to make the records available, did direct the investigators to the licensee's home office where copies of the records in question were maintained and disclosed. Also, as has been determined above, the investigators were able to accomplish their immediate purpose of ascertaining whether WNJR had engaged in double billing, notwithstanding the station manager's failure to not make available for inspection the entire file of documents in his possession. However, the effect of the manager's reprehensible conduct in this respect was to conceal from the investigators information to which they were entitled under the circumstances. It should be noted that the actions of the WNJR manager during the investigation in question (March 1963) were not taken under any authority from, or with the knowledge and consent of, the licensee's home office in Wilmington, and he proceeded entirely on his own with respect to these matters.

34. As the conclusions indicate further, the WNJR station manager caused to be prepared by a WNJR salesman a large number of spurious documents which the manager turned over to Commission investigators in April 1964 as being original individual "contracts" which had been received by the station in connection with the "Celebrity Time" program. The falsification of these documents, which duplicated in part information from other documents received from freelancer salesmen-announcers on "Celebrity Time," was initiated in a period when the manager was under severe emotional stress caused by personal problems as indicated in conclusions above. Here, too, the WNJR manager undertook to have the bogus file of documents prepared, and also made the decision to palm them off to Commission representatives as originals, without the knowledge or consent of the licensee's home office officials. The licensee not only was not a party to the manager's duplicity but was also a victim thereof. As has been observed above, the licensee here cannot avoid responsibility for the misconduct of its station manager in dealing with the Commission. Nevertheless, in making a judgment as to the licensee's qualifications to retain the status of a licensee, it is important to bear in mind that the WNJR

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manager was not a "principal" of the licensee. His stock ownership during his managerial tenure varied between 800 and 5,100 shares in Rollins, Inc., the parent corporation of the licensee herein. Thus, his interest in the licensee, by virtue of his equity in Rollins, was always less than two-tenths of 1 percent. In addition, he was never an officer or director of the licensee corporation or of Rollins, Inc. Essentially, then, the individual who knowingly perpetrated the wrongful acts of misrepresentation in dealings with the Commission was an employee of the licensee corporation, and whatever policy functions he exercised as the manager had been in effect delegated to him by the Rollins' home office. He was always subject to the directions and orders issued to him by the home office, and the fact that he was a stockholder held no particular significance for the licensee when the decision was reached by Wayne Rollins, president of the licensee, to remove the manager from this position at WNJR.

35. Although it has been concluded that the factual statements contained in a sworn response executed by Wayne Rollins and submitted in opposition to a forfeiture notice were largely inaccurate, it has also been found that neither Rollins nor the other home office officials of the licensee were guilty of making any intentional misrepresentations in connection with the filing of the response with the Commission. At most, there was some negligence on the part of Rollins' subordinates in the inclusion of an erroneous statement as to when contracts with an agency had terminated, and, at worst, only a very minor degree of culpability—and certainly not anything in the way of a serious misrepresentation—can be attributed to a subordinate of Rollins for the inclusion of a footnote statement which failed to reflect a reduction for a period of about 3 months in the weekly charge made by the station for the "Celebrity Time" broadcast periods. Rollins had no purpose to mislead or deceive the Commission in any way when he signed the response and he is not chargeable with either misconduct or irresponsibility in connection with the episode of the filing of the response.

36. Despite the strenuous contentions of counsel for the licensee to the contrary, it has been concluded that the licensee violated section 1.613(c) of the rules by failing to file a number of contracts, held by the examiner to be "time brokerage" arrangements, with the Commission within 30 days of their execution. In mitigation of the violations, it is true that the contracts in question were not filed upon the advice of Rollins' counsel. Moreover, the Rollins' company has always had a stated policy against time brokerage arrangements and none of the home office officials has conceded that the arrangements covered by the particular contracts constituted the brokerage of time. Several decisions by the Commission rendered in the recent period commencing in January 1965, have persuaded the examiner that the five contracts in question qualified as agreements for the sale of time to "time brokers." However, these agreements were executed before 1965, and the examiner recognizes the merit in counsel's contention that earlier rulings did not as a body of precedent provide the clearcut guidance required by communications counsel for the formulation of opinions as to the existence of time brokerage which would not later come back to haunt their clients.

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37. The conclusion has been reached that for a period of about 5 months (July–December 1964) there were unintentional violations of the sponsorship identification requirements of section 73.119(a) of the rules by WNJR with respect to a single sponsor—Essex Records. Further, these violations were not accompanied by any violation of section 73.119(b) of the rules since the failure to make the required identification announcements for this sponsor did not result from a lack of due diligence on the licensee's part under the circumstances noted above (par. 21, supra).

38. During the nearly 4-year period of WNJR operation under consideration, there were numerous violations of section 73.111 and 73.112 of the rules resulting from the failure of WNJR personnel to maintain accurate program logs. The Rollins' home office was apprised of the persistence of these violations through its periodic monitoring of WNJR and its examination of WNJR program logs. It struggled interminably with this problem at WNJR and never quite licked it. There is evidence that the solution was hampered by employee resentment of the unremitting criticism received from the home office which was regarded by the announcers as unwarranted, and that the provisions of union contracts with announcers precluded drastic disciplinary action by the station. These considerations, of course, afford no excuse for the violations and do not relieve the licensee of its responsibility therefor. But, in considering the significance of the logging violations in the instant case in regard to the question of licensee qualifications for a renewal, the following statement of the Commission's Review Board in *West Central Ohio Broadcasters, Inc.;* 9 R.R. 2d 739, 741 (1967), at f.n. 4, is instructive:

> * * * Support for the proposition that logging errors by announcers are a problem shared by many of the Nation's broadcasters may be found in the fact that such errors have been revealed on numerous of the Commission's records. For example, in Community Broadcasting Service, Inc., 2 FCC 2d 53, 6 R.R. 589 (1965), each of the two applicants involved were shown to have had the problem; however, there being no "intent to falsify the logs or to otherwise deceive the Commission", the Board followed the Commission's policy of leniency in such situations.

While some of the logging violations committed in the case at hand were of a more aggravated nature than those which were found in the *Community Broadcasting Service, Inc.* case cited by the Review Board, the fact remains that there was no intent on the part of either the licensee's home office officials or the WNJR manager to falsify the logs or otherwise deceive the Commission. Those logging infractions which did occur at WNJR were never authorized or condoned by the licensee and they repeatedly drew the fire of the home office in memorandum after memorandum. Clearly the licensee here neither acquiesced in nor encouraged the logging violations committed by the WNJR announcers. Accordingly, the licensee is entitled in this proceeding to the benefit of the Commission's policy which recognizes that accurate logging has posed an operational problem for even the well-intentioned broadcaster.

39. The further conclusion has been reached above that the licensee did not exercise adequate control or supervision over the operation of

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WNJR during the most recent license renewal period (1961–64). Yet, it cannot be said that the failure of the licensee to hold a tight rein over its station was marked by disinterest in or total lack of attention to the manner in which the affairs of the station were conducted. Rather, as has been previously indicated, the measures of supervision exerted by the station were inadequate and ineffectual to maintain the degree of control required to prevent violations of Commission rules and the licensee's policies. Undoubtedly, in this case the licensee's shortcomings in the control area are inextricably bound up in the failings of the WNJR manager. It is apparent that he repeatedly did not competently execute the duties of his position, and his performance as a manager left much to be desired. Conceivably, his personal problems during the period diverted his full attention from his job or else there were too many duties required of him as an individual charged with responsibility for directing all the operations of a station (sales, programing, etc.) in a very large metropolitan market. Whatever the precise reasons, he did not succeed in the satisfactory management of the station. As Rollins acknowledged in his testimony, the difficulty was in the personnel at the station, and so in December 1964, he finally brought an end to the trouble-ridden administration of WNJR by removing the manager from the helm. At the same time, Rollins directed that the contracts which had given use to the time-brokerage question be eliminated. In the examiner's view, this measure too was a further desirable step in the direction of strengthening licensee control over WNJR. In addition, the licensee has since taken a firmer stand against manifestation of announcer disregard of operating rules and policies.

40. As has been noted above, the licensee's failure to exercise adequate control over WNJR had some adverse effects upon the station's program service. But the record bears out that at no time did the station receive any complaint from a member of the radio audience about its programing. In this connection, the record indicates that the program "Celebrity Time," even when presented by freelancers of amateur standing, enjoyed considerable popularity among that segment of the metropolitan listeners to whom it was primarily directed. There is no evidence of dissatisfaction with any other aspects of the station's operations on the part of a member of the public. It is noteworthy too that the home office required monthly reports on the volume of public service programing accomplished by WNJR; each report was sufficiently detailed to show a daily tabulation of the public service program and announcements carried by the station in the month reported on.

41. Continental Broadcasting, Inc., the licensee of WNJR, is a wholly owned subsidiary of Rollins, Inc., a public corporation whose stock is listed on a major exchange. O. Wayne Rollins, the president of Rollins, Inc., and also of the licensee corporation, has owned about 48 percent of voting stock in Rollins, Inc. since 1960 and together with his family has effective voting control of this corporation by virtue of their combined 67 plus percent ownership of the voting stock thereof. Rollins actively assumed and exercised the ultimate responsibility for the operation of WNJR during the most recent renewal period (1961–

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64) under consideration in connection with the hearing issues in this proceeding. He undertook to discharge this responsibility in concert with: Albert L. Lanphear, then Rollins' executive vice president for radio operations and also a vice president of Continental, Inc., and whose stock ownership in Rollins was somewhat less than 2,000 shares (less than one-tenth of 1-percent ownership interest), and Howard Tim Crow, director of the Rollins' quality control department and owner of less than 2,500 shares in Rollins, Inc. (also less than one-tenth of 1-percent ownership interest in this corporation). In a realistic view, these three individuals were the persons most importantly involved in directing the operations of station WNJR on behalf of the licensee corporation. The individual charged with responsibility for directing the day-to-day operations of the station was Leonard Mirelson, the station manager employed by the licensee, whose stock ownership in Rollins, Inc., has never exceeded 5,100 shares and thus has been less than two-tenths of 1 percent of the total ownership interest in this corporation. Judging by the importance of their respective roles in exercising control and supervision over the operation of WNJR, only the three first mentioned individuals are to be considered principals of the licensee corporation. The station manager, on the other hand, cannot be regarded as a principal of the licensee either by virtue of his ownership interest in Rollins, which was insignificant in terms of total stock, or of his position at WNJR which was that of the top employee in the station. The record reflects that whatever authority he did possess was subordinate to and exercised subject to that of the three above-named individuals in the licensee's home office at Wilmington.

42. It has been concluded that none of the above-identified principals of the licensee was guilty of making intentional misrepresentations to the Commission. While it has been concluded that the WNJR manager was lacking in candor in dealing with Commission investigators and was guilty of false representation to the Commission in furnishing to its investigators spurious documents which he had caused to be fabricated, again the three home office officials were not a party to his deceitful conduct, and his wrongful acts were perpetrated without their knowledge or approval. Although the licensee failed to file time brokerage contracts with the Commission, the responsible officials of the licensee did not seek to practice a deception upon the Commission since they did not believe the particular arrangements were in the nature of time brokerage and were also guided by the advice of counsel in not complying with the filing requirement of the rules. Moreover, the licensee has acted to forestall the recurrence of the filing violations as well as the misrepresentations to the Commission by elimination of time brokerage arrangements from the WNJR operations and by relieving the miscreant manager of WNJR from this position of responsibility. Other violations of the rules in the nature of logging violations did not result from any intent on the licensee's part to deceive the Commission or to falsify logs, and is attributable in the first instance to the failure of station employees to properly perform their duties in maintaining the program logs. Moreover, no intentional violation of the Commission's sponsorship identification rules has been found. Finally, while the adequacy of control issue has been resolved

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against the licensee, it has also been found that the licensee's deficiency on this score was not characterized by disinterest in, or lack of concern for, the proper conduct of the station's affairs. The present case, then, is not one in which the licensee's principals have perpetrated deception upon the Commission or the public. Nor has the record revealed a licensee so insensitive to its obligations that it cannot be relied on to operate its station with due regard for its licensee responsibilities in the future. Hence, it is concluded that, notwithstanding those unfavorable aspects of the operation of WNJR noted above, the licensee (now applicant) has reflected the necessary qualifications to continue to be the licensee of WNJR.

43. In reaching the conclusion that renewal of its license for WNJR should be granted to applicant, one cannot, however, dismiss altogether certain events in the more recent history of WNJR operation which undoubtedly led the Commission to order the present hearing. It has been found from the record compiled herein that the manager of WNJR, albeit without the knowledge of the licensee, made false misrepresentations of a serious nature to the Commission. For these improper actions of its employee, the licensee of WNJR cannot in any event disclaim responsibility, *Eleven Ten Broadcasting Corp.*, 32 FCC 706, 707 (1962). It has been shown too that the licensee entered into several time brokerage arrangements and thereafter failed to comply with the Commission's filing requirements applicable to those contracts. Moreover, the licensee of WNJR has been found wanting in the exercise of adequate control and supervision over its station's affairs. While the licensee tardily acted to clear the Augean stable at Newark, it is apparent that the Commission's investigation into certain aspects of the station's affairs at least to some extent inspired the licensee to make the necessary changes in the WNJR operation. It is not mete that the licensee should be permitted to go "scot free" after the occurrence of the unsavory conduct of its manager and the additional matters above discussed. An early rendering of an account to the Commission of its further stewardship under the instant renewal should have a salutary effect upon the licensee's discharge of its licensee responsibilities under the instant renewal and also incidentally serve as a warning to other licensees that such undesirable happenings in the operation of a station as those mentioned above will not be permitted by the Commission to take place with impunity. Therefore, it is concluded that renewal of the license of WNJR for a limited period of 1 year is appropriate under the circumstances revealed by the record herein, and that the public interest would be served by a grant of the instant renewal application for a term of 1 year. In this connection, it must be added that the forfeiture of $1,000 already paid by the licensee in connection with the "Celebrity Time" agency time brokerage contracts is not considered an adequate penalty so as to preclude the necessity for restricting the present license renewal to a short-term grant. That penalty did not purport to cover the additional violations and other objectionable conduct disclosed in the hearing.

Accordingly, *It is ordered*, that unless an appeal to the Commission from this *Initial Decision* is taken by any of the parties or the Com-

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mission reviews the *Initial Decision* on its own motion in accordance with the provisions of section 1.276 of the Rules, the above-captioned application of Continental Broadcasting, Inc., for a renewal of license of Station WNJR in Newark, N.J., *Is granted* for a term of 1 year only.

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FCC 68R-475

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
JOHN W. SCHULER, TR/AS DEARBORN COUNTY BROADCASTERS, AURORA, IND.	Docket No. 18264 File No. BPH-6125
GREPCO, INC., AURORA, IND.	Docket No. 18265
For Construction Permits	File No. BPH-6235

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1968)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the applications of John W. Schuler, tr/as Dearborn County Broadcasters (Dearborn) and Grepco, Inc. (Grepco), for authorization to construct a new FM broadcast station in Aurora, Ind. By Order, 33 F.R. 2264, published August 15, 1968, the mutually exclusive applications were designated for hearing. Presently before the Board is a motion to enlarge issues,[1] filed August 30, 1968, by Grepco, seeking, with respect to Dearborn, enlargement as follows: (1) to determine the construction costs of the proposed FM station and whether the facility can be built for the estimated sums; (2) to determine the basis for operating costs during the first year of operation, the likely extent of first year operating costs and whether the applicant will be able to effectuate program proposals; (3) to determine the facts and circumstances surrounding the loan from the First National Bank of Livingstone, Tenn., the status and availability for security of the farm allegedly owned by John W. Schuler, and the extent of interests of other parties in the application and loan; (4) to determine if Dearborn has failed to disclose material facts or has displayed a disqualifying lack of candor; and (5) to determine if Dearborn is legally and financially qualified to construct and operate the proposed FM station.

[1] Other pleadings before the Board for consideration are: (*a*) Broadcast Bureau's comments, filed Sept. 23, 1968; (*b*) opposition, filed Sept. 23, 1968, by Dearborn; and (*c*) reply, filed Oct. 8, 1968, by Grepco. The Broadcast Bureau has submitted the following additional pleadings: (*a*) Broadcast Bureau's Petition Requesting Acceptance of Supplementary Comments, filed Oct. 18, 1968, and (*b*) Broadcast Bureau's Supplementary Comments on Petition to Enlarge Issues, filed Oct. 18, 1968. A reply to the Bureau's supplementary comments was filed Nov. 6, 1968, by Dearborn and supplementary comments and a request to accept them were filed by Grepco on Nov. 12, 1968. The additional pleadings call the Board's attention to a financial amendment filed by Dearborn on Oct. 9, 1968, which was granted by *Memorandum Opinion and Order*, FCC 68M-1464, released Oct. 30, 1968. As indicated herein, the Board has considered the amendment and finds that it has no substantial effect on our disposition of the subject petition. We will accept the supplementary pleadings, but, since they have no effect on our disposition, to await filing of further responsive pleadings would merely delay action and serve no useful purpose.

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Estimated Costs of Construction

2. In section III of its application Dearborn estimates $11,500 for construction costs and $18,000 for first year's operating costs.[2] To meet this requirement Dearborn is relying on a $30,000 line of credit from the First National Bank of Livingstone, Tenn., a $6,000 loan from the First National Bank of Aurora, Ind., and the personal assets of John W. Schuler. The balance sheet submitted with the application reflects that Schuler has $6,519.98 in current and liquid assets in excess of current liabilities. Grepco first alleges that Dearborn will be unable to construct its proposed station for $11,500, as estimated in its application. An affidavit of William C. King, Jr., petitioner's consulting engineer, estimates that the minimum construction cost for used equipment (proposed by Dearborn) would total $12,050.[3] In addition to this sum, petitioner avers, the initial cost would include legal and engineering fees, furniture and fixtures, equipment installation and shipping. Grepco alleges that Dearborn has not shown that used equipment is available or can be made capable of implementation. More specifically, petitioner states, that the transmitter is an "old type" and Dearborn has presented no basis upon which it can be determined if it can be used for proposed remote operation, and probable modification would increase initial expenditures. Dearborn, in opposition, submits a breakdown of estimated construction costs which totals $11,500.[4] Dearborn also submits an affidavit from its consulting engineer who states that such equipment is available; that the quoted prices include all installation costs; and that the equipment and installation will meet the Commission's standards of good engineering practice.

3. Sufficient uncertainty exists about the adequacy of Dearborn's estimated construction costs to warrant further inquiry. Aside from the fact that a comparison of the two applicants' estimates shows that Dearborn's estimate is approximately $4,050 less than Grepco's for

[2] Dearborn's Oct. 9, 1968, amendment was accepted by the examiner in an *Order* (FCC 68M–1464) released Oct. 30, 1968. The amendment increases this applicant's estimate of first year's operating costs to $27,000. In addition the amendment includes statements of intent to advertise from various local businessmen.

[3] This engineering statement submitted by Grepco provides an estimated breakdown for used equipment as follows:

Transmitter	$3,000
Antenna	1,500
Transmission line	150
Tower, including foundations, erection and painting FM antenna and line installation	2,000
Monitors	500
Remote control equipment	900
Prefabricated transmitter building	1,000
Studio equipment	3,000
Total	12,050

[4] The following is a proposal submitted to Dearborn by J. A. Cunningham, consulting engineer:

Transmitter	$2,500
Antenna system including towers, antenna, and transmission line	2,100
Frequency and modulation monitors	900
Studio equipment, microphones, transcription equipment, and remote control equipment	2,100
Transmitter building (to be leased)	400
Remodeling studios	1,250
Office equipment and nontechnical equipment	1,250
Engineering	1,000
Total cost of equipment and installation	11,500

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equivalent equipment, Dearborn's estimate makes no provision for legal fees or preoperating costs. Moreover, Dearborn does not respond with sufficient specificity to Grepco's allegations that modifications and resultant expenses will in all likelihood be necessary. Dearborn has made no attempt to establish that modifications will not be necessary, or, in the alternative, that needed modifications can be made without incurring additional expenses. In view of the deficiencies in Dearborn's proposal, a substantial question has been raised about Dearborn's costs of construction.

First-Year Costs of Operation

4. Grepco alleges that deficiencies in Dearborn's application raise uncertainty as to whether or not Dearborn has correctly estimated its first year's operating costs. In support of this allegation, Grepco furnishes an affidavit by Charles R. Plummer, a principal of the applicant who is an experienced broadcaster, in which the affiant estimates that the entire operating costs of Dearborn ($18,000) would be consumed by salaries [5] for its proposed staff of five persons. In addition, petitioner notes that Dearborn has not allocated sums for utilities, insurance, or salary for a salesman. In opposition, Dearborn submits a breakdown of first year's operation costs, which purports to make all necessary provision for the items specified as omitted by Grepco.[6] Dearborn states that Schuler proposes to act as manager—news director—engineer and his wife (as secretary) without salary; that their estimated income ($9,000) from Schuler's bulk oil products plant and service station is adequate for family expenses; and that Schuler intends to secure the necessary engineering license to fulfill the Commission's first class operator license requirement for operation of the proposed station.

5. The Dearborn miscellaneous allocation, which provides for maintenance and interest, is attacked in the reply as being inadequate to cover first year loan repayments by $4,100. Grepco submits that it would be impossible for John Schuler to adequately perform the functions of general manager, chief engineer, and news director. Moreover, Grepco avers, Dearborn has not shown that Schuler can qualify for a first class engineer's license or hire the services of a salesman on other

[5] The following is given by Grepco as Dearborn's minimum personnel expenses:

2 announcers	$9,360
Secretary	3,380
1 combination—salesman-engineer; newsman-engineer; or announcer-engineer	5,980
Total	18,720

[6] The following is a breakdown of estimated first year operating costs by Dearborn:

Rent	$1,200
Wire service	2,300
Phone and remote lines	1,000
Music license fees	900
Office supplies	400
Utilities	400
Miscellaneous, including maintenance, interest, etc	3,480
Manager: news director, engineer (no salary)	------
Secretary (no salary)	------
Announcers (2)	8,320
Salesmen (commission on sales)	------
Total	18,000

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than a salary basis. Grepco further submits that Dearborn has not shown that Schuler will not have to accept a salary from the broadcast station.

6. The Review Board is unable to ascertain Dearborn's first year operating expenses with certainty. Dearborn has failed to show that additional personnel expenses, i.e., engineer's salary, salesman's salary and a possible salary for Schuler, will not be necessary.[7] Moreover the Dearborn estimate for miscellaneous expenses is not sufficient to cover loan payments during the first year of operation. Finally, despite the fact that Dearborn attempted, in its opposition pleading herein, to substantiate its $18,000 estimate, it has amended its application to reflect a $27,000 estimate.[8] In view of these unexplained deficiencies and inconsistencies, the Board finds that the financial inquiry should encompass Dearborn's first year operating expenses.

Staff Adequacy

7. Grepco also requests an adequacy of staff issue. This request is based on the same allegations presented under the operating costs issue, plus the allegation (supported by the affidavit of Plummer) that Schuler cannot do an adequate job of three important positions, and cannot effectuate the proposed program plans.

8. Although this issue was first specifically requested in Grepco's reply, the petition does include a request for an issue to determine whether Grepco can effectuate its program proposals, and the deficiencies relied upon were not fully defined until set forth in Dearborn's opposition. In our view, the allegations raise substantial questions as to whether additional personnel and/or salaries will be necessary. An issue to explore this matter will therefore be specified.

Bank Loan—$30,000

9. Grepco points out that Dearborn is relying on a $30,000 line of credit from the First National Bank of Livingstone, Tenn., and alleges that question exists as to the adequacy of the proposed security, i.e., mortgages on equipment and certain real property. Specifically, Grepco questions whether the bank is aware of the "antique" vintage of the equipment and the true ownership of the property.[9]

Grepco notes that Schuler stated in the balance sheet submitted in the application to the Commission, that he was the owner of the real property to be used as security and alleges that this assertion, if false, is tantamount to a failure to disclose material facts or a display of a

[7] The Broadcast Bureau, in its comments, points out that although Schuler proposed to maintain his income based, in part, on subleasing his service station, Dearborn's amendment reflects that this cannot be done, and that he will promote one of his employees and hire additional help instead. The effect of this change on Schuler's income cannot, on the basis of the pleadings, be determined. In Dearborn's reply to the Broadcast Bureau's supplementary comments the applicant submits an exhibit attempting to show that John Schuler can depend upon a $9,000 family income. However, this submission doesn't resolve all the questions raised by the Bureau.

[8] Dearborn supplied an itemization of its amended estimate for costs of operation in a supplemental pleading. This itemization is deficient because Dearborn has not provided an amount for repayment of principal of its loan.

[9] Dearborn submits an affidavit from an individual who states that he examined the property records at Lawrenceburg, Ind., and that this examination failed to disclose any record of real property in the name of John Schuler.

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disqualifying lack of candor. The First National Bank requires, as a condition of the loan, "personal endorsement by all interested parties." This requirement plus the facts that Dearborn is negotiating the loan in the city where its consulting engineer resides and that the engineer helped to prepare certain parts of Dearborn's application leads Grepco to conclude that an issue is warranted regarding undisclosed principals in interest.

10. In its opposition, Dearborn concedes that the property in question belongs to his mother, Mrs. Nellie Schuler. Attached to the opposition is Mrs. Schuler's affidavit stating that she intends to deed the property to her son in the event that his application is granted.[10] This arrangement, it is alleged, was understood prior to the submission of Dearborn's application. Dearborn admits that the disclosure about title should have been made, but submits that the omission does not amount to misrepresentation; that the balance sheet was prepared without the benefit of counsel; that the condition required by the bank is merely standard language. Dearborn's engineer, in his affidavit, denied that he was paid or promised any consideration other than that reflected in the application.

11. The Review Board is of the view that petitioner's allegations do not warrant the addition of an issue inquiring into the loan from the First National Bank. Petitioner has submitted no facts which would indicate that the loan is not the result of an arms-length business transaction and the pleadings reflect that Schuler can provide the necessary security.[11] Nor does the Board find an adequate basis for the addition of a misrepresentation issue. The question of title has been clarified. Thus, while Schuler's representation that he owned the real property was not accurate, it is clear that the property is available, as represented, and we have no reason to doubt the veracity of Schuler's sworn statement that he did not intend to deceive the Commission as to the true facts. Finally, Grepco has not submitted sufficient specific allegations in accord with rule 1.229(c) to warrant an issue regarding undisclosed principals. The facts that Dearborn's engineer helped to prepare its application, that Dearborn's bank letter of commitment requires endorsement by all interested parties, and that Dearborn's engineer lives in the community where the bank is located do not, in our view, raise a substantial question as to whether the engineer is a real party in interest, and the sworn statement from the engineer that he is to receive no consideration other than that specified in the application is adequate to resolve all doubts in this regard. Thus, Grepco's request is based on speculation and surmise, and its conclusions appear to be no more than unsupported suspicions.

12. Accordingly, *It is ordered*, That the Broadcast Bureau's petition requesting acceptance of supplementary comments, filed October 18, 1968, and the petition for leave to file additional comments or for other relief, filed November 12, 1968, by Grepco, Inc., *Are granted;* that the petition to enlarge issues, filed August 30, 1968, by

[10] Included in Dearborn's Oct. 9, 1968, amendment is another affidavit from Mrs. Schuler, wherein she states that although the property is now subject to a first mortgage, she has sufficient funds to pay off that mortgage.

[11] In a supplementary pleading Dearborn submits a letter from the First National Bank of Livingstone which states that John Schuler has established a line of credit with the bank and that a first mortgage will be placed on property presently owned by Nellie Schuler.

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Grepco, Inc., *Is granted* to the extent indicated below, and *Is denied* in all other respects; and that issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine as to Dearborn County Broadcasters, the basis of its (1) estimated construction costs, and (2) its estimated operating expenses for the first year of operation.

(2) To determine whether Dearborn County Broadcasters has available to it funds in excess of the $30,000 already shown to be available if such additional funds are necessary.

(3) To determine, in the event that Dearborn County Broadcasters will depend upon operating revenues to meet costs and first-year operating expenses, the basis of its estimated revenues for the first year of operation, whether such estimate is reasonable, and the extent to which net operating revenues may be relied upon to yield necessary funds for the initial construction and first-year operating costs.

(4) To determine on the basis of the evidence adduced under the aforesaid issues, whether Dearborn County Broadcasters is financially qualified.

(5) To determine whether the staff proposed by Dearborn County Broadcasters is adequate to effectuate its proposal.

13. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden of proof under the issues added herein shall be upon Dearborn County Broadcasters.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1110

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 81 TO CHANGE THE ELIGIBILITY REQUIREMENTS FOR LIMITED COAST AND MARINE UTILITY RADIO STATION LICENSES USING TELEPHONY IN THE MARITIME MOBILE SERVICE.	Docket No. 18133

REPORT AND ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission on April 18, 1968, adopted a notice of proposed rulemaking in the above-entitled matter (FCC 68-415) which made provision for filing comments. The notice was published in the Federal Register on April 23, 1968 (33 F.R. 6170). The time for filing comments and reply comments has passed.

2. The notice proposed rule changes to make additional categories of persons eligible for limited coast and marine utility radio station licenses. Under present rules, licensees of these types of stations are limited, generally, to persons who operate commercial transport vessels or who operate a port, harbor, or waterway. The proposed changes would also make eligible for license (1) operators of movable bridges over waterways, (2) shipping agents who assist in the docking or direction of vessels in port, and (3) persons who provide maritime service to vessels.

3. Comments favoring the rule changes as proposed were received from the Association of American Railroads, Collins Radio Co., Com-Nav Electronics, Inc., Electronic Services, Inc., Gulf Radiotelephone, Inc., Karr Electronics Corp., Marine Electronics, Inc., Marine Fueling Services, Inc., Motorola, Inc., Sperry Marine Systems Division of Sperry Rand Corp., and York Communications. Most of these comments contained elaboration in some detail on the reasons for favoring the rule changes and included assertions that the changes would be materially helpful and would contribute to the advancement of efficient maritime operations. All the above parties, except the Association of American Railroads, stated they were engaged in major maritime servicing operations involving either vessels, or the radiocommunications equipment of vessels.

4. Comments opposing the proposed rule changes were filed by Two Way Radio of Carolina, Inc., a licensee of public coast stations, and comments opposing, in part, the proposed changes were filed by the American Petroleum Institute (API), the American Merchant Marine

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Institute, Inc. (AMMI), and the Port of New York Authority. Two Way Radio asserted that the changes would divert traffic from its station to its economic disadvantage at a time when it is struggling to maintain a foothold and would create many "pseudo common carriers." API and AMMI expressed concern over the inclusion of the term "servicing" and recommended that the word be deleted. They pointed out that a too liberal interpretation of the term could result in the licensing of many nonmaritime operators such as laundries or taxis and cause intolerable frequency congestion on a busy waterfront such as New York. The New York Authority, in essence, agreed with the position of API and AMMI.

5. Concerning the comment filed by Two Way Radio regarding the economic impact of the rule changes on its public coast station operations, were are aware of the desirability of maintaining viable and highly efficient public correspondence systems in the maritime service. Thus, we are interested in and sensitive to any developments that would appear to unduly jeopardize the maintenance and improvement of this essential communications service. Common carrier maritime communication service, however, is not intended to exist to the exclusion of other marine communications services, but rather to supplement such services and to provide services for hire to those who may not be eligible for a license in any service or who, even though eligible, do not desire to operate their own communication facilities. This approach is entirely consonant with that which the Commission has taken in the private land mobile services, the private microwave services, and, indeed, is even now the approach in the maritime mobile services. No change is being proposed in this regard and the fact that eligibility for limited coast stations is being somewhat expanded does not justify an alteration in this basic premise as suggested by Two Way Radio. We note that of the almost 200 public coast stations the licensee of only one station has commented with respect to possible economic impact and the comment made no showing as to the contemplated loss.

6. In response to Two Way Radio's comment that "pseudo common carriers" may be created by the licensing of additional persons for limited coast stations, we point out that section 81.179 of the Commission's rules prohibits the imposition of charges for the service of limited coast stations; section 81.355(a)(2) prohibits their use to furnish communication common carrier services; and section 81.352, which governs cooperative use of the facilities of limited coast stations, would not be changed by the instant rule amendments and in its present form this section has not engendered any problems relating to "pseudo common carriers."

7. With respect to the concern of API, AMMI and the Port of New York Authority that undue frequency loading may result from the expanded eligibility for limited coast stations which permits servicing organizations to be licensees of these stations, it is believed that the Commission's recent action in docket No. 17295, which approximately doubled the number of assignable VHF frequencies, should be sufficient to meet any possible problem in this regard. Also, section 81.355(a)(5) will continue to limit communications to those necessary "to

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serve the operational and business needs of ships." There is no basis for excluding from eligibility for limited coast stations one type of organization serving such needs as contrasted with some other type. If future developments indicate the desirability and a basis for establishing relative priorities among the various "operational and business needs of ships," then frequency availability could at that time be limited accordingly.

8. Accordingly, *It is ordered*, Pursuant to authority contained in section 4(i) and 303(r) of the Communications Act of 1934, as amended, that effective December 30, 1968, part 81 of the Commission's rules is amended.

9. *It is further ordered*, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68–1095

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petitions by FIRST ILLINOIS CABLE T.V., INC., SPRINGFIELD, JEROME, LELAND GROVE, SOUTHERN VIEW AND GRANDVIEW, ILL. RANTOUL CATV CO., A CORPORATION, RANTOUL, ILL., AND THE ADJACENT UNINCORPORATED TERRITORY For Authority Pursuant of Section 74.1107 of the Rules To Operate CATV Systems in the Springfield-Decatur-Champaign Television Market (ARB 72)	Docket No. 18206 File No. CATV 100–31 Docket No. 18207 File No. CATV 100–42

MEMORANDUM OPINION AND ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. On June 5, 1968, we considered seven petitions for waiver of the hearing provisions of section 74.1107 of the rules in regard to proposals to distribute distant signals in the Springfield-Decatur-Champaign television market, ranked 72d by the American Research Bureau according to net weekly circulation figures. By our *Memorandum Opinion and Order*, 13 FCC 2d 284, released June 10, 1968, we granted five of the requests for waiver and denied two others. Now before us is a petition filed on July 12, 1968, by First Illinois Cable T.V., Inc. (First Illinois), which seeks reconsideration of our denial of its waiver request.[1]

2. First Illinois operates CATV systems serving Springfield, Ill., and the surrounding communities of Jerome, Leland Grove, Southern View and Grandview. In addition to the distribution of signals of the Illinois stations whose grade B contours penetrate Springfield,[2] First

[1] Also before us are an unopposed petition for acceptance of late-filed pleading, filed on July 12, 1968, by First Illinois, and the following pleadings responsive to the petition for reconsideration filed on July 12, 1968, by First Illinois: comments of the Broadcast Bureau filed on July 25, 1968; opposition filed by Midwest Television, Inc. (WCIA) on July 25, 1968; and a reply to oppositions filed by First Illinois on Aug. 7, 1968.

[2] These stations are: channel 20, WICS (NBC), Springfield; channel 3, WCIA (CBS), Champaign (whose signals are carried on a translator at Springfield); channel 17, WAND (ABC), Decatur; channel *12, WILL–TV (educational), Champaign-Urbana; and channel 14, WJJY–TV, Jacksonville. First Illinois also proposes to carry the signal of channel 43 (independent), Bloomington, Ill., whose grade B contour also penetrates Springfield, when construction is completed and the station is operational.

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Illinois proposes to carry the signals of two distant stations, channel 11, KPLR–TV (independent), and channel *9, KETC–TV (educational), both in St. Louis, Mo.[3] In denying First Illinois' request for authorization without hearing to carry these distant signals, we took into consideration the fact that the CATV systems are located in or near Springfield, the city in the market with the largest population (83,271) and the one upon which the independent UHF stations in the area are most likely to depend for revenues. On the basis of the pleadings before us, we were unable to determine whether the importation of distant signals on the CATV systems of First Illinois would prejudice the establishment and healthy maintenance of UHF service in this market, and we designated the matter for hearing. First Illinois contends that we linked the disposition of its application with another, and distinguishable, proposal without giving separate consideration to the individual merits of its own proposal which would have justified favorable action. It also contends that we failed to give due weight to the similarities of the proposal to those where waivers were granted.

3. We find no merit to the contentions advanced by First Illinois, and its petition for reconsideration will be denied. The pertinent and material facts of each proposal were detailed in our *Memorandum Opinion and Order*, and the considerations which prompted us to grant waivers for some and to designate others for hearing are fully set forth therein. To repeat here the reasons for our disposition of these matters would serve no useful purpose. Suffice it to say that the size of the CATV communities involved, the proximity to the city in this market from which UHF stations would derive their principal economic support, and other factors enunciated in our designation order, clearly support our action in designating the First Illinois request for hearing.

4. First Illinois further argues that the failure of any UHF station to object to its proposal is entitled to substantial weight in support of its waiver request, but we do not agree. There may be many reasons why the permittee or licensee of a UHF station deemed it to be to his personal advantage not to object to the CATV's importation of distant signals, but our primary concern is with the public interest in the maintenance and growth of UHF, not with the private economic interests of the said licensee or permittee.[4] Neither do we find any merit to the contention of First Illinois that even the maximum number of homes likely to be served by its CATV system would never reach significant proportions in relation to the size of the market involved and would not seriously jeopardize the development of stations in the market. The critical issues in this proceeding may not be resolved by references limited to petitioner's CATV proposal and its impact upon existing television stations; but a determination must be predicated

[3] First Illinois' original proposal requested waiver to permit distribution of six distant signals, station KPLR–TV, St. Louis, Mo., and five Chicago, Ill. stations. In 1967, it amended its distant signal proposal deleting all Chicago stations and adding the St. Louis, Mo., educational station.

[4] As we pointed out in footnote 6 of our *Designation Order* (13 FCC 2d at 286), the licensee of station WICS, channel 20, at Springfield withdrew its opposition after it acquired an option to obtain up to 50 percent of the stock of First Illinois. We can hardly consider a withdrawal of objections under such circumstances as a public interest factor favoring a grant of a waiver to First Illinois.

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upon the effects of "current and proposed" CATV penetration "upon existing, proposed, and potential television broadcast stations in the market" (13 FCC 2d at 291). In our designation order we concluded that a full evidentiary hearing is necessary in order to enable us to make an informed judgment as to the public interest, and we are not persuaded by any of the contentions advanced by the petitioner to depart from our conclusion.

5. With respect to the proposed carriage of the St. Louis educational station, First Illinois failed, as the Broadcast Bureau pointed out in its opposition, to comply with the requirements of section 74.1105 of the rules that school authorities and State educational television agencies be notified. Although First Illinois attached copies of recent letters from school officials in the area to its reply, we shall not rule on their adequacy. Since the material was submitted in a reply pleading, opposing parties have been afforded no opportunity to interpose objections or to otherwise comment on the weight or sufficiency of the letters, and in these circumstances we can give these letters no consideration in reaching a decision on the petition for reconsideration. They may be offered into evidence at the hearing where their admissibility, weight and sufficiency will be passed upon by the hearing examiner.

6. Accordingly, *It is ordered*, That the petition for acceptance of late-filed pleading which was filed by First Illinois Cable T.V., Inc. on July 12, 1968, *Is granted*, and

7. *It is further ordered*, That the petition for reconsideration filed by First Illinois Cable T.V., Inc. on July 12, 1968, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R-483

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
JESSE R. WILLIAMS AND ALBERT MACK SMITH d/b/a JEFF DAVIS BROADCASTING SERVICE (WKPO) PRENTISS, MISS.	Docket No. 18208 File No. BP-17136
MISS LOU BROADCASTING CORP. (WYNK) BATON ROUGE, LA.	Docket No. 18209 File No. BP-17572
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 20, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS BERKEMEYER AND PINCOCK ABSENT.

1. This proceeding involves an application by Jeff Davis Broadcasting Service (WKPO) (Jeff Davis) for a change of frequency from 1510 kc to 1380 kc, Prentiss, Miss., and an application by Miss Lou Broadcasting Corp. (WYNK) (Miss Lou) for increased power on 1380 kc,[1] Baton Rouge, La. The applications, which would result in mutually destructive interference, were designated for hearing by order of the Chief, Broadcast Bureau, acting pursuant to delegated authority (mimeo 18082, released June 20, 1968). The order specified areas and populations and section 307(b) issues. Now before the Review Board is a joint petition, filed October 8, 1968, by Jeff Davis and Miss Lou, seeking approval of an agreement whereby Jeff Davis's application would be dismissed, Miss Lou's application would be granted, and Miss Lou would reimburse Jeff Davis for part of the expenses incurred in preparing and prosecuting its application.[2]

2. In support of the request, petitioners submit affidavits from their principals setting forth the nature of the consideration involved and describing the details of the initiation and history of the negotiations leading to the agreement. The agreement, provides for the payment of Jeff Davis's expenses up to a maximum of $1,300. Jeff Davis submits an itemization of expenses sworn to by one of its principals; the itemization claims aggregate expenses of $961.24, which includes engineering fees of $646.24 and legal fees of $200.

3. The Broadcast Bureau, in its comments, asserts that because no supporting affidavits for the alleged attorney's and engineer's expenditures have been submitted, the items must be disallowed. In addition,

[1] Jeff Davis presently operates at 1 kw (250 w-Ch) daytime and proposes to operate at 500 w daytime. Miss Lou presently operates at 500 w daytime and proposes to operate at 5 kw, DA, daytime.

[2] Also before the Board is Broadcast Bureau comments, filed Oct. 23, 1968.

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the Bureau notes that "the license files and applications" show that Jeff Davis's proposal would result in a loss of 11,500 people within the noncritical hour predicted 0.5 mv/m contour, whereas the Miss Lou proposal would result in a gain of almost 25,000 people within its 0.5 mv/m contour; the Bureau claims, however, that no showing is made as to area, population, and other services available within the 0.5 mv/m contour of Jeff Davis's 500-watt proposal not presently served by its existing 250-watt critical hour operation. The Bureau concludes that, unless such a showing is made, it cannot be determined whether Jeff Davis's withdrawal will defeat the objectives of section 307(b) and that, therefore, publication pursuant to 1.525(b) should be required. No reply pleadings have been filed and the time for such filing has passed.

4. The Review Board agrees with the Broadcast Bureau that the expenditures for legal and engineering services have not been properly documented. Because these deficiencies relate to the bulk of the expenses for which reimbursement is sought, the joint petition will be denied, *Hartford County Broadcasting Corp.*, 10 FCC 2d 48, 11 RR 2d 244 1968).[3]

5. Accordingly, *It is ordered*, That the joint petition for approval of agreement, filed October 8, 1968, by Jeff Davis Broadcasting Service and Miss Lou Broadcasting Corporation *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] We note that the petitioners have not responded to the Bureau's contention that publication is required.

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FCC 68R-469

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH AMERICAN BROADCASTING CO. INC., BOYNTON BEACH, FLA.	Docket No. 18310 File No. BP-17843
RADIO BOYNTON BEACH, INC., BOYNTON BEACH, FLA.	Docket No. 18311 File No. BP-17999
BOYNTON BEACH COMMUNITY SERVICES, INC., BOYNTON BEACH, FLA.	Docket No. 18312 File No. BP-18000
J. STEWART BRINSFIELD, SR., J. STEWART BRINSFIELD, JR., J. LUTHER CARROLL AND MAX R. CARROLL, D/B/A RADIO VOICE OF NAPLES, NAPLES, FLA.	Docket No. 18313 File No. BP-17991
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1968)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. This proceeding, which involves mutually exclusive applications for a standard broadcast station, was designated for hearing by Commission order, FCC 68-904, 33 FR 14085, published on September 17, 1968. Now before the Board is a motion to enlarge issues, filed October 2, 1968, by Boynton Beach Community Services, Inc. (Community) seeking the addition of a legal qualifications issue against North American Broadcasting Co., Inc. (North American).[1]

2. In support of its motion, Community asserts that North American, a Tennessee corporation, must qualify to do business in the State of Florida, since its proposed station will be located in that State. Community submits an attorney's affidavit reciting that, upon inquiry to the Florida State Corporation Office, it was learned that North American has neither applied for, nor received, a certificate of authorization to do business in that State. Referring to the powers and purposes clause of the North American certificate of incorporation, Community asserts that it is silent regarding North American's authority to conduct business outside of Tennessee and contains language which indicates that North American is without such power. Based on the foregoing, Community contends that serious questions exist as to whether North American can qualify for authority to do business in Florida and whether it is legally qualified to prosecute its application

[1] The following related pleadings are also before the Board: (a) opposition, filed Oct. 15, 1968, by North American; (b) Broadcast Bureau comments, filed Oct. 16, 1968; and (c) reply, filed Oct. 28, 1968, by Community.

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for a Florida-based broadcast station, and that these questions should be explored in hearing. The Broadcast Bureau supports the request.

3. In opposition, North American concedes that it is not now qualified to do business in Florida. It notes, however, that there is no showing that Tennessee law prohibits its domestic corporations from doing business in other States or that Florida law would prohibit a Tennessee corporation from doing business in Florida. It claims that qualifications can be effected by merely complying with the "technical requirements" of Florida law, which entail filing of an authenticated copy of the corporation's charter and payment of requisite fees and taxes. North American concludes that, since the Commission has never required a showing of full compliance with all applicable State law as a precondition to grant of a license, the requested issue is not warranted. In reply, Community asserts that qualification to do business in Florida is "not automatic," and that, until North American makes application and is qualified to do business in such State, it cannot be assumed that it has the legal qualifications to own and operate a broadcast station there.

4. The motion will be denied. There is no question here of North American's basic legal qualifications to be a licensee and petitioner's contentions fall short of raising significant doubt that the procedural requirements of State law cannot or will not be met. Thus, North American is duly incorporated in Tennessee with specific power under its certificate of incorporation to own and operate broadcast stations; no questions concerning the citizenship of its principals or other matters going to the heart of its qualifications are raised. An examination of the pertinent provisions of Florida law, cited by the petitioner, demonstrates that qualification to do business in that State is merely a procedural requirement and that the qualification process is essentially ministerial; the sections provide that, unless the objects of the foreign corporation are prohibited by Florida law, then, upon filing of the requisite documents and payment of specified fees, the Florida secretary of state "shall" issue the appropriate permit to do business within the State. Petitioner does not show that North American's powers and purposes are prohibited by Florida law, that Florida does not permit entry of a Tennessee corporation, or that Tennessee prohibits its domestic corporation from operating beyond its boundaries.[2] We do not agree with petitioner's contention that North American's certificate of incorporation specifically restricts its operation to Tennessee. A careful reading of the provision of the charter claimed by petitioner to be restrictive reveals, in fact, the opposite effect of taking to the corporation those corporate powers and purposes allowed by Tennessee law which are not specifically enumerated elsewhere in the North American charter. Similarly meaningless is the fact that North American's charter does not specifically authorize it to do business outside of Tennessee. It is elementary corporate law that, in the absence of a law, charter, or bylaw provision to the contrary, a corporation may do business outside the State of incorporation simply upon an appropriate resolution of its board of directors. Petitioner does not

[2] Nor does petitioner contend that North American will be unable to pay the filing fees and franchise taxes.

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suggest that such a resolution could not be obtained. Finally, the decisions in *Flora Broadcasting Corporation, et. al.*, 14 FCC 2d 277, 13 RR 2d 1196 (1968), cited by the Broadcast Bureau, and *Pittsburg Publishing Company, et. al.*, 3 FCC 62 (1936), are not to the contrary; in such cases there was no positive indication that the qualifications procedure was simply ministerial. Petitioner's allegations are not sufficient to raise a substantial question as to whether North American can and will qualify to do business in Florida, and the requested issue is therefore not warranted.

5. Accordingly, *It is ordered*, That the motion to enlarge issues filed October 2, 1968, by Boynton Beach Community Services, Inc., *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R–473

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of NORTHERN INDIANA BROADCASTERS, INC., MISHAWAKA, IND. For Construction Permit	Docket No. 14855 File No. BP–14771

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1968)

BY THE REVIEW BOARD: SLONE AND KESSLER. BOARD MEMBER NELSON DISSENTING AND VOTING TO GRANT THE APPLICATION.

1. This proceeding involves the application of Northern Indiana Broadcasters, Inc. (Northern Indiana) for authority to construct a standard broadcast station to operate on 910 kHz with a power of 1 kw, unlimited time with different directional antennas, day and night in Mishawaka, Ind. After completion of the hearing held pursuant to the *Policy Statement on section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965), the Board[1] adopted a decision (released June 26, 1968) denying the application, 13 FCC 2d, 546, 13 RR 2d 615.

2. In its decision, the Board found that Northern Indiana had failed to carry its burden of proof under the *Suburban Policy Statement* issues; that it had not established that its proposed station would realistically provide a local transmission service to Mishawaka; and that, therefore, it had to be considered as an application for South Bend, pursuant to the *Suburban Policy Statement*. But, since the proposal would not be in compliance with the Commission's rules (sec. 73.188(b) and sec. 73.28(2)(3)) as a South Bend station, i.e., at night it would violate the "10 percent rule" and would not serve the entire city of South Bend, and further, would not place a 25 mv/m signal either day or night over the business district of Mishawaka, and, since the Board found no ground for waiving the rules, it denied the application.

3. On July 26, 1968, Northern Indiana Broadcasters, Inc., filed a petition for reconsideration and rehearing of the Board's decision,[2]

[1] Board Member Nelson dissented with a statement proposing a grant of the application.

[2] The following related and responsive pleadings are before the Board for consideration: an opposition filed by South Bend Tribune on Aug. 6, 1968, and oppositions filed by Michiana Telecasting Corp. and the Broadcast Bureau on Aug. 20, 1968. (The Board on August 13, 1968 (FCC 68R–337) granted an extension of time in which to file responsive pleadings), and a reply to the oppositions was filed by Northern Indiana on Aug. 28, 1968. Northern Indiana also filed a petition for reargument on July 26, 1968. This petition and responsive pleadings are considered in a separate memorandum opinion and order adopted this date (FCC 68R–472).

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requesting the Board to either reconsider and set aside its decision, and issue a revised decision granting its application, or, in the alternative, to reconsider and set aside its decision and remand the proceeding to the examiner to afford Northern Indiana the opportunity to present additional evidence under the issues added pursuant to the *Policy Statement*. In support, it asserts that it is not possible to determine what findings of fact were relied upon by the Board; that no guidelines were available at the time of hearing as to the nature and scope of the evidence to be adduced under the *Suburban Policy Statement* issues; that that statement has been improperly interpreted and applied here in light of the "public interest" standard; and that the Board's *Decision* contains numerous erroneous findings and statements.

4. First, Northern Indiana contends that the usual procedure of adopting findings of an initial decision, as modified by the rulings on the exceptions, has not been followed here; and that the Board's conclusion in its decision "was (a) not based upon complete findings of fact, based, in turn, upon all relevant and material evidence, and (b) was so erroneous, arbitrary and capricious as to result in denial of due process." It submits that the Board cannot deny the relief requested without first preparing complete findings of fact and affording Northern Indiana the opportunity to note exceptions and obtain appropriate rulings. However, the Board's *Decision* does contain a complete set of findings of fact on the nonengineering issues which are the basis for the denial of the application. To the extent that the Board did not through inadvertence include a statement concerning the examiner's findings of fact on the engineering issues, the *Decision* will be modified by deleting the last sentence of paragraph 2 of the *Decision*, and substituting therefor the following: "Except as modified and supplemented herein, and in the rulings on exceptions contained in the attached appendices, the examiner's findings and conclusions on the engineering issues of his *Initial Decision* are adopted." With this correction, and because the Board's decision is complete on the nonengineering issues, the Board finds no merit in Northern Indiana's request for the Board to make a complete new set of findings.

5. Northern Indiana argues that its application cannot be denied without affording it another opportunity to present additional evidence because there have not been available any guidelines as to the nature and scope of evidence to be adduced under the *Suburban Policy Statement* issues; that, during the prehearing conference on June 15, 1966, it expressed concern with the issues and requested guidance; that at that time and even today, there are no clear-cut definitions as to the meaning of "distinct and separate programing needs," and "specific, unsatisfied programing needs" found in issues (a)(1) and (a)(3) respectively; and that there has always been a strong presumption of need for a first local transmission service, citing *Star of the Plains Broadcasting Co.* v. *Federal Communications Commission*, 105 U.S. App. D.C. 352, 267 F. 2d 629 (1959), and *Regional Radio Service*, 32 FCC 1073, 23 RR 599 (1962). Continuing it states that "it was forced to sail upon largely uncharted waters, using *Star of the Plains* for navigation"; and that, assuming arguendo

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that *Monroeville Broadcasting Company* (*Monroeville*), 12 FCC 2d 359, 12 RR 2d 946; *The Tidewater Broadcasting Company, Incorporated* (*Tidewater*), 12 FCC 2d 471, 12 RR 2d 1133 (1968), rehearing denied 14 FCC 2d 646, 14 RR 2d 161; *Boardman Broadcasting Co., Inc.*, 10 FCC 2d 422, 11 RR 2d 566 (1967), rev. denied FCC 68-559; and *Goodman Broadcasting Co.*, 10 FCC 2d 141, 11 RR 2d 331 (1967) shed some light upon the questions of definition and evidence required, its application cannot be denied for lack of sufficient evidence without affording it an opportunity to present additional evidence in light of subsequent pronouncements.

6. As to the foregoing, based upon a fair reading of the record as a whole and the Commission's pronouncements concerning the policy statement, a reopening of the record to afford Northern Indiana another opportunity to present more evidence is not warranted. First, the Board in its remand order (FCC 66R-921 released March 11, 1966) (see par. 32 of the *Decision*) stated that "the evidence in the existing record is not sufficient to resolve" the policy statement issues. Yet, in spite of that admonishment, and also the colloquy between the examiner and applicant's counsel at the prehearing conference (June 15, 1966) (Tr. 693) concerning the separate and distinct needs of Mishawaka,[3] Northern Indiana chose to rely principally upon that record evidence, and, consequently at the further hearing presented very little evidence pursuant to the remand issues. (See footnote 8 of the *Decision*.) Commenting on the "evidence in the existing record", the Board said, in its *Decision* (par. 32) "that that evidence was [not] designed to meet the remanded issues"; and as to the remand evidence, the Board found that it, "in all major respects (as also acknowledged by the applicant) is substantially similar to the evidence previously presented in 1963; and that "it is essentially supplemental evidence which does not comport with the more stringent and comprehensive showing required by the *Policy Statement*." It must be noted that Northern Indiana has not contested these findings. Second, the cross-examination of Udell on October 20, 1966,[4] should also have alerted Northern Indiana to the inadequacy of its presentation, and the need for additional evidence then—not now after an adverse decision.

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[3] PRESIDING EXAMINER. * * * Your second problem was the separate and distinct program needs.
Mr. BOOTH. Yes.
PRESIDING EXAMINER. You raise a question as to what that means. May I understand this to clarify it. I thought this Conference was for ways and means to proceed. You are located besides South Bend, and there is an inference because you are so approximate that there is fusion of interest. You may have a whole separate and distinct program needs in Mishawaka you want to identify. If that is the fact or that isn't the fact, there is a difference from Mishawaka and South Bend. If there is, they want you to come forward and make that showing. Does that clarify your thinking on that?
Mr. BOOTH. The thing which concerns me, if I understand, if I don't come forward to show the distinct needs, am I out of court?

[4] By Mr. DEMPSEY:
Q. Mr. Udell, one of the issues in this proceeding is to ascertain whether or not Mishawaka has been ascertained to have separate and distinct programing needs from South Bend.
Could you tell me what has been put in the evidence since we started yesterday, specifically what exhibits, you would rely on to show the separate programing needs of Mishawaka as opposed to South Bend?
In other words, to show what needs Mishawaka has separate and distinct from South Bend.
Mr. BOOTH. I would object.
PRESIDING EXAMINER. Overruled. Let him answer.
The WITNESS. I am not sure that we have entered into the record today or yesterday a great amount of material that is different from the exhibits which have been on file for

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7. Further, in connection with Northern Indiana's contention about the lack of guidelines, it should be noted that a similar question was presented in a petition for rehearing in *Tidewater*, supra. There, the applicant *Tidewater* contended that the *Policy Statement* "is fatally vague and indefinite, because there is no definition of the terms used and because there is no specific description of the showing required to overcome the *Policy Statement*." In answer to that contention, the Commission pointed out that "not all applicants shared Tidewater's alleged difficulty understanding the content and purpose of the *Policy Statement;*" and that the necessary showing had been made in *Naugatuck Valley Service, Inc.* (*WOWW*) (*Naugatuck*), 8 FCC 2d 755, 10 RR 2d 237 (1967), aff'd *sub nom. Northeast Broadcasting, Inc.* v. *Federal Communications Commission* (*Northeast*); and in *Monroeville*, supra. The Commission further said that "While we have attempted to set forth, simply and clearly, the scope of the problem and the nature of the evidence that would be considered pursuant to the *Policy Statement*, the particular factors that will be decisive in a specific proceeding can only be determined in the context of the facts and circumstances concerning that application, since each allocation of a standard broadcast station must be considered in the light of the individual characteristics of the proposed service." These comments are equally pertinent here.

8. In addition, in *Boardman*, supra, the Board, in discussing the showing required of an applicant, said (par. 2):

> * * * It is apparent that while the specific procedure prescribed by the *Policy Statement* is a new one, the general approach to consideration of suburban applications is by no means novel. Nor is the type of evidentiary showing contemplated here by the initial inquiry into suburban community needs unlike showings which have been required in other types of proceeding[5] where it has similarly been material to determine the composition of population groupings—here the suburban community—in terms of relevant sociological, economic, and other related factors. The ultimate determination here required of the Board calls for an evaluation of these factors, just as they have been evaluated in the context of other ultimate determinations in other types of proceeding.

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5 years. We were under the impression this program schedule we filed reflected the needs of the community of Mishawaka.

I believe I testified to amplifying factors. We made no change in the program schedule. We believe it was correct at the time we filed it and we believe it is correct now.

By Mr. DEMPSEY:

Q. I am sorry, sir, maybe you did not understand me. I am not especially concerned with the program schedule you proposed in this question. What I am trying to ascertain is what has been proffered since this hearing began by Northern Indiana Broadcasters to show the separate and distinct programing needs of Mishawaka as opposed to South Bend?

Mr. BOOTH. I would object to that.

* * * * * * *

PRESIDING EXAMINER. Overruled. He is the station manager and owner. He is making a showing. He knows the presumption under which he is operating.

Now the question, as I understand it, is what showing have you made to indicate that there is a separate and distinct series of program needs in Mishawaka as distinguished from South Bend. That is proper cross-examination.

The WITNESS. I go with Mr. Booth to the extent that if we used only information submitted the last 2 days we would not tell the whole story.

Mr. DEMPSEY. I have no further questions.

[5] See, e.g., *Herbert Muschel*, 33 FCC 87, 23 RR 1059 (1962); *Huntington-Montauk Broadcasting Co., Inc.*, 25 FCC 1309, 16 RR 173 (1958), rehearing denied 28 FCC 689, 16 RR 192b (1960).

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and, in paragraph 41:

> * * * [I]n the present case, while the particular decisional criteria differ somewhat from those involved in the *Huntington* case, as does the issue being litigated, the evidentiary showing required is similar. Thus, as in *Huntington*, it is necessary for the applicant to establish that the relevant community needs, which he must indicate, "are such that they [are not] met with substantial adequacy by stations situated elsewhere and that the proposal of the applicant possesses particular characteristics peculiarly designed to meet those * * * needs and interests."

In its *Decision* herein, the Board said (paragraph 33) that:

> * * * [T]he Board cannot agree that the *Suburban Policy Statement* issues require only the limited type of evidence submitted here to rebut the *Policy Statement* presumption. The emphasis of such issues is upon the "separate and distinct programing needs" and "specific, unsatisfied needs". The burden upon an applicant to rebut the presumption that his proposed station will become a big city station is different than the one requiring an applicant to show only that his programing will meet needs and interests of the area to be served; not only must he show that those needs and interests will be served but, in addition, he must show that the needs and interests of the specified location are distinguishable from the needs and interests of the central city, and that the "specific, unsatisfied programing needs" established, will be fulfilled by his proposal.

Thus, the Board can find no merit to Northern Indiana's contention. Moreover, under petitioner's theory, every time a new rule or policy is promulgated, the first few applicants denied under such rules or policies would be entitled to retry their cases. Surely, such a procedure is neither desirable nor necessary. Accordingly, on the basis of the foregoing, Northern Indiana's request must be denied.

9. Northern Indiana next contends that the Board has required a greater or higher degree of proof than does the *Policy Statement.* In support of this contention, it states that the word "presumption" appears throughout the *Policy Statement* (paragraph 8 and part of paragraph 10 of the *Policy Statement*); that the Commission spoke about rebutting the presumption several times in its *Policy Statement;* that the Board discussed the presumption only once; that instead, it read the issues without giving consideration to the statements made in the *Policy Statement* concerning the presumption; that it is clear from the Board's *Decision* that the quantum of proof required by it under the issues is substantially greater than that required to merely rebut the presumption referred to in the *Policy Statement;* and that for this reason alone, the evidence must be reexamined to see if the less rigid standard or requirement has been met.

10. As to the foregoing argument, Northern Indiana has overlooked the statement in paragraph 10 of the *Policy Statement* which reads as follows: "Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has *separate and distinct programing needs* * * * and the applicant will be expected to show the extent to which his program proposal will meet the *specific, unsatisfied programing needs* of his specified community." In paragraph 11, the Commission went on to

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say that "If an applicant *sustains* his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom." [Emphasis supplied.]

11. It is clear from the foregoing that under the issues an applicant is expected to adduce evidence concerning "separate and distinct programing needs" and the manner in which an applicant's program proposal would meet "specific, unsatisfied programing needs" as a preliminary to rebutting the presumption. In failing to adduce such evidence, and absent other evidence tending to rebut the presumption, an applicant has failed to rebut the *Policy Statement* presumption. Contrary to Northern Indiana's claims, the Board in paragraphs 33, 37, 47 and footnote 12 of its *Decision* adequately considered the statements of the *Policy Statement* concerning the presumption. The majority of the Board then concluded that Northern Indiana had failed to meet its burden under Issues (a)(1) and (a)(3). Consequently, Northern Indiana had also failed to rebut the presumption that it "realistically proposes to serve the larger community [of South Bend] rather than [its] specified community [of Mishawaka]." Further, there is no basis to contend, nor does Northern Indiana's pleading establish, that the Board has required a degree of proof greater than is required by the *Policy Statement*. A careful reading of the issues (see paragraph 1 of the *Decision*) and the *Policy Statement* (par. 10 supra) establishes that the issues are designed to elicit the type of evidence which the Commission said in its *Policy Statement* an applicant would be expected to adduce. Northern Indiana failed to adduce such evidence. It is not a matter of the Board requiring a greater degree of proof than the *Policy Statement;* it is simply that the Board was unable to find on the basis of the record evidence, that Mishawaka had *any* separate and distinct needs. Moreover, Northern Indiana has not alleged that this finding is erroneous. Further, the nonhearing cases cited by Northern Indiana do not support its argument that a higher degree of proof has been required here than in those cases. See paragraphs 15–18, infra.

12. In further support of its argument, Northern Indiana relies upon the *Monroeville Decision*, supra, which held that there is no set standard for the amount of evidence required in a given case to rebut the *Policy Statement's* presumption; that such evidence will differ depending upon the "variable factors," such as power and coverage; and that such variable factors will require different showings and different amounts of evidence to rebut the *Policy Statement's* presumption, and meet the burden of proof within said issue. First characterizing the Commission's recognition of variable factors as utilization of a sliding scale, Northern Indiana then asserts that the Board has not recognized the variable, or sliding scale nature of the amount of proof required. Contrary to this assertion, the Board did recognize the variable nature of proof when it stated that Northern Indiana's burden was greater than that of either applicant in *Monroeville*. See paragraph 33 of the *Decision*. Moreover, in view of the fact that Northern Indiana's 5 mv/m contour encompasses the entire city of South Bend, some factors which could lessen Northern Indiana's burden of proof are not present here. Thus, in *Monroeville*, the penetration of

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the pertinent contours into the central city was substantially less than here. Further, as the Commission said in *Monroeville*, supra (par. 7), the particular factors that will be decisive in a specific proceeding can only be determined in the context of the "facts and circumstances concerning that application." Pertinent in this connection, is the statement of the Court in *Northeast*, supra, "That application of the *Policy* [*Statement*] both by the Review Board and the Commission to varying factual and technical situations will result in rulings both for and against applicants is inevitable." The programing facts which the Board carefully weighed and on which it made determinations are set forth adequately in its *Decision* and need not be repeated here.

13. Another allegation made by Northern Indiana is that the Board has ignored the basic objectives of the 307(b) *Suburban Policy*, stating in support that there is no indication that it considered certain other portions of the *Policy Statement*, i.e., references in paragraphs 8 and 9 of that statement which state:

> * * * We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering facts of conductivity, frequency, and power, is sufficient to raise a question as to *whether the proposal will be a realistic local transmission service for its specified community or merely another reception service.* [Italic supplied by Northern Indiana.]
>
> * * * * * * *
>
> * * * This new policy is intended to provide an accomodation of the herebefore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be *merely a substandard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service.* [Italic supplied by Northern Indiana.]

However, Northern Indiana does not direct the Board's attention to either objective evidence of its coverage or what other matters should be weighed in determining whether Mishawaka deserves a first local transmission service and which would warrant a grant of its proposal in the absence of the required showing under the *Policy Statement* issues. Here, Northern Indiana's proposal involves a directional antenna pattern, day and night, radiating its strongest signal in a general northwesterly direction toward South Bend over Mishawaka; its site is located to the south of Mishawaka, while South Bend is northwesterly of the site and of Mishawaka. Although it can be argued that it was necessary to select a site southeast of Mishawaka and radiate the major lobe northwesterly in order to afford protection to existing stations, no showing was made, as noted in the Board's decision, paragraph 8, that a power of 1 kw is necessary to provide the alleged service to Mishawaka;[6] that the conductivity is unusually high; or that the proposed frequency was a low one causing a strong signal to be placed over South Bend, factors which the Commission said in its *Policy Statement* would be given weight. But the very factor giving rise to the presumption, in the first instance, was the 5 mv/m signal penetra-

[6] The maximum field intensity radiated in the major lobe is 340 mv/m during the day and 460 mv/m at night, equivalent to a power of 3.2 kw and 5.8 kw, respectively; South Bend's main business district would receive a signal of 10 to 25 mv/m both day and night from the proposal.

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tion of South Bend, and, in view thereof, Northern Indiana was given an opportunity to rebut the presumption by adducing evidence called for under the issues. It failed to do so. Thus, its proposal is in the same posture as it was in the beginning—its 5 mv/m signal covers the entire city of South Bend, and, as noted, the record fails to reflect any reason or explanation why such coverage is necessary; nor does the record, as the decision finds, reflect that Northern Indiana's proposal would provide a realistic local transmission service for Mishawaka.

14. Northern Indiana argues that because Mishawaka is a city with a population of 33,361 and is one without a radio station of any type, it deserves a station, and that, under such circumstances, there has always been a strong presumption of a need for a first local transmission service, citing *Star of the Plains*, supra, and *Regional Radio Service*, supra. In *Star of the Plains*, the court held that the Commission could not rely solely on an assumption in finding diminished need for a first local outlet. Here, however, the principal question is whether an applicant will provide a realistic transmission service for the specified community, and reliance is not solely on an assumption. Rather, a hearing has been conducted designed to adduce evidence on this very question. Thus, *Star of the Plains* is inapposite here. The Commission, in *Tidewater*, supra, said that the *Policy Statement* had been adopted in pursuance of its "mandate to provide fair, efficient and equitable distribution of broadcast service"; and that it was, thus, adopted so that the Commission would "have the means to determine whether a proposed allocation would provide a realistic local transmission service for its specified station location, or merely another reception service for the entire metropolitan area." Thus, the strong presumption on which Northern Indiana relies cannot, in the context of the *Policy Statement*, be given any significant consideration as a factor weighing in favor of a grant here.

15. Northern Indiana alleges next that the Board has not followed precedents which support a grant of its proposal, citing *WTOW, Inc.* (*WTOW*), 11 FCC 2d 277, 11 RR 2d 1211 (1968); *Naugatuck*, supra; *Monroeville*, supra; *Grace Broadcasters, Inc.* (*Grace*), 6 FCC 2d 533, 9 RR 2d 459 (1967); *Du Page County Broadcasting, Inc.* (*Du Page*) 5 FCC 2d 557, 8 RR 2d 930 (1966); *KEZY Radio, Inc.* 3 FCC 2d 407, 7 RR 2d 294 (1966); *Clay Broadcasters, Inc.*, 4 FCC 2d 932, 8 RR 2d 687 (1966); and *Jupiter Associates, Inc.*, 12 FCC 2d 217, 12 RR 2d 889 (1968). As to the *WTOW* proceeding, the applicant there (Towson, Md.) requested only a change in its directional pattern which would result in its 5 mv/m contour coverage of Baltimore (central city) being increased from 20 percent to about 45 percent. The Commission noted, among other things, that WTOW was an existing station and that its proposal neither involved an increase in power nor a move; that by a reorientation of the radiation pattern, those portions of Baltimore County not then served by WTOW, would be served; that, additional coverage of the city of Baltimore was incidental to the coverage of the county; and that a 25 mv/m coverage of the business district of Towson would be obtained with the proposed operation, while such coverage was not obtained under the existing operation, and that, thus, com-

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pliance with the coverage requirements of section 73.188 of the rules would be achieved. Here, in contrast, Northern Indiana's 5 mv/m contour would encompass the entire city of South Bend, Northern Indiana is not proposing a modification of an existing operation involving a minor change, and, as noted above, no showing has been made that the power and directional pattern proposed is required in order to provide service to Mishawaka in accordance with the requirements of the rules. These are substantial distinctions, and the Board observes no analogy between WTOW's proposal and Northern Indiana's.

16. The *Naugatuck* proceeding is readily distinguishable. There, the Board specifically found that the applicant had met its "burden with respect to the issues framed"; and that "the evidence adduced on the remand issues indubitably demonstrates that WOWW operating as proposed 'is designed to provide a realistic local transmission service for [Naugatuck]'." Here, the Board has been unable to make such findings, and accordingly, *Naugatuck* is not a precedent for a grant. Likewise, the Board finds no parallel between Northern Indiana's proposal and those in *Du Page*, supra. In *Du Page*, both proposals' 5 mv/m contours penetrated the central city to a limited extent: one applicant proposed an operation with minimum power and a directional operation with the thrust of its signal directed away from the central city; the other proposed a directional operation with low power with its radiation not directed toward the central city and its 5 mv/m coverage of the central city included only an airport. In *Grace* above, the Commission considered a petition for waiver of hearing and stated that because of the unusual fact situation, it would be inappropriate to apply the *Policy Statement* presumption of intent there. The facts concerned the use of a site which was particularly desirable for the applicant, the site was owned by a religious organization closely affiliated with the applicant and it was available at no cost to the applicant, the employees of the religious organization lived on or near the premises and would make up the staff of the station; the applicant indicated by its program proposals (a specialized religious programming format) that it was not seeking to serve the central city, and the applicant was a nonprofit corporation, and proceeds from the operation would be turned over to the religious organization. The Board can find no special fact situation here similar to the foregoing which could be used as a precedent for a grant.

17. *KEZY*, supra, is also not in point here. There, an existing station requested an increase in power which would result in an increase in penetration of the 5-mv/m contour of the central city from 4.9 to 11.1 percent. There the Commission found, based upon the data submitted, that the applicant had made a showing sufficient to overcome the presumption that the proposed increase in power was requested to serve the central city. In *Clay Broadcasters, Inc.*, supra, an applicant proposed a 500-watt nondirectional operation. The proposed 5-mv/m contour would have encompassed a substantial portion of the central city, but the Commission found, among other things, that the 500-watt power appeared reasonable in light of applicant's desire to furnish adequate service throughout the county in which the station would be located; that the relatively low power together with the nondirectional

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radiation pattern tended to rebut the inference that the applicant's real goal was to serve the larger community; and that the applicant's proposed antenna location was not placed to the south of its city where it would be closest to the central city, but to the southeast thereof where county coverage would be maximized. Again, the Board finds no parallel of the proposal here with *Clay Broadcasters, Inc.* In *Jupiter Associates, Inc.*, supra, the Board found that the applicant Radio Elizabeth, Inc., had "rebutted the presumption that it is an applicant for some larger city, and had demonstrated, pursuant to remand issues (a) (1) to (a) (4), that it realistically intends to, and would in fact be, a local transmission service for Elizabeth, N.J." As to applicant *Jupiter Associates, Inc.*, the Board expressed its concurrence with the Examiner's determination that *Jupiter* had successfully rebutted the presumption that it was an applicant for New York City, referring to *Jersey Cape Broadcasting Corp. (WCMC)*, 2 FCC 2d 942, 7 RR 2d 540 (1966). The Board finds no parallel between Northern Indiana's proposal and the ones in *Jupiter*. The successful applicant there proposed a low power 500-watt nondirectional operation, and the Board found, among other things, "that from an engineering standpoint, Radio's proposal is consistent with its expressed intention to provide Elizabeth with its first transmission service." Such a finding cannot be made here with the substantial proposed coverage of South Bend. In addition, the Board found the applicant had met its burden under the issues. The final case relied upon by Northern Indiana is *Southington Broadcasters*,[7] 12 FCC 2d 440, 12 RR 2d 1036 (1968), an Examiner's Initial Decision which became effective without further action. Therefore it is not one to be used as a precedent.[8]

18. A review of the foregoing cases does not reveal that the Board has imposed a greater burden of proof upon Northern Indiana than was placed upon the applicants in those cases. Each case is distinguishable from Northern Indiana's; the principal distinctions between Northern Indiana's and those applications which were granted without a hearing, or specification of the *Suburban Policy Statement* issues are either that the applicant's proposed insubstantial coverage of the central city with its 5-mv/m contour, or that the power and/or site proposed did not raise the same substantial presumption as is raised here. In those cases when the *Suburban Policy* issues were specified in adjudicatory hearings, the presumption was resolved on the basis of evidence adduced at the hearing; some were granted and others have been denied. Moreover, the evidence on which the Board relied in resolving issues (a) (1) and (a) (3) is the evidence adduced by Northern Indiana; Northern Indiana does not controvert the Board's conclusions drawn from those findings; it wants an opportunity to present additional evidence. There are no allegations that the evidence it wishes to present is newly discovered evidence, or that such evidence would establish that Mishawaka does, in fact, have separate and distinct needs. It is not a matter of more evidence per se, but rather evidence of a different type, directed toward a favorable resolution of the issues.

[7] Northern Indiana cited the case as *Southampton Broadcasters*, but, based upon its reference citation, it appears to be *Southington Broadcasters*.

[8] See Public Notice G, FCC 61-25 mimeo 98192 [20 RR 1141], released Jan. 6, 1961, finalization of initial decisions.

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This, Northern Indiana did not offer at the hearing, nor does it do so now.

19. Northern Indiana asserts that the ratios of populations between the central cities and the applicants' communities in other cases involving the 307(b) *Suburban Policy Statement* were higher than the ratio between South Bend and Mishawaka; and that the population of Mishawaka is larger than those other suburban communities except those involved in *KEZY*, supra, and *Jupiter Associates*, supra. However, it does not indicate how these facts are to be weighed here, or what significance they may have in the determinations required to be made. A review of the cases cited fails to show that such ratios or the size of communities were a controlling factor in the resolution of the presumption raised under the *Policy Statement* criteria. Only the ratio has been used in terms of raising the presumption, i.e., when the central city has a population of 50,000 and its population is twice as great as the suburban community.

20. Finally, Northern Indiana states that the Board's *Decision* contains numerous erroneous findings and statements, contending, among other things, that the findings are either irrelevant, inaccurate, incorrect, or incomplete. Generally, Northern Indiana's disagreement pertains to matters involving judgment or the weight to be accorded evidence. The Board has reviewed its *Decision* in light of the allegations made and does not find any significant corrections or modifications of the *Decision* to be necessary. The first statement in paragraph 1 of the *Decision* to which exception is taken involves a factual statement concerning the denial of an earlier filed application. However, since the sentence is not essential to the *Decision*, and in order to avoid any possible prejudice, as claimed, the sentence and its footnote will be deleted. The second allegation of error in paragraph 1 of the *Decision*, concerning reasons expressed for the remand of the proceeding, is deminimus and the Board finds no reasons to modify the statement. The reasons for the remand are fully set forth in its remand order (FCC 68R–407), cited in that paragraph. As to Northern Indiana's request to reconsider the Board's ruling on its exception 3 to the *Supplemental Initial Decision*, the Board has reviewed that ruling and reaffirms it. It appears that Northern Indiana misconstrues the ruling. The finding requested in its exception, is based upon measurements made upon WSBT in 1962 along one radial only. The 1962 measurements were rejected for the reasons stated in the ruling in preference to the more complete measurements made in December 1964, measurements which established WSBT's nighttime interference-free contour, and which showed that WSBT serves Northern Indiana's alleged white area. The finding requested as to "grey area" population was also based upon the 1962 measurements, and was rejected for the reasons stated in the ruling. As to the next allegation of error, the nighttime service of WNDU is adequately set forth and considered in the *Decision*, see paragraphs 5 and 40, and footnote 15. The findings of the program service of stations WSBT, WNDU, and WJVA, rendered to Mishawaka, and adduced pursuant to issue (a) (2) have been reviewed on the basis of Northern Indiana's contentions concerning their inadequacies. However, the Board finds no rea-

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son to disturb such findings because they adequately reflect the record, and the additional findings sought by Northern Indiana are not of decisional significance. In this connection, it is also to be noted that the Board's findings are in no way controverted by Northern Indiana. As noted in the *Decision*, the Board found that Northern Indiana had not carried its burden under issues (a) (1) and (a) (3). The remaining allegations made concerning the errors of the *Decision* have been reviewed and the Board reaffirms those findings, having determined that they adequately reflect the matters of record or the considerations involved.

21. From the foregoing, it is apparent that Northern Indiana has not raised any facts which would warrant the Review Board's reconsideration of its *Decision* except to the extent hereinafter ordered, or ordering a rehearing in this case.

22. Accordingly, *It is ordered*, That the last sentence of paragraph 2 of the *Decision Is replaced* with the following sentence:

> Except as modified and supplemented herein, and in the rulings on exceptions contained in the attached Appendices, the Examiner's findings and conclusions on the engineering issues of his *Initial Decisions* are adopted.

and

23. *It is further ordered*, That the second sentence of paragraph 1 of the *Decision Is deleted;* and

24. *It is further ordered*, That the petition for reconsideration and rehearing filed on July 26, 1968, by Northern Indiana Broadcasters, Inc., *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R-468

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SUNSET BROADCASTING CORP., YAKIMA, WASH.	Docket No. 16924 File No. BPCT-3478
APPLE VALLEY BROADCASTING, INC., YAKIMA, WASH.	Docket No. 16925 File No. BPCT-3648
NORTHWEST TELEVISION & BROADCASTING CO. (A JOINT VENTURE), YAKIMA, WASH.	Docket No. 16926 File No. BPCT-3672
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1968)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING. BOARD MEMBER KESSLER ABSENT.

1. Cascade Broadcasting Company (Cascade), the licensee of Station KIMA-TV, Yakima, Wash.[1] and a party respondent, petitions to add full disclosure and concentration of control issues against Apple Valley Broadcasting, Inc., and an issue to determine whether the pending merger agreement serves the public interest.[2] The case has a somewhat complicated history to which some reference must be made for a clear understanding of the questions raised by Cascade's petition to enlarge.

2. On November 29, 1965, prior to designation for hearing, Cascade filed a petition to deny Apple Valley's application, alleging, among other things, that Apple Valley had failed to list in its application some of the broadcast activities in which Morgan Murphy had had an interest and that the concentration of control which would result from a grant to Apple Valley would not be in the public interest. After amending its application to show those broadcast interests which, it was stated, had been omitted inadvertently and without any intention to mislead the Commission, Apple Valley opposed Cascade's petition to deny without attempting to answer the allegations of concentration of control.

3. When the applications were designated for hearing,[3] the Commission made no reference to the incomplete disclosure of past broad-

[1] Cascade is also the licensee of KEPR-TV, Pasco, Wash.; KLEW-TV, Lewiston, Idaho; AM station KIMA, Yakima, Wash.; and AM station KEPR, Kennewick-Richland-Pasco, Wash.

[2] The Petition to Enlarge was filed August 9, 1968. Apple Valley filed an opposition Aug. 30, 1968. Northwest Television & Broadcasting filed an opposition Sept. 3, 1968. The Broadcast Bureau filed comments Sept. 3, 1968 (the time for filing responsive pleadings was extended to Sept. 3, 1968, by the Board); and Cascade filed a reply Sept. 10, 1968.

[3] FCC 66-918, released Oct. 18, 1966.

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cast interests by Apple Valley. Cascade's charges of concentration of control were discussed at some length, and it was concluded "that there is no basis for concern that a grant of the application would result in a concentration of control of television broadcasting * * * ." No issues other than the standard comparative were specified against Apple Valley, although Commissioner Bartley, in a concurring statement, said that he would, among other things, include an issue as to concentration of control against Apple Valley. Cascade was made a party respondent with respect to the other applicants but not as to Apple Valley. Later, in response to a petition to intervene, the hearing examiner made Cascade a party as to Apple Valley, as well.[4]

4. Before any evidentiary hearings were held the applicants filed a joint petition for approval of agreement pursuant to which the interest of the several applicants were to be merged into a corporation in which Apple Valley's parent corporation would retain a 30-percent stock interest. Cascade opposed the agreement as did the Broadcast Bureau, and in a document released June 26, 1967,[5] the Review Board denied the joint request because of what appeared might constitute excessive reimbursement to two principals of Sunset Broadcasting Corp. A modified agreement, once again opposed by Cascade but now supported by the Broadcast Bureau, was approved by the Board September 7, 1967.[6] In the June 26 opinion, the Board observed that the merger aspects of the agreement were before it "only to the extent necessary to a determination whether the merger itself is a *bona fide* one * * * or is in fact merely a vehicle for prohibited excessive reimbursement in consideration for dismissal of the Sunset application." Referring to Cascade's attack on the merger aspects of the agreement the Board stated, in its September 7 opinion, "the Commission will closely scrutinize the merger agreement with all its provisions when the construction permit is assigned to the merged entity or when there is a transfer of control. At that time, the Commission will also examine the qualifications of the ultimate licensee and determine whether the assignment or transfer will serve the public interest, convenience, and necessity." [Footnote omitted.] The Commission denied Cascade's application for review.[7]

5. Cascade appealed to the U.S. Court of Appeals for the District of Columbia, but before the appeal was argued the Commission obtained a remand of the proceeding so that a hearing could be ordered on a trafficking issue. A request for such an issue in Cascade's petition to deny had been rejected in the first designation order. The court's remand order of June 27, 1968, provided that the Commission might specify "such other issues as the Commission may deem appropriate," and, accordingly, in the designation order on the trafficking issues [8] the Commission held that "the parties are not precluded from seeking enlargement of the issues in accordance with section 1.229 of the Com-

[4] FCC 66M–1650, released Dec. 7, 1966.
[5] 3 FCC 2d 642, 67R–262.
[6] 9 FCC 2d 902, 67R–372.
[7] FCC 68–144, released Feb. 21, 1968. Commissioners Bartley and Johnson dissented, the former stating, among other things, that examination of the post merger entity should not be postponed until the Commission acts on the assignment application.
[8] FCC 68–721, released July 24, 1968. Commissioner Bartley, in a concurring statement, urged the specification of additional issues.

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mission's rules." [9] The earlier order which denied Cascade's application for review of the Board's approval of the merger agreement was also vacated. At this point, the petition to enlarge now under consideration was filed by Cascade.[10]

6. The first issue requested reads as follows:

> To determine whether Apple Valley has made a full disclosure in its application regarding ownership interests in broadcast stations and, if not, whether the failure to make such disclosures adversely affects the applicant's qualifications to be a licensee of the Commission.

7. Referring to its petition to deny Cascade states that in the application in which an officer of Apple Valley attested that the statements contained therein were true, complete, and correct, that applicant failed to disclose that Morgan Murphy at one time held, directly or indirectly, controlling interests in WMFG, Hibbing, Minn.; WHLB, Virginia, Minn.; WFBC, Duluth, Minn.; WISM (AM & FM) Madison, Wis.; WEAQ, Eau Claire, Wis.; WIAL (FM), Eau Claire, Wis.; and WMAM, Marinette, Wis.; and had ownership interest in KGTV, Des Moines, Iowa. Cascade also asserts that Murphy was a party to an application for new TV and FM stations in Duluth and a new TV station at Hibbing. Calling attention to the importance which the Commission and courts have attached to full and accurate disclosure by applicants, Cascade maintains that because the omitted broadcast interests bear on the possible trafficking activities of Murphy, "there is particular reason * * * for the Commission to submit the incomplete disclosure of Apple Valley to close scrutiny * * * ." Petitioner then notes that in first designating this case for hearing (see par. 3, supra), the Commission did not dispose of this issue nor treat of the matter in any way, an omission which Cascade asserted in its appeal as being in violation of section 309(d)(2) of the act, and urges that the Board correct this error by designating the issue requested.

8. Apple Valley, Northwest Television, and the Broadcast Bureau oppose this aspect of Cascade's petition to enlarge. In substance, they argue (Northwest by adopting Apple Valley's arguments) that no basis for an issue exists because Apple Valley's amendment answered the point made by Cascade in its petition to deny, and that since no substantial issue was prescribed for resolution, either at the time of original designation or in the remand designation, the Commission was not required under section 309 to issue a concise statement of its reasons for rejecting Cascade's request for a nondisclosure issue. Apple Valley also contends that Cascade "has failed to show any intention to withhold pertinent information from the Commission which was not otherwise a matter of record with it, or anything but an inadvertent oversight in the application process upon which all facts are now before the Commission." Replying, Cascade insists that under the cir-

[9] Sec. 1.229 governs the filing of motions to enlarge, change, or delete issues.

[10] On Oct. 11, 1968, Hearing Examiner Chester F. Naumowicz issued an *Initial Decision*, FCC 68D-63, recommending that the grant to Apple Valley be reinstated. Although the proceeding is now before the Commission, the subject petition to enlarge was properly filed with the Review Board, and, in order to implement the Commission's directive to expedite this proceeding, the Board will act on this petition.

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cumstances of this case the nondisclosure question presented a substantial issue requiring treatment by the Commission.

9. Whether or not Cascade's petition to deny on grounds of nondisclosure raised an issue of sufficient substance to require "a concise statement of the reasons for denying the petition" is a question the Board need not decide. We are in a position to remove doubt on this question simply by evaluating the allegations and responses, for we interpret the remand from the court and the latest designation order to be broad enough to permit such a disposition now. As heretofore noted, Cascade pointed out in its petition to deny that Apple Valley's application filed in 1965, did not set forth all of Morgan Murphy's past broadcast interests; only those held by Murphy during the previous 5 years had been reported. Apple Valley amended to supply the omitted information, and the vice president of Apple Valley who had prepared the original application submitted a statement in which he indicated that in preparing the application he had "erroneously included only past broadcast interests which were held during the past 5 years." He pointed to the fact that in the next proceeding section of the application the past 5 years is the period for which information about business and financial interests is requested. He then declared that the "omission of other broadcast interests held prior to 1960 was completely inadvertent and not in any way intended to mislead the Commission as to such other interests." Cascade did not respond to the amendment and in its reply to the opposition to its petition to deny Cascade said it did not desire to dwell on the subject in its reply and merely reminded the Commission of the need for complete, accurate, and candid response in an application. There was no challenge to the reasonableness of Apple Valley's explanation nor any questioning of veracity or motives. It was not until Cascade filed its court appeal that motives for the nondisclosure were suggested, and they have been repeated in the petition now before the Board. In its reply to the opposition to its instant petition Cascade does not question the accuracy of the statement made by Apple Valley's vice president in support of the amendment.

10. After reviewing the matters summarized above, the Board concludes that insufficient facts have been alleged to justify specification of the nondisclosure issue sought by Cascade. Certainly, no one questions the importance of full disclosure in applications filed with the Commission, but in the face of prompt amendment to correct the deficiency and the accompanying explanation by Apple Valley, mere assertion of the principle does not suffice as a basis for enlargement of the issues. Cascade has not challenged Apple Valley's explanation except to the extent that its suggestion that the trafficking question supplied a motive for nondisclosure impliedly constitutes such a challenge. However, the Board is unable to conclude that this suggestion of a motive is enough to put Apple Valley's contention that the omission was inadvertent in doubt in light of Apple Valley's reasonable explanation, its sworn denial of any intent to conceal information and the fact that all of the omitted data was extant in official Commission files. Suspicion and surmise, as the Board has repeatedly said, are not sufficient grounds for issue enlargement.

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11. The second issue asked for by Cascade pertains to concentration of control and reads:

> To determine whether a grant of the instant application of Apple Valley would result in an undue concentration of control of the media of mass communications.

Cascade does not base its request on overlap of grade B contours but rather on what it describes as "effective coverage, i.e., those areas within which a licensee exerts influence over the dissemination of news and opinion." Factual reliance is placed on Morgan Murphy's ownership interest in communications media in California, Minnesota, Wisconsin, and Washington and upon a KXLY–TV advertising brochure in which KXLY–TV [11] is portrayed as having the greatest coverage of any television station in the United States and lists within its service area parts of Washington, Idaho, Montana, Oregon, and British Columbia. Reference is also made to the station's listing in Television Factbook, 1968 edition, in which KXLY claims to serve 50 percent or more of the television homes in substantial areas beyond its grade B contour (based on a 1965 ARB study). Apple Valley's pending application for a construction permit for a television station on channel 42 at Kennewick, Wash., is also cited, and the fact that KXLY–TV has between 25 and 50 percent circulation in the county where channel 42 would operate is posited as further proof of concentration of control by Apple Valley. Similarly, petitioner points to the fact that KXLY–TV has over 50 percent circulation in three other counties which allegedly are the primary counties channel 42 will serve.

12. Observing first that the Commission previously denied the request for a concentration issue, Apple Valley contends in opposition that Cascade has failed to make an adequate threshold showing for such an issue. The relevant facts, says Apple Valley, are that it does not, and would not after merger, own or control a single operating broadcast or other communications medium in Yakima, Yakima County, or the entire grade A coverage area of the proposed station; it has no other operating broadcast or communications facility in Washington except KXLY–TV, AM and FM in Spokane; there will be no overlap of grade B contours between the Yakima and Spokane stations which will be 50 miles apart at their closest; and there is an abundance of competitive television and radio media in Spokane and Yakima. According to Apple Valley, the proposed satellite station [12] in Kennewick "only represents its attempt to achieve some supportable level of competitive equality with Cascade and the other long-established Yakima station * * *."

13. The Broadcast Bureau opposes insertion of a concentration issue on the ground that Cascade's allegations were fully discussed and rejected in the order which initially designated the case for hearing and were reaffirmed and amplified in the Commission's brief before the court of appeals. It is also the Bureau's view that the request for a concentration issue was again considered by the Commission at the time of the designation of trafficking. Therefore, based on *Atlantic*

[11] KXLY–TV is owned by the Evening Telegraph Co. in which Murphy is a 97.49-percent stockholder.

[12] This station is proposed as a satellite of Apple Valley's Yakima station at issue here.

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Broadcasting Co., 5 FCC 2d 177, the Board should deny the request, the Bureau concludes.

14. Except in details, Cascade's basis for the requested concentration issue is the same as that presented in the petition to deny, and the Commission, in rejecting this showing in the original designation order, relied on the facts that there would be no overlap of the grade B contours which were separated by 50 miles at their closest point and that the communities involved were separate and distinct for the conclusions that the two stations would not be serving substantially the same areas and populations. The Commission also noted that there is an abundance of competitive media in Spokane and Yakima. Since the matter was discussed in detail in the designation order, the Board is not in a position to consider the request further unless new elements of substance have been brought in by Cascade in its petition to enlarge. *Atlantic Broadcasting Co.*, 5 FCC 2d 717.

15. The only element of substance relied on now by Cascade is the application of Apple Valley for a satellite station on channel 42 at Kennewick, Wash., which, says petitioner, will serve areas in some of which KXLY–TV presently has circulation between 25 and 50 percent and in other portions of which KXLY–TV has over 50 percent circulation. However, as noted, there will be no overlap of grade B contours between the proposal for Yakima and KXLY–TV in Spokane. The respective grade B contours of the Yakima proposal and its proposed satellite at Kennewick overlap each other's grade A contour, but this is not significant here. Aside from the fact that satellites are exempted from the flat prohibition against overlap specified in section 73.636(a)(1) of the rules,[13] the Board does not view Apple Valley's Kennewick proposal as being germane to the question whether undesirable concentration will result from a grant of the Apple Valley Yakima application.

16. Note 4 of section 73.636(a), supra, and the Commission's explanation for the satellite exemption [14] make it plain that in each instance the pertinent facts will be examined to determine whether the overlap is against the public interest, and the factors to be considered in such an evaluation are specified. However, in the Kennewick case the Board is not in a position to make the factual evaluation. That application is not in hearing status and will not be until the Commission has made the necessary examination and decided that it should be. The Board does not have delegated authority to do this. Moreover, there is not now in existence a commonly owned or controlled station for the satellite to overlap and, until Apple Valley is finally authorized to operate in Yakima, the Kennewick proposal is virtually in the position of being a contingent application. While a grant of the satellite application cannot be awarded until the Yakima proposal is made final, the occurrence of the latter event, which is still undecided, would not assure approval of the satellite. Therefore, it would be better to

[13] See note 4 to sec. 73.636 of the rules which generally exempts satellite television stations from the automatic application of the overlap rule (sec. 73.636(a)(1)).

[14] Amendment of secs. 73.35, 73.240 and 73.636 of the Commission's rules relating to multiple ownership, etc., FCC 64–445, 29 F.R. 7535, 2 RR 2d 1588 (1964) and reconsideration thereof, FCC 64–904, 29 F.R. 13896, 3 RR 2d 1554 (1965), the latter, at 3 RR 2d 1562 being particularly in point.

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follow that line of cases, exemplified by *Haywood F. Spinks*, FCC 63R–229, 25 RR 441 (1963), which hold that in situations where aspects of multiple ownership are involved, questions raised by a second application involving the same applicant are better left to be acted upon at the time the Commission has that application before it for action.

17. Aside from the foregoing Cascade still relies to a large extent on a KXLY–TV advertising brochure which was before the Commission at the time of designation as a part of the petition to deny, but this does not change the undisputed fact the service areas of Murphy's commonly owned stations are separated by more than 50 miles and that Spokane and Yakima are approximately 175 miles apart. While petitioner describes Apple Valley as a "powerful broadcasting monolith," the facts reveal to the contrary that there are numerous competing stations; 15 in Spokane and eight in Yakima. Commission records further reveal that there are in operation in the State of Washington 15 commercial and six educational television stations, as well as 95 AM and 45 FM stations, none of which are controlled by Murphy.

18. Petitioner is correct in pointing out that concentration of control can exist without there being overlap of the grade B contours of commonly owned or controlled stations. Section 73.636(a)(2) of the rules provides, in part, that in deciding this question, "consideration will be given to the facts of each case with particular reference to such factors as the size, extent, and location of area served, the number of people served, and the extent of other competitive service to the areas in question." These aspects of the concentration issue were plainly disposed of by the Commission in the designation order. Moreover, the Board does not view the designation order as leaving unanswered the contention, made by Cascade in its petition to deny, that account must be taken of the fact that signals from KXLY–TV are received in areas which lie beyond that station's grade B contour. The Commission has not recognized reception of signals beyond a station's grade B contour. (Indeed, when problems of coverage under section 73.636 arise, the field intensity contours are to be used. Section 73.683(b)(2).) To the contrary, the Commission has said that grade B service is the minimum acceptable television service, *Triangle Publications, Inc.*, 3 RR 2d 37 at 88, 37 FCC 307 (1964). In *Triangle*, the Commission indicated some of the problems which arise in the use of ARB reports in preference to the technical standards, and those comments clearly indicate the need to lay down a better basis for their use here than KXLY's advertising brochure before they could be considered.[15]

19. The third issue requested by Cascade is:

> To determine whether the proposed merger will serve the public interest, convenience, or necessity within the meaning of section 311 of the act.

[15] While the Commission utilizes ARB net weekly circulation reports for the purpose of ranking the major television markets, it has refused to accept these figures as necessarily coterminous with the area essential for the development of UHF television in major markets. *T–V Transmissions, Inc.*, FCC 67–1000, 11 RR 2d 123.

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The basis for the issue is the way in which the Board handled aspects of Cascade's opposition to the merger agreement heretofore referred to.

20. When the Board, in its June 26, 1967, *Memorandum Opinion* (footnote 5, supra), first considered the merger agreement, it observed, that the merger aspects of the agreement could be considered by the Board "only to the extent necessary to a determination whether the merger itself is a bona fide one * * * or is in fact merely a vehicle for prohibited excessive reimbursement in consideration for dismissal of the Sunset application." Later, after the agreement had been modified, the Board again examined the agreement, and ruled that all matters unrelated to the bona fides of the merger were not properly before the Board. It went on to state, "The Commission will closely scrutinize the merger agreement with all its provisions when the construction permit is assigned to the merged entity or when there is a transfer of control. At that time, the Commission will also examine the qualifications of the ultimate licensee and determine whether the assignment or transfer will serve the public interest, convenience, and necessity." This ruling was not disturbed by the Commission on review, and it was one of the points on which Cascade sought court review. Upon remand, the Commission, in its new designation order, stayed the effect on the Board's order approving the agreement and vacated its own order which denied review of the Board's order.

21. It is unnecessary to deal at great length with the Cascade arguments on this point. Essentially, Cascade contends that the Board's treatment of the merger, except insofar as it affects the bona fides of the agreement, as a matter to be separately examined by the Commission, is wrong. This contention and its supporting arguments must be rejected for two reasons. First, the Board's previous ruling on this point has only been stayed, not set aside, leaving us without any jurisdictional basis for changing it, since the time for reconsideration has long since expired without there being a request from Cascade, or any other party, to do so. Second, the treatment which the Board gave to the merger aspects of the agreement was dictated by the Commission's ruling in *Spanish International Television Company, Inc.*, FCC 65–425, 5 RR 2d 479, on which we relied in our September 7, 1967, opinion referred to, supra. In that case, although a copy of a joint venture agreement had been submitted with the dismissal agreement, the Commission stated that "the effectuation of such agreement is not involved in this proceeding" and that "we will exercise our judgment thereon when the application is filed with us seeking our consent to the assignment of construction permit * * * to the joint venture * * *." As we said in *Gross Broadcasting Company*, FCC 65R–237, 5 RR 2d 805, the Commission's statement in *Spanish International* is applicable to this proceeding. Until such time as the Commission alters the position it took in that case, Cascade's arguments will be unavailing.

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22. On the basis of the foregoing, *It is ordered*, That the petition to enlarge filed August 9, 1968, by Cascade Broadcasting Co., *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R-484

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LOUIS VANDER PLATE, FRANKLIN, N.J., ET AL. For Construction Permits	Dockets Nos. 18251 (File No. BP-16837), 18252, 18253, 18254, 18255, 18256, 18257

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS BERKEMEYER AND PINCOCK ABSENT. BOARD MEMBER NELSON ABSTAINING.

1. Presently before the Board is a petition to enlarge issues, filed October 8, 1968, by the Broadcast Bureau.[1] By *Order*, FCC 68-731, released July 22, 1968, the applications herein were designated for hearing. The Bureau now requests that the issues in the proceeding be enlarged to include: (1) a determination of whether or not Lake-River Broadcasting Corp. (Lake-River) has had a copy of its application available for public inspection in accordance with rule 1.594; and (2) to determine, in light of the foregoing, whether the Lake-River application should be dismissed or a comparative demerit assessed.[2]

2. In support of its allegation that Lake-River's public notice did not direct interested persons to the correct point of reference, the Bureau submits a letter from Mr. Robert Gold, advising the Commission that on September 5, 1968, he attempted to examine the Lake-River application at the location specified in the public notice and was told it was not there. The Bureau also alleges that the Lake-River point of reference was changed at or near the time notice was published. In support of this allegation the Bureau submits an affidavit, executed on October 1, 1968, of Laurence Tighe, president of Lake-River (which was prepared in reference to a Bureau letter attempting to ascertain information regarding this matter), in which the affiant states that he advised his counsel "approximately 2 months ago" that it would be necessary to change the point of reference. The Bureau reasons that since publication commenced on July 29, 1968, and ended on August 6, 1968, the point of reference described in the notice must have been erroneous.

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[1] Other pleadings before the Board for consideration are: (a) opposition, filed Oct. 21, 1968, by Lake-River Broadcasting Corp.; and (b) reply, filed Oct. 24, 1968, by the Broadcast Bureau.

[2] Although the Bureau's petition does not comply with the time requirement of sec. 1.229 of the Commission's rules, the Review Board will accept the petition. In view of the fact that the basis for the petition was not known to the Bureau until after the requisite 15 days had elapsed, and the Bureau filed its petition within a short period after it learned of the relevant facts, good cause for the delay has been shown.

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3. In opposition, Lake-River states that the reason why the change in the point of reference was not in the published notice is because the advertisement was prepared by legal counsel in Washington, D.C., and the Lake-River principals did not advise legal counsel that the reference point had been changed until after the advertisement had been published.[3] Lake-River argues that there has been "substantial compliance" with the public reference requirements because the staff at the published reference point was directed to send interested persons to a location where the application was available. Lake-River emphasizes that legal counsel advised that the giving of instructions as to where the record could be reviewed would be substantial compliance. Moreover, Lake-River alleges that a complete new record was sent to the published point of reference on October 17, 1968. Lake-River concludes by arguing that section 1.594 of the Commission's rules does not provide a procedure to be employed when the reference point is changed after publication.

4. In the reply the Bureau submits two affidavits of Mr. Melvin Lieberman in which the affiant details his futile efforts to gain inspection of the application both at the office indicated in the public notice and at the office where Lake-River allegedly kept the application. The Bureau submits that these affidavits confirm the de facto nonavailability of the application.

5. In view of the affidavits submitted by the Bureau, Lake-River's allegation that it has substantially complied with section 1.594 of the Commission's rules is unpersuasive. The Bureau has made a showing that the application was neither available at the published reference point, nor at the office where the application was allegedly kept. Moreover, Lake-River has failed to give an adequate explanation as to why the change in reference point was not communicated to its counsel before publication or, in the alternative, why a corrected notice was not subsequently published. The reasons given by Lake-River as to why a corrected notice was not subsequently published (including reliance on the advice of counsel) do not resolve the factual questions raised by the allegations of difficulties encountered in obtaining the application at both reference points. The argument that section 1.594 does not provide a procedure for changing the reference point is also unpersuasive. The logical conclusion of Lake-River's argument is that a fortuitously timed change could eliminate the publication requirement of the section altogether. "Common sense and good judgment" in substantially complying, as advocated by Lake-River, should not be permitted to dilute the protections afforded by section 1.594.

6. Accordingly, *It is ordered*, That the petition to enlarge issues, filed October 8, 1968, by the Broadcast Bureau, *Is granted* and that issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine whether Lake-River Broadcasting Co. has had a copy of its application available for public inspection as required by section 1.594 of the rules.

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[3] The opposition appears to contradict the statements of Laurence Tighe in his affidavit of Oct. 1, 1968, in which he states that he advised counsel that the place of reference would be changed. Presumably Mr. Tighe's information was communicated before publication. However, the timing is unclear.

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(2) To determine, in light of the evidence adduced under the foregoing issue, whether the Lake-River application should be dismissed or a comparative demerit assessed.

7. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden or proof under the issues added herein shall be upon Lake-River Broadcasting Co.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1126

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of: VIKING TELEVISION, INC., MINNEAPOLIS, MINN.	Docket No. 18381 File No. BPCT-3772
CALVARY TEMPLE EVANGELISTIC ASSOCIATION, MINNEAPOLIS, MINN.	Docket No. 18382 File No. BPCT-4091
For Construction Permit for New Television Broadcast Station	

ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER WADSWORTH ABSENT.

1. The Commission has under consideration the captioned applications, each requesting a construction permit for a new commercial television broadcast station to operate on channel 23, Minneapolis, Minn.

2. Based on information contained in the application of Viking Television, Inc., cash in the amount of $389,292 will be needed to construct and operate the proposed station for 1 year.[1] To meet the cash requirement, the applicant claims the availability of a $200,000 bank loan, $300,000 in stock subscriptions, and cash and prepaid expenses of $14,242. The bank loan is to be secured by pledges of named stocks by certain members of the applicant, who have agreed to pledge their stock for this purpose. However, stock subscribers Harold W. Bangert and Barbara D. Marmet have used some of the same common stock that is pledged to secure the loan to establish their financial ability to meet their commitments to purchase stock in the applicant. It may well be that these stock subscribers have enough of the named stocks to meet both commitments, but we cannot make such a determination on the basis of the information before us. Accordingly, appropriate issues will be specified. In addition, stock subscriber Morton H. Henkin has not demonstrated the availability of sufficient current and liquid assets in excess of current liabilities, as defined by paragraph 4(d), section III, FCC Form 301, to enable him to meet his commitment to the applicant, and an issue will be specified in this regard. The availability of the cash and the disbursement of the prepaid expenses to be applied against construction costs have been established.

3. Based on information contained in the application of Calvary

[1] Consisting of down payment on equipment ($125,000), payments and interest on equipment ($47,292), equipment not covered by deferred credit ($7,880), first-year operating costs ($202,000), and miscellaneous expenses ($15,000).

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Temple Evangelistic Association, at least $450,869 will be needed for the construction and first-year operation of the proposed station.[2] To meet the cash requirement, the applicant has established the availability of loans of $36,400 and $220,000 from Midwest Federal Savings, and a $100,000 loan from Mr. Marvin J. Nelson. The applicant has also established the availability of a $100,000 loan from the Midland National Bank of Minneapolis. However, this loan does not specify the terms of repayment and does not, therefore, meet the requirements of paragraph 4(h), section III, FCC form 301. An issue will be specified to ascertain these terms. The cash-needed figure must, of course, be increased to the extend that the terms of repayment require first-year payments of principal and/or interest. The applicant has therefore established the availability of $456,400 to meet a commitment of at least $450,869. It would appear, however, that the applicant would be short funds if only minimal payments are required during the first year on the Midland National Bank loan.[3] Although the applicant states that it will rely on revenues for any shortages, it has not submitted any firm commitments that would establish that such revenues will, in fact, be available. We will therefore specify an appropriate issue.

4. Calvary Temple Evangelistic Association, in section IV, supplement of its application, states that in conducting its survey of community leaders—

> * * * the individual was apprised of the association's general plan to establish a broadcast station for the essential purpose of providing an outlet for local expression in all areas of community life. Suggestions were also solicited. In every instance, the individual indicated wholehearted support of the proposal and confirmed the continuing need for such a facility. The suggestions received were of a general nature, to the effect that such a station should strive to provide an outlet for as many areas of community life as possible and that our proposal appeared to meet such a need.

As we stated in our public notice of August 22, 1968, concerning ascertainment of community needs by broadcast applicants, the consultations with community leaders "should elicit constructive information concerning community needs, and not mere approval of existing or preplanned programing." In reviewing the letters submitted as "suggestions" from community leaders, it appears that the applicant's statements to community leaders concerning its general programing plans had the restrictive effect we sought to avoid by the publication of the quoted statement from the public notice. All but one of the letters appear to be endorsements of the general plans set forth by the applicant. The application does contain an occasional suggestion, but these are too few and too general to be meaningful. We have therefore specified a *Suburban* issue. We note, in this connection, that long-time

[2] Consisting of down payment on equipment ($128,000), first-year payments and interest on equipment ($27,840), equipment not covered by deferred credit ($715), principal and interest payments on loans ($41,404), first-year operating expenses ($198,000) and miscellaneous expenses ($55,000). Although the applicant lists its first-year cost of operation at $215,948, this figure includes $17,948 interest payments on bank loans, which we have listed separately.

[3] For example, assuming no payments on principal and a 7-percent yearly interest rate payable within the first year, the $7,000 additional cash needed would create a shortage of $1,469.

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association with the area to be served does not establish, without more, that an applicant is familiar with the programing needs and interests of the community, *Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 RR 2d 691 (1968).

5. Except as indicated below, each of the applicants is qualified to construct, own, and operate the proposed new television broadcast station. The applications are, however, mutually exclusive in that operation by both applicants as proposed would result in mutually destructive interference. The Commission is therefore unable to make the statutory finding that a grant of the applications would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

6. Accordingly, *It is ordered*, That, pursuant of section 309(e) of the Communications Act of 1934, as amended, the applications of Viking Television, Inc. (BPCT–3772) and Calvary Temple Evangelistic Association (BPCT–4091) *Are designated for hearing in a consolidated proceeding* at a time and place to be specified in a subsequent order, upon the following issues:

(1) To determine with respect to the application of Viking Television, Inc.—

(*a*) Whether Harold W. Bangert, Morton H. Henkin, and Barbara D. Marmet have sufficient current and liquid assets in excess of current liabilities to enable them to meet their stock subscription commitments to the applicant.

(*b*) Whether Barbara D. Marmet and Harold W. Bangert, in addition to those assets required in issue (*a*), have the necessary common stock available to be pledged to secure the $200,000 bank loan from the First National Bank of Minneapolis.

(*c*) Whether, in view of the evidence adduced under issue (*b*), the $200,000 bank loan from the First National Bank of Minneapolis will be available to the applicant.

(*d*) Whether, in view of the preceding issues, the applicant is financially qualified.

(2) To determine with respect to the application of Calvary Temple Evangelistic Association—

(*a*) The terms of repayment on the $100,000 loan from the Midland National Bank of Minneapolis.

(*b*) In view of the evidence adduced under issue (*a*), the extent, if any, to which the applicant's cash requirements will be increased.

(*c*) Whether, in view of the evidence adduced under issues (*a*) and (*b*), the applicant has available sufficient funds to meet its cash requirements, and if not, whether the applicant will have available sufficient revenues to supplement available funds.

(*d*) Whether, in view of the evidence adduced under the preceding issues, the applicant is financially qualified.

(*e*) The efforts made by the applicant to ascertain the community needs and interest of the area to be served and the means by which the applicant proposes to meet those needs and interests.

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(3) To determine which of the proposals would better serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the above issues, which, if either, of the applications should be granted.

7. *It is further ordered*, That the applicants, to avail themselves of the opportunity to be heard, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

8. *It is further ordered*, That the applicants shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, file notice of the hearing within the time and in the manner prescribed in such rules, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1108

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of PAUL L. CASHION AND J. B. WILSON, JR., D.B.A. WILKES COUNTY RADIO, WILKESBORO, N.C. For Construction Permit	Docket No. 16311 File No. BP-16556

MEMORANDUM OPINION AND ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSTAINING FROM VOTING; COMMISSIONER WADSWORTH ABSENT.

1. Involved in this proceeding is the application of Paul L. Cashion and J. B. Wilson, Jr., doing business as Wilkes County Radio (County), for a construction permit for a new class IV standard broadcast station to operate on 1240 kc/s, utilizing 100 watts, unlimited time, at Wilkesboro, N.C. The application was designated for hearing by order (FCC 65-1049), released November 26, 1965.[1] The ultimate issues in hearing concerning County's application were: (*a*) areas and populations to be served; (*b*) whether County's proposal would provide principal city coverage as required by section 73.188(a)(1) of the Commission's rules, and, if not, whether circumstances existed which would warrant waiver of said rule; and (*c*) the ultimate public interest determination.[2] Both the hearing examiner (*Initial Decision*, FCC 67D-27, 10 FCC 2d 627) and the Review Board (Review Board's *Decision*, 10 FCC 2d 622, 11 R.R. 714) favored a waiver of section 73.188(a)(1) of the Commission's rules and a grant of County's application.

2. Before us are the following matters: (*a*) a petition for leave to amend, filed January 31, 1968, by County; (*b*) a response to the petition to amend, filed February 9, 1968, by Chief, Broadcast Bureau (Bureau); (*c*) an opposition to petition to amend and a petition to dismiss application or to remand for further hearings, filed February 12, 1968, by Wilkes Broadcasting Co. (Broadcasting);[3] (*d*) com-

[1] County's application was designated for comparative hearing with the then mutually exclusive application of Fletcher R. Smith and Madge P. Smith doing business as Wilkesboro Broadcasting Co. which was dismissed by the Review Board (4 FCC 2d 164, 8 R.R. 2d 141, review denied FCC 66-728, Aug. 19, 1966).

[2] In our designation order we imposed a heavy burden upon the applicant to show that a grant of the application would serve the public interest in view of the Commission policy to discourage applications for 100 watt operation. The *Report and Order* which thereafter raised the minimum power for a class IV station from 100 watts to 250 watts exempted pending applications (FCC 66-506, 7 R.R. 2d 1670, 1673 released June 3, 1966).

[3] Shortly after designation, Wilkes Broadcasting Co., licensee of stations WKBC and WKBC-FM, North Wilkesboro, N.C., was made a party to the proceeding (FCC 66M-75, released Jan. 12, 1966).

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ments on Broadcasting's opposition and its petition to dismiss application or to remand for further hearings, filed April 3, 1968, by the Bureau; (*e*) a reply, filed April 2, 1968, by County; (*f*) a petition for leave to submit a substitute amendment and to withdraw its previously tendered amendment, filed April 2, 1968, by County; (*g*) a response to the petition for leave to submit a substitute amendment, filed April 12, 1968, by the Bureau; (*h*) a reply to County's and the Bureau's oppositions to the petition for dismissal and an opposition to County's further attempt to amend, filed April 22, 1968, by Broadcasting; (*i*) a reply, filed April 29, 1968, by County; (*j*) a supplement to the petition for leave to amend filed April 29, 1968, by County; (*k*) an opposition to supplement filed May 8, 1968, by the Bureau; and (*l*) a reply, filed May 13, 1968, by County. Also before us are: (*a*) an application for review, filed December 15, 1967, by Broadcasting; (*b*) an opposition, filed January 12, 1968, by County; (*c*) an opposition, filed January 12, 1968, by the Bureau; and (*d*) a reply filed January 24, 1968, by Broadcasting.

3. We have reviewed the pleadings enumerated above and believe that a detailed summation of those pleadings would serve no useful purpose. The substance of those pleadings are: (*a*) a request by County, after release of decisions by both the hearing examiner and the Review Board, for leave to amend its application to specify a transmitter site location other than that originally proposed; (*b*) a petition to dismiss County's application for lack of a suitable transmitter site location, filed by Broadcasting; (*c*) a petition to remand for further hearings alleging misconduct against County, filed by Broadcasting; and (*d*) an application for Commission review of the Review Board's decision affirming the hearing examiner's recommendation to grant County's application.

4. County's request to amend its application to substitute a different transmitter site will be denied. This case has gone through hearing and decisions favorable to County have been issued both by the hearing examiner and by the Review Board. The determination to waive the principal city coverage requirements of section 73.188(a)(1) of the rules was based in large part upon the predicted coverage from the site specified in the application. Only upon a showing of exceptionally meritorious circumstances would we authorize at this late stage of the proceeding the amendment requested by County and no such showing has been made. Throughout the proceeding, and even in the pleadings now before us, County has maintained that the site proposed in the application is available for its use and County has presented no sufficient justification for abandoning that site. On the contrary, the engineering statement submitted in support of its petition discloses an additional reason for denying the amendment since operation from the alternative transmitter site would result in less service nighttime to the principal city, Wilkesboro. The transmitter site proposed in the amendment is 600 feet farther from the center of the city than that set forth in the application, with the result that approximately 15.4 percent of the population of Wilkesboro, instead of the 4 percent under its original proposal, would be outside the nighttime interference-free

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contour of County's proposed operation.[4] From all of the foregoing, we conclude that the public interest would not be served by a grant of County's petition or by the acceptance of its amended application.

5. With respect to the requests of Broadcasting that County's application be dismissed for lack of a transmitter site or be remanded for further hearing on issues of misconduct by County, they are lacking in substantive merit. No new substantial or material facts have been alleged by Broadcasting to indicate that County has lost its original transmitter site and we do not believe that abandonment can be implied so as to justify a summary dismissal merely because County has selected an alternative site. Broadcasting's charges of misconduct against County are unsupported and, at most, they merely represent a reargument and a reiteration of prior allegations which both the examiner and the Review Board have consistently rejected. Cf. *WWIZ, Inc.*, 37 FCC 685, 3 R.R. 2d 316 (1964). Furthermore, we are not persuaded that misconduct may be implied simply because an applicant deemed it necessary because of practical considerations to propose several transmitter sites. Cf. *Cabrillo Broadcasting Company*, FCC 62 R–133, 24 R.R. 608, 615 (1962).

6. The application for review filed by Broadcasting presents no question of law, fact, or policy which merits Commission consideration.

7. Accordingly, *It is ordered*, That:

1. The petitions filed by Paul L. Cashion and J. B. Wilson, Jr., doing business as Wilkes County Radio on January 31, 1968, for leave to amend and on April 2, 1968, for leave to submit a substitute amendment and to withdraw the previously tendered amendment are:

(*a*) *Granted* to the extent that County's tendered amendment of January 31, 1968, *Is dismissed;* and

(*b*) *Denied* in all other respects.

2. The petition filed by Wilkes Broadcasting Co. on February 12, 1968, to dismiss application or to remand for further hearing *Is denied.*

3. The application for review filed by Wilkes Broadcasting Co. on December 15, 1967, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] In its opposition, Broadcasting contends that 21.2 percent of the population would be outside that contour. Irrespective of which figure is correct, a substantial question is presented as to whether a public interest determination concerning the application for waiver of sec. 73.188(a)(1) could be made without further hearing.

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FCC 68R-487

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WMID, INC., PLEASANTVILLE, N.J. For Construction Permit	Docket No. 18005 File No. BPH-5958

MEMORANDUM OPINION AND ORDER

(Adopted November 25, 1968)

BY THE REVIEW BOARD.

1. The Review Board has before it an appeal from examiner's ruling, filed October 21, 1968, by WMID, Inc. (WMID), seeking reversal of the hearing examiner's denial of a petition for leave to amend the WMID application.[1] The proffered amendment consists of a change in channel specification (see note 3, infra), a proposed program change, information relating to a survey of the program needs of the community, and information clarifying certain aspects of the staffing of the proposed station.

2. The proceeding involves WMID's application for a new FM broadcast facility at Pleasantville, N.J., which was designated for hearing with the mutually exclusive application of Atlantic City Broadcasting Co.[2] Under the Commission's designation order (33 F.R. 3243, published February 21, 1968) the only specified issue relating to WMID was the general comparative issue. Thereafter, the Review Board, by *Memorandum Opinion and Order* (13 FCC 2d 412, 13 R.R. 2d 505 (1968)), specified a *Suburban* issue against the applicants; this order stated that, because of the "unusual circumstances" of the proceeding and because the added issue is of a disqualifying nature, the parties should be afforded an opportunity to amend to make the requisite showing. WMID's responsive amendment, filed July 29, 1968, was accepted on August 5, 1968 (the August 5 amendment) by the hearing examiner.[3] The Broadcast Bureau petitioned for reconsideration of the acceptance of the August 5 amendment, asserting that the amendment made extensive changes in programing which raised certain other issues, i.e., staffing and financial qualifications, but that the Bureau would not object to a new amendment making appropriate changes necessitated by the change in programing. In response, WMID agreed to withdraw its July 29, 1968, amendment,

[1] The following related pleadings are also before the Board: Broadcast Bureau comments, filed Oct. 28, 1968; and reply, filed Nov. 4, 1968, by WMID.

[2] The Atlantic City Broadcasting Co. application was subsequently dismissed with prejudice by Review Board order (FCC 68R-401, released Sept. 30, 1968).

[3] Thereafter, the Commission, by order (33 FR 11294, published Aug. 8, 1968), substituted channel 257A at Pleasantville for the previously assigned channel 285A; since WMID's application specified channel 285A, it was invited to amend to specify the newly assigned channel.

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and, on condition that its original amendment would not thereby be lost, resubmit a new amendment covering the issues raised in the Bureau's petition for reconsideration. The hearing examiner's denial of the Bureau's petition for reconsideration (FCC 68M–1276, released September 12, 1968) appears to have rendered the Bureau's proposal and WMID's acceptance moot. WMID filed the subject petition for leave to amend on September 13, 1968. The hearing examiner, by order (FCC 68M–1385, released October 9, 1968) denied the petition and the appeal now under consideration ensued.

3. In support of its appeal, petitioner asserts that after completion of its direct case, it learned that a network program originally included in its proposal had been discontinued, requiring a revision of its program proposal. Petitioner claims that it thereupon caused a new survey, not merely confined to the deleted program but covering the broad spectrum of program needs of its community, to be taken on August 21 and 28, 1968; that these surveys "fortify" its earlier evaluation of program needs; and that the surveys are proffered as a part of the amendment. Petitioner asserts that denial of the amendment places it in a dilemma not of its own making: on the one hand, the Commission has, according to petitioner, enunciated an "ever more strict" interpretation of the information called for by form 301, section IV–A (citing *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968), and the *Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants*, 33 F.R. 12113, published August 27, 1968); on the other, petitioner claims, it is neither given relief from this putative redefinition of the *Suburban* standards nor is it, by way of the instant amendment, permitted to meet such standard.[4] Petitioner argues that a grant of the amendment would neither prejudice any other party nor result in a comparative advantage to petitioner, because it is the sole applicant in the proceeding. Citing *Brown Broadcasting Co., Inc.*, 12 FCC 2d 189, 12 R.R. 2d 826 (1968), petitioner contends that precedent supports its contention that the amendment should be allowed where, as here, the issue involved is of a disqualifying nature. Petitioner concludes that, for these reasons, the hearing examiner's ruling should be reversed.

4. The Broadcast Bureau urges that the appeal be summarily dismissed as untimely filed and not fundamental to the entire case or that the examiner's ruling be affirmed as correct.[5] The Bureau contends that, under rule 1.301(b), the appeal should have been filed within "5 business days" after the ruling, but was, in fact, filed 8 days thereafter. The Bureau cites the footnote to rule 1.301 which states that unless the complained-of ruling is fundamental, appeals should be deferred and raised as exceptions to the initial decision; it argues that the substitution of programing necessitated by network cancellation is not fundamental and the appeal should therefore be deferred. The Bureau further asserts that any right to amend given petitioner under our prior order was exhausted by the August 5 amendment and that

[4] Petitioner also notes that because of the denial of the amendment, it is unable to change its channel specification from 285A to the newly assigned 257A.

[5] The Bureau concedes, in passing, that good cause for the substitution of channel 257A for channel 285A is shown, and that, to this extent, the amendment should be allowed.

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independent good cause for the instant amendment must therefore be shown. It argues that *Minshall*, supra, and the *Public Notice*, supra, do not change but merely clarify the existing law; that good cause for the amendment is thus not shown; and that a grant of the amendment would "subvert" the orderly Commission processes. In reply, petitioner contends that the Bureau has improperly computed the time for filing under rule 1.301(b) and that deferral of its complaint with regard to the ruling until after the initial decision would only serve to protract the proceeding. It argues that the reason for the amendment, i.e., the program cancellation, does not determine whether good cause for the amendment exists, and urges reversal of examiner's ruling.

5. As to the threshold questions raised by the Bureau, we agree with the Bureau that the appeal is untimely. In computing the time for filing, petitioner has included 3 days for mailing under rule 1.4(g). However, rule 1.4(g) only applies to the filing of responsive pleadings, and does not apply to appeals filed pursuant to section 1.301 of the rules. We note, however, that the delay is slight, that no prejudice to any party has been alleged, and that the delay appears to have been occasioned by a misunderstanding of the applicability of rule 1.4(g). We therefore believe that consideration of the merits of the appeal is appropriate. More significantly, we disagree with the Bureau's claim that the ruling complained of is not fundamental. The Bureau's position rests upon a very narrow characterization of the amendment as involving merely a program substitution; yet, elsewhere in its pleadings, the Bureau recognizes that the amendment involves an "entirely new" survey of program needs. This survey, which goes to a disqualifying issue, may well be outcome-determinative and the ruling, denying the amendment, thus is clearly fundamental. Moreover, the footnote to rule 1.301 was manifestly not intended to raise an immutable principle that examiners' rulings should only be attacked as exceptions: rather, it and the rule itself were designed to order the Commission's business in as efficient manner as possible. Where, as here, the proceeding involves a single applicant, the issue is a disqualifying one, and the ruling and complaint thereof go to the completeness of the record, the Board is of the view that the complaint may properly be heard before exceptions to the initial decision are filed.

6. This brings us to the critical question on the appeal: has good cause for the amendment been shown. In this connection, we need not and do not decide whether *Minshall*, supra, and the *Public Notice*, supra, change or merely clarify existing standards regarding the requirements of form 301, section IV–A; neither have we considered whether the proffered amendment satisfies these standards. While we agree with the Broadcast Bureau that good cause cannot be founded on our prior order authorizing an amendment, in view of the previously accepted August 5 amendment, we think that independent good cause for the instant amendment exists. We recognize that the Broadcast Bureau, in its petition for reconsideration of the August 5 amendment, suggested the submission of an amplification of that amendment and that the instant submission is partially in response to such suggestion. In addition, we note that acceptance of the amendment will not prejudice any party to the proceeding and, since the pro-

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ceeding now involves a single applicant, no comparative advantage to the applicant will result. Nor is there any indication that acceptance of the amendment will necessitate the addition of new parties or issues,[6] or delay or disrupt the hearing in any substantial way.[7] In view of the circumstances, and the fact that we have in the past accepted amendments to meet disqualifying issues, *Cornbelt Broadcasting Corporation*, FCC 68R–417 —— FCC 2d ——; *Rice Capital Broadcasting Co.*, 7 FCC 2d 899, 9 R.R. 2d 1057 (1967), we conclude that good cause for the instant amendment exists and it should be accepted.

7. Accordingly, *It is ordered*, That the appeal from Examiner's ruling, filed October 21, 1968, by WMID, Inc., *Is granted*; that the hearing examiner's ruling (FCC 68M–1385) *Is vacated;* that the petition for leave to amend, filed September 13, 1968, by WMID, Inc., *Is granted;* and that the amendment *Is accepted.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[6] Indeed, the instant amendment was intended to obviate certain questions regarding financial qualifications and staffing raised by the Bureau, in its petition for reconsideration, as to the Aug. 5 amendment.

[7] Appellant points out that the amendment was filed prior to a hearing session at which appellant had a witness available for the purpose of qualifying the amendment.

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FCC 68R-489

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ALMARDON INCORPORATED OF FLORIDA, POMPANO BEACH, FLA.	Docket No. 18020 File No. BPH-5928
SUNRISE BROADCASTING CORP., POMPANO BEACH, FLA.	Docket No. 18021 File No. BPH-5931
DEERFIELD RADIO, INC., DEERFIELD BEACH, FLA.	Docket No. 18187 File No. BPH-6178
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER NOT PARTICIPATING.

1. This proceeding which involves mutually exclusive applications for a new FM broadcast station was designated for hearing by Commission order (FCC 68-575, released May 29, 1968). The designation order specified, inter alia, a Section 307(b) issue, and a contingent comparative issue. Now before the Board are: (*a*) a joint petition, filed August 30, 1968, by the three above captioned applicants [1] seeking approval of an agreement among these three parties whereby Sunrise's application would be dismissed and it would be reimbursed by Almardon and Deerfield for its reasonable and prudent expenditures in preparing and prosecuting its application (the Sunrise agreement); and (*b*) a joint petition filed August 30, 1968, by Almardon and Deerfield seeking approval of an agreement between the two applicants whereby Deerfield's application would be dismissed, Almardon's application would be granted, and, subject to Commission approval, Almardon's construction permit would be assigned to a new entity owned 70 percent by Almardon and 30 percent by Deerfield or its principals.[2] Since the pleadings specifically recite that ap-

[1] Almardon Incorporated of Florida, Deerfield Radio, Inc., and Sunrise Broadcasting Corp. are respectively referred to herein as: Almardon, Deerfield, and Sunrise.

[2] The following related pleadings are before the Board: (1) joint supplement, filed September 11, 1968, by Almardon and Deerfield; (2) Broadcast Bureau comments, filed Sept. 18, 1968; and (3) joint reply, filed Oct. 9, 1968, by Almardon and Deerfield. The joint reply sets forth certain amendments to the Deerfield agreement, and in response, the Broadcast Bureau requested permission to file an "Opposition to Alternative Proposal" on Oct. 15, 1968; separate replies to this opposition were filed by Almardon and Deerfield on Oct. 24, 1968. To the extent that the opposition and the replies thereto deal with matters not discussed in the previous pleadings, they are accepted and have been considered by the Board. A "Statement on Joint Request For Approval of Agreement" was filed Oct. 21, 1968, by Ft. Lauderdale Tribune, Inc., which is not a party to this proceeding; intervention not having been sought or granted, this document is not properly before the Board, and it therefore has not been considered; see rule 1.223(d), 1.225. On Oct. 30, 1968, Almardon and Deerfield filed a motion to strike the pleading filed by the Fort Lauderdale Tribune, Inc., and an opposition was filed by the Fort Lauderdale Tribune, Inc. In view of the fact that the Board has not considered the unauthorized pleading, the motion to strike will be dismissed as moot. *Cf. Ouachita Valley Radio Corp.*, FCC 63R-141, 25 R.R. 124.

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proval of the Sunrise agreement is not contingent upon approval of the Deerfield agreement, the Board will consider each request separately.[3]

2. The Sunrise agreement provides that Sunrise will be reimbursed in an amount not to exceed $2,000. The petition and affidavits submitted therein substantiate the expenses for which reimbursement is sought, set forth the exact nature of the consideration involved, and describe the initiation and history of the negotiations. Recognizing that approval of the agreement will facilitate a more expeditious resolution of the issues in the proceeding, the Broadcast Bureau interposes no objection to approval of the agreement. Since it therefore appears that the parties have fully complied with rule 1.525, and that a grant of this request would be in the public interest, the Sunrise agreement will be approved.

3. The Deerfield agreement poses a more difficult problem. By an amendment to the agreement, submitted with the Almardon-Deerfield reply, the parties have provided that if publication pursuant to rule 1.525(b) is ordered by the Board or the Commission, then the agreement shall be null and void. We have in the past given effect to such provisions,[4] and are thus confronted with the threshold question of whether the withdrawal of the Deerfield application, as contemplated by the Deerfield agreement, will unduly impede a fair, efficient and equitable distribution of radio service necessitating publication pursuant to rule 1.525(b).

4. In support of their contention that publication is not required, petitioners acknowledge that Deerfield's application designates Deerfield Beach, Fla, as its proposed principal city and Almardon's application specifies Pompano Beach, Fla. However, petitioners note that the two communities are 2 miles apart; that, according to the 1960 census, Deerfield Beach had a population of 9,573 and Pompano Beach a population of 22,500; that the Almardon proposal would place a signal in excess of 3.16 mv/m over both communities; and that the population included within the 1 mv/m contour of Deerfield's proposal is 1,279,090, whereas Almardon's proposal encompasses 1,315,214. Petitioners assert that the communities and the area between is "completely homogeneous"; that Deerfield Beach presently receives service from 10 radio stations; and that Almardon, as licensee of a daytime standard broadcast station in Pompano Beach, presently provides program service responsive to the needs of Deerfield Beach and will continue to do so through its FM proposal. Urging that the Almardon proposal will provide the first FM broadcasting service to "both Pompano Beach and Deerfield Beach", petitioners insist that publication pursuant to rule 1.525(b) is thus not required. The Broadcast Bureau, in response, takes note of Almardon's request for *Suburban Community* issues contained in its petition to enlarge the issues, filed June 24, 1968,[5] in which it is claimed that the Deerfield Beach pro-

[3] On June 24, 1968, Almardon filed a petition to enlarge issues as to Deerfield, and a petition for modification or enlargement of issues also as to Deerfield; by order of the Review Board (FCC 68R-870, released Sept. 11, 1968) the time within which to file responsive pleadings to such petitions was extended to a date 10 days after Board action on the petitions for approval of agreement now under consideration.

[4] See, *e.g.*, *Holston Broadcasting Corp.*, FCC 63R-520, 1 R.R. 2d 679 (1963).

[5] See footnote 3, supra.

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posal will realistically provide another local outlet for Fort Lauderdale. The Bureau asserts that the location of the proposal is shifted by petitioners from Deerfield Beach to Fort Lauderdale to Deerfield Beach-Pompano Beach with "fortuitous fluidity"; it urges that the need for a first broadcast outlet in Deerfield Beach is greater than the need for a third such outlet in Pompano Beach.[6] The Bureau thus concludes that publication is mandated.

5. In their replies, petitioners deny that the site of the proposal has been shifted, recognize that Deerfield Beach and Pompano Beach are separate political entities, but assert that certain factors inherent in the makeup of the two communities reinforce their contention that publication is unnecessary: The two communities are within the Fort Lauderdale-Hollywood Urbanized area and are therefore a part of an integrated social and economic unit; the two share certain governmental services (such as schools and vehicle inspection stations) and have a close economic relationship as is evidenced by the existence of a joint board of realtors. Almardon asserts that there is no inconsistency between the contention, in its petition to enlarge issues, that the Deerfield application is, in reality, for Fort Lauderdale and its current contention that the nondismissing applicant will serve Pompano Beach-Deerfield Beach. Deerfield points out that the petition to enlarge issues is, because of our order extending the time to reply, unopposed and argues that the allegations therein should not be considered here. Submitting an aerial photograph of the area, petitioners assert that the homogeneity of the two communities in question is clearly greater than it was in *WRIS, Inc., et al.*, —— FCC 2d ——, 14 R.R. 2d 311 (1968) in which publication was not ordered; accordingly, petitioners conclude that publication should not be required here.

6. Rule 1.525(b) requires that other persons be given the opportunity to apply for a facility specified in the withdrawing application if (*a*) the proceeding involves section 307(b) considerations; (*b*) the agreement calls for withdrawal by the only applicant for one of the communities involved; and (*c*) the withdrawal would unduly impede the fair, efficient and equitable distribution of radio services. It is manifest that the first two factors are involved in this proceeding; therefore, the question is whether the withdrawal of the Deerfield application, without publication, would defeat the objectives of section 307(b). We think it would.

7. While petitioners stress the "homogeneity" of Deerfield Beach and Pompano Beach, they cannot and do not deny that the two communities are separate and distinct legal entities;[7] that the Almardon application specifies Pompano Beach as its transmission service location; and that the Deerfield proposal specifies Deerfield Beach as such location. Neither applicant has attempted to amend its application to specify a dual city identification. Thus, the applications themselves indicate recognition of a difference in the broadcast needs of the two communities (see *Five Cities Broadcasting Co., et al.*, 35 FCC 501, 1

[6] There are two existing standard broadcast stations located in Pompano Beach.

[7] Petitioners do not claim that Deerfield Beach is not a "community" within the meaning of rule 73.30(a); see *Campbell and Sheftall, et al.*, 7 FCC 2d 658, 9 R.R. 2d 999 (1967), review denied FCC 67-1297.

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R.R. 2d 279 (1963); *Campbell and Sheftall, et al.*, 7 FCC 2d 658, 9 R.R. 2d 999 (1967) review denied, FCC 67–1297), and petitioners' allegations do not afford a sufficient basis for concluding either that Deerfield Beach has no programing needs and interests separate and apart from Pompano Beach or that such needs and interests as do exist will be adequately met by a Pompano Beach station. In addition, petitioners misconceive the thrust of our holding in *WRIS, Inc.*, supra. The mere fact that the withdrawing applicant specifies a station site within an urbanized area which its opponent also proposed to serve does not, of itself, require us to dispense with the publication requirements of rule 1.525(b).[8] In *WRIS*, each community had a local transmission service. Here, as noted by the Broadcast Bureau, and specifically recognized by Deerfield's application (exhibit B), the Deerfield proposal would provide a first broadcast service to Deerfield Beach, whereas the Almardon proposal would provide a third such service to Pompano Beach. (See *Campbell and Sheftall*, supra.)

8. For the foregoing reasons, we cannot conclude that the withdrawal of the Deerfield application would not unduly impede the fair, efficient and equitable distribution of radio services. Since we find that publication under rule 1.525(b) is warranted and give effect to the clause in the Deerfield agreement providing that, in such case, the agreement shall be null and void, we need not and do not consider the other grounds for disapproval of the agreement urged upon us by the Broadcast Bureau. The joint request for approval of the Deerfield agreement will be denied and the Deerfield and Almardon applications will be retained in hearing status.[9]

9. Accordingly, *It is ordered*, That the joint motion to strike, filed on October 30, 1968, by Almardon Incorporated of Florida and Deerfield Radio, Inc., *Is dismissed;* that the joint petition for approval of agreement, filed August 30, 1968, by Almardon Incorporated of Florida, Deerfield Radio, Inc., and Sunrise Broadcasting Corp. *Is granted;* that the agreement *Is approved;* and that the application of Sunrise Broadcasting Corp. (BPH–5931) *Is dismissed* with prejudice; and

10. *It is further ordered*, That the joint petition for approval of agreement, filed August 30, 1968, by Almardon Incorporated of Florida and Deerfield Radio, Inc., *Is denied;* and that the applications of such parties *Are retained* in hearing status.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[8] Similarly, the proximity of the two communities does not necessarily warrant waiver of publication; we have held that publication may be required in a case involving a single community, when a 307(b) issue had been designated, *Marietta Broadcasting, Inc.*, FCC 64R–290, released May 26, 1964.

[9] The time for filing of responsive pleadings to the petitions to enlarge the issues and the petition for modification of enlargement of the issues (see note 3, supra) shall begin to run as of the release date of the *Memorandum Opinion and Order.*

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FCC 68R-497

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CHRISTIAN VOICE OF CENTRAL OHIO, Gahanna, Ohio. DELAWARE-MARYSVILLE BROADCASTING SERVICE, INC., Delaware, Ohio For Construction Permits	Docket No. 18308 File No. BPH-6137 Docket No. 18309 File No. BPH-6199

MEMORANDUM OPINION AND ORDER

(Adopted November 27, 1968)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. This proceeding involves the applications of Christian Voice of Central Ohio (CVCO) and Delaware-Marysville Broadcasting Service, Inc. (D-M) for authorizations to construct new FM broadcast stations in Gahanna, Ohio, and Delaware, Ohio, respectively. The mutually exclusive applications were designated for hearing by *Order*, FCC 68-903, released September 11, 1968. Presently before the Board is a petition to enlarge issues, filed October 2, 1968, by CVCO,[1] seeking the enlargement of issues to determine with respect to the application of D-M: (1) the basis for its estimated construction and first year operating costs; (2) the availability to D-M of the funds necessary to construct and operate its proposed station; (3) whether D-M has misrepresented to the Commission its ability to finance its proposal, or has exhibited a lack of candor in dealing with the Commission; (4) the adequacy of its proposed staff; and (5) in view of D-M's proposal for duplicated-automated programing, the evidence developed under the *Suburban* issue, the requested staffing and financial issues, whether, and to what extent, D-M proposes a "transmission" service for Delaware, Ohio within the contemplation of a section 307(b) issue. The requested issues will be treated seriatim.

Sufficiency of Funds

2. In its amended application, D-M estimates construction costs of $8,000 and first year operating costs of $16,200. To meet these expenditures the amended application indicates that D-M has available the following sources of funds: (*a*) existing capital totaling $12,190; (*b*) a long-term loan from Mount Sterling Broadcasting Co., Inc. of $20,000; and (*c*) a long term loan from the Exchange Bank of Kentucky of $20,000. CVCO alleges that D-M's reliance on the experience of the applicant's principals in assessing construction estimates is un-

[1] Also before the Board are: (*a*) opposition, filed Oct. 23, 1968, by D-M; (*b*) Broadcast Bureau's comments, filed Oct. 23, 1968; and (*c*) reply, filed Oct. 30, 1968, by CVCO.

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reliable, because these principals have consistently and drastically underestimated such costs in past application procedures.[2] In support of this allegation CVCO shows comparisons of the proposed and actual construction costs of three stations in which D–M principals underestimated actual costs by at least 30 percent in their proposed estimates. CVCO also attacks D–M's estimate of $500 for a concrete block transmitter building as being unrealistic when compared to WKYW's cost of $2,415 and WMST–FM's cost of $1,800 for a similar structure. Although D–M has estimated that its proposed equipment will cost $14,440, CVCO alleges that D–M has represented to its proposed supplier that it contemplates a $19,000 equipment package and has obtained a deferred credit on that proposal basis. CVCO also submits that D–M's estimate of $1,500 to cover all "other" costs, including legal and engineering fees, is grossly insufficient since the applicant is faced with an adjudicatory hearing. This "other" category, petitioner avers, also fails to include amounts for apparently proposed remote or mobile units. Moreover, CVCO submits that no amounts are provided for preoperational expenses, music license fees, line charges and remote control expenses, insurance taxes, and overtime wages for existing AM employees.

3. In opposition, D–M avers that in response to the Commission's questions regarding the financial qualifications of the applicant, D–M submitted two amendments, after receipt of which the Commission declined to designate any issues concerning financial qualifications. D–M further alleges that it has shown more than double the amount of available funds required to construct and operate its proposed station.

4. The Review Board finds that an issue inquiring into D–M's estimated costs is warranted. D–M's estimate of $1,500 for other costs, including legal and engineering costs, has not been shown to be unrealistically low.[3] Although D–M's equipment supplier has proposed to supply a complete equipment package for $19,000, D–M proposes to purchase equipment in an amount of $14,440 and it has not attempted to explain this inconsistency. D–M has also failed to respond to the allegation that it has not provided for remote or mobile units, thus further inquiry into this matter is justified. Moreover, D–M's failure to provide amounts for music license fees, line charges and remote control expenses, insurance, taxes and the omission of an amount for preoperational expenses may be significant. In view of these deficiencies the Board is of the view that an evidentiary inquiry is required.

Availability of Funds

5. CVCO attacks the availability of the $20,000 loan from Mount Sterling Broadcasting Co. (Mt. Sterling), because, petitioner alleges, its availability is supported by an outdated and presently inaccurate Mt. Sterling balance sheet. Mt. Sterling's most recent balance sheet, dated April 30, 1968, reflects, CVCO avers, that Mt. Sterling does not

[2] D–M is also the licensee of station WDLR(AM) in Delaware, Ohio and its principals are owners of licensees of stations WFKY and WKYW–FM in Frankfort, Ky., and station WMST (AM–FM) in Mount Sterling, Ky.

[3] Allegations of underestimations for cost items should be supported by affidavits of persons with personal knowledge. See *The Graphic Printing Co., Inc.*, FCC 68R–173, 12 FCC 2d 674.

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have the ability to lend such a sum because the total cash balance is exceeded by current liabilities and is presently almost totally otherwise committed. CVCO also challenges D–M's estimate of its existing capital, alleging that its May 31, 1968 balance sheet shows cash on hand of only $4,002.41 and the balance of current assets consists of accounts receivable. Finally, CVCO alleges that the loan from the Exchange Bank of Kentucky is inadequately supported, because the bank letter fails to indicate what security will be required.

6. In opposition D–M relies on its balance sheet as of May 31, 1968, and avers that the current assets ($25,900) of WDLR(AM) are approximately twice the amount of current liabilities ($13,700); that the current assets of Mt. Sterling ($65,300) are nearly three times its current liabilities ($23,300); and that D–M has secured a $20,000 bank line of credit. In view of these circumstances, D–M avers, CVCO's argument that D–M has not shown the availability of funds is without merit.

7. The Review Board finds that sufficient question exists about the availability of funds to warrant an inquiry into this matter. Mt. Sterling's current balance sheet lists current liabilities in excess of liquid assets (cash and bank account), thereby reflecting an inability to finance the proposed loan to D–M. D–M's balance sheet shows $25,871.42 in current assets and $13,681.20 in current liabilities. However, the balance sheet shows cash on hand of only $4,002.41. The balance of D–M's current assets are accounts receivable which, as CVCO points out, are not "new quick assets" in the absence of evidence of their convertibility to cash. The bank letter from the Exchange Bank of Kentucky does not state whether or not security will be required. The Review Board is unable to find reasonable assurance that the loan will be made in view of this deficiency and the questionable availability of other funds. An appropriate issue will therefore be added.

D–M's Lack of Candor

8. To show Mt. Sterling's ability to lend the applicant $20,000 D–M submitted a Mt. Sterling balance sheet, dated November 30, 1967, with its application, filed March 15, 1968, CVCO alleges that D–M's failure to submit a more recent balance sheet with its July 22, 1968, amendment, wherein D–M again relies on the proposed loan from Mt. Sterling, constitutes lack of candor because the April 30, 1968 balance sheet reflects Mt. Sterling's inability to lend the applicant $20,000 and that the balance sheet was not filed in this proceeding. In submitting an outdated balance sheet, CVCO avers, D–M overestimated Mt. Sterling's presently existing assets by approximately $20,000. Furthermore, CVCO alleges, Mt. Sterling's financial position was known to D–M's executive vice president prior to the July 22, 1968 amendment in the present proceeding, since he executed a license application for WMTS–FM to which was attached the 1968 balance sheet.

9. In opposition D–M avers that the changes in the balance sheets of Mt. Sterling do not amount to a "material adverse change in the financial position of that company."

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10. D–M originally submitted the November 30, 1967, balance sheet with its application, filed March 15, 1968. There is no indication that the 1967 balance sheet was not accurate when it was filed with the application. Furthermore, the proximity of the dates of filing and the 1967 balance sheet suggests that the issue of lack of candor is not warranted. However, D–M's withholding of the current Mt. Sterling balance sheet and submission of and reliance on the old balance sheet at the time of making amendments raises a substantial question as to a violation of section 1.65 of the Commission's rules. The showing of Mt. Sterling's financial position should have been brought up to date when the 1968 balance sheet was prepared, particularly since it was relied on in the amendment. Significant changes in liquid assets over current liabilities constitute a material change. Thus, a question is raised as to whether or not D–M has failed to inform the Commission of a material change which affects its financial qualifications, and an issue to explore this matter at the hearing will be specified.

Staff Adequacy

11. D–M proposes to add one additional staff member to its existing AM staff of nine in order to operate the combined AM–FM facility. The FM facility will operate 126 hours per week; news, weather, local programs and programing prior to 8 a.m. will be duplicated. CVCO alleges that D–M has failed to show that the proposed facility could be operated with only one addition to the AM staff and that it has failed to budget personnel for its live remote broadcasts. In opposition, D–M contends that its staff proposal is based upon past experience of its principals who have operated a similar operation with a staff of comparable size. An affidavit from one of D–M's principals is submitted to support this contention.

12. The Review Board will add the requested adequacy of staff issue. Since D–M proposed to operate its FM station with only one additional member, since it proposes a substantial amount of unduplicated programing, and since its proposed transmitter site is different from the location of its standard broadcast station, the Review Board believes that substantial question as to staff adequacy is raised. D–M made no attempt to supply the Commission with any specific information showing how it can operate its combined facility with its presently contemplated staff. Thus, the Board will add an appropriate issue. *Cf. Tri-Cities Broadcasting Corp.*, 10 FCC 2d 470, 11 R.R. 2d 609 (1967).

Local Transmission Service

13. CVCO alleges that a very real question exists as to whether D–M will serve as an outlet for local expression to any significant degree in Delaware, Ohio, because D–M's responsiveness to the needs of the community remains to be established under a specific *Suburban* issue and D–M has proposed extremely modest operating budget and staffing plans. CVCO argues that this is not a case in which the Commission is asked to subordinate the needs of one community to the comparative ability of the applicants to serve needs. Rather, CVCO avers,

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the Review Board is asked to determine, if D–M has made a threshold showing, based on its apparent qualifications, to serve any local transmission needs.

14. In opposition, D–M avers that its proposed station will provide the Delaware area with its first local nighttime and early morning broadcast service; that, except for station WDLR it will be the only local broadcast facility for this community; and that the relationship between D–M's program proposals and the community's needs and interests will be fully explored under the designated *Suburban* issue.

15. CVCO's argument that a separate issue is required to determine whether D–M will realistically provide a local transmission service for its specified community is unpersuasive. Petitioner does not set forth any allegations which, of themselves, indicate that D–M will not provide its specified community with a local transmission service. The request is based on several alleged deficiencies in D–M's basic qualifications. If D–M is unable to establish its basic qualifications, its application will be denied. If, on the other hand, these basic qualifications issues are resolved in D–M's favor, there is no reason why it should not be accorded the same treatment as other qualified applicants for a particular community.

16. Accordingly, *It is ordered*, That the petition to enlarge issues, filed October 2, 1968, *Is granted* to the extent indicated below and *Is denied* in all other respects; and that the issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine as to Delaware-Marysville Broadcasting Service, Inc., the basis of its estimated costs of construction and operation.

(2) To determine as to Delaware-Marysville Broadcasting Service, Inc., the amount of funds available to construct and operate its proposed facility.

(3) To determine on the basis of the evidence adduced under the aforesaid issues, whether Delaware-Marysville Broadcasting Service, Inc. is financially qualified.

(4) To determine whether the staff proposed by Delaware-Marysville Broadcasting Service, Inc. is adequate to effectuate its proposal.

(5) To determine whether, Delaware-Marysville Broadcasting Service, Inc. failed to amend or attempt to amend its application within 30 days after substantial changes were made as required by rule 1.65, and, if so, the effect on its requisite qualifications to be a Commission licensee.

17. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden of proof under the issues added herein shall be upon Delaware-Marysville Broadcasting Service, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R–499

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CHRISTIAN VOICE OF CENTRAL OHIO, GAHANNA, OHIO	Docket No. 18308 File No. BPH–6137
DELAWARE-MARYSVILLE BROADCASTING SERVICE, INC., DELAWARE, OHIO	Docket No. 18309 File No. BPH–6199
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 2, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT; BOARD MEMBER NELSON NOT PARTICIPATING; BOARD MEMBER SLONE DISSENTING.

1. This proceeding involves the mutually exclusive applications of Christian Voice of Central Ohio (CVCO) and Delaware-Marysville Broadcasting Service, Inc. (D–M), each seeking a license for a FM broadcast station in its respective community. The Commission, by *Order*, FCC 68–903, released September 11, 1968, designated this proceeding for hearing on various issues, including a section 307(b) issue. Presently before the Board is a motion to enlarge issues, filed October 2, 1968, by D–M, seeking the addition of a suburban community issue and an issue inquiring into compliance with section 73.315(a) of the rules with respect to CVCO.[1]

2. D–M first requests an issue to determine whether CVCO will realistically serve as a local transmission outlet for Gahanna, Ohio (population 2,717), rather than for the larger nearby city of Columbus, Ohio (population 471,306).[2] In support of its request, D–M contends that channel 285A was assigned to Columbus at the request of CVCO in a rulemaking proceeding in which CVCO consistently indicated that it was a Columbus-based organization and was seeking to provide program service to the Columbus area. D–M further contends that CVCO's application indicates that most of its principals reside and work in Columbus and that it intends to principally serve the city of Columbus and additionally serve the city of Gahanna. Petitioner cites *Berwick Broadcasting Corp.*, 12 FCC 2d 8, 12 R.R. 2d 665 (1968), in support of its request.

3. In its partial opposition, CVCO does not oppose the specification of the suburban community issue. CVCO submits that when its early efforts to obtain a channel in Columbus were frustrated and it sought

[1] Other pleadings before the Board are: (*a*) Broadcast Bureau's comments, filed Oct. 16, 1968 and (*b*) partial opposition, filed Oct. 24, 1968, by CVCO.
[2] Petitioner alleges that Gahanna is located 6 miles from Columbus.

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an allocation at New Albany, Ohio, the Commission allocated this channel in recognition of the need of the Columbus area for a noncommercial religious station, not in recognition of the peculiar needs of New Albany.[3] In accordance with this approach, CVCO avers that the choice of Gahanna as the principal community for a station to serve the metropolitan Columbus area is consistent with the Commission's action in allocating a channel to New Albany. CVCO submits that although Gahanna was chosen as its principal community because its proposed city coverage was inadequate to cover the entire city of Columbus, its programing will serve the needs of the entire Columbus area, including Gahanna. Lastly, CVCO argues that the *Policy Statement on Suburban Communities*[4] represents an AM allocation tool with no relevance to FM allocations and that CVCO will not be tempted to seek commercial support from central city advertisers because its proposal is not commercial, but religious in orientation (citing *Grace Broadcasters, Inc.*, 6 FCC 2d 533, 9 R.R. 2d 459).[5]

4. The Review Board finds that a substantial question exists concerning CVCO's designation of Gahanna as its principal community. The presumption set forth in *The Policy Statement on Suburban Communities*, supra, as interpreted in *Berwick Broadcasting Corp.*, 12 FCC 2d 8, 12 R.R. 2d 665 (1968), does not apply to FM applications. However, the Board, in *Berwick*, held that the policy considerations underlying the *Policy Statement* were applicable to such an application, and stated as follows: "* * * the objectives of section 307(b) of the act would be frustrated where an applicant, whether for an AM or FM station, receives a 307(b) preference for providing a local outlet for a community it will not realistically serve." In the instant case CVCO has conceded that its proposal is intended to serve the city of Columbus and surrounding area. It appears to argue, however, that suburban community issues should not be specified in FM cases. This argument, on its face, clearly runs counter to *Berwick*. CVCO's argument that its religious nature obviates the commercial implications in advertising primarily in the city of Columbus under the *Suburban Community Policy* is not persuasive. The factual situation on the instant case is similar to that in "*What the Bible Says, Inc.*", FCC 68R–36, 11 FCC 2d 620, in which the Review Board refused to delete a suburban community issue designated against a noncommercial, nonprofit station proposing specialized religious programing with area wide appeal. In "*What the Bible Says, Inc.*", the respondent was not shown to be fully qualified in all respects. Thus, the Board decided that the most appropriate manner of resolving the 307(b) suburban community question was through an already required hearing process. In view of the uncertainty as to which city is CVCO's principal community and the designation of hearing in the instant case, the Board finds "*What the Bible Says, Inc.*", controlling and, therefore, will add the

[3] The channel assigned to New Albany was subsequently deleted because of a short-spacing problem.

[4] FCC 65–1153. 2 FCC 2d 190, 6 R.R. 2d 1981 (1965) reconsideration denied FCC 66–2, 2 FCC 2d 866, 6 R.R. 2d 1908 (1966).

[5] CVCO also suggests that a similar issue be specified against the petitioner. However, this request, which is inappropriately contained in a responsive pleading, is lacking in supporting allegations.

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requested 307(b) suburban community issue with the modification suggested by the Bureau.[6]

5. D–M alleges that CVCO's proposal does not provide a signal of 3.16 mv/m over the entire city of Columbus, its alleged principal community, as required by section 73.315(a) of the Commission's rules. In opposition CVCO submits that there is no need for a technical qualifications issue because its principal community is Gahanna. The Review Board concurs with the Broadcast Bureau that the question presented in CVCO's application is whether CVCO's proposal will realistically provide a local transmission facility for Gahanna, its specified station location and therefore whether it should be treated as a Gahanna station in making the 307(b) determination herein. In the absence of an amendment, CVCO could not receive a grant as a Columbus station. Thus, consideration of whether or not CVCO's engineering proposal will provide an adequate signal to the city of Columbus is irrelevant.

6. Accordingly, *It is ordered*, That the motion to enlarge issues filed October 2, 1968, *Is granted* to the extent indicated below, and *Is denied* in all other respects; and that the issues in this proceeding *Are enlarged* by the addition of the following issue:

> **To determine whether the proposal of Christian Voice of Central Ohio will realistically provide a local transmission facility for its specified station location and in light thereof, whether the application of Christian Voice of Central Ohio should be considered, for purposes of the determination to be made herein under section 307(b) of the Communications Act of 1934, as amended, a proposal for Gahanna.**

7. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden of proof under the issue added herein shall be upon Christian Voice of Central Ohio.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[6] In *"What the Bible Says, Inc."*, the Board distinguished the factual circumstances of the *Grace* case, supra. Those distinctions apply with equal force here.

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FCC 68-1128

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CLEVELAND BROADCASTING, INC., CLEVELAND, OHIO COMMUNITY TELECASTERS OF CLEVELAND, INC., CLEVELAND, OHIO For Construction Permits for New Television Broadcast Stations	Docket No. 15163 File No. BPCT-3117 Docket No. 15164 File No. BPCT-3176

MEMORANDUM OPINION AND ORDER

(Adopted: November 26, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONERS COX AND JOHNSON DISSENTING.

1. The Commission has under consideration: (*a*) its *Memorandum Opinion and Order*, FCC 68-560, 12 FCC 2d 1008, released May 23, 1968; (*b*) a petition for reconsideration, filed June 24, 1968, by Westchester Corp.; (*c*) an opposition, filed July 8, 1968, by the Chief, Broadcast Bureau; (*d*) an opposition, filed July 8, 1968, by Community Telecasters of Cleveland, Inc.; and (*e*) a reply, filed July 17, 1968, by Westchester Corp.

2. The document of which Westchester seeks reconsideration was issued in response to a petition by Westchester to reopen the record and admit new applicants for a television station on channel 19 at Cleveland, Ohio. Westchester asserted that the then pending agreement whereby Cleveland Broadcasting, Inc. proposed to drop out in return for compensation, constituted, in effect, a request for dismissal of its application, and that Community Telecasters of Cleveland, Inc. is not qualified to be a licensee. Hence, argued Westchester, there are no applicants remaining in the proceeding to whom a grant may be made, and Westchester should be permitted to file a channel 19 application. In disposing of the petition, we concluded that Westchester had no standing to file the petition,[1] that it was attempting to file an application five years late without any excuse for its delay, and that its participation would not assist the Commission in its deliberations. We adhere to these views and Westchester's petition for reconsideration is subject to denial for these reasons alone. Nevertheless, as we did with Westchester's petition to reopen, we have reviewed the allegations of its petition for reconsideration with a view to determining whether public interest considerations require action on our own motion.

[1] Westchester contends in its current pleadings that we accorded it standing when we considered its contentions. We did not do so. Our consideration of allegations in a pleading in order to determine whether action sua sponte is warranted confers no standing on the pleader.

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3. Westchester argues in its petition for reconsideration, as it did in its petition to reopen, that Community is not qualified to be a Commission licensee. This argument is based on three theories, to wit: (*a*) that a grant to Community would violate the Commission's multiple ownership and cross interest policy in that Steadman, the major stockholder of Community, has management control of mutual funds, two of which hold shares in corporations which have broadcast interests; (*b*) that Community violated section 1.65 of the rules by failing to update its application to reveal such mutual fund interests; and (*c*) that a grant to Community would create a conflict of fiduciary duties between Steadman's duty to the potential channel 19 television station and his duty as manager of the mutual funds. All of the pertinent facts as well as Westchester's arguments based thereon were before us when we concluded, in our memorandum denying the petition to reopen, that no sufficient basis exists to disqualify Community as an applicant. Relying upon the decision of the Court of Appeals for the District of Columbia Circuit in *West Michigan Telecasters, Inc.* v. *Federal Communications Commission*,[2] Westchester asserts that the Commission did not adequately articulate its reasons for disposing of the issues which it raised. The cited case is clearly inapposite. Insofar as the critical issues of duopoly or cross interest and the failure to update as required by section 1.65 of the rules are concerned, the Review Board developed both situations exhaustively in its decision.[3] Under neither category did the Review Board conclude that Community was disqualified and we were under no obligation to give a detailed explanation as to why Westchester's arguments had failed to convince us that the undisputed facts before us [4] required a conclusion of disqualification. However, to remove any doubt concerning the basis for our determination we shall set forth the reasons which prompted us to conclude that Community is not disqualified to be a licensee of the Commission.

4. Steadman, owner of a 47.5-percent interest in Community, is the 99-percent owner of the stock of Steadman Security Corp., which manages three mutual funds. Two of the funds hold shares in various corporations with broadcast interests, but in each case the interest of the mutual fund is only a fraction of 1 percent of the outstanding common stock.[5] Thus, one of the mutual funds owns 10,000 out of a total of 58,486,016 shares of the outstanding common stock of Radio Corporation of America (RCA) or 0.017 percent. RCA owns the stock of National Broadcasting Co. which is the licensee of WKYC at Cleveland, and on these facts Westchester claims a violation of the duopoly policy. Also, by adding together all of the broadcast interests

[2] Case No. 21396, 13 R.R. 2d 2039, decided May 31, 1968.

[3] The decision was set aside by our *Memorandum Opinion and Order*, FCC 68-560, 12 FCC 2d 1008, released May 23, 1968, but the facts recited therein have been questioned by no party to this proceeding.

[4] Westchester, among other criticisms, takes exception to our statement that it "has done nothing more than reargue facts already known to the Commission" (12 FCC 2d 1009 at par. 2) claiming that the conflict of fiduciary interests argument was raised by it for the first time after the adoption of the Jan. 30, 1968, *Memorandum Opinion and Order* which referred the dropout agreement to the Review Board, and hence could not have been known to or considered by the Commission. No new facts have been adduced by Westchester or anyone else since our last appraisal of the situation.

[5] The number of shares and the percentages of the outstanding shares of stock owned by the mutual funds are detailed in the Review Board's decision (7 FCC 2d at 685-688) and the statement of the dissenting member (7 FCC 2d at 719).

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of the corporations in which the mutual funds hold stock, Westchester charges that there exists a violation of the multiple ownership rules. With respect to each of the corporations having broadcast interests, however, the percentage of shares which Steadman has the power to vote is far less than 1 percent.[6] While Steadman is the president and a director of each of the mutual funds, he owns less than 1 percent of the shares of such funds.

5. We gave careful consideration to the cross-interests of Community and to the discussion of such cross-interests in the Review Board's decision and in the statement of the dissenting member. While the Review Board was concerned with these matters from a comparative standpoint, we are concerned here only with the question of disqualification and we do not see the indirect control by Steadman of minuscule stock interests in the licensee corporations as constituting a basis for disqualification of Community. As a result of our recent study of the multiple ownership rules, we have concluded that with respect to the provisions of paragraphs (a) (1) and (2) of section 73.636, an investment company or mutual fund "need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company" except that all holdings by "investment companies under common management shall be aggregated."[7] The aggregate of all the stock which Steadman is empowered to vote is far less than the 3 percent specified by the rules. Moreover, even under the old multiple ownership policy, Community would have been qualified to receive the channel 19 permit at Cleveland since Steadman does not directly or indirectly own as much as 1 percent of the voting stock of any other corporation having broadcast interests. Thus, power of a mutual fund manager to vote minuscule stock interests in corporations which are licensees of broadcast stations is not of sufficient significance to constitute a violation of our multiple ownership rules or cross-interest policy, and we reaffirm our conclusion that Community is not by reason of Steadman's voting power disqualified from being a licensee of the Commission.

6. We also reaffirm our conclusion that Community is not disqualified by reason of its failure promptly to update its application as required by section 1.65 of the rules. Steadman acquired his connection with the mutual funds approximately in October 1965, after the issuance of the *Initial Decision*,[8] but the full details with respect thereto were not submitted to the Commission until about April 1966. The post-*Initial Decision* changes which occurred should have been reported promptly and the failure to do so would, in a comparative proceeding, have warranted the imposition of a comparative demerit. But disqualification is another matter and it is the question of disqualification which is before us now. Considering the minute nature of the stock holdings of the

[6] The percentages are approximately as follows: CBS, 0.004; Cox Broadcasting Corp., 0.075; Metromedia, 0.10; General Tire, 0.29; Westinghouse, 0.04; RCA, 0.017 (7 FCC 2d at 719).

[7] Section 73.636. Note 4, effective July 31, 1968. See *Multiple Ownership rules (docket No. 15627)*, FCC 68-627, 13 R.R. 2d 1601, released June 17, 1968.

[8] The *Initial Decision*, which favored the competing applicant, Cleveland Broadcasting, Inc., was issued on Nov. 12, 1964 (FCC 64D-74, 7 FCC 2d 728).

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mutual funds in corporate licensees of broadcast facilities, disqualification of Community for lack of candor because it failed to file such information with the Commission at an earlier date is not warranted.

7. The further argument that Steadman's interest in the mutual fund having a stock interest in the licensee of WKYC at Cleveland and his interest in the Cleveland channel 19 television station would present a conflict of fiduciary interests must be rejected as wholly without merit. His voting power over a 0.017-percent interest in RCA hardly puts him in a position to influence the management of WKYC, especially in view of the mutual fund's disclaimers of intention to control on file with the Commission. Moreover, we cannot conceive that Steadman would do anything to prejudice the channel 19 station in which he will have a substantial investment in order to favor WKYC.[9] We find no significant conflict of interest on Steadman's part and we conclude that Community is not disqualified from receiving a grant of its application because of Steadman's indirect and minor interest in the RCA stock.

8. To summarize, we find, conclude and decide that Westchester had no standing to file its petition of March 12, 1968, and we accorded it no standing by our consideration of its arguments. Nevertheless, we have examined and assessed the contentions advanced both in its original petition and in its petition for reconsideration in order to determine whether public interest considerations called for action on our own motion. On the basis of this examination and our evaluation of the merits of Westchester's contentions, we affirm our conclusions that Community is not disqualified from being a licensee of the Commission and that the public interest will be served by a grant of Community's application for a new UHF station to operate on channel 19 at Cleveland, Ohio.

9. Accordingly, *It is ordered*, That the Commission's *Memorandum Opinion and Order*, FCC 68-560, 12 FCC 2d 1008, released May 23, 1968, *Is affirmed*, and that the petition for reconsideration, filed June 24, 1968, by Westchester Corp. *Is dismissed.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[9] Cf. *The Enterprise Co.*, 24 FCC 271, 17 R.R. 61 (1958).

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FCC 68-1151

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CORNBELT BROADCASTING CORP., LINCOLN, NEBR. KFMQ, INC. (KFMQ-FM), LINCOLN, NEBR. For Construction Permits	Docket No. 17410 File No. BPH-5424 Docket No. 18174 File No. BPH-6016

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1968)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has under consideration: (1) an application for review of two Review Board *Memorandum Opinions and Orders*, 68R-417 and 68R-418, both released October 9, 1968 (14 FCC 2d 797 and 14 FCC 2d 800), and (2) a petition for stay of the effective date of the Board's *Orders* pending action on the application for review, both filed by Cornbelt Broadcasting Corp. on October 16, 1968.[1]

2. The application for review will be denied. However, we now have before us for consideration certain new facts bearing on the question of control of KFMQ, Inc., which facts were not before us when the above applications were designated for hearing solely on a comparative issue. We believe that an enlargement of the issues as to KFMQ is warranted on the Commission's own motion.

3. At the time KFMQ's above application was filed in May 1967, 66⅔ percent of the corporate stock was owned by S. L. Agnew (president, treasurer and director) and 33⅓ percent was owned my his wife, S. L. Agnew (vice president, secretary and director). On December 26, 1967, KFMQ filed an application (BTC-5528) to transfer 50 percent of its stock to Frederic A. Gottschalk in return for his cancellation of a note against the corporation in the amount of approximately $31,000. At the same time the above application was amended to show the proposed sale of 50 percent of the stock to Gottschalk and to show that KFMQ proposed to finance the cost of construction and operation by a $60,000 loan from the Union Bank and Trust Co. of Lincoln, Nebr., as set forth in the bank's letter of December 19, 1967. As conceded by KFMQ,[2] the credit extended by the bank was premised on the expectancy that Gottschalk would acquire 50 percent of the stock and on his personal guarantee. Prior to Commission action on the

[1] Oppositions to the application for review were filed by KFMQ, Inc., on Oct. 24, 1968, and by the Broadcast Bureau on Oct. 25, 1968; and a reply to the oppositions was filed by Cornbelt Broadcasting Corp. on Nov. 6, 1968. The Broadcast Bureau filed comments on the petition for stay on Oct. 23, 1968. KFMQ, Inc., filed an opposition to the petition for stay, along with a petition for late acceptance of its opposition, on Oct. 24, 1968.

[2] See Review Board *Memorandum Opinion and Order*, FCC 68R-418, released Oct. 9, 1968, par. 3.

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transfer application, KFMQ, by letter dated April 26, 1968, requested its dismissal.

4. On May 1, 1968, KFMQ transferred to Mr. Gottschalk 49.5 percent of its stock and he was elected vice president, secretary and a director of the corporation. Mr. Agnew retained 50.5 percent of the stock and remained as president, treasurer and director. Mrs. Agnew was eliminated as a stockholder, officer and director. By letter dated May 31, 1968, the bank confirmed its willingness to make the $60,000 loan based on Gottschalk's 49.5 percent ownership interest plus his personal guarantee.

5. Since it appears that the bank's extension of credit to KFMQ is based on Gottschalk's stock ownership in the corporation and on the fact that his personal guarantee of repayment of the loan must be given, a question arises as to the nature and extent of his control, if any, over KFMQ's finances and thus over the operation and control of the station. Although Gottschalk has stated in an affidavit submitted to the Review Board that his interest in the station is and always has been solely as a financial investment, "it is well known that one of the most powerful and effective methods of control of any business * * * is the control of its finances."[3] Under all of the circumstances, we believe that there should be fully developed on the hearing record the nature of the relationship between Gottschalk and Agnew and the extent of Gottschalk's past, present and future control, if any, over the station's finances and operation. An issue will be added, therefore, to determine whether Gottschalk has exercised, now exercises or will exercise de facto control over KFMQ, Inc., and the operation of the station contrary to section 310(b) of the Communications Act. The initial burden of proceeding with the introduction of evidence and the burden of proof on this issue are placed on KFMQ, Inc.

6. Accordingly, *It is ordered:*

(*a*) That the petition to accept late pleading filed by KFMQ. Inc., on October 24, 1968, *Is granted.*

(*b*) That the application for review filed by Cornbelt Broadcasting Corp. on October 16, 1968, *Is denied.*

(*c*) That the petition for stay filed by Cornbelt Broadcasting Corp. on October 16, 1968. *Is dismissed* as moot; and

(*d*) That the issues designated for hearing in this proceeding *are*, on the Commission's own motion, *enlarged* to include the following issues:

To determine whether Frederic A. Gottschalk has exercised, now exercises or will hereafter exercise de facto control over KFMQ, Inc., and the operation of station KFMQ–FM contrary to section 310(b) of the Communications Act; and

To determine, in the light of the evidence adduced with respect to the preceding issue, whether KFMQ, Inc., should be disqualified in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] See *Heitmeyer* v. *FCC*, 98 F. 2d 91, 99 (1937); and compare *WLOX Broadcasting Co.* v. *FCC*, 260 F. 2d 712; 17 R.R. 2120 (1958).

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FCC 68-1130

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
IMAGE RADIO, INC.	Docket No. 17945
For Renewal of License of Station WCFV, Clifton Forge, Va.	File No. BR-2540
IMPACT RADIO, INC.	Docket No. 17946
For Renewal of License of Station WPXI, Roanoke, Va.	File No. BR-3487
IMPACT RADIO, INC. (ASSIGNOR)	File No. BAL-6349
and	
H. CLYDE PEARSON, TRUSTEE IN BANKRUPTCY (ASSIGNEE)	
For involuntary assignment of license of Station WPXI, Roanoke, Va.	
H. CLYDE PEARSON, TRUSTEE IN BANKRUPTCY (ASSIGNOR)	File No. BAL-6402
and	
T & H BROADCASTING, INC. (ASSIGNEE)	
For assignment of license of Station WPXI, Roanoke, Va.	

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1968)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON CONCURRING IN THE RESULT; COMMISSIONER ROBERT E. LEE ABSTAINING FROM VOTING.

1. By orders released January 11, 1968, we designated each of the above-captioned applications for renewal of license for hearing on issues to determine if the applicants possess the requisite qualifications to continue as Commission licensees. *Impact Radio, Inc.*, FCC 68-16, 11 FCC 2d 226 (1968); *Image Radio, Inc.*, FCC 68-15, 11 FCC 2d 223 (1968). Impact Radio, Inc. (Impact) is the licensee of station WPXI, Roanoke, Va., and Image Radio, Inc. (Image) is the licensee of station WCFV, Clifton Forge, Va. At the time these proceedings were designated for hearing, the majority stockholders in Impact, Buford D. Epperson and Charles F. Barry, Jr. (33.3 percent each) were also the majority stockholders in Image (26 percent each). Since we considered that the issues in each proceeding could be dispositive of the ultimate issue, concerning the qualifications of both corporate renewal applicants to continue as Commission licensees, we ordered that a consolidated hearing be held. A bill of particulars has been filed in each proceeding by the Chief, Broadcast Bureau, charging each licensee

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with specific acts of misconduct including alleged misrepresentations to the Commission.

2. Now before the Commission for consideration are separate petitions for reconsideration and grant without hearing in each proceeding. The petition on behalf of Impact was filed by H. Clyde Pearson, its trustee in bankruptcy (hereinafter trustee), who requests that Impact's license be renewed without hearing.[1] According to the petition, Impact was adjudicated a bankrupt by the United States District Court for the Western District of Virginia on January 19, 1968, and on March 29, 1968, H. Clyde Pearson was appointed as trustee in bankruptcy.[2] Thereafter, the trustee's petition to intervene was granted by the Hearing Examiner (FCC 68M–896, released June 10, 1968),[3] and he submitted an application for consent to the involuntary assignment of the license to himself as trustee (BAL–6349). The application was accepted for filing on June 7, 1968, and is currently pending before the Commission. An application for Commission approval of the voluntary assignment of the station license from the trustee to T & H Broadcasting, Inc. was filed concurrently with the petition for reconsideration and this application was accepted for filing on July 11, 1968 (BAL–6402).

3. In his petition for reconsideration, the trustee alleges that none of the former principals of the bankrupt presently has any connection with the operation of station WPXI, and that they have no ownership interest in the station to which he now holds legal title as trustee. On the basis of the foregoing, he argues that a hearing at this time would serve no useful purpose since, in view of the intervening bankruptcy proceeding, the qualifications of Impact to continue as a licensee are now academic; and no useful information would be adduced inasmuch as the person directly responsible for the alleged malfeasance, Buford Epperson, has disappeared and the trustee has no information concerning the alleged instances of misconduct. Furthermore, the trustee contends, nonrenewal of the license would not hurt the wrongdoers, but it would seriously injure innocent creditors who have outstanding claims which exceed $207,000 against the bankrupt.

4. In order to obtain funds to satisfy creditors' claims, the trustee entered into a contract with T & H Broadcasting to sell the station for $115,000, and this contract was approved by the bankruptcy court on June 6, 1968. Under the terms of this sale and the bankruptcy settlement, the trustee contends that not only will Impact's stockholders receive nothing on their investment but the public interest will be served by the transfer of the license to the proposed assignee, the principals of which include individuals with long residence in Roanoke and an experienced broadcaster.

5. In response, the Broadcast Bureau does not oppose the trustee's petition but urges that action with respect thereto be deferred until additional information is submitted to establish that no person

[1] The petition was filed June 27, 1968. Also before the Commission regarding the Impact petition is a partial opposition filed by the Chief, Broadcast Bureau, on July 18, 1968, and the reply of the trustee in bankruptcy, filed July 29, 1968.

[2] For a brief period, Buford Epperson was the trustee in possession but upon petition of the bankrupt's creditors he was removed as trustee.

[3] The hearing examiner also granted intervention to three secured creditors of Impact (FCC 68M–434, released Mar. 14, 1968) and an appeal from that determination was dismissed by the Review Board (FCC 68R–221, 13 FCC 2d 59, released May 28, 1968).

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charged with misconduct will benefit from the proposed renewal and transfer. The Bureau raises three factual questions which it contends must be resolved before dispositive action is taken on the petition: (1) the status of special bank account, "Trust Account E," apparently established for Impact and in existence as of March 31, 1967, but not listed by the trustee as an asset available for distribution to creditors, and whether Buford Epperson obtained possession of the funds; (2) the status and final disposition of a $7,000 claim against the bankrupt by Charles Barry, Jr., another stockholder alleged by the Bureau to have engaged in misconduct in this matter; and (3) whether the full capital contributions of Epperson and Barry were made and, if not, whether the trustee is able to assure the Commission that these stockholders will not be permitted to default.

6. As an exception to our established policy against approval of an application for assignment of license when a question exists concerning the character qualifications of the licensee's principals, we have authorized the transfer of a license to a qualified assignee where the licensee has been adjudicated a bankrupt, the individuals charged with misconduct are disassociated from station operations and will derive no benefit from the proposed transfer, and where nonrenewal would result in substantial harm to innocent creditors. *Arthur A. Cirilli*, 2 FCC 2d 692, 6 R.R. 2d 903 (1966); and *Twelve Seventy, Inc.*, 2 FCC 2d 973, 7 R.R. 2d 336 (1966). Despite the Broadcast Bureau's contention that further clarification is necessary, the pleadings and supporting data persuade us that the trustee's petition for reconsideration satisfies these criteria. The bankrupt licensee is under the control of the trustee who is operating the station for the benefit of the creditors, and none of Impact's principals have participated in station affairs since his appointment as trustee. Whether stockholders Epperson and Barry made payment in full for their subscribed shares and the question concerning the disposition of the funds in "Trust Account E" are matters which are of primary concern to the trustee, but their resolution is not essential to the disposition of the problem before us. While it is possible that Impact principals chargeable with malfeasance have improperly acquired corporate funds or have failed to make required capital contributions, the recovery thereof is the responsibility of the trustee.[4] However, our action permitting renewal and assignment will confer no benefit on Epperson or Barry or any of the stockholders through recovery of any part of their investment since it is apparent that the proceeds from the sale of the station and any other amounts collected will not exceed the amount necessary to satisfy the claims of creditors against the bankrupt.[5]

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[4] In this connection we call attention to a letter dated June 21, 1966, from Impact's attorney to Epperson, a copy of which was thereafter furnished to the Commission, stating as follows: "This is to acknowledge receipt of funds in the amount of $59,920.12 which has been deposited in a trust account and as previously discussed, to be held for application in engineering services needed for twenty-four (24) hour license and for future expansion of Impact Radio, Inc. through purchases of real estate." In his reply pleading, the trustee alleged that the trust account "is still in use." Whether any part of the funds contained therein are available for distribution to creditors is a matter which the trustee presumably will explore.

[5] The whereabouts of Epperson is unknown and there is no indication in the pleadings before us that the trustee will be able to obtain sufficient funds to do more than meet the costs of administration of the bankrupt estate and to discharge a proportion of the amount due to creditors.

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7. The remaining objection advanced by the Bureau relates to the possibility that Barry, an alleged wrongdoer, would share as a creditor in the proceeds of the sale and thus benefit from the renewal and assignment of license. Although such a possibility exists, we do not believe that approval of the sale should be withheld for that reason. In the first place, the trustee has represented that he will oppose the claim on the ground that any money advanced by Barry was a contribution to capital and unrecoverable. Furthermore, even assuming that the claim were allowed, Barry would recover only a fraction of the amount involved.[6] We believe it would be unfair to the innocent creditors to deny them an opportunity to recover at least a portion of their losses merely because of the contingency that Barry might benefit to some minor extent by our approval of the assignment.

8. Our examination of the application for consent to the assignment of license to T & H Broadcasting, Inc. and the documents submitted in support thereof, reveals that the proposed assignee is qualified to hold a Commission license. Approval of the assignment will enable this station to remain in operation and to continue to provide service to the community. On the basis of all of the foregoing, we conclude that the public interest will be served by a grant of the trustee's petition for reconsideration, and by approval of the applications for involuntary assignment to the trustee and for voluntary assignment to T & H Broadcasting, Inc. of the station license of WPXI at Roanoke, Va.

9. The petition for reconsideration filed on August 13, 1968, by Image Radio, involving station WCFV at Clifton Forge, Va., presents a substantially different situation.[7] Image asserts that Buford Epperson, corporate president and the one in complete control of station WCFV, was solely responsible for the alleged misconduct which originally prompted designation of its renewal application for hearing, and that he is no longer associated with the licensee.[8] In affidavits submitted with its pleadings, all present Image principals deny any connection with, or knowledge of the alleged malfeasance now at issue. Should the Commission, however, consider that Charles F. Barry, Jr., is also chargeable with misconduct, Image proposes to eliminate him as a stockholder through the purchase of his interest by another stockholder, William Creech. Therefore, Image asserts that its application merits renewal without hearing since there is no substantial question as to the qualifications of any of its present principals to be Commission licensees and since no person responsible for the misconduct charged will benefit from renewal of the station license.

10. The Broadcast Bureau opposes grant of Image's petition on the ground that numerous unresolved issues remain concerning the character qualifications of Image to continue as a Commission licensee and that the resolution of such issues require a hearing. It asserts that

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[6] According to the estimate of the trustee, this sum would not exceed $1,000.

[7] Also before the Commission are an opposition to the petition of Image filed by the Chief, Broadcast Bureau, on Aug. 23, 1968; a supplemental petition for reconsideration filed Sept. 30, 1968, by Image; an opposition to the supplemental petition filed by the Chief, Broadcast Bureau, on Oct. 15, 1968; and a reply filed by Image on Nov. 8, 1968, to the further opposition. Pursuant to section 1.45(c) of our rules, we authorize the supplemental petition for reconsideration filed by Image, and the pleadings responsive thereto.

[8] Epperson's stock is presently held by the First National Bank of Eastern North Carolina, pursuant to its purchase at a foreclosure sale after Epperson had defaulted on a note secured by the stock.

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under established Commission policy, elimination of a wrongdoer from the corporate licensee is not sufficient to warrant a grant of the renewal application, but that even if it were, a hearing is necessary in this case. In addition to the charges of serious misconduct on the part of Epperson and Barry, the Bureau contends that the conduct of Creech as well as the indications of extreme negligence and the flagrant disregard by other stockholders of their responsibilities as principals of the licensee should be explored in an evidentiary hearing.

11. In this situation, we are persuaded that Image's petition should be denied. No reasons worthy of consideration have been advanced to justify a departure from our clearly enunciated policy that a licensee cannot escape responsibility for the transgressions of persons who are delegated the authority to manage the station for the licensee. *Eleven Ten Broadcasting Corp.*, 32 FCC 706, 22 R.R. 699 (1962), affirmed sub nom. *Immaculate Conception Church of Los Angeles, et al.* v. *F.C.C.*, 116 U.S. App. D.C. 73, 320 F. 2d 795, (D.C. Cir. 1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 FCC 1039, 25 R.R. 577 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (D.C. Cir. 1964), cert. denied 380 U.S. 910 (1965); and *Mile High Stations, Inc.*, 28 FCC 795, 20 R.R. 345 (1960). From the pleadings and affidavits before us, it is apparent that the other Image principals permitted Buford Epperson, to whom they now attribute sole responsibility for the misconduct of the licensee, to exercise complete dominion over the affairs of the station during his tenure as president. We are therefore unable to accept the contention that the license should be renewed without hearing so that those same principals, who abdicated all responsibility in the conduct of the licensee's operations, may be spared the risk of the loss of their investment. If proven, the alleged malfeasance will bear directly on the qualifications of Image and these principals to be Commission licensees and a renewal without hearing would be inconsistent with the public interest.

12. Accordingly, *It is ordered*, That the petition for reconsideration, filed by H. Clyde Pearson, trustee in bankruptcy for Impact Radio, Inc. on June 27, 1968, *Is granted;* and that

(*a*) The application for renewal of license (BR–3487) for station WPXI at Roanoke, Va., *Is granted.*

(*b*) The application for consent to involuntary assignment of license to H. Clyde Pearson, trustee in bankruptcy from Impact Radio, Inc. (BAL–6349), accepted for filing on June 7, 1968, *Is granted.*

(*c*) The application for consent to voluntary assignment of license to T & H Broadcasting, Inc. (BAL–6402), accepted for filing on July 11, 1968, *Is granted;* and

(*d*) The hearing proceeding in docket No. 17946 *Is terminated.*

13. *It is further ordered*, That the supplemental petition for reconsideration, filed by Image Radio, Inc. on September 30, 1968, and the pleadings responsive thereto *are authorized* and *are accepted* for filing; and that the petition for reconsideration, filed August 13, 1968, by Image Radio, Inc. and the above-mentioned supplemental petition for reconsideration, *Are denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R–498

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KITTYHAWK BROADCASTING CORP., KETTERING, OHIO, ET AL. For Construction Permits	Docket No. 17243 Files Nos. BP–16603, 17244, 17245, 17246, 17247, 17249, 17250.

MEMORANDUM OPINION AND ORDER

(Adopted November 29, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. This proceeding, involving seven applications for new or changed standard broadcast facilities, was designated for hearing by *Memorandum Opinion and Order*, FCC 67–256, 7 FCC 2d 153, released March 16, 1967. The Review Board, on July 24, 1968, released a *Memorandum Opinion and Order* (FCC 68R–309, 13 FCC 2d 928) adding issues to this proceeding, including an issue inquiring into Gem City Broadcasting Co.'s failure to notify the Commission of an NLRB Trial Examiner's Decision, TXD–207–68, released April 9, 1968. Now before the Review Board is a petition for review of examiner's ruling on the production of evidence, filed October 9, 1968, by Kittyhawk Broadcasting Corp. (Kittyhawk).[1] Petitioner requests reversal of that portion of the Order of Hearing Examiner Chester A. Naumowicz, Jr., issued October 4, 1968 (FCC 68M–1379), which denied Kittyhawk's request for further evidence.

2. Kittyhawk's "request for further evidence" sought the production of Gem City's principal stockholder, Arthur Beerman, pursuant to section 1.353 of the Commission's rules,[2] as a witness for testimony about Gem City's failure to notify the Commission of the aforesaid NLRB trial examiner's decision.[3] Petitioner avers that the Review Board, in its *Memorandum Opinion and Order*, supra, specifically indicated that the conduct underlying the NLRB suit should be explored; that the production of Beerman is necessary because it is his

[1] Other related pleadings presently before the Board for consideration are: (*a*) opposition, filed Oct. 21, 1968, by the Gem City Broadcasting Co.; (*b*) Broadcast Bureau's comments, filed Oct. 21, 1968; (*c*) supplement to petition, filed Nov. 14, 1968, by Kittyhawk; and (*d*) opposition to supplement, filed Nov. 26, 1968, by the Gem City Broadcasting Co.

[2] Sec. 1.353 of the Commission's rules provides: "At any stage of a hearing, the presiding officer may call for further evidence upon any issue and may require such evidence to be submitted by any party to the proceeding."

[3] In its supplement to petition Kittyhawk informs the Commission that the National Labor Relations Board issued an order affirming the previously submitted NLRB examiner's decision. Kittyhawk notes that no further administrative review is available. To the extent the supplement points out that the NLRB examiner's decision was adopted by the NLRB, the supplement will be considered. However, the supplement also contains a request for clarification with respect to Gem City's burden of proof. The request for clarification is inappropriate in a responsive pleading and must be denied because there is no indication that a similar request was first made to the examiner. See *United Transmission, Inc.*, FCC 67R–480, 10 FCC 2d 702, released Nov. 16, 1967 (*Order*).

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conduct which gave rise to the NLRB *Order;* and the facts in question are peculiarly within the knowledge of Beerman. Kittyhawk argues that evidence regarding the NLRB suit has not been introduced into the record because the examiner erroneously admitted the NLRB *Order* solely for the purpose of establishing that the NLRB proceeding did take place and that the order was the result of such proceeding, and refused to compel Gem City to meet its burden of proof on the issue. Kittyhawk argues that if evidence should be taken on a designated issue, which the examiner concedes, then it must follow the processes of the Commission should be used to obtain that evidence.

3. In opposition, Gem City avers that the Review Board stated in its *Memorandum Opinion and Order* that the examiner was authorized to permit an appropriate evidentiary inquiry with regard to the conduct underlying the NLRB suit under the standard comparative issue. However, Gem City avers that the Board did not order the examiner to hear such evidence; that no specific issue was added regarding such conduct; and that no burden was placed on Gem City regarding such conduct. Moreover, Gem City argues, Beerman is not a competent witness with regard to the issue under consideration.

4. As the Broadcast Bureau correctly notes, the Board stated that it would permit the conduct underlying the NLRB suit "to be explored under the standard comparative issue" and authorized the examiner to permit "an appropriate evidentiary inquiry."[4] This inquiry was authorized under the standard comparative issue (which has not yet been reached in the hearing procedure), not within the context of the 1.65 issue. Consequently, the Board finds that the Hearing Examiner has complied with the Board's *Order* in taking notice of the NLRB trial examiner's decision for the limited purpose of establishing that the NLRB proceeding did take place and resulted in an order. The examiner's refusal to compel the production of Beerman as a witness under the 1.65 issue, therefore, was not an abuse of discretionary power. The examiner correctly ruled that the burden of proof was on Gem City and that he had no obligation to tell Gem City how to try its case.

5. Accordingly, *It is ordered*, That the request to accept supplement, filed November 14, 1968, by Kittyhawk Broadcasting Corp., *Is granted* to the extent indicated herein and *Is denied* in all other respects; and that the petition for review of examiner's ruling on the production of evidence, filed October 9, 1968, by Kittyhawk Broadcasting Corp. *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] The issue in question added by the Review Board is as follows:
(a) To determine (1) the facts and circumstances surrounding the Gem City Broadcasting Co's failure to notify the Commission of the NLRB trial examiner's decision, TXD-207-68, released April 9, 1968; (2) whether, in light thereof, this applicant has continued to keep the Commission advised of "substantial and significant" changes, as required by section 1.65 of the rules; and (3) if not, the effect on the applicant's requisite and comparative qualifications to be a Commission licensee.

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FCC 68R-496

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of ALBERT JOHN WILLIAMS AND JACK M. REEDER, D.B.A. RADIO NEVADA, LAS VEGAS, NEV. For Construction Permit	Docket No. 16115 File No. BP-16524

APPEARANCES

Samuel Miller, *Mark E. Fields*, and *Joseph Chachkin*, on behalf of Radio Nevada; *R. Russell Egan* and *Erwin G. Krasnow*, on behalf of WGN Continental Broadcasting Co.; *L. Adrian Roberts*, *Francis X. McDonough*, and *Charles J. McKerns*, on behalf of Golden West Broadcasters (KMPC); and *John B. Letterman* and *Richard M. Riehl*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted November 26, 1968)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND SLONE. BOARD MEMBER BERKMEYER CONCURRING AND ISSUING STATEMENT.

1. Albert John Williams and Jack M. Reeder, doing business as Radio Nevada (Radio Nevada) seek authority to construct a new Class II-A broadcast station (720 kHz, 50 kw-D, 10 kw-N, DA-N, U) at Las Vegas, Nev. By *Memorandum Opinion and Order*, FCC 65-630, released July 21, 1965, this application, together with six other applications,[1] was designated for consolidated hearing. Additional parties were named to this proceeding, including Golden West Broadcasters, licensee of KMPC, Los Angeles, Calif., and WGN Continental Broadcasting Co. (WGN), licensee of WGN, Chicago, Ill.; the latter operates as the dominant station on the clear channel frequency of 720 kHz. With the dismissal of the five applications noted above, the remaining Radio Nevada and Circle L proposals were no longer mutually exclusive. In an *Initial Decision*, FCC 68D-41, 13 R.R. 2d 279, released May 31, 1968, Hearing Examiner Isadore A. Honig recommended a grant of both the Circle L and Radio Nevada applications. In addition, the examiner granted Circle L's motion to sever

[1] The application of Circle L, Inc. (Circle L), requesting a construction permit for a class II-A standard broadcast station at Reno, Nev., to operate on 780 kHz, remained in consolidated hearing. The following applications were subsequently dismissed: Capital Broadcasting Co. of Utah (KPTL) for use of 780 kHz at Carson City, Nev.; Southwestern Broadcasting Co. (KORK) and 780, Inc., each seeking the use of 780 kHz at Las Vegas; and the Benay Corp. (KTEE) and Meyer (Mike) Gold (KLUC) for use of 720 kHz at Idaho Falls, Idaho, and Las Vegas, Nev., respectively.

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the applications.[2] The following modified issues involving the Radio Nevada proposal remained unresolved:

> To determine the areas and populations which would receive primary service from * * * Radio Nevada, and the availability of other primary service to such areas and populations.
>
> To determine whether the Radio Nevada proposal would cause objectionable interference to station KMPC, Los Angeles, Calif., or any other existing standard broadcast station, and, if so, the nature and extent thereof, and the availability of other primary service to such areas and populations.
>
> To determine whether * * * Radio Nevada would be able to adjust and maintain [its] directional antenna as proposed in [its] application.
>
> To determine whether the Radio Nevada proposal would cause interference to station WGN, Chicago, Ill.
>
> To determine, with respect to Radio Nevada's financial proposal:
>
> (*a*) The basis of Radio Nevada's
>
> (1) estimate of construction costs, and
>
> (2) estimated operating expenses for the first year of operation;
>
> (*b*) Radio Nevada's current financial position and whether sufficient funds are available to meet the cost of construction and one year's operation of the proposed station;
>
> (*c*) The basis for Radio Nevada's estimate of revenues in its first year of operation, whether such estimate is reasonable, the extent to which net operating revenues may be relied upon to yield necessary funds for the initial construction and one year's operating cost;
>
> (*d*) Whether, in the light of the evidence adduced pursuant to items a, b, and c, Radio Nevada is financially qualified.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

2. In brief, the examiner found that Radio Nevada proposes nighttime service for a total of 124,097 persons in an area of 5,896 square miles; such service would include a nighttime "white" area population of 7,551 in a 5,274 square mile area or approximately 6 percent of the population and about 90 percent of the area within Radio Nevada's service area as delineated by its 3.7-mv/m contour.[3] The examiner concluded that a grant of the Radio Nevada application would be consistent, in all respects, with the allocation principles pertaining to class II–A stations. The examiner also found that Radio Nevada had demonstrated the availability of assets valued in excess of $600,000 with which to meet construction and first year's operating costs of approximately $422,000, and he therefore concluded that Radio Nevada is financially qualified to construct and operate the proposed Las Vegas station. Finally, the examiner concluded that Radio Nevada can adjust and maintain its three-element array to constrain radiation within the specified maximum expected operating values (MEOV), and that the Radio Nevada proposal would not cause objectionable interference to station WGN or any other existing station except station KMPC.[4] The proceeding is now before the Review Board on

[2] The application of Circle L was granted by the Review Board. *Circle L, Inc.*, 14 FCC 2d 924, 14 R.R. 2d 473 (1968). Therefore, references to the Circle L proposal in these issues and additional inquiries relating exclusively to the Circle L application have been deleted.

[3] Rule 73.22(b) provides that "No class II–A stations shall be assigned unless at least 25 percent of its nighttime interference-free service area or at least 25 percent of the population residing therein receives no other interference-free nighttime primary service."

[4] Station KMPC would receive first adjacent channel interference during daytime hours to 0.04 percent of the total population which it serves during these hours. All portions of this interference area presently receive at least four other primary services, and the signal from the proposed new station would also be available in the area which will lose the KMPC signal. Thus the total number of signals available to that area will not be reduced.

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exceptions filed by WGN, which relate to various technical, financial, and coverage questions. The Board has reviewed the *Initial Decision* in light of these exceptions, our examination of the record, and the oral arguments presented before a panel of the Board on October 10, 1968; we concur both in the examiner's recommendation that the Radio Nevada application be granted and his reasons therefor. The *Initial Decision* is accordingly adopted, subject to such modifications as are contained in the following paragraphs and in the rulings on WGN's exceptions.

Proposed Coverage

3. WGN submits that the examiner erred in finding a grant of the Radio Nevada proposal to be consistent with the Commission's *Clear Channel* proceeding [5] and allocation policies. More specifically, WGN argues that although the proposal satisfies the minimum standards of "white" area service specified in rule 73.22(b) (see footnote 3, supra), such service would be provided to a virtually uninhabited area, and thus constitute a wasteful use of the frequency. WGN notes that Radio Nevada proposes to serve a "white" area in which only 1.5 persons per square mile reside, compared with a national average density of 50.5 persons per square mile. In addition, WGN argues that the Examiner erroneously rejected an exhibit which showed that FM service is presently available to substantial portions of Radio Nevada's "white" area. WGN submits that the utter futility of class II–A allocations and the potential for improved skywave service from class I–A stations should be recognized.[6]

4. WGN's argument is without merit. As noted by the Review Board in *Flathead Valley Broadcasters* (*KOFI*), 4 FCC 2d 14, 8 R.R. 2d 450 (1966), the primary objective of the *Clear Channel* proceeding was "to render wide area service to the residents of less densely populated portions of the country which are beyond the effective reach of interference-free nighttime service from other classes of stations." *In the Matter of Clear Channel Broadcasting*, 31 FCC at 575, 21 R.R. at 1812. It would be less than realistic therefore to compare the population density within the proposed service area (1.5 persons per square mile) with the national average density (50.5 persons per square mile) in order to determine the desirability of the proposal. It should be noted that both of the states to which the class II–A assignments on this frequency could have been made have population densities significantly lower than the national average: Nevada, 2.6 persons per sq. mi.; Idaho, 8.1 persons per sq. mi. In addition, the Board agrees with the examiner's determination that the proposed service area is not virtually uninhabited. Thus, Radio Nevada's proposal to serve a "white" area nighttime population of 7,551 (in 90 percent of its proposed service area) compares favorably with Commission grants in *Boise Valley Broadcasters*, FCC 65–149, 4 R.R. 2d 559 (nighttime

[5] *In the Matter of Clear Channel Broadcasting*, 31 FCC 565, 21 R.R. 1801 (1961); reconsideration denied, FCC 62–1214, 24 R.R. 1595; *Memorandum Opinion and Order*, FCC 65–732, 5 R.R. 2d 1724.

[6] On Oct. 31, 1963, WGN filed an application for authority to operate with 750 kw on an experimental basis.

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"white" area residents—2,977); *Harriscope Broadcasting Corp. (KTWO)*, 7 FCC 2d 449, 9 R.R. 2d 742 (1967), (3,663 persons); and *XYZ Television, Inc. (KREX)*, 11 FCC 2d 839, 12 R.R. 2d 495 (1968), (7,130 persons). While other class II–A grants have involved considerably larger "white" area populations, the cases cited above demonstrate that the "white" area of present concern cannot be considered uninhabited.

5. WGN's arguments concerning the availability of FM service in the area and the desirability of its proposed 750 kw operation are of little relevance to the instant proceeding. With respect to FM availability, the Commission has indicated that the clear channel proceeding "has always been considered as pertaining to and concerning the standard broadcast band" and that a consideration of FM service "would merely serve to delay a conclusion of the proceeding." *In the Matter of Clear Channel Broadcasting, supra*, 24 R.R. at 1612–1613. See also *Boise Valley Broadcasters*, supra, where the same argument was specifically rejected by the Commission. The question of high-power authorization for existing class I–A stations was also considered in the clear channel inquiry. In that report, at 31 FCC 575–577, 21 R.R. 1812–1815, the Commission discussed the question of duplication versus very high power and concluded that the public interest would best be served by permitting class II–A stations to operate nighttime at predetermined locations on each of 12 specified class I–A clear channels. As to the remaining 13 class I–A clear channels, the Commission reserved its determination for some future date. In this connection, the Commission noted "the potential for widespread improvement in skywave service is * * * preserved for future evaluation" and in concluding, the Commission said, "that the proper balance between immediate objectives and possible future goals is best achieved by deferring action on the channels noted above and permitting one new unlimited time operation on the following: * * * 720 * * *." Thus, the Commission has determined that the public interest will best be served by permitting a class II–A station in Utah, Idaho, or Nevada, to operate on the class I–A channel 720 kHz. The Commission's decision in this matter was appealed by WGN, Inc., and others. The U.S. Court of Appeals for the District of Columbia Circuit affirmed that decision, sub. nom., *The Goodwill Stations, Inc.* v. *FCC*, 325 F. 2d 637; 1 R.R. 2d 2040 (1963). Accordingly, WGN's argument with respect to its future potential operation with very high power on 720 kHz can be accorded no weight.

FINANCIAL QUALIFICATIONS

6. In addition to the various exceptions relating to Radio Nevada's estimates of expenses and funds available (see for examples, pars. 8 and 9, infra), WGN excepts to the examiner's failure to discuss (*a*) the various inadequacies and inconsistencies in Radio Nevada's financial showing which moved the Commission to add a full financial issue; (*b*) the applicant's deferral of numerous expenses beyond the first year of operation (in amounts alleged to total over $700,000), in

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order to be found financially qualified; and (*c*) Williams' October 1966 pledge that the proposed KAIL–TV [7] operation "will have first call over the Radio Nevada proposal upon the *total* assets of Williams and Trans-America * * *."

7. Although the Review Board is in substantial agreement with the examiner's findings with respect to Radio Nevada's cash requirements and available funds, we believe that the clearest and most expeditious means of reaching the merits of WGN's exceptions relating to cost items, and of correcting minor errors in computation, is to itemize the cost requirements of Radio Nevada and the funds it has available, with appropriate explanations where the figures differ from those contained in the examiner's findings. The following specified amounts reflect projected expenditures to be incurred by Radio Nevada during the first year of operation of the Las Vegas facility and the cash drain attributable to the operation of station KAIL. In each instance, the sums represent amounts which would be required for the 16-month period (4 months preoperational and first year of operation) terminating at the end of 1969.[8]

8. Construction and first year operating expenses:

(*a*) Technical equipment	$51,572.60
This amount includes a downpayment ($23,083.60), 2 installments during the preoperational period $3,927), 1st year installments ($23,562), and freight ($1,000). The examiner estimated $3,760.34 for preoperational installments. However, the figure appearing above, advanced by WGN exception 6, appears to be the correct computation.	
(*b*) Studio and office equipment	0
The examiner found that additional equipment for 2 complete studios and offices is at hand. While WGN excepts to the examiner's failure to include an unspecified expense for shipment of these items (WGN exception 7), as Williams testified, such costs would be inconsequential.	
(*c*) Land	15,250.00
This includes the cost of a title search estimated by the examiner as a $375 expense. WGN excepts to this estimate (WGN exception 8) and the record supports a higher estimate of approximately $500, included above.	
(*d*) Building construction	14,617.00
(*e*) Professional fees	2,000.00
WGN excepts to the absence of allocations for legal and engineering fees (WGN exceptions 9 and 11). The record indicates that the bulk of these expenses have been deferred past the first year of operation. The $2,000 estimate for accounting fees was not shown to be deferrable.	

[7] Television Station KAIL, Fresno, Calif., is owned by a subsidiary of Trans-America Corp.; all of the outstanding shares of Trans-America are owned by the principals of Radio Nevada—Albert John Williams and Jack M. Reeder.

[8] While WGN argues that, due to the present state of the proceeding, the 16-month period should end in June 1970, its argument is unpersuasive. A review of the record indicates that in all significant instances the examiner applied a particularly stringent standard in determining Radio Nevada's financial competence. Thus, contrary to the argument of the Broadcast Bureau and Radio Nevada that this applicant should only be held accountable for the cash drain attributable to station KAIL's first year of operation (ending December 1967), the examiner charged Radio Nevada with station KAIL expenses for an additional period of approximately 2 years. In addition, the examiner computed the cash drain of KAIL by projecting average monthly KAIL revenues of only $5,000, even though the record establishes that, beginning January 1967, KAIL's monthly revenues have continually increased to a level exceeding $5,000 per month. Therefore, the examiner's selection of the period ending December 1969 appears both reasonable and adequate to assure that the cash requirement of station KAIL will not adversely affect Radio Nevada's ability to construct and operate its proposed station for 1 year.

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(*f*) Preoperational expenses	$11,167.00
WGN excepts to failure to include $250 in property taxes (WGN exception 12). However, since this amount was shown to be an operating cost, nonsalaried, it has not been added here. Exception is also taken to failure to include portions of travel expense during the entire 16-month period (WGN exception 13). Some provision has been made by the applicant for this expense and the remaining amounts are minimal and beyond estimate.	
(*g*) 1st year operating costs	[1] 152,300.00
Included in this amount is a $400 expense for legal fees incurred through Radio Nevada's incorporation (WGN exception 13). However there is some evidence that the services could be performed gratis.	
(*h*) Contingency fund	10,000.00
(*i*) Cash requirements for KAIL[2]	141,252.00
(*j*) Repayment of loans	24,500.00
This amount includes interest and commitment fees on United California Bank loans to Williams and Reeder (WGN exceptions 24 and 30). Repayment of principal of these loans and a loan from Marie J. Williams will begin after 1st year of operation.[3]	
Total	422,658.60

[1] This estimate included nonsalaried 1st year expenses. Both the examiner and Radio Nevada allocate $27,400 for this expense; however, due to an apparent typographical error, the examiner's figures for legal and accounting expenses ($2,000) should appear as $1,000.

[2] The examiner's computations in par. 15 of the conclusions are substantially correct. The cash drain for KAIL–TV for the additional 2-year period (1968–69) would amount to a maximum of approximately $95,888.* When added to the projected cash drain of KAIL–TV for the last 7 months of 1967 (a maximum of $11,696*), and current obligations ($13,416, $18,495, and $1,757), the total cash requirement for KAIL–TV would be a maximum of approximately $141,252 for the period ending December 1969.

*The Board's review of the financial data indicates that the cash drain for the last 7 months of 1967 amounts to only $10,696. Consequently, the additional 2-year cash drain of $95,888 would be reduced proportionately. However, the Board has chosen to utilize the figures most adverse to the applicant. The footnote mark in par. 15, line 4 of the *Initial Decision* is in error.

[3] Letters from the United California Bank, extending the maturity dates of the loans to Aug. 7, 1969, were accepted by the Board in an amendment filed by Radio Nevada on Aug. 9, 1968. *Circle L, Inc.*, FCC 68R–367, 14 FCC 2d 579, released Sept. 5, 1968. In addition, the record shows that the loan to Albert J. Williams from Marie J. Williams is payable "beginning 1 year after negotiated." It has not been shown that the loan will be negotiated at a time which would require repayment to commence within the 1st year of the proposed station's operation.

9. Funds available:

(*a*) Jack M. Reeder commitment: $58,106.00.	
While WGN excepts to Reeder's ability to meet his commitment (WGN exception 25), the record shows Reeder's available funds as follows: Net bank loans ($49,500); cash and other liquid assets less current liabilities ($24,418);[1] potential 2d mortgage on home ($6,000 to $8,000); gross income over past 3 years (over $19,000 a year).	
(*b*) Albert J. Williams (committed to furnish remaining funds):	
(I) Cash	$152,807
The examiner found cash of $186,607 available; however, Williams testified that approximately $33,800 would be retained for KTYM and KAIL expenses. (KTYM AM/FM, Inglewood, Calif., is licensed to Trans-America Corp.)	
(II) Loan from Gautney and Jones	20,000
(III) Loan from Marie J. Williams	30,000

[1] WGN exception 25 objects to the examiner's finding that Reeder's "own" liquid assets total more than $24,000. While most of the negotiable securities recorded in Radio Nevada exhibit 27, p. 23, are owned jointly by Reeder and his wife, the latter has indicated her intention to makke her interests available to Reeder.

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(IV) Stock gift	3,500
(V) Net on loan from United California Bank	198,000
Subtotal	404,307
(VI) Net income from KTYM AM/FM less depreciation (as requested by WGN exception 27), and taxes	92,628
WGN argues that Williams' full salary of $60,000 should be deducted (WGN exception 27); however, the portion actually received in salary ($15,000) by Williams has been deducted and any remaining amount is held as a business asset. See Radio Nevada exhibit 27, tr. p. 31, 69.	
Subtotal	496,935
(c) Estimated revenues	[2] 30,000
	526,935
Plus Reeder commitment	58,106
Total	585,041

[2] As is indicated infra, even without this $30,000, Radio Nevada would have available to it approximately $132,000 more than it requires to construct and operate the proposed station.

10. The record clearly demonstrates that Radio Nevada has sufficient resources to construct and operate its proposed facility with a "cushion" of approximately $162,000. Stated in a different manner, the deposited revenues from the operation of KTYM (found to be approximately $61,000 yearly) would offset the cash requirements of KAIL–TV without reliance on other assets. Absent loans, Reeder and Williams will have available funds of $177,225 in cash and liquid assets to meet the Radio Nevada requirement of approximately $281,000. The difference of approximately $104,000 would be more than offset by expected revenues ($30,000) and the availability of almost $298,000 in loans. While WGN raises exceptions to Radio Nevada's deferral of expenses, its argument is unpersuasive. In *Mt. Carmel Broadcasting Co.*, 8 FCC 2d 1033, 10 R.R. 2d 961 (1967), the Board indicated that the "normal practice of deferring loan repayments until the second year of operation" did not constitute an attempt to evade an applicant's duty to account for its "normal and expected expense" under *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965). Numerous cases recognize the practice of deferring bank loan repayments. See for example, *Connecticut Coast Broadcasting Co.*, 5 FCC 2d 640, 8 R.R. 2d 1007 (1966), reconsideration en banc denied 6 FCC 2d 481, 9 R.R. 2d 151 (1967), recon. den., 7 FCC 2d 438, 9 R.R. 2d 839; *L. B. Wilson, Inc.*, 37 FCC 511, 3 R.R. 2d 61 (1964). As noted in *Ultravision Broadcasting Co.*, supra, objectionable deferred expenses involve "first monthly or quarterly installment payments for equipment or other fixed charges [which] have, by agreement with the manufacturers or supplier, been deferred beyond [the first year operating] period." In the instant case, Radio Nevada's technical equipment will cost $115,418; the installments to be paid by the applicant during the 16-month construction and operating period amount to $51,572.60. In addition expenses for studio and office equipment, land, and building construction are payable, in full, during the first year of operation. Although the applicant's deferral of professional fees in this and other proceedings is

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somewhat unusual[9] (other than the $2,000 expense for accounting services), it appears that the applicant has allocated $10,000 for contingencies and has sufficient additional resources to meet these expenses even during the first year of operation. Thus, this is not a situation where an applicant is able to establish his financial qualifications only because he has deferred "first monthly or quarterly installment payments for equipment or other fixed charges" such as the Commission found objectionable in *Ultravision Broadcasting Co.*, supra.

11. WGN's exceptions directed to the examiner's failure to discuss the circumstances which moved the Commission to add a full financial issue are, at best, only historically relevant. The major inaccuracies which prompted the addition of the financial issue have been adequately explained both in testimony and in the 74-page financial analysis (Radio Nevada exhibit 27) submitted by the applicant. The fact that Radio Nevada's application was the subject of several financial amendments affords, of itself, no basis for concluding that the amended proposal is deficient.

12. WGN also excepts to the examiner's failure to discuss various representations made by Williams to the Commission with regard to the 1966 transfer of station KAIL to the principals of Radio Nevada, to wit: That the facilities of KAIL–TV would be improved and that the "KAIL operation will have first call over the Radio Nevada proposal upon the total assets of Williams and Trans-America." WGN submits that, although the Commission relied on these representations in granting the KAIL transfer, the record in the instant proceeding reveals that Williams, in an effort to be found financially qualified herein, has subsequently altered his financial priorities in favor of the Radio Nevada proposal. To allow Williams to ignore his prior representations to the Commission, WGN contends, would be "to allow an applicant to make a mockery of Commission processes."

13. Viewed in the context of the financial issue designated against Radio Nevada, it appears that the question of cash requirements for the improvement of KAIL–TV facilities is moot inasmuch as there is no longer an outstanding construction permit or application pending for such modifications.[10] The construction permit originally held by the applicant's principals was, in effect, "inherited" with the purchase of the KAIL facility, which was approved by the Commission in December of 1966. Thereafter, upon conducting independent engineering studies of the KAIL operation, it was determined, through an exercise of legitimate business judgment, that the modifications then authorized were insufficient to effectuate the service objectives of the new owners; the permit was therefore canceled in May of 1967. However, an intention to improve the KAIL facilities has not been disclaimed, and there is indication in the record that preliminary steps

[9] The Board notes that Radio Nevada's exhibit 27, p. 47, indicates that as of Mar. 31, 1967, this applicant had already paid in excess of $8,000 for legal, engineering, and accounting fees incurred in the preparation and prosecution of its application.

[10] WGN's implied suggestion that Radio Nevada should somehow be forced to proceed with its previously proposed modification of KAIL must be rejected. The Commission accepted the construction permit when it was returned, and the Board has no authority to compel Radio Nevada to proceed with that abandoned proposal.

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have been taken by the applicant to secure equipment and plan construction for the improved facility. Finally, if in fact a question of Williams' candor is being raised, it must be noted that no issues were specified concerning this matter and no request for enlargement of issues inquiring into this matter was filed. Moreover, the Board is not persuaded that the fact that Radio Nevada dismissed the application to improve the facilities of KAIL approximately 6 months after it represented that the operation and improvement of KAIL would receive first call on its assets would, of itself, afford an adequate basis for specifying any disqualifying issues. Thus, the explanation given by Radio Nevada for its actions is credible and uncontradicted, and we have no reason to suspect that the representation was not made in good faith. Nor is there any indication that Radio Nevada has, on any other occasion, failed to carry out its promises to the Commission. In short, we fail to see abuse of the Commission's processes in the circumstances surrounding KAIL's return of its construction permit.

14. Accordingly, *It is ordered*, That the application of Albert John Williams and Jack M. Reeder, doing business as Radio Nevada (BP-16524) for a construction permit for a new class II–A standard broadcast station at Las Vegas, Nev., *Is hereby granted*, subject to the following conditions:

(1) Painting and lighting of the proposed antenna system shall be in accordance with paragraphs 1, 3, 12, 21, and 22 of FCC Form 715.

(2) A properly designed phase monitor shall be installed in the transmitter room as a means of continuously and correctly indicating the amplitude and phase of currents in the several elements of the directional antenna system.

(3) Field measuring equipment shall be available at all times, and, after commencement of operation, the field intensity at each of the measuring points shall be measured at least once every 7 days and an appropriate record kept of all measurements so made.

(4) A complete nondirectional proof of performance, in addition to the required proof of the directional antenna system, shall be submitted before program tests are authorized.

(5) Permittee shall notify the FAA when equipment test commences.

(6) Before program tests are authorized, permittee shall eliminate any adverse effects of excess radiation over the FAA site at Las Vegas, Nev.

(7) The instrument of authorization issued to Radio Nevada should specify that the allowable deviations in phase and current ratio be held within plus or minus 1° and 1 percent, respectively.

DEE W. PINCOCK, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS OF WGN TO THE INITIAL DECISION

Exception Nos.	*Ruling*
1 ----------	Denied. When read in conjunction with the cited sec. 73.22 of the Commission's rules, par. 3 of the findings of fact, and footnote 1 of the *Initial Decision*, it

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Exception Nos.	*Ruling*
	is clear that applications seeking a class II–A assignment in Idaho were also acceptable for filing.
2	Granted. See footnote 3 of this decision.
3, 35, 52	Denied for reasons stated in par. 5 of this decision.
4, 32, 50	Denied. The examiner's acceptance of the amendment was affirmed by the Board (*Circle L, Inc.*, 7 FCC 2d 494, 9 R.R. 2d 854 (1967)) and WGN has offered no reason which persuades us to reconsider that ruling. The evidence establishes that Radio Nevada can adjust and maintain its directional array as proposed.
5, 34	Denied. The calculations offered in Radio Nevada exhibit 12 are based on measured patterns filed with the Commission in support of applications for licenses, pursuant to which licenses were granted. These patterns were independently reviewed by Radio Nevada's consulting engineer. WGN has offered no evidence to rebut the testimony of Radio Nevada's consulting engineer in support of this exhibit.
6	Granted. See par. 8(a) of this decision.
7	Denied. See par. 8(b) of this decision.
8	Granted to the extent indicated in par. 8(c); denied in all other respects as not decisionally significant.
9	Granted to the extent indicated in par. 10 of this decision.
10	Denied to the extent indicated in par. 10 of this decision.
11, 33	Denied. The additional aerial measurements urged are not required by the rules and appear unwarranted. Skywave measurement requirements were specifically deleted from the rules, *In the Matter of Amendment of the Standards of Good Engineering Practice*, 10 R.R. 1562 (1954), and appear needless in this case. Additional expenditures for these measurements are therefore not required.
12	Denied. See par. 8(f) of this decision.
13	Granted to the extent indicated in par. 8(g) of this decision; denied in all other respects. See par. 8(f) of this decision.
14	Denied. The examiner's findings with respect to Radio Nevada's salary estimates are supported by the record, and WGN's additional exceptions do not contradict the findings of fact on p. 66 of the *Initial Decision*.
15	Denied. The examiner's finding that "[n]one of the other parties offered evidence either challenging or rebutting these Radio Nevada cost estimates" is relevant to the issue of whether Radio Nevada has demonstrated its financial qualifications in that it constitutes one of the reasons for acceptance of Radio Nevada's estimates.
16, 20, 21, 29, 40	Denied. See par. 13 of this decision.
17	Denied. As to the preliminary construction costs, while they could have been more accurately recorded in Tel-America's balance sheets, the expenses involved have been charged against the applicant and, therefore, were considered when evaluating the applicant's financial qualifications. Denied in all other respects as not decisionally significant.
18	Denied. The examiner's findings with respect to KAIL–TV's operating revenues are reasonable and supported by the record. See also footnote 8 of this decision.
19	Denied. The examiner's finding that operating expenses for KAIL–TV during 1967 would come to approxi-

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Exception Nos.	*Ruling*
	mately $92,500 is supported by record. See Radio Nevada exhibit 27, p. 71. Denied in all other respects for the reasons stated in ruling on WGN exception 17.
22	Denied as of no decisional significance.
23	Denied as moot. See footnote 11 of this decision.
24	Granted to the extent indicated in par. 8(j) of this decision; denied in all other respects as moot. See ruling on exception 23.
25	Denied. See par. 9(a) and footnote 12 of this decision. Insofar as this exception relates to the ability of Reeder to fund his loan, it is denied as being of no decisional significance.
26	Denied. See footnote 11 of this decision.
27	Granted to the extent indicated in par. 9(b)(VI) of this decision and denied in all other respects since the examiner's findings are accurate and adequately reflect the record.
28	Granted. See par. 9(b)(I) of this decision.
30	Granted to the extent indicated in par. 8(j) of this decision; denied in all other respects as moot. See ruling on exception 23.
31	Denied. Radio Nevada's estimate of 1st year revenues of $250,000 was based on various factors in addition to those listed in this exception. However, Williams' evaluation of this data in arriving at his estimate is of no present relevance. The examiner independently examined this data and properly concluded that this applicant could reasonably expect a minimum income of $30,000 during the 1st year of operation.
36	Granted. The record supports the conclusion that Radio Nevada's proposed daytime coverage would extend to 88,759 square miles, as reflected in par. 40 of the *Initial Decision*.
37	Denied. See par. 4 of this decision.
38, 45, 46	Denied. The examiner's conclusions are adequately supported by the record.
39, 41, 44, 47, 48	Denied. The examiner's conclusions, as modified by this decision, are supported by the record.
42	Denied for the reasons stated in footnote 8 of this decision.
43	Granted. See footnote 10 of this decision.
49	Denied. WGN's consulting engineer has conceded that the proposed Radio Nevada array could be adjusted to protect the secondary service area of WGN. The additional requested conditions are neither required by the Commission's rules nor necessary.
51	Denied. The examiner properly accepted the amendment for the reasons stated in *Circle L, Inc.*, FCC 67M-1058, released June 26, 1967.

STATEMENT OF BOARD MEMBER DONALD J. BERKEMEYER

Inasmuch as the engineering amendment to which I dissented has been allowed and did not affect the interference problems in any way, I join in the above decision.

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FCC 68-1144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of HARRY D. STEPHENSON AND ROBERT E. STEPHENSON, LEXINGTON, N.C. (Requests: 1140 kc, 1 kw, DA-Day)	Docket No. 18385 File No. BP-17021
CHINA GROVE BROADCASTING CO., CHINA GROVE, N.C. (Requests: 1140 kc, 500 w, Day) For Construction Permits	Docket No. 18386 File No. BP-17686

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration the above-captioned applications which are mutually exclusive by virtue of interlinking prohibited overlap of contours as defined by section 73.37 of the Commission's rules.

2. Also before the Commission are (*a*) a petition for reconsideration and return of the application of China Grove Broadcasting Co. (hereinafter, China Grove), filed by Foy T. Hinson, licensee of stations WRKB and WRKB-FM, Kannapolis, N.C.; (*b*) China Grove's reply; (*c*) Hinson's response to the reply; (*d*) Hinson's subsequently filed petition to deny the China Grove application; and (*e*) pleadings in opposition and reply thereto.

3. Petitioner Hinson bases his claim of standing as a party in interest on the allegation that the proposed China Grove station would be located within the service area of stations WRKB and WRKB-FM and would compete with them for advertising revenue. The Commission finds that petitioner has standing as a party in interest within the purview of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 R.R. 2008 (1940).

4. The China Grove application was tendered for filing on March 30, 1967, accompanied by a request for waiver of section 1.569 of the Commission's rules. The proposal involves a technical violation of section 1.569(b)(2)(i) since the proposed site is located outside a 500-mile extension of the 0.5-mv/m 50-percent nighttime contour of class I-A station KSL, Salt Lake City, Utah, on 1160 kc (a frozen channel) and, therefore, is in an area where a class II-A facility might be allocated if 1160 kc should be duplicated. Since the proposed frequency is 20 kc removed from 1160 kc, the problem which might be

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involved with a new class II–A assignment in the area would be overlap of 2 and 25 mv/m contours.

5. On May 3, 1967, the Commission waived section 1.569(b)(2)(i) and accepted the China Grove application for filing. Reliance was placed on the applicant's demonstration that the existing operations of stations WTYC, Rock Hill, S.C., and WBAG, Burlington-Graham, N.C., both operating on 1150 kc, 1 kw, day, already precluded the establishment of any class II–A station in the area of the instant proposal. Applicant contended that any class II–A proposal close enough to involve 2 and 25 mv/m contour overlap with the China Grove proposal would also involve adjacent channel overlap of 0.5 mv/m contours with the aforementioned stations. It was further stated that, since any class II–A station established in the area would have to afford protection to KSL during nighttime hours, a directional antenna system would be required. This system would require the signal to be suppressed toward the west and radiate the major lobe toward the east or southeast. Therefore, any such station would have its major lobe within an area which presently receives primary nighttime service from class I–B station WBT, Charlotte, N.C., operating with 50 kw. Thus, any area which might be precluded by the proposed operation would not be usable for a transmitter site by an assumed class II–A operation, because it would be impossible to meet the requisite 25 percent "white area" nighttime.

6. In his petition for reconsideration and return of application filed June 2, 1967, Hinson contends that the Commission erred in reaching the conclusion that the proposed operation of China Grove will not materially prejudice future consideration of adjacent class I–A channels. The engineering statement submitted in support of the Hinson petition assumes 250 w power for the hypothetical class II–A station to show the areas precluded by the existing operation of stations WBAG, Burlington-Graham, N.C., and WTYC, Rock Hill, S.C. On the other hand, it assumes a class II–A operation of 50,000 w to show the area that would be precluded by the instant China Grove proposal. The Commission agrees with the applicant's reply statement that it is fallacious to assume the lowest power of 250 w to depict the area precluded by the existing operation of stations WBAG and WTYC and then to assume the highest power of 50,000 w to show the area precluded by the applicant's proposal. A further pleading filed by Hinson on July 1, 1967, likewise does not persuade us to alter our previous finding that the China Grove proposal would not preclude the assignment of a new class II–A facility. Accordingly the petition for reconsideration and return of the China Grove application will be denied.

7. Pursuant to the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901 (1965),[1] Hinson

[1] Therein, the Commission called for an examination to determine whether an applicant's proposed 5-mv/m-daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. If such a condition exists, a rebuttable presumption arises that the applicant realistically proposes to serve the larger community.

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requests inclusion of an issue to determine whether China Grove's proposal will realistically provide a local transmission facility for its specified station location, China Grove, N.C., or for the larger community of Kannapolis, N.C. Hinson argues the 50,000 population test set out in the *Suburban Community Policy Statement*, *supra*, was not intended as an inflexible standard, and that he has made the necessary threshold showing that the proposal actually seeks to serve Kannapolis rather than China Grove citing in support *V.W.B., Inc.*, 8 FCC 2d 744, 10 R.R. 2d 563 (1967). While admitting that the communities in question fail to meet the population test enunciated by the Commission, petitioner contends that the applicant's 500-w proposal for China Grove (1960 U.S. census population, 1,500) places its 5-mv/m contour over approximately one-third of Kannapolis (1960 census population, 34,647), and extends its 2-mv/m contour over the remaining area of that community. According to Hinson, the 1960 population of China Grove was only one twenty-third the population of Kannapolis, and this disparity will grow larger as Kannapolis continues its steady expansion.[2] As additional support for the requested issue, petitioner alleges (*a*) that China Grove is only 5 miles from the center of Kannapolis and within that community's "metropolitan area"; (*b*) that because of China Grove's small population, the applicant would of necessity have to seek revenues outside of the community, most logically in Kannapolis; (*c*) that the residents of China Grove do their "significant shopping" in Kannapolis; (*d*) that coverage of China Grove could be achieved with 250-w power rather than the 500 w proposed; and (*e*) that since the Commission must designate the China Grove application for hearing in any event, because of its mutual exclusivity with the above-captioned Lexington proposal, a hearing would be an appropriate forum for full exploration of the question of which community China Grove Broadcasting Co. will realistically serve. Petitioner also implies that the applicant's motive in identifying with China Grove is primarily to gain a comparative hearing advantage over the Lexington proposal, since China Grove presently has no local broadcast service, whereas Lexington has existing AM (WBUY) and FM (WXLN-FM) stations.

8. In response, China Grove has simultaneously filed both a motion to dismiss Hinson's petition to deny as procedurally defective and an opposition pleading treating petitioner's objections on the merits. The applicant notes that although petitioner has made numerous statements of an allegedly factual and conclusive nature, his petition is unsupported by affidavits as required by section 1.580(i) of the Commission's rules. Additionally, it is contended that Hinson has submitted a highly misleading map, which makes it appear that Kannapolis encompasses all of the area composing the cities of Concord, Landis, and China Grove, N.C. Regarding the merits of a 307(b) suburban issue, the applicant asserts that while China Grove has been incorporated

[2] Petitioner notes that Kannapolis has grown from its 1950 census figure of 28,448 to its 1960 population of 34,647. In contrast, China Grove's population has remained static, as attested by the following U.S. census figures: 1,567 in 1940; 1,491 in 1950; and 1,500 in 1960. Neither Hinson nor the applicant has provided more recent figures. According to Commission inquiry, the Census Bureau has not undertaken an official study of the area subsequent to 1960.

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since 1889, Kannapolis remains an unincorporated entity, without either established boundaries or normal municipal government, owing its existence solely to the Cannon Mills Co., which founded that community and still owns a substantial portion of its downtown business and residential areas. Noting that Kannapolis is divided into northern and southern portions by the Rowan-Cabarrus Counties line, the applicant argues that the area known as North Kannapolis (i.e., the portion located in Rowan County) is generally considered separate and apart from the Cabarrus County area of Kannapolis. This situation, according to the applicant, raises a question as to whether there is in reality any 5-mv/m penetration of Kannapolis, since China Grove's proposed 5-mv/m contour penetrates only North Kannapolis.[3] Moreover, the applicant argues that China Grove is itself a vigorous, self-sufficient community, complete with civic groups, churches, schools, and municipal functions, as well as a wide variety of retail stores and business establishments. With apparent reference to the availability of potential advertising revenues, the applicant has submitted an extensive listing (furnished by the Rowan County tax supervisor's office) of area businesses. In addition, the applicant claims that a more realistic picture of the population of the China Grove area is provided by reference to the population of China Grove Township, placed at 19,172 by the 1960 U.S. census. To further support its position the applicant disavows any intention of serving Kannapolis, stating that it is confident that China Grove and the adjacent towns of Landis, Faith, Rockwell, and Granite Quarry will adequately support the proposed station. According to China Grove, it was out of a desire to provide service to these additional small communities (and not to Kannapolis) that the 500-w proposal was submitted.

9. In opposition to the applicant's motion to dismiss, petitioner Hinson, noting that the map exhibit questioned by the applicant is a portion of the larger U.S. Geographical Survey topographical map of the area, with this source and the scale of depiction indentified on the face of the exhibit, reaffirms that accuracy of the map as a valid representation of the Kannapolis urbanized area. Hinson asserts that the shaded portions of the map, which allegedly correspond to similarly shaded areas on the larger USGS topographical map, do not purport to show the corporate boundaries of Kannapolis, or any other community, but only the general urbanized area under consideration herein. Regarding the initial lack of required affidavits, petitioner states that he has reiterated the same contentions, supported by the appropriate documents, in a subsequent reply to the applicant's opposition pleading.

[3] The applicant has submitted numerous exhibits and affidavits to support its representations concerning the nature of the Kannapolis area. Attention is drawn to the lack of municipal services in Kannapolis. Police protection is provided by the Rowan and Cabarrus Counties sheriffs' departments in their respective areas of authority. Water and sewage services are provided by the Cannon Mills Co. to the properties it owns, but all other residents of Kannapolis rely upon their own wells and septic tanks. There is no municipal trash collection. In the area known as North Kannapolis residents have joined together to form a sanitary district to provide for water and sewage facilities. The Kannapolis school system extends into both Rowan and Cabarrus Counties, but, according to the applicant, most of the children residing in North Kannapolis attend Rowan County schools.

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10. In his reply, petitioner acknowledges that Kannapolis is unincorporated, but argues that this is no indication that the community is not a thriving entity, comparable to any other city of similar size. To counter the applicant's claim that Kannapolis is without municipal services, Hinson cites the existence of a volunteer fire department, a school system, a sanitary district and the two-county police force servicing the community.[4] With reference to the applicant's statement that Kannapolis is a one-industry town, petitioner quotes from the applicant's own exhibit No. 6 to the effect that virtually all the employment listed in China Grove is also under the auspices of the Cannon Mills Co. Hinson contends throughout that the applicant has confused the actual limits of Kannapolis proper, and has attempted to becloud the issue of the relative size of China Grove as compared to Kannapolis. Submitted as appendix B is an excerpt from the North Carolina Session Laws of 1953, which creates the Kannapolis Street Planning Board, describing exactly the limits of its jurisdiction. These boundaries, which in petitioner's view constitute the outermost limits of Kannapolis, are depicted in petitioner's appendix C, an allegedly official street planning board map of Kannapolis. This map includes North Kannapolis within the area of the board's jurisdiction. It is further argued that the Kannapolis school system includes the portion of the city in Rowan County, and that the U.S. Post Office in Kannapolis serves the areas of the city located both in Rowan and in Cabarrus Counties. Hinson claims that the applicant's reference to China Grove Township is misleading, since this area is merely an arbitrarily drawn subdivision of Rowan County, set for administrative purposes and having no bearing on population concentrations. According to petitioner, within the area designated as China Grove Township are located not only China Grove, but all of that portion of Kannapolis which is situated in Rowan County. Thus, of the 19,172 persons in China Grove Township claimed by the applicant as a truer picture of the population it proposes to serve, 11,794 are alleged to live in Kannapolis itself. This, in petitioner's opinion, lays bare the applicant's actual intentions to operate as a Kannapolis rather than a China Grove station. Also with regard to the applicant's alleged intentions, Hinson argues that upon examination of China Grove's exhibit No. 7, wherein some 388 businesses are listed as potential of revenue for the proposed station, a total of 134 are located in Kannapolis itself. Of the remainder, Hinson alleges that 29 have no telephones, and 43 have home telephones listed, indicating that they are small operations. Seven businesses appear twice on the list, and two have not been in operation for the past 2 years. Thus, petitioner contends that based on the information submitted in its own exhibit, the applicant intends to rely on businesses in Kannapolis proper for advertising revenues, and could therefore be expected to identify itself

[4] Petitioner notes that while the applicant makes much of the fact that the Kannapolis police department is staffed by county deputies, China Grove's own exhibit No. 8 states that the city of China Grove has one full-time patrolman who is a member of the Rowan County sheriff's department.

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with the Kannapolis metropolitan area rather than serving the particular needs of its specified community of China Grove.[5]

11. With regard to the applicant's argument in paragraph 8, supra, that Hinson's petition to deny is procedurally defective, the Commission finds that petitioner, in failing to attach the required affidavits, did not comply with section 1.580(i) of the Commission's rules. Moreover, this defect was not remedied, as Hinson contends, by the repetition of his original arguments properly supported by affidavits in his reply pleading, since that pleading (considered as a petition to deny) was itself procedurally defective under section 1.580(i) by virtue of the fact that it was filed subsequent to China Grove's published cutoff date. Accordingly, the petition will be dismissed. Nevertheless, we will treat it as an informal objection under section 1.587 of our rules and, because of his interest in the matter, Hinson will be made a party to the hearing hereinafter ordered. As far as Hinson's map is concerned, we find upon comparison with our own USGS topographic map of the Kannapolis area that Hinson's exhibit is a reasonably accurate depiction.

12. In adopting the *Suburban Community Policy Statement*, supra, the Commission was careful to note that the 5-mv/m, 50,000-population test was not meant to serve as an inflexible standard. We acknowledged the right of interested parties to attempt to raise the issue on petition and stated that such attempts would receive favorable consideration if the petitioner could make a threshold showing that the proposal would realistically afford primary service to a community other than the one specified. As noted in the *V.W.B.* case, supra, the burden a petitioner must carry under these circumstances is not a light one. Applications will not be designated for hearing merely because they happen to place a strong signal over a somewhat larger community. Fully cognizant of these considerations, we nevertheless conclude that, based on the weight of relevant factors, petitioner Hinson has made the requisite threshold showing, and that addition of a 307 (b) suburban issue is therefore warranted in this case.

13. In reaching this conclusion, we rely heavily on the great disparity in population between China Grove and Kannapolis.[6] To determine population with respect to the operation of the suburban community presumption, the 1960 U.S. census represents the most

[5] Attention is also drawn to the fact that certain of the applicant's shareholders herein (i.e., Dorothy D. Childers and Dr. and Mrs. R. N. Butler), while holding controlling interests in station WKTE, King, N.C., filed an application (BP–16610) to increase power of that station from 500 w to 5 kw, thereby proposing a 5-mv/m penetration of Winston-Salem, N.C. This application was opposed by station WSJS, Winston-Salem, and subsequently designated for hearing on a 307(b) suburban issue. Thereupon, the WKTE application was amended to reduce power to 1 kw and was granted by the Commission on Oct. 11, 1967. Shortly thereafter, pursuant to Commission approval, the parties to the China Grove application transferred all their interest in WKTE. Noting this sequence of events, petitioner questions the applicant's professed confidence that a small community such as China Grove can support a radio station profitably. According to Hinson, "perhaps the sale (of WKTE) resulted from the frustration of the principals' attempts to increase power and serve Winston-Salem." The Commission has, however, refrained from any findings with reference to the alleged motives of the applicant in submitting a proposal for China Grove, or the fact that principals of the applicant have on another occasion been involved in a question of which community they actually intended to serve. Petitioner's statements regarding these matters, and the implications he attempts to draw from them, are without substantive support and purely speculative in nature.

[6] According to the 1960 U.S. census, China Grove's population (1,500) is roughly 4 percent that of Kannapolis (34,647). This is approximately the same percentage of population disparity that existed in the *V.W.B.* case, supra.

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objective measurement. *Babcom, Inc.*, 12 FCC 2d 306, 12 R.R. 2d 999 (1968). Reliance on official census determinations are especially relevant in a case of this nature, where both the boundaries and population of the communities involved are subject to debate. We note that the census includes both the Rowan and Cabarrus Counties portions of Kannapolis in its determination of that community's total population. Nowhere does the census refer to North Kannapolis. Based on these factors, we can only conclude that, contrary to China Grove's contentions, Kannapolis proper includes the area known as North Kannapolis, and therefore that the applicant does in fact penetrate Kannapolis with its proposed 5-mv/m contour. As petitioner has pointed out, whether or not a city is incorporated is not the determinative factor under the *Suburban Community Policy Statement*, supra. In this connection, we note that we have already determined, pursuant to section 73.30 of the Commission's rules, that Kannapolis is an integral community so far as the allocation of its two existing AM and one FM broadcast facilities is concerned. While the existence of China Grove as a separate community is not disputed, its location in close proximity to Kannapolis, and the inconclusive nature of the applicant's showing as to the availability of revenues outside of Kannapolis proper,[7] place in question the ability of the proposed station to maintain itself as a local transmission service for China Grove. As previously mentioned, the applicant fully anticipates 5 mv/m service to the area known as North Kannapolis. Although the applicant's proposed operating power of 500 w is not, in itself, so excessive as to throw in question its alleged intention primarily to serve China Grove and its immediate environs, examination of its engineering exhibits suggests that the applicant could, in fact, provide its intended service to the nearby communities of Landis, Rockwell, Granite Quarry, and Faith with a 250-w proposal. Further examination also reveals that had the applicant specified its same 500-w proposal for Kannapolis, the application would not have been accepted for filing due to prohibited adjacent channel overlap with station WTYC, Rock Hill, S.C. In light of these factors, and considering the extensive factual data presented, we are of the opinion that a satisfactory resolution of the question of the applicant's actual intentions can best be ascertained within the framework of a full evidentiary hearing on the 307(b) suburban issue.

14. According to the China Grove application, funds in the amount of $49,325 will be required to construct and operate the proposed station for 1 year without revenues. The alleged cash requirements are as follows: Downpayment on equipment, $4,800; first year payments on equipment, with interest, $4,928; land purchase, $2,900; downpayment and total first year expenses on building, $1,091; and first year working capital, $35,606. To meet these expenses, the applicant indicates reliance upon existing capital of $360, shareholder stock subscriptions of $22,500, and a loan commitment from the Northwestern Capital

[7] The applicant has submitted an extensive list of area businesses. However, as petitioner has noted, approximately one-third of these businesses have Kannapolis addresses. Furthermore, the list as a whole is merely an undigested compilation of names and addresses prepared by the Rowan County tax authorities. Presumably, the applicant would rely upon many of these sources for advertising revenues, but no information is supplied as to the actual feasibility of any of them as potential customers.

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Corp. for $50,000. Examination of their personal balance sheets indicates, however, that two of the applicant's principals do not show sufficient liquid assets to meet their stock subscription agreements totaling $15,000.[8] In addition, the letter of March 13, 1967, evidencing Northwestern Capital Corp.'s willingness to loan the applicant $50,000, fails to set out the terms of the loan's repayment or the necessary collateral as required by paragraph 4(h) of section III of form 301. Furthermore, since it is not readily apparent from the letter itself that Northwestern Capital Corp. is a qualified lending institution, a financial statement demonstrating its ability to comply with the loan agreement is required. In view of these deficiencies, the applicant has shown the availability of only $7,860 toward meeting its $49,325 requirement. Therefore, an issue will be included to determine whether the applicant has sufficient funds available to construct and operate the station for 1 year without relying upon prospective revenue. *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965).

15. Review of the China Grove application raises a question as to whether the applicant has reasonable assurance of being able to secure its proposed antenna site. As exhibit 4 to its application, China Grove has submitted an option agreement, whereby Britte M. Deal, owner of the property specified as the applicant's proposed antenna site, has agreed, in return for $100, to convey the land to Ray A. Childers, on or before January 30, 1968, upon payment of a $2,900 purchase price. The agreement also provides that Childers, by giving 30 days notice and payment of an additional consideration of $100, may extend the option for another 12-month period beyond January 30, 1968. As presently constituted, the China Grove application fails to indicate whether Childers has exercised his option to buy the property, whether the agreement has been extended as provided, or whether, in light of Mr. Childers' withdrawal, the site is still available to the applicant. Accordingly, an issue will be included to determine whether there is reasonable assurance that China Grove will be able to secure its proposed antenna site.

16. Commission records indicate that Ray A. Childers currently has pending an application (File No. BP-17493) for a standard broadcast station to be located at Eden, N.C. This application, initially filed on October 27, 1966, was amended on April 29, 1968, to reflect the filing, on March 30, 1967, of the China Grove proposal. However, no reference, pursuant either to paragraph 19(b) of section II of form 301, or to the requirements of section 1.65 of the Commission's rules,[9]

[8] Richard H. Taylor has agreed to purchase $7,500 worth of stock in the applicant corporation, but his financial statement demonstrates availability of acceptable liquid assets (i.e., cash on hand and cash value of life insurance) of only $3,340. Ray A. Childers and his wife, Dorothy D. Childers, together initially agreed to purchase $7,500 worth of stock. On June 21, 1968, the China Grove application was amended to reflect the withdrawal of Mr. Childers and the assumption by Mrs. Childers of all his ownership interest in the corporation. A new balance sheet was not, however, filed by Mrs. Childers, and, according to the joint financial statement previously submitted on behalf of both herself and her husband, the Childers, even jointly, do not show total liquid assets sufficient to meet the $7,500 commitment now entirely assumed by Mrs. Childers. Although the Childers have also listed considerable assets comprised of stocks, bonds, real estate and "business investment," none of these sources have been sufficiently identified to allow them to be credited toward Mrs. Childers' stock purchase obligation. See par. 4(d) of sec. III of form 301.

[9] Sec. 1.65 of the rules requires that whenever the information contained in a pending application is no longer substantially accurate and complete in all significant aspects, the applicant shall, within 30 days, unless good cause is shown, attempt to amend his application to provide the correct information.

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has ever been made in the instant application to the pendency of Childers' Eden proposal. Since Mrs. Childers has from the outset remained a party to the China Grove application, the withdrawal of Ray A. Childers does not excuse the applicant's failure to mention Childers' Eden application. A proper response to paragraph 21(b) of section II requires complete disclosure of any interest in a pending application held by a close relative of one submitting the instant proposal. Childers' eventual amendment of his Eden application (albeit after a delay of over 1 year) to reflect his then interest in the China Grove proposal would tend to dispel any suspicion of concealment of his part. We note, however, that the ability of Mrs. Childers to meet her financial requirement, tied as it appears to be to her husband's financial position, is already in issue in this case. Therefore, any additional financial undertaking on Mr. Childers part, especially in the broadcast field, is of considerable significance in determining China Grove's eventual financial qualification. In view of these considerations, we are of the opinion that an issue, pursuant to section 1.65 of the rules, is warranted concerning China Grove's failure to correct and keep accurate its application and to determine the effect of this failure upon the applicant's requisite and comparative qualifications to receive a grant of its proposal. Cf. *Vernon Broadcasting Company*, 12 FCC 2d 946, 13 R.R. 2d 245 (1968); *Romac Baton Rouge Corp.*, 7 FCC 2d 564, 9 R.R. 2d 1029 (1967).

17. With regard to the proposal submitted by Harry D. and Robert E. Stephenson for Lexington, N.C. (hereinafter Stephenson), an estimated $78,477, will be required to construct and operate the proposed station for 1 year without revenues. Anticipated expenses consist of down payment on equipment, $5,178; first-year payments on equipment, with interest, $5,599; cost of acquiring land and building $12,000; miscellaneous, $2,500; first-year repayment of a bank loan including interest, $8,200; and first-year working capital, $45,000. The only source of funds indicated by the Stephensons as available to meet these expenses, is a $37,000 line of credit committed to them by the Bank of Fuquay, Fuquay Springs, N.C. Since this amount falls short of meeting their aforementioned financial needs, an issue will be added to determine whether the Stephensons have sufficient funds available to meet their requirements under the *Ultravision* standard, supra.[10]

18. Examination of the Stephensons' application discloses that, although it was retendered for filing (see footnote 10, supra), subsequent

[10] Although the Stephensons estimate that $45,000 total first-year operating expenses will be required, they have based their showing of alleged financial qualification on one-fourth that amount ($11,250), as required under the former 3-month financial standard. This circumstance apparently resulted from the fact that the original Stephenson application, tendered on Apr. 12, 1965, and requesting waiver of section 1.569(b)(2)(i) of the rules, was returned as unacceptable for filing, because the applicant had failed to show that a grant of its application would not prejudice future consideration of the class I–A clear channel, 1160 kc. On Nov. 22, 1965, the Stephensons retendered their proposal with supplemental engineering data to support the requested waiver. They also asked that their proposal be assigned a file number retroactive to Apr. 12, 1965. By letter of Nov. 9. 1966, the Commission granted a waiver of section 1.569, but specifically refused to assign a retroactive file number to the application. Meanwhile, the Commission decided the *Ultravision* case, supra, holding that the financial standard enunciated therein would be applicable to all applications filed after July 2, 1965. See *Clarification of Applicability of New Financial Qualifications Concerning Standard Broadcast Applications*, 1 FCC 2d 550, 5 R.R. 2d 349, released July 8, 1963. Thus, it would appear that in retendering their application, the Stephensons failed to consider the new financial criteria. Nor have they subsequently amended their application in keeping with the *Ultravision* requirements.

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to November 1, 1965, the effective date of the revision of Section IV of form 301,[11] the application fails to contain either the new form itself, or the programing survey and detailed information now required. Because of this deficiency, the Commission is unable to determine whether the applicant is aware of and responsive to the needs of the Lexington community. *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968). Accordingly, an issue will be specified to determine the efforts made to ascertain the programing needs and interests of the Lexington community and the manner in which the applicant proposes to meet those needs and interests.

19. Examination of the Commission's form 323 ownership reports reveals that substantial changes have occurred in the Stephensons' current broadcast interests which have not been reported on their application, as required by section 1.65 of the rules. Effective July 1, 1965, Capital Broadcasting Co., Inc., assigned the license of station WRNC, Raleigh, N.C., to Robert E. and Harry D. Stephenson, doing business as Raleigh Radio Co. Subsequently, on March 21, 1967, the Commission granted an application (file No. BAL–6003) for assignment of license of WRNC to Raleigh Radio Co., Inc., a corporation in which the Stephensons each owned a 50-percent interest. Thereafter, on December 8, 1967, an ownership report was filed informing the Commission that the Stephensons had transferred a 45-percent interest in the licensee corporation to Norman J. Suttles, James C. Davis, and Derwood H. Godwin (15 percent each). The Stephensons continue to hold 55 percent of the corporation as joint owners. Neither the initial acquisition of WRNC, nor the above ownership transfers are reflected in any way on the Stephensons' Lexington application. As noted in *Cleveland Broadcasting, Inc.*, 2 FCC 2d 717, 7 R.R. 2d 205 (1966), the requirements of section 1.65 of the Commission's rules are not met by filing information on form 323 ownership reports. Furthermore, we are of the opinion that the change in question may be of particular significance in a comparative case such as we have here, for not only do the Stephensons now possess an additional broadcast interest in North Carolina, but the newly added principals at WRNC are extensively involved in station ownership throughout that State and elsewhere.[12] Accordingly, an issue will be added to determine the effect the Stephensons' failure to keep their application substantially correct and current may have on their requisite and comparative qualifications to receive a grant of their Lexington proposal.

20. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are*

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[11] *Report and Order on Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms*, 1 FCC 2d 439, 5 R.R. 2d 1773, released Aug. 12, 1965.

[12] Norman J. Suttles and Derwood H. Godwin own substantial interests in the following stations: WFBS, Spring Lake, N.C.; WISP, Kinston, N.C.; WPVA and WPVA–FM, Petersburg-Colonial Heights, Va.; WSMY, Waldon, N.C.; and WSML, Graham, N.C. James C. Davis has ownership interests in stations WISP, WPVA, WPVA–FM, and WSML.

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designated for hearing in a consolidated proceeding, at a time and place to be specified in a subsequent *Order*, upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.
2. To determine, with respect to the application of China Grove Broadcasting Co.:
   (*a*) Whether Richard H. Taylor and Mrs. Dorothy D. Childers have sufficient cash or liquid assets to meet their respective stock purchase commitments.
   (*b*) Whether Northwestern Capital Corp. has sufficient cash or liquid assets to meet its loan commitment.
   (*c*) Whether, in light of the evidence adduced pursuant to (*a*) and (*b*) above, the applicant is financially qualified.
3. To determine, with respect to the application of Harry D. and Robert E. Stephenson:
   (*a*) The manner in which they will obtain additional funds to construct and operate the proposed station for 1 year.
   (*b*) Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
4. To determine whether there is reasonable assurance that China Grove Broadcasting Co. will be able to secure its proposed antenna site.
5. To determine whether either applicant has submitted complete and accurate information in response to the Commission's Form 301, and has continued to keep the Commission advised of substantial and significant changes as required by section 1.65 of the Commission's rules.
6. To determine, in light of the evidence adduced under the foregoing issue, whether either applicant has the requisite and comparative qualifications to receive a grant of its application.
7. To determine the efforts made by Harry D. Stephenson and Robert E. Stephenson, copartners, to ascertain the programing needs and interests of the area to be served and the manner in which the applicant proposes to meet such needs and interests.
8. To determine whether the proposal of China Grove Broadcasting Co. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:
   (*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;
   (*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;
   (*c*) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and
   (*d*) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.
9. To determine, in the event that it is concluded pursuant to the foregoing issue that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, Kannapolis, N.C.
10. To determine in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

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11. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

12. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

22. *It is further ordered*, That the petition for reconsideration and return of the China Grove application filed by Foy T. Hinson *Is denied;* and that the petition to deny the China Grove application also filed by Foy T. Hinson *Is dismissed.*

23. *It is further ordered.* That Foy T. Hinson, licensee of stations WRKB and WRKB–FM, Kannapolis, N.C., *Is made a party* to the proceeding.

24. *It is further ordered*, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein pursuant to section *1.221(c)* of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this *Order*, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order.*

25. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1129

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SUNSET BROADCASTING CORP., YAKIMA, WASH.	Docket No. 16924 File No. BPCT-3478
APPLE VALLEY BROADCASTING, INC., YAKIMA, WASH.	Docket No. 16925 File No. BPCT-3648
NORTHWEST TELEVISION & BROADCASTING CO. (A JOINT VENTURE), YAKIMA, WASH.	Docket No. 16926 File No. BPCT-3672
For Construction Permits for New Television Broadcast Stations	

ORDER

(Adopted November 26, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING, COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration: (*a*) the *Memorandum Opinion and Order*, FCC 68-721, 13 FCC 2d 974, released July 24, 1968, designating this proceeding for a further hearing; and (*b*) the *Initial Decision*, FCC 68D-63, released by Hearing Examiner Chester F. Naumowicz, Jr., on October 14, 1968.

2. Subsequent to the Review Board's approval of a merger agreement among the three applicants in this proceeding, we concluded that a hearing was required to determine whether Morgan Murphy has engaged in trafficking in broadcast authorizations and whether a grant of Apple Valley's application would serve the public interest. At the same time we vacated our *Order* denying an application for review of the Board's action and stayed the Board's *Order*. After holding the specified hearing, the examiner issued an *Initial Decision* concluding that Murphy has not trafficked in broadcast authorizations, that a grant of Apple Valley's application would serve the public interest, and that Apple Valley's application should be reinstated. From our consideration of this matter, we are persuaded that the examiner's conclusions are supported by the evidentiary record and that no useful purpose would be served by further consideration of the trafficking issue in this proceeding.

3. Accordingly, *It is ordered:*

(*a*) That the *Initial Decision*, FCC 68D-63, released in this proceeding on October 14, 1968, *Will be permitted* to become effective pursuant to section 1.276 of our rules;

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(*b*) That the stay of the Review Board's *Memorandum Opinion and Order*, FCC 67R–372, 9 FCC 2d 902, released September 7, 1967, *Is vacated;* and

(*c*) That the *Order*, FCC 68–144, released February 21, 1968, *Is reinstated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in the result reached here because the record apparently does not demonstrate that Murphy has engaged in trafficking. Nonetheless, there are some aspects of the matter which trouble me.

In the first place, Cascade Broadcasting Co., which had petitioned to deny Apple Valley's application, had opposed the later merger of the competing applicants, and had continued that opposition in the hearing before the examiner, has now apparently withdrawn from the case. On November 5, 1968, Cascade filed an application for transfer of control of KIMA–TV and associated stations to Filmways, Inc., and has not filed exceptions to the examiner's decision. We are thus deprived of the views of the sole party adverse to the result here reached.

The Broadcast Bureau participated in the hearing, but offered no exhibits, cross-examined Murphy briefly on only one rather collateral point, and did not file initial findings and conclusions but simply adopted those of other parties and supported the ultimate conclusion that no trafficking had been proved. While I realize that limitations on participation of Bureau counsel are imposed by their heavy workloads, I think a more active role would be desirable in cases as important as this one.

The examiner's decision seems thorough and is quite persuasive, but I still have some concerns—perhaps because the determination of whether one who has bought and sold stations has engaged in trafficking is not an easy one. Certainly Murphy did not traffic in licenses between 1926 and 1958, during which he established 13 broadcast stations and sold none of them. But in the next 7 years he sold 12 stations, three of which had been purchased during this period—plus three more which he still owns.

In 1958 he bought control of the licensee of WMAM and WLUK–TV in Marinette, Wis., and in the following year merged the company with the licensee of WLUC–TV in Marquette, Mich. In 1960 he bought out the minority interest in the merged company. In that same year he sold WMAM, and in 1964 he sold WLUK–TV and WLUC–TV. The examiner noted that Murphy had not taken any money out of the licensees of these stations. It seems to me that one who draws neither salary nor dividends from stations he owns—perhaps because he is in a high tax bracket which would siphon off most of such ordinary income—is in a position where he can profit from his broadcast properties only by sale. In other words, he has an incentive to leave earnings in the business, thus enhancing its value on subsequent sale—with the proceeds taxable at much more favorable capital gains rates.

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In paragraph 37 of his opinion, Examiner Naumowicz discussed certain matters which he considers relevant to the evaluation of a charge of trafficking, as follows:

> 37. One factor frequently considered is the length of time for which the authorizations were held. The reason for this is obvious. An individual who has acquired a station for the purpose of disposing of it at a profit may be expected to desire to turn that profit as soon as possible, and it is characteristic of traffickers that they dispose of their stations relatively soon after acquisition. Another pertinent factor is financial involvement. While a shrewd trafficker would avoid starving his station to the point where it becomes unattractive to a prospective purchaser, he would be reluctant to tie up substantial funds which do not have a leverage effect on the sales price of the station. Hence, typically, if a station is acquired for the purpose of sale the owner will minimize the funds invested to improve service and maximize the percentage of revenues which he withdraws in one form or another. A third factor which is frequently of importance is that of profit. While it may be assumed that even the most innocent of sellers hopes to receive the maximum price for the station he is selling, it is characteristic of traffickers that price is the governing consideration.

He sites no authority for these propositions, and I have some trouble with each of them. I am not sure that one who acquires a station with the primary hope of later selling it at a profit will "desire to turn that profit as soon as possible." Our 3-year rule now bars the kind of quick turnover which sometimes used to take place, where the transferee of a station really performed the function of broker or optionee rather than that of a true licensee. It would appear that in some cases it would take substantially longer than 3 years to build up the station so as to realize the desired profit. Consequently, I am not sure that holding a station for as much as 5 or 6 years necessarily negates a plan to buy and operate—but only for long enough to permit a profitable sale. Certainly at some point the extended operation of a station would seem to demonstrate that it was acquired and held to serve the public rather than for sale, the classic example being the licensee who, after long operation, sells all or most of his stations in order to retire or to put his estate in a more liquid position. Many of Murphy's stations were held for such long periods as to rebut any charge of traffickers, but I am not sure that all of his sales would be justified on this ground alone—and I do not suggest that the examiner so held.

Similarly, I'm not sure that financial involvement disproves trafficking. I think a "shrewd trafficker" would continue to put funds into a station just as long as he felt that doing so would produce a satisfactorily higher price on sale. This would be particularly true, it seems to me, where all or most of the investment in improved facilities and strengthened operation is derived from retained earnings, thus avoiding high personal income tax rates which would be involved if a station owner were to "maximize the percentage of revenues which he withdraws in one form or another." I therefore find this factor quite unpersuasive—unless the investment has been so heavy that it results in a loss rather than a profit on the sale.

Finally, I'm not sure that maximization of price on resale is a reliable test. I think that most people who sell broadcast stations—like the sellers of anything else—generally try to get the highest possible price,

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so in most cases I don't think this factor will tell us much. But I can imagine cases where even a trafficker would sell at less than the highest possible price—because a lower bidder would pay cash, or seems more likely to operate the station in such a manner as to insure payment of a deferred balance, or would pose less of a problem in securing Commission consent to the transfer. In this case, I do think that some of the sales to close associates tend to establish that, as to them, Murphy had no intent to traffic in licenses.

Despite my difficulty with some of the examiner's rationale, it seems to me that—at least on the record before him—he reached a reasonable result. Reviewing the patterns presented by all of Murphy's acquisitions and sales to date, it seems to me likely that he will operate the proposed new station in Yakima, Wash. with a view to public service and, hopefully, year to year profit, rather than resale at a profit. I think that likelihood is increased by the review of his activities which we have undertaken here.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of:	
SUNSET BROADCASTING CORP., YAKIMA, WASH.	Docket No. 16924 File No. BPCT–3478
APPLE VALLEY BROADCASTING, INC., YAKIMA, WASH.	Docket No. 16925 File No. BPCT–3648
NORTHWEST TELEVISION & BROADCASTING CO. (A JOINT VENTURE), YAKIMA, WASH.	Docket No. 16926 File No. BPCT–3672
For Construction Permit for New Television Broadcast Station	

APPEARANCES

Arthur Stambler on behalf of Apple Valley Broadcasting, Inc.; *William J. Potts* and *Kenneth W. Gross* (Haley, Bader & Potts) on behalf of Columbia Empire Broadcasting Corp.; *Benito Gaguine* on behalf of Northwest Television & Broadcasting Co. (a joint venture); *E. Stratford Smith* and *Arthur V. Weinberg* on behalf of Cascade Broadcasting Co.; and *P. W. Valicenti* and *John F. Reilly* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued October 11, 1968; Effective December 3, 1968, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. By order released October 18, 1966, the above-captioned mutually exclusive applications for a new television station on channel 35, Yakima, Wash., were designated for consolidated hearing. However, prior to hearing the applicants reached a merger agreement among themselves, which agreement was approved in a Review Board order released September 7, 1967. The Commission, in an order adopted February 14, 1968, declined to review the Board's action, whereupon Cascade Broadcasting Co., an intervenor, noted an appeal to the United States Court of Appeals for the District of Columbia Circuit.

2. On June 25, 1968, the Commission requested the Court to remand the matter for further proceedings before the Commission, and on June 27, 1968, the Court did so remand. On July 24, 1968, the Commission vacated its order refusing to review the Board's approval of the applicants' merger, stayed the Board's order, and designated the Apple Valley application for hearing on the following issues:

> 1. To determine whether Morgan Murphy, a party to the Apple Valley Broadcasting Co. application, has engaged in trafficking in broadcast authorizations;

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2. To determine in the light of the evidence adduced pursuant to the foregoing issue whether a grant of the application to which Morgan Murphy is a party would serve the public interest, convenience and necessity.

3. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Prehearing conferences were held on July 31 and August 7, 1968, and hearings were conducted August 27 and 28, 1968, with the record being closed on the later date. Proposed findings of fact were filed by Apple Valley and Cascade on September 23, 1968, and reply findings were filed by all parties on October 9, 1968.

FINDINGS OF FACT

4. Morgan Murphy is a resident of Superior, Wis., and is the publisher and sole owner of The Evening Telegram, a newspaper published in that community. The Evening Telegram, in turn, is the sole owner of Apple Valley, and would own 30 percent of the stock of the merged corporation which is proposed as the licensee of the Yakima facility. At present Murphy is also the effective sole owner of stations KXLY–TV, AM and FM in Spokane, Wash., and 50-percent owner of station WISC–TV, Madison, Wis.

5. Murphy's participation in broadcasting began in 1926 when he formed an association with Walter C. Bridges who had received a license for station WEBC, Superior, Wis. some 2 years previously. Murphy, through the Telegram, financed the construction of WEBC as a full-fledged commercial station. The license was transferred to Head of the Lakes Broadcasting Co. of which Murphy was president and 52.3-percent stockholder and Bridges was general manager with a 10-percent stock interest. In 1928 station WEBC was moved to Duluth, Minn. by Head of the Lakes.

6. In 1935 Murphy, who owned a newspaper in Lafayette, La., established station KVOL in Lafayette in conjunction with a local businessman, George Thomas. Each effectively owned 50 percent of the licensee, Evangeline Broadcasting Co., with Murphy being president and Thomas being treasurer and general manager.

7. Also in 1935 Head of the Lakes constructed station WMFG in Hibbing, Minn. The day-to-day operation of the station was placed in the hands of a local manager.

8. In 1936 Head of the Lakes established station WHLB in Virginia, Minn.

9. In 1937 Central Broadcasting Co., in which Murphy was secretary-treasurer and 54.3 percent stockholder, and in which Bridges was president and 18.6 percent stockholder, built station WEAU in Eau Claire, Wis. Bridges had responsibility for overseeing the operation of the station.

10. In 1948 Radio Wisconsin, Inc., in which Murphy had a majority interest [1] and in which Bridges held 10 percent, applied for and built station WISC in Madison, Wis.

11. Bridges had an early enthusiasm for the prospects of FM broadcasting with which he infected Murphy. Accordingly, in 1940 Head

[1] The record does not reveal his precise stockholding.

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of the Lakes applied for a new FM authorization in Duluth, which application was granted and the station built in 1944. The facility, WEBC–FM, continued operation through the mid 1950's, always at a loss. In 1946 Central received an authorization for station WEAU–FM in Eau Claire. It operated the station until it was sold in 1959, although it never received any independent revenues. In 1947 Evangeline established station KVOL–FM in Lafayette. Although the station never made expenses, it was operated until 1956. When Radio Wisconsin established its standard broadcast station in 1948 it also built station WISC–FM in Madison. The station never received any substantial independent revenues, but was operated by Radio Wisconsin until its sale in 1958.

12. In 1953 Murphy entered into television. In that year Central established WEAU–TV in Eau Claire; Radio Wisconsin applied for a television station in Madison [2]; and Rib Mountain Television, Inc., in which Murphy was majority stockholder, established UHF station KGTV in Des Moines, Iowa.[3]

13. Thus, in the 32 years between 1926 and 1958 Murphy had established 13 broadcast stations without having bought or sold any of them. His economic experience had been uneven. Some of the stations made money, some of them lost. Stations WEBC, KVOL, WMFG, WHLB and WEAU were reasonably profitable. None of the FM ventures returned their investment. WEAU–TV was initially unprofitable, although its position improved with time. WISC–TV has become profitable, but KGTV was a financial disaster. With respect to most of the stations substantial sums have been expended for improvements from time to time.

14. By the late 1950's Murphy's interest in radio had commenced to abate. He believed that the character of radio broadcasting had changed, and he no longer found it as appealing to him as it had been over the previous three decades. However, television seemed to him, at that time, to be analogous to radio 30 years previously, and as his interest in radio waned his interest in television waxed.

15. In 1958 The Evening Telegram purchased 55 percent [4] of the stock of M & M Broadcasting Co., licensee of stations WMAM and WLUK–TV,[5] Marinette, Wis. The price was $155,300. Murphy became president of M & M, which at the time of the purchase was in very poor financial shape. Although the radio station was making money, the television station was losing even more. Nevertheless, it was the availability of the television station which attracted Murphy to the deal, and he purchased the radio station only because it was part of the package. At that time M & M had total assets of $692,000 and total liabilities of $360,000.

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[2] By this time merger with a local Madison group had reduced Murphy's stock interest to 50 percent. Following a comparative hearing, station WISC–TV in Madison went on the air in 1956.

[3] The Des Moines station suffered heavy losses, but was operated by the Murphy group until it went off the air in 1955.

[4] At the same time Bridges acquired 10 percent of M & M's stock as did Norman Postles, a CPA employed by the Telegram. Mr. Murphy's wife subsequently secured 3.3 percent of the corporation's ownership.

[5] At that time the station had the call letters WMBV–TV.

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16. Subsequent to the acquisition of M & M the television transmitter was moved in order to obtain coverage more nearly comparable to that of the two Green Bay, Wis., stations with which it competed. This necessitated the abandonment of the original facilities with a book value of some $350,000, and the expenditure of an additional $306,000. In order to meet these costs the Telegram loaned M & M $185,000.

17. Later still M & M petitioned the Commission to reallocate its channel from Marinette to Green Bay. The Commission adopted the proposal, and in 1960 the television transmitter was again moved. Once again the existing facilities were abandoned at almost total loss, and $233,000 was expended to effectuate the move. On this occasion the Telegram loaned M & M $160,500.

18. The various moves did not succeed in making WLUK–TV a profitable station. In 1958 the station lost $59,000, in 1959 it lost $57,000, and in 1960 it lost $87,000.

19. In 1959 there occurred a merger of interests between M & M and Lake Superior Broadcasting Co., licensee of WLUC–TV [6], Marquette, Mich. A new corporation, North Central Broadcasting Co., was formed of which M & M held 52 percent of the stock and Lake Superior 48 percent. North Central assumed $102,000 of Lake Superior's indebtedness, and the Telegram loaned $160,000 to a newspaper owned by Lake Superior's sole stockholder, receiving in turn an option to purchase another of his newspapers.

20. At the time of the merger WLUC–TV, which had been operating at a loss, showed total assets of $483,000 and total liabilities of $457.000. As part of the merger the Telegram, through M & M, loaned North Central $50,000 for working capital, and more Telegram money was invested later.

21. In 1960 M & M acquired Lake Superior's 48 percent of North Central for $40,000, and Murphy became the corporation's president. Thereafter, WLUC–TV was operated very closely in conjunction with WLUK–TV.

22. In March of 1962 through the Telegram and related companies Murphy purchased stations KXLY–AM–FM and TV, Spokane, Wash. The purchase price was $3,250,000, although the depreciated value of the assets was only $130,000. In addition, the Telegram lent KXLY–TV $75,000 as working capital. Here also Murphy was not especially interested in acquiring the radio stations but did so because they were part of the package in which the television station was being sold. Since the acquisition substantial sums have been invested in the stations, but the AM and FM stations have not operated at a profit.

23. In 1958 Murphy commenced to sell certain of his broadcast interests. At that time the Commission was conducting a hearing concerning the Telegram's proposed acquisition of M & M, and the opponents of the proposal were charging that Murphy and Bridges had some concentration of control of Wisconsin broadcasting. Communications counsel suggested that this problem might be avoided if WMFG, Hibbing and WHLB, Virginia, Minn. were to be assigned. The suggestion was not unwelcome to Murphy, who, as has been noted, was beginning to lose his zest for radio broadcasting.

[6] At that time the station had the call letters WDMJ–TV.

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24. Accordingly, the stations were sold by Head of the Lakes to their general manager and chief engineer, each of whom acquired 50 percent of the two assignee companies. Each was sold for $84,500 to be paid $15,000 down with the balance over 5 years at 4 percent. At the time WMFG and WHLB had depreciated asset values of $19,000 and $3,000, respectively.[7] For the 6 years prior to sale the stations had been averaging a combined annual income of $32,000. The transfer application asserted that the assignor's reason for assignment was:

> Licensee's desire at this time to concentrate on station WEBC; its principals' desire to devote time to other broadcast interests; matters of business judgment, and to take advantage of opportunity for assignment to local parties closely familiar with the local area and with serving it in radio broadcasting.

25. Later in 1958 a station broker came unsolicited to Head of the Lakes suggesting a possible purchaser for station WEBC, Duluth. As a result of this contact the station was sold in November of 1958 for $250,000, the station having assets with a depreciated value of $36,000. In the time just prior to the sale the station's financial position had been deteriorating.[8] The transfer application gave as the assignor's reason for assignment:

> The principals of Head of the Lakes Broadcasting Co. after having devoted almost 30 years to the operation of station WEBC now desire to devote greater time, effort and attention to other of their broadcast interests and, as a matter of business judgment, to take advantage of an opportunity to assign their interest in WEBC to an experienced broadcaster who will make Duluth his home and who gives assurance of continuing WEBC's long-established record of local public service.

Shortly after the transfer Head of the Lakes, having no further function as a licensee, was dissolved. Less than two years later the purchaser of WEBC resold the station for $400,000.

26. In 1959 a group of local people approached Radio Wisconsin with a proposal to purchase stations WISC–AM and FM in Madison. The proposal was accepted, and the stations were sold. The price was $350,000, with $25,000 down, $75,000 at closing and the balance over 7 years at 5 percent. The stations' assets then had a depreciated value of $83,000. The transfer application gave the assignor's reasons for sale as:

> After more than a decade of aural broadcasting, the assignor desires to concentrate all of its efforts in the newer medium of television broadcasting.

Radio Wisconsin did not sell WISC–TV, which it still operates.

27. During the negotiations for the sale of WISC–AM and FM the purchasing group expressed an interest in stations WEAU–AM and FM in Eau Claire, Wis. The interest ripened into a contract, and simultaneously with the disposition of the Madison stations the Eau Claire stations were sold to the same group. The purchase price for these stations was also $350,000, with the same terms as those which were extended on the Madison stations. The Eau Claire stations had a de-

[7] Throughout this *Initial Decision* monetary sums have been rounded off to the nearest thousand.

[8] The record does not disclose whether, at the time of sale, the station was making or losing money.

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preciated asset value of $61,000. The assignor's reasons for the assignment as set forth in the application was:

> **After 22 years of aural broadcasting the assignor desires to concentrate all of its efforts in the new medium of television broadcasting.**

Central Broadcasting retained WEAU–TV, although, as hereinafter noted, the station was sold some 2½ years later.

28. In 1960 the former owner of WLUC–TV offered to purchase station WMAM from M & M. The offer was accepted and in May 1960 an application was filed to transfer the station for $167,500. At the time the depreciated value of its assets was $33,000. Murphy's Evening Telegram loaned the assignee's parent company the entire $167,500 purchase price. The application stated the assignor's reason to be:

> **Assignor desires to devote full-time attention to operation of television broadcasting station.**

M & M did retain WLUK–TV, although an application for approval of its transfer was filed some 4 years later.

29. In October, 1961, an application was filed to transfer Murphy's 50-percent interest in station KVOL, Lafayette, La. to his associate, George Thomas. The price for the sale was 50 percent of the book value as of the date of Commission approval of the transfer. This worked out at $175,000. At the time the licensee corporation had total assets of $389,000, including over $250,000 in cash and a certificate of deposit, as well as depreciated assets of $65,000. Because of the long association between Thomas and Murphy no written contract for sale was executed, and Murphy did not bargain for a higher price although he believed book value did not represent the worth of the business.[9] The transfer application stated the reason for the sale as:

> **After more than 26 years of Evangeline Broadcasting operation of Lafayette Radio Station KVOL in association with George Thomas, Morgan Murphy * * * desires to devote his time, efforts and attention to other broadcast interests, existing as well as proposed.**

30. Late in 1961 Bridges recommended to Murphy that WEAU–TV be disposed of. Because of a desire to devote more time to his own two radio stations, and his advancing age, Bridges was disinclined to continue to spend the 2 days a week he had been averaging at WEAU–TV. Although Murphy did not himself wish to discontinue his association with the station, his long-time friendship with Bridges made him disinclined to consider bargaining over the price he might pay for Bridges' interest. Therefore, it was decided that the station would be sold.

31. A broker was retained to find a buyer for the station,[10] and in February of 1962 an application was filed to transfer the station to Post Broadcasting Corp. The sale price was $2,100,000. At that time the depreciated asset value was $236,000. The application gave as the assignor's reason for assignment:

> *** * * Central's major principals Morgan Murphy and Walter C. Bridges now desire to assign the license of WEAU–TV and terminate their longtime**

[9] Less than 2 years later Thomas sold the station for $310,000, retaining assets in addition worth $175,000.

[10] This is the only instance where a broker was employed to dispose of any of Murphy's broadcast interests.

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broadcasting activities in Eau Claire so as to now be enabled to devote their greater time and efforts to other broadcast interests.

The Commission granted the application in May of 1962.

32. At some time prior to the fall of 1964 Norman Postals, a CPA employed by the Telegram and a minority stockholder in M & M, together with John Stang and Charles Goldberg who were also minority stockholders in M & M but otherwise unassociated with Murphy, urged Murphy to consider selling M & M. After consulting Bridges, who was opposed to the move, Murphy declined to put the M & M stations on the market. Nevertheless, shortly thereafter the Post Broadcasting Co. which had purchased WEAU–TV, communicated to Murphy through Postles an offer to purchase the stations.

33. With the passage of time Bridges, who no longer wished to devote time to the management of the M & M stations, modified his position and recommended to Murphy that the stations be sold. This advice weighed heavily with Murphy, and he authorized the acceptance of the Post offer. The sale price was $3,200,000 cash [11] for 100 percent ownership of M & M. Since M & M owned North Central the sale transferred both M & M's station WLUK–TV, Green Bay, Wis. and North Central's station WLUC–TV, Marquette, Mich. At the time WLUK–TV had depreciated assets of $423,000, and WLUC–TV had depreciated assets of $413,000. As heretofore noted, WLUK–TV continued to be operated at a loss up through the time of sale. However, by 1964 WLUC–TV showed an operating profit of $58,000. The assignor's reason for assignment was stated to be:

> * * * M & M's principal Morgan Murphy and his longtime associate Walter C. Bridges now desire to transfer the WLUK–TV and WLUC–TV licenses and activities in this area of Northern Wisconsin and Michigan in order to be enabled to devote their greater efforts to other broadcast interests which they currently own and/or may acquire in the future. The latter would not only include VHF facilities but also those in the UHF portion of the spectrum which they had earlier attempted to pioneer in Des Moines, Iowa in the initial phase of UHF growth and difficulties during the period 1953 to 1955. While there will be no geographic limitations as such on this hoped-for acquisition of new facilities, they particularly have in mind the section in and around the Northwestern area of the United States with which they have in recent years become closely familiar through the operations of other of their broadcast stations (radio as well as TV) in Spokane, Washington. * * *

The Commission approved the transfers in January of 1965.

34. During the years of Mr. Murphy's association with broadcasting he has not generally been active in the day-to-day operation of his stations. Rather he has depended upon his managers and associates to actually run the stations, and has limited his participation to frequent telephone and intermittent personal contact. His primary reliance was on Bridges with respect to those stations in which Bridges had an interest. Subsequent to that gentleman's death in 1964 he has relied heavily on Wayne McNulty. Although this pattern of indirect management has always characterized Murphy's broadcast activities,

[11] By subsequent agreement Goldberg, Stang and Postles agreed to accept promissory notes rather than cash for their 28.4 percent of M & M. Although Post requested that Murphy and Bridges also accept notes, they refused and insisted that they receive cash for their M & M stock.

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it has become more pronounced in recent years as Mr. Murphy has been afflicted with failing eyesight.

35. Murphy has followed a pattern of not stinting on his investments in his stations. Technical improvements, frequently very expensive have been the rule, and all of the stations have been supplied with adequate working capital. Similarly, he has not taken money out of the operations except in those instances where profits have been created over and above the stations' needs. For example, he took no money out of the M & M or North Central operations, nor has he taken any money out of his Spokane stations.

CONCLUSIONS

36. The basic question to be determined is whether Murphy has "trafficked" in broadcast authorizations: that is, whether he has acquired them for the purpose of disposing of them rather than to operate them as proposed. Plainly, this is a question of intent, and, since intent can rarely be the subject of direct proof, it must be inferred from the surrounding circumstances. For this reason precedents offer an uncertain guide. The legal principle involved is simple, but the evidence in each case must, of necessity, be unique, and factors which may have little weight in one proceeding may be determinative in another. Thus, although the Commission has from time to time articulated matters which it may consider when evaluating a charge of trafficking, by so doing it has merely indicated areas where evidence as to intent is likely to be found, and it has not purported to delineate the scope of any future trafficking case or to assign relative weights to various types of evidence.

37. One factor frequently considered is the length of time for which the authorizations were held. The reason for this is obvious. An individual who has acquired a station for the purpose of disposing of it at a profit may be expected to desire to turn that profit as soon as possible, and it is characteristic of traffickers that they dispose of their stations relatively soon after acquisition. Another pertinent factor is financial involvement. While a shrewd trafficker would avoid starving his station to the point where it becomes unattractive to a prospective purchaser, he would be reluctant to tie up substantial funds which do not have a leverage effect on the sales price of the station. Hence, typically, if a station is acquired for the purpose of sale the owner will minimize the funds invested to improve service and maximize the percentage of revenues which he withdraws in one form or another. A third factor which is frequently of importance is that of profit. While it may be assumed that even the most innocent of sellers hopes to receive the maximum price for the station he is selling, it is characteristic of traffickers that price is the governing consideration.

38. On all of these factors the evidence favors Murphy. Certainly prior to 1958 none of his activities even hint at trafficking. He built his own stations; he poured substantial amounts of money into them including disastrous experiments during the infancy of FM and UHF, he saw to their management through the services of close and

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valued associates; and he continued to operate for very long periods of time. During Murphy's first 30 years of station ownership there can be no doubt that he was a good faith broadcaster.

39. This is not to say that Murphy's long years of exemplary service necessarily exculpate him from the instant charge, for it is possible that at some point in his long career his intentions underwent a change. Certainly, in 1958 there was a significant modification in the pattern of his activities. For the first time he started to buy stations rather than build them, and for the first time he undertook to dispose of certain of his properties.

40. Nevertheless, examination of the pattern and the details of his sales persuades the examiner that Murphy was not motivated by any improper intent. His sales were occasioned by the operation of two different and sometimes conflicting forces: his desire to divest himself of radio and concentrate on television; and his desire to accommodate the wishes of his longtime broadcasting associates.[12]

41. By 1958 Murphy was beginning to lose his zest for radio, but he believed he saw in television analogies to the challenge which had first attracted him to broadcasting. He was, therefore, receptive when opportunities arose to sell his radio interests. The original sales of the Hibbing, Virginia and Duluth stations, which he had held for so many years, were not attempts to dispose of the properties to the highest bidder. It is significant that the Hibbing and Virginia stations were sold to the people who had been running them on terms which permitted virtually the entire purchase price to be paid out of the income of the stations, and it is also significant that the price received for the Duluth station was substantially less than the buyer was able to resell it for less than 2 years later.

42. The sales of the Madison, Eau Claire and Marinette radio stations over the next 2 years reflect part of the same pattern. Madison and Eau Claire had been held for substantial periods of time, and, although the Marinette station had been held for a much shorter period, the terms of its sale negate any inference of trafficking. Since The Evening Telegram loaned the buyer the entire purchase price, the Murphy interests received no new money whatsoever at the time of sale. Such actions are entirely inconsistent with the goals of a trafficker.

43. Similarly, the 1961 sale of the Lafayette radio station to a longtime associate cannot be reconciled with a scheme of trafficking. Rather than seeking the highest bidder, the station was sold under a formula which made it virtually certain that the full market value of the station would not be realized. This transaction is consistent with the entire pattern of the sale of the radio stations and accords with Murphy's assertion that he was motivated primarily by a desire to get out of

[12] Throughout this *Initial Decision* findings and conclusions are based on certain uncorroborated testimony by Murphy. This reliance is based not only on the fact that the testimony is both plausible and uncontradicted, but on the examiner's faith in the witness based upon his demeanor while testifying. Murphy's answers were spontaneous and forthright. He attempted to supply the information he believed his questioners were seeking, even when their questions did not center directly upon the mark. He did not conceal, evade or dissemble. The examiner is persuaded that his testimony represents the truth as he knows it.

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radio. It is irreconcilable with the concept of a man whose primary interest was capital appreciation through the barter of broadcast properties.

44. Altogether different considerations motivated Murphy's sale of the Eau Claire, Green Bay and Marquette television stations in the 1962–65 period. As he had throughout his broadcasting career, Murphy depended upon others to oversee directly the operation of his television stations. His closest associate had been Walter C. Bridges, and Bridges was the man who had primary responsibility for the television operations. By 1962 Bridges was feeling the weight of his advancing years, and desired to liquidate his holdings in television and devote his energies to other projects. He, therefore, urged Murphy to sell, and, although Murphy's personal inclination was to hold the television stations, because of his close relationship to Bridges the advice weighed heavily with him.

45. In evaluating that weight it is appropriate to consider two bits of evidence. First, the terms Murphy extended to associates when selling his radio stations suggest a strong inclination to accede to the needs and desires of his close colleagues, even at some sacrifice of his own interests. Second, his long demonstrated disinclination to administer personally his broadcast properties had been heightened by failing eyesight. Thus, if Bridges were to leave Murphy would have lost the essential individual through whom he had seen to the operation of his stations. In view of the long and close association between the two men Murphy would be expected to view Bridges as far less easy to replace than any ordinary manager. Hence, when Bridges wanted to free his time from television responsibilities and to do so by selling off the stations, it is not surprising that Murphy ultimately acceded to his wishes. Such motives, arising as they did well after the acquisition of the television stations, do not establish trafficking.

46. It is concluded that Murphy has not trafficked in broadcast authorizations, and that a grant to an entity of which he is a principal would serve the public interest.

Accordingly, *It is ordered*, That unless an appeal is taken to the Commission by a party or the Commission reviews the *Initial Decision* on its own motion in accordance with the provisions of section 1.276 of the rules, the grant of the application of Apple Valley Broadcasting, Inc. *Is reinstated.*

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FCC 68–1155

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSED REVISIONS IN THE RATES OF THE WESTERN UNION TELEGRAPH CO. FOR TIE-LINE DOMESTIC INTERSTATE TELEGRAPH SERVICES	Docket No. 17554
In the Matter of PROPOSED REVISIONS IN THE DOMESTIC TELEGRAPH MESSAGE TARIFFS OF THE WESTERN UNION TELEGRAPH CO.	Docket No. 18270

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1968)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT; COMMISSIONER, JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it a motion filed by The Western Union Telegraph Co. (Western Union) on October 2, 1968, to amend paragraph 6 of the Commission's *Memorandum Opinion and Order* released August 2, 1968 (FCC 68–776).

2. Western Union by Transmittal Letter No. 6223, dated June 28, 1968, filed with the Commission revised tariff schedules pertaining to its public message offerings to become effective, in part, on August 1, 1968, and, in part, on September 1, 1968. The Commission after an examination of the new and revised schedules was unable to determine whether the charges, classifications, regulations or practices contained therein would be lawful under the Communications Act of 1934, as amended. Noting that if the increased charges were permitted to become effective on the dates specified therein the rights and interests of the public might be adversely affected the Commission ordered a hearing and investigation concerning the aforementioned tariff schedules and pursuant to section 204 of the act suspended the operation of the tariff schedules for 3 months from their respective effective dates. In paragraph 6 of that *Order* we further ordered that in the event a decision as to the lawfulness of the provisions suspended was not made during the suspension period, and said revised charges, classifications, regulations, and practices went into effect, Western Union and its connecting and concurring carriers were required, until further order, to keep an accurate account or record of all amounts received by reason of the increased charges specifying by whom and in whose behalf such amounts were paid. If upon completion of the hearing the increased

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charges were found to be not justified the Commission pursuant to section 204 of the act might by further order require the refund, with interest, of the amounts received as a result of the increased rates.

3. In its motion, Western Union alleges that the accounting requirements imposed on it by the *Order* (*a*) are unduly burdensome, (*b*) would impose great expense on Western Union which may have the practical effect of preventing the carrier from placing the increases in effect at the end of the 3-month suspension period, and (*c*) are not necessary to protect the public interest even should the Commission ultimately exercise its discretion and order refunds. In support of its contentions Western Union points out that its present accounting, billing and record retention routines are not geared, without substantial and very extensive changes, to accommodate the mandate of the Commission's order. Pointing out that the telegram service is currently handling approximately 70 million telegrams a year, Western Union, to comply with the provisions of the order, would find it necessary to—

(*a*) retain messages beyond the present 6-month period, or alternately, to record all information required by the order;

(*b*) to record the sender's full name and address on all cash and telephone charge messages;

(*c*) to extract messages where bad debts, charge backs or service refunds are involved, since a refund would not be applicable;

(*d*) to revise extensively the billing procedures for the regular charge customers; and

(*e*) to require all agencies to forward original messages to the controlling Western Union independent office, and to require railroad officers to forward the original message along with the monthly report.

4. Western Union further contends that the purpose of the accounting order imposed by the Commission would be the possibility that the Commission, after hearing, may require it to make refunds to the senders of telegrams. Should the Commission order refunds, Western Union would find it necessary to—

(*a*) rerate all messages;

(*b*) calculate differences;

(*c*) sort cash messages by sender's name, summarize, prepare refund checks, envelope and mail;

(*d*) sort telephone charge messages by telephone number, summarize, prepare refund check payable to subscriber, envelope and mail; and

(*e*) for charge account messages, summarize, prepare refund check, envelope and mail.

The company illustrates the magnitude of this task by pointing out that should the hearing run a normal course, between 70 and 140 million telegrams would be involved.

5. In view of the foregoing, Western Union in its motion requests that the Commission amend the present accounting provisions of its

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aforesaid *Memorandum Opinion and Order* by deleting the present accounting provisions on condition that (*a*) Western Union maintains such records as may be prescribed by the Chief of the Common Carrier Bureau showing the amount of revenues attributable to the increases in rates reflected in the tariffs under suspension, (*b*) make such reports thereof at such intervals as may be required, and (*c*) file acceptance of the condition that such portion, if any, of those revenues which the Commission finds not justified will be disposed of in such a manner as the Commission determines to be reasonable and in the public interest, and for such other and further relief as the Commission may deem proper.

6. Whether or not a carrier whose increased rates are subject to investigation and hearing should be relieved of the accounting requirement is a matter for the exercise of Commission discretion under section 204 of the Communications Act. It is our view that such relief should be afforded by the Commission only upon a persuasive showing (1) that implementation of the requirement would be attended by inordinate costs and difficulties of administration; and (2) that any portion of the revenue which the Commission finds related to an unjustified increase in rates will be accounted for by the carrier in such manner as the Commission determines to be in the public interest. On the basis of Western Union's showing as explained above, we are satisfied that good cause exists in the circumstances of this case to excuse Western Union from the accounting and refund requirement of our *Memorandum Opinion and Order* of August 2, 1968; and that as a condition to such relief, Western Union should be required to maintain its accounts in such manner as will permit the Commission to identify and direct appropriate disposition of the amount of revenues the Commission may find to be unreasonable.

Accordingly *It is ordered*, That paragraph 6 of the Commission's *Memorandum Opinion and Order* (FCC 68–776) *Is deleted* upon the filing of an acceptance by Western Union, within 5 days of the issuance of this *Memorandum Opinion and Order*, of the following conditions:

(*a*) In accordance with the directions of the Chief, Common Carrier Bureau, Western Union shall develop and file such traffic data as will keep the Commission informed in detail as to changes in volume and composition of all intra-United States message traffic and as to the amount by which charges on interstate messages in November 1968, and subsequent months exceed what the charges would have been on the same traffic if the rates in effect prior to November had been in effect in November and subsequent months;

(*b*) Western Union shall make such reports thereof at such intervals as may be required by the Chief, Common Carrier Bureau;

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(*c*) That such portion, if any, of those revenues which the Commission finds not justified will be disposed of in such manner as the Commission determines to be reasonable and in the public interest.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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FCC 68R–509

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RONNIE J. CAMP, TEMPLE CITY, CALIF. Suspension of Amateur Radio Operator License (K6EVR)	Docket No. 17598

APPEARANCES

John A. Dundas, III, for Ronnie J. Camp; and *J. Russell Smith*, and *Robert J. Ungar*, for the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted December 5, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER. BOARD MEMBER SLONE CONCURRING WITH STATEMENT.

1. By *Order* released on June 19, 1967, the Commission suspended for a 6-month period the Amateur Radio Operator License K6EVR issued to Ronnie J. Camp of Temple City, Calif. The *Order* alleged that, on March 18, 1967, Camp operated his transmitter with an input power in excess of 1 kw, in violation of section 97.67 of the Commission's rules,[1] and concluded that Camp's license should be suspended for a 6-month period. The licensee made timely written application for a hearing on such suspension pursuant to 47 U.S.C. 303(m)(2), as a result of which the matter was designated for hearing by *Order*, published in the Federal Register on July 29, 1967 (32 FR 11092). The designation order specified issues as to whether the licensee had violated the Commission's rules as alleged and, if so, whether the facts or circumstances would warrant any change in the *Order* of suspension.

2. Hearing was held in Los Angeles, Calif., on April 8, 1968, following a prehearing conference held on April 4, 1968. Hearing examiner Jay A. Kyle issued an *Initial Decision* (FCC 68D–54, released August 2, 1968) concluding that Camp had violated rule 97.67 and recommending affirmance of the suspension *Order*. Exceptions to the *Initial Decision* were filed by Camp, and the Chief, Safety and Special Radio Bureau filed a reply; oral argument was not requested, and we do not believe it is necessary to our determination herein. The review board has reviewed the *Initial Decision* in light of the record, the exceptions and the reply. Except as amplified and modified herein and

[1] Rule 97.67 (47 CFR 97.67) provides in pertinent part: "* * * each amateur transmitter may be operated with a power input not exceeding 1 kw to the plate circuit of the final amplifier stage * * *"

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in the rulings on exceptions appended hereto, we concur with the examiner's findings and conclusions and hereby adopt the *Initial Decision.*

3. The examiner found that Camp's transmitter was monitored, on March 18, 1967, by three Commission engineers in accordance with standard monitoring procedures.[2] According to the examiner, three test transmissions were made, the first two at an antenna heading of 310°, the last at an antenna heading of 340°. Measurement of input power of the first test transmission, according to the examiner, were taken on Camp's own meters, and showed an input power of 1365 w, 365 w in excess of the authorized maximum. The examiner found that the relative signal strength of this first test transmission was 3 db below the initial reading observed on the signal strength meter (S-meter) in the Commission monitoring vehicle (see footnote 2); that the second test transmission, made at increased power and measured on both Camp's meters and a Commission volt-ohm meter, produced a signal strength still 1–2 db below the original reading, as indicated by the S-meter [3] and that, because Camp claimed to have been transmitting with an antenna heading of 340° prior to the arrival of the Commission engineers, which he contended would account for a 3 db drop in signal strength from the original reading, the third test was taken at that heading. However, the third test transmission, the examiner found, produced a relative signal strength on the monitoring car S-meter still lower than the original, approximately 8 dbs lower.[4] The examiner noted that Camp has been a licensee for 14 years and has not previously been cited for violation of the Commission's rules, and found that the testimony of Camp's expert witness as to the accuracy of the Commission volt-ohm meter amounted to no more than "sheer speculation." He concluded that the "sole question" was whether Camp had violated rule 97.67; and, dismissing Camp's contentions, including those relating to the accuracy of the Commission's meter and the time of the test transmissions, as "shadow boxing", "speculation", and "conjectures", concluded that a violation had been proved and that the suspension order should be affirmed.

4. The record as a whole, upon which we base our concurrence with the *Initial Decision*, clearly substantiates the examiner's conclusion that Camp violated rule 97.67. Even viewing the evidence most conservatively, it is clear and undisputed that the measurements of the first test transmission were made on Camp's meters and that these measurements showed an input power well in excess of the authorized maximum. Neither at the time of the investigation, at the hearing, nor

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[2] The procedure is as follows. One Commission engineer is stationed in a car from which he may observe any movement of the operator's antenna and takes a signal strength reading on an S-meter in the car's radio receiver. Once an initial relative signal reading, expressed in decibels (db), has been made, the other two Commission engineers enter the operator's station and take power input readings, expressed in watts. The input readings determine compliance with rule 97.67; the relative signal strength readings establish a reference point which may be used to determine whether changes in transmitter input power or directivity of the antenna have occurred during the inspection of the station. The engineer in the car is in radio communication with his colleagues.

[3] According to the examiner's findings, this second test produced the following power input readings: on Camp's meters, 1530 W, and on the Commission's meters, 1470 w.

[4] If Camp had, in fact, been operating at a heading of 340° prior to the arrival of the Commission engineers and with no change in power, the third test should have produced a relative signal at least equal in strength to that of the initial S-meter reading.

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before us has Camp sought to prove that these first measurements were incorrect, or that his own meters, on which the measurements were made, were inaccurate.[6] Rather, Camp has, through his own testimony and that of his expert witness, sought to establish that the Commission's volt-ohm meter might be, for diverse reasons, inaccurate or defective; that the directiveness of his antenna might account for the 2–3 db drop in relative signal strength; that the db readings, because of the calibration of the S-meter dial from which they were obtained, were mere estimates; and that he was transmitting at 14 mc, not 21 as shown by the Commission evidence. However, it is our view, as well as the examiner's, that Camp's contentions are unsupported by credible evidence relating directly to the circumstances of the case and involve extensive conjecture and surmise. In addition, a number of his contentions entirely miss the mark since they do not detract from or cast doubt upon the undisputed result of the first test transmission, which, in and of itself, would be sufficient to establish that rule 97.67 was violated.

5. As indicated above, the examiner concluded that the "sole question" in the proceeding was whether Camp had violated the rule. The designation order, however, specified a second issue as to whether the facts or circumstances warrant a change in the suspension order. The examiner made findings from the record that Camp has been a Commission licensee for 14 years, and has never before received notice or warning relative to overpowering or other statutory or rule violation. The examiner drew no conclusions from these findings. Based upon such findings, and the fact this is Camp's first violation and relates to a single, not repetitious, incident, we think that under these circumstances a modification of the suspension order to the extent that the period of suspension be reduced to 3 months is warranted, and we hereby so find pursuant to the second issue specified in the designation order. However in reducing the sanction imposed, we emphasize the fact that we do not find that the evidence is, in any manner, insufficient to sustain the conclusion that a violation of rule 97.67 was committed; nor do we find that the violation was of a technical or minor nature. Moreover, we do not suggest that cases of overpower operation in the amateur radio service are to be lightly regarded. On the contrary, we think the record more than adequate to conclude that a violation occurred; we do not regard Camp's operation at an input power more than one-third above the authorized maximum as being minor; and, we are well aware of the fact that overpower operation cases in the amateur radio service present a recurring problem to the Commission and must therefore be seriously considered.

6. Accordingly, *It is ordered*, That the Amateur Radio Operator License, K6EVR, issued to Ronnie J. Camp, *Shall be suspended* for a period of 3 months effective January 20, 1969; that a copy of this

[6] The only conclusion which may be drawn from the fact that his own meters indicated a power in excess of 1000 w input is that he should have known that he was operating his station in violation of the rule. Rule 97.67 provides that "An amateur transmitter operating with a power input exceeding 900 w to the plate circuit *shall provide means for accurately measuring the plate input to the vacuum tube or tubes* supplying power to the antenna." (Emphasis supplied.) This rule places the responsibility directly upon the amateur licensee here to maintain accurate measuring equipment with which he can always know that his power input is limited to 1000 w.

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order shall be served upon licensee by certified mail, return receipt requested, at his last known address; and that licensee shall mail such license to the Secretary of the Federal Communications Commission on or before the effective date of such suspension.[6]

SYLVIA D. KESSLER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS TO INITIAL DECISION

Exception No.	*Ruling*
1, 2, 5	Granted in substance. In par. 5 of the *Decision* we have set forth specific conclusions as to the second issue of the designation order. While the record amply substantiates the examiner's finding that rule 97.67 was violated, and while we do not agree with Camp's contention that the six-month sanction originally imposed was "clearly excessive", we have reduced the period of suspension for the reason set forth in the *Decision*. Cf. *Sam Rosenberg*, 5 FCC 2d 441 (1966).
3	Denied. The examiner did not abuse his discretion in denying Camp access to the Commission's investigative files in this matter; such investigative files have been held to be "privileged" and not subject to inspection or production. 47 CFR 0.457(g), 0.461; *Azalea Corporation*, et al., 13 FCC 2d 339, 13 R.R. 2d 495 (1968).
4	Denied. The exception assigns as prejudicial error the examiner's refusal to permit Camp to examine the investigative report relied upon by one of the Commission's engineers during his testimony at the hearing. Where, as here (tr. 93), a witness reviews the document before taking the witness stand, testifies from independent recollection and does not refer to the document during testimony, it lies within the discretion of the trier of fact as to whether the document should be made available to opposing counsel. *Goldman* v. *U.S.*, 316 U.S. 129, 132 (1942); *Needleman* v. *U.S.*, 261 F. 2d 802 (5th Cir., 1959); *S.E.C.* v. *R. A. Holman, Inc.*, 34 FRD 139 (S.D.N.Y. 1963). Cf., rule 1.362 (47 CFR 1.362); *Amendment of part 1 of the rule of practice and procedure to provide for discovery procedures*, 11 FCC 2d 185, 191, 11 R.R. 2d 1691, 1697 (1968), and *compare* 18 USC 3500; *Palermo* v. *U.S.*, 360 U.S. 343, 352, 353 (1959). Camp has made no showing whatsoever that the examiner abused or did not exercise his discretion, nor would such contentions prevail inasmuch as the examiner was manifestly concerned with the preservation of the procedural integrity of the Commission's investigative processes.
6	Denied. The evidence supports the examiner's finding that Camp's antenna was not moved from the time of the initial relative field signal measurement to the time of the third test transmission. Camp's contention that because the engineer in the car was required to simultaneously observe both the S-meter and the antenna, he would

[6] Within 30 days of the release date of this *Order*, a petition for reconsideration may be filed with the Review Board pursuant to 47 CFR 1.106, or an application for review thereof by the Commission may be filed pursuant to 47 CFR 1.115.

During the period of suspension the Commission will not consider any application made by licensee for any class of license or privilege and will not grant or issue any class of license or privilege for which licensee may have previously qualified.

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Exception No.	*Ruling*
	be unable to detect any movement of the latter, is, at best, argumentative and unsupported by credible evidence. Nor does the engineer's inability to precisely estimate the extent of antenna movement support Camp's inference that the engineer could not, therefore, detect any movement. Finally, leaving aside all of the evidence regarding the relative signal strength readings, the undisputed power input measurements of the first test transmission clearly establish a violation of the rule. See *Decision*, par. 4.
7	Denied. The exception contends that the examiner's characterization of Camp's testimony as "shadowboxing," "speculation" and "conjecture" was erroneous as a matter of law. The testimony of Camp's expert witness was, as the examiner aptly found, "sheer speculation" being concerned with volt-ohm meters in general and not with the circumstances of the case and the Commission meter in particular. Similarly, the inference that Camp seeks to derive from the calibration of the S-meter dial and the directive nature of Camp's antenna are, at best, speculative and there is no supporting evidence for such inference. As to Camp's contention that he was transmitting on 14 mc, rather than 21 as stated by the Commission's witnesses, the *Initial Decision* makes clear that the examiner found Camp's testimony unworthy of credence; from an examination of the record as a whole, we cannot say that the examiner's conclusion in this regard was unwise or unjust. Finally, although much of Camp's attack is addressed to the directiveness of his antenna, the calibration of the S-meter and the accuracy of the Commission's volt-ohm meter, it is worth stressing that violation of rule 97.67 is predicted not on the relative signal strength readings but upon the power input as measured on Camp's own meter, the accuracy of which is not disputed. See *Decision*, par. 4.
8	Denied in substance. Neither the applicable Statute (47 U.S.C. 303(m)), nor the rules (47 CFR 1.89, 97.67) require findings of willfulness or repeated violations to warrant suspension of a licensee. *Accordingly*, the *Examiner* did not err in failing to make such findings, even though the *Notice of Violation* states that "Any of the rule violations * * * [enumerated in the notice] * * * if repeated or willful * * * may result in suspension of the license." However, we have considered the fact that this is a first violation in our determination that the period of suspension should be reduced.

Concurring Statement of Board Member Slone

I concur, but since in my view the violation was willful and there are no mitigating circumstances, I would suspend the license for a period of 6 months.

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FCC 68D-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RONNIE J. CAMP, TEMPLE CITY, CALIF. Suspension of Amateur Radio Operator License (K6EVR)	Docket No. 17598

APPEARANCES

John A. Dundas II, Esq., for Ronnie J. Camp; and *J. Russell Smith, Esq.*, and *Robert J. Ungar, Esq.*, for the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued August 1, 1968)

PRELIMINARY STATEMENT

1. This proceeding involves the proposed suspension of Amateur Radio Operator License K6EVR issued to Ronnie J. Camp of Temple City, Calif.

2. The Commission, by the Chief, Safety and Special Radio Services Bureau, acting under delegated authority, released an order on June 19, 1967, suspending the amateur radio license of Camp for a period of 6 months. Camp filed an application requesting a hearing on the Commission's suspension order, which was granted. By an order released July 18, 1967, the Commission designated the matter for hearing upon the following issues:

> (1) To determine whether the licensee committed the violation of the Commission's rules as set forth in the Commission's *Order of Suspension*.
> (2) If the licensee committed such violation, to determine whether the facts or circumstances in connection therewith would warrant any change in the Commission's *Order of Suspension*.

3. Upon request of respondent the place of hearing was transferred to Los Angeles, Calif., from Washington, D.C. A prehearing conference was held in Los Angeles on April 4, 1968, and the evidentiary hearing was held there on April 8, 1968, on which date the record was closed. Proposed findings of fact and conclusions of law were filed by the Bureau on June 28, 1968, and on behalf of Camp on July 1, 1968.

FINDINGS OF FACT

4. What gave rise to this proceeding was that the Commission's Los Angeles field office had received complaints from amateurs of overpower operation on amateur radio service frequencies in the vicinity of

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respondent's home at 9861 East Estrella Avenue, Temple City, Calif.

5. As a result thereof, three engineers from the Commission's field office in Los Angeles, on March 18, 1967, commenced monitoring operations in the vicinity of Camp's home.

6. One of the witnesses, an employee of the Commission, was Walter W. Wallace. He is an electronics engineer, and is assistant engineer-in-charge of the Los Angeles field office. He testified that he had been employed by the Commission for about 22 years. It was stipulated by counsel that Wallace was qualified as an expert in the field of measuring as it relates to radio electronics. The other two engineers associated with Wallace in the monitoring activities were Richard M. Smith and Lawrence D. Guy.

7. Wallace testified that the monitoring commenced about 1 p.m. on March 18, 1967. At the time of the monitoring there were a large number of amateur radio enthusiasts participating in an American Radio Relay League (ARRL) contest. The objective of the contest, according to Wallace, was to contact as many different stations as possible in different countries. It is pointed out here that Wallace testified that the monitoring was in the general area of Camp's home, and besides Camp, there were a number of other suspects.

8. Wallace testified, in detail, that standard procedure for investigating overpower amateur operations normally involves three men and two cars. One man maintains a fixed position in a specially equipped car from which he can observe any change in the orientation of the subject's antenna. The relative signal strength of the subject's radio signal is observed through the use of an S-meter in the radio receiver used by the engineer in one car. (This was Guy's assignment.) The other two engineers enter the station and make test transmissions to determine how much power produces the same signal strength reading. An increase or decrease of power will then be reflected by an increase or decrease in the relative field strength measurements.

9. In this particular situation Lawrence Guy parked the Commission's investigative car about one block from Camp's home and obtained a relative field strength reading at approximately 3 p.m. He radioed this fact to Wallace and Smith who were in the neighborhood and they immediately went to Camp's home. It is to be noted that Smith and Guy were in constant contact by radio from this point all through the test transmissions which will be hereinafter referred to. When Wallace and Smith arrived at Camp's home they rang the doorbell and were met by Mrs. Ronnie J. Camp at about 3:05 or 3:06 p.m. They advised Mrs. Camp who they were and that they wanted to make a station inspection of Camp's station. Mrs. Camp said "Just a moment," closed the door and did not reappear until some 5 or 6 minutes[1] after which she admitted them. They went through the Camp home and out the back door, and around to the back of the garage where Camp had his room for his radio station. The room where an amateur station is located is commonly called "ham shack."

10. Smith, as noted was in radio communication with Guy in the car. He was informed upon entry that about 2 minutes earlier respond-

[1] See the summary of Richard M. Smith's testimony in par. 14, infra.

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ent's signal strength had dropped approximately 3 db.[2] It is important to observe here that this information from Guy was received in the intervening time from when Guy took the relative field strength reading referred to in paragraph 9, supra, and the time when Wallace and Smith entered Camp's ham shack after being delayed at the door by Mrs. Camp at their residence for a period of 5 or 6 minutes. This information was relayed on to Wallace, who then had the licensee make a test transmission. Guy still reported that the respondent's signal strength was down 3 db. The measurements of voltage and current to the plate circuit of the final amplifier stage were read from the licensee's own meters by Wallace. These measurements indicated a plate voltage of 3900 volts and a plate current of 350 ma. These figures, when multiplied together yield a computed input power of 1365 w, which is 365 watts above the 1 kw permitted in the Commission's rules.[3] Camp was apprised of these readings and the fact that the signal had apparently dropped from what had been previously observed and Camp was asked if he had made any changes in the station to account for the drop. Camp's reply was in the negative. However, on direct examination Camp testified that he had not changed the settings on his amplifier for at least 30 minutes prior to the inspection.

11. At Wallace's request, Camp increased the power and made another test transmission resulting in measurements of 3400 v at 450 ma, the equivalent of about 1530 w. Guy, from the car, after the second test transmission reported that the field strength level was up between 1 and 2 db from the first test transmission. The voltage and milliampere indications for this transmission were also measured by the respondent's own meters and by the Commission's meter, a Simpson Model 260 Volt-Ohm Meter. The results of the two sets of measurements on the second transmission test were as follows:

Respondent's meter	Commission's meter
Voltage 3400	Voltage 3500.
Milliamperes 450	Milliamperes 420.
Power input 1530 w	Power input 1470 w.

The figures just set out and those resulting from the first test transmission were obtained by Wallace who announced them to Smith. Smith confirmed that these were the figures related to him by Wallace during the station inspection.

12. Wallace testified that as the result of the foregoing measurements, Camp was asked whether he could raise the power higher on his own meter and he testified that Camp replied, that he could not raise the power beyond that point. However, Camp apparently contradicted himself at the evidentiary hearing that he had not increased the power as high as he could have. His testimony in that respect, upon interrogation by his counsel, is as follows:

> Q. Now, did you attempt to load it as much as it would go or not?
> A. No. I didn't load it as much as it would go, but I increased it to approximately whatever they were measuring on there. *I increased it slightly.* (Emphasis supplied.)

[2] Also see pars. 14 and 15, infra.
[3] Section 97.67.

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13. Part of Wallace's testimony is as follows:

> During the inspection Camp had mentioned several times that he believed the direction of his beam had changed just prior to our entry, which might account for the drop in signal strength observed. At the time of entry I believe the beam heading was on 310°. He mentioned that just prior he had had it on 340°.

As the result of this and coupled with the fact that Guy reported to Wallace that he had not observed any change in the beam antenna, Camp was asked to turn his beam to a heading of 340°, in order to test the effect on the signal strength. Then the third test transmission was taken. When this was done, Guy reported to Wallace that he had observed a drop in signal strength of approximately 8 db. At this point the Bureau contends that if the respondent had previously turned his antenna from a heading of 340° to a heading of 310°, as he claimed, there would have been an increase in signal strength and not the 3 db drop earlier reported by Guy. Furthermore, between the time Guy made his initial signal strength reading and the time of the above-mentioned antenna test, he observed no movement of the respondent's antenna from the car in which he was sitting from where he had a clear vision of Camp's antenna.

14. Richard M. Smith is an electronics engineer and has been with the Commission approximately 5 years. He holds a bachelor of science degree with a major in electronic engineering. He testified that he was familiar with the various instruments and meters used by the Commission and that he participated in the inspection of the Camp station on March 18, 1967. He testified that he visited Camp's home on that date about 3 p.m. and was detained at the door, along with Wallace, for 5 or 6 minutes. He testified that his main assignment was to maintain communications with Guy via the walkie-talkie radio. He added that when he entered the ham shack Guy advised him that approximately 2 minutes earlier, the observed signal strength on the receiver in Guy's car had dropped approximately 3 db and he relayed the information to Wallace. Smith testified that thereafter Wallace made the readings on the transmissions; that upon the first test transmission Guy reported that the signal level was still 3 db from the roof level and he reported this information to Wallace. He said that after that conversation Wallace asked Camp to bring the power up to the level at which he was operating prior to their arrival at the Camp home. Camp maintained that he had made no changes except in the possible change of the antenna bearing. Smith testified further that he had been present in the hearing room and had heard the testimony of Wallace and that he had heard Wallace's testimony relating to the second transmission, and that to the best of his knowledge, Camp made no objections to the results of Wallace's meter readings. The witness said that Camp maintained that the possible difference in the signal levels obtained was due to a change in antenna position. He further stated that on the last transmission Camp put the antenna on "this 340 heading" and that he was in communication with Guy when this happened and Guy reported that the signal dropped drastically, or about 8 db.

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15. Lawrence D. Guy is an electronics engineer having been employed by the Commission for 7 years. This witness had been an engineer with Hughes Aircraft Co., in its radar laboratories for 5 years prior to his entering the Commission's employment. He testified that he was familiar with the various types of instruments such as receivers, field strength meters, modulation and deviation meters, voltmeters, ammeters, and signal generators. Guy testified as did Wallace and Smith that he was in the vicinity of 9861 East Estrella Avenue, Temple Hills, Calif., on March 18, 1967, and that they started monitoring in the area about 1 p.m. The particular function of his assignment was to observe any apparent drop in relative signal strength before entry as opposed to after entry at a given point. He testified that the receiver in the car in which he was located was an SX122 type equipped with an S-meter and an oscilloscope. When the measurements were taken on the Camp station the witness testified in part:

> **I was approximately 50 feet or so east of Baldwin on the same street that Camp lived on, Estrella.**
> **Q. On the same side of the street?**
> **A. Yes.**
> **Q. I see. And can you tell us at approximately what time you made this measurement?**
> **A. Just shortly before 3 o'clock.**

Without being repetitious, Guy's testimony parallels that of Richard Smith in that he communicated via walkie-talkie radio with Smith and further that a few minutes after Wallace and Smith entered the Camp premises he observed a decided drop in the relative signal strength of Camp's signal. As the result thereof he advised Smith, who in turn told Wallace. He testified that from where he was located on Estrella Avenue he could see Camp's antenna and that there was no change in Camp's antenna before and after the two tests.

16. This witness further testified that the first test transmission occurred 5 or 6 minutes before 3 p.m. on the day in question and the second test transmission was a few minutes thereafter. He said that he noticed a change in the readings between the first test transmission and the second test transmission. He estimated that the change was between 1 and 2 db. He also testified that he had instructions from Smith to observe the Camp antenna and the relative S-meter indications because they were going to make another test by having Camp move his antenna. When this was accomplished the witness testified that there was approximately 8 db drop in the signal strength. He could estimate that the antenna was moved about 20° or 30° [4] but he could not state positively the extent of the antenna move. When he was asked the following questions he replied:

> **Q. Did you at any time between the time you made your relative field strength measurement and the time that you were told that the antenna would be moved, did you at any time see a change in the antenna bearing, Mr. Guy?**
> **A. No, there was no change.**
> **Q. From where you were, would you have been able to tell if there had been a change in the antenna bearing?**
> **A. Yes. I might add that the position was chosen so I could make—detect the change.**

[4] Wallace and Smith testified that it was moved 30°.

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17. On cross-examination Guy stated that normally he kept the exact time on making observations on test transmissions but on this particular occasion he overlooked doing so. However, from his recollection all this transpired around 3 p.m. on the involved date. He also testified on cross-examination that prior to the inspection of Camp's station, two other stations in the general area were also inspected. He further testified on cross-examination that he had made "hundreds" of relative field strength measurements in the 7 years he had been with the Commission. However, he had made no measurements within the last year. On redirect examination Guy testified that after the inspection an investigative case report was made and, as brought out on recross-examination, this report was prepared about 2 days after the investigation. It is a narrative type report.

18. Ronnie J. Camp, testified in his own behalf at the evidentiary hearing. He testified at the time of the inspection that the equipment he was using included a Collins 75S3 receiver, Collins 32S3 transmitter, GSB201 Gonset, GSB201 and a home-built single 4–1000A tube amplifier. He testified that he had been a licensed amateur since 1954 and that he had participated in many contests. Wallace had testified that Camp had the reputation of being very successful in the winning of contests. Camp has confirmed contacts with 343 countries. The respondent testified that in terms of contests that he is "on what they call honor roll, top of honor roll." He also testified that there are only two countries in the world that he had not contacted and in all these transmissions he had never received any notice or warning from the Commission relating to overpower. He did concede, however, that he had been visited by representatives of the Federal Communications Commission a number of times and there were two visits that he could definitely recall. One was in 1957 or 1958 relating to TVI complaint. The second visit that he could recall was one by Walter W. Wallace in 1959 or 1960 relative to overpower. He added that the previous inspection by Wallace was similar to the one that had been described in this proceeding by the Commission witnesses. He thought that at the time of the first visit by Wallace that the measured power was 970 w. He testified that when Wallace and Smith entered his shack on the day in question, that his log sheet reflected the hour was 2:29 p.m. He testified that the test transmissions taken by Wallace and Smith were approximately 10 to 15 minutes, thereabouts. He conceded he had been transmitting before Wallace and Smith entered the shack approximately 15, maybe 20 minutes.

19. Generally speaking, the licensee denied the overpower violation here involved.

20. But explicitly Camp challenged seriously the accuracy of the Simpson meter used by the engineers in making the station inspection and produced as a witness on his behalf in this respect Robert M. Brooks, who is an electronics engineer employed by Cary Instruments. Brooks' testimony is hereinafter referred to in paragraph 24, infra. Camp, however, suggests that when Wallace at the start of the inspection borrowed a screwdriver to zero the meter involved and as he put it "he [Wallace] took the screwdriver, to my amazement, and proceeded to re-zero the Simpson 260 to zero." Wallace had testified that

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in the normal practice, to insure the accuracy of a meter, the first thing which is done is "you zero the meter adjustment so that when no voltage is applied, the meter reads zero on the scale." Wallace went on to explain that there is an adjustment on the meter needle to compensate for any variation. Therefore, the needle is brought to the zero point before any voltages or currents are applied. Wallace further testified that this is the usual procedure and it is recommended by the manufacturer's instructions which accompany the meter that the first step is to zero the meter to insure its accuracy. It must be pointed out here that while respondent professed amazement at this procedure his own witness Brooks, on cross-examination, testified that the operating instructions for all recent series of the Simpson meter state that before use of a given meter, it should be zeroed.[5] A considerable amount of testimony was devoted to the Simpson model 260–3 meter which the Commission's staff members used in making the test transmissions at Camp's home in Temple City, Calif. Both the Bureau and Camp produced expert witnesses to testify on their respective behalf concerning the reliability of the Simpson meter.

21. Frank Miara is a technician employed by Quality Electronics and has been thus engaged for 10 years. He testified that he repaired and calibrated about 200 Simpson meters a month. He further testified that on April 1, 1967, he received a Simpson model 260–3, serial No. 33803, from the Commission's staff to be tested for accuracy. Wallace and Guy testified that the meter here involved which was used in the inspection of respondent's station, was not used again after the tests of Camp's station on March 18, 1967, until it was brought to Quality Electronics to be checked for accuracy.

22. Miara testified that he calibrated the meter and found it to be within the manufacturer's accuracy specifications. His testimony was to the effect that when the meter indicated 3500 v the true voltage was 3620 v. The discrepancy between 3500 and 3620 v reflects an error of less than 3½ percent, an error within the manufacturer's specifications. He also testified that the meter indicated 420 ma which was the same figure shown during the second test transmission at Camp's ham shack. The true amperage according to Miara was 418 ma, an error of less than one-half of 1 percent which is well within the manufacturer's specifications.

23. On cross-examination Miara was asked whether he had an opinion as to the accuracy of this particular meter on March 18, 1967. His reply was, "It could be on the manufacturer's 'spec'." Thus, we have a witness for the Commission testifying as to the reliability of the meter used for the respondent's station test transmissions. It is also pointed out here that Miara testified that the meter was in good condition when brought to Quality Electronics and, likewise, it was not cracked and no part was changed or replaced.

24. A technical witness for Camp was Robert M. Brooks who is an electronics engineer with Cary Instruments. He testified that he was classified as a components engineer involved with standards of components and instruments. His work with Cary involves the cali-

[5] See tr. 148-9.

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bration of meters. Additionally, Brooks testified that he held an amateur's license and a first-class radiotelephone license with a radar endorsement.

25. Brooks testified that he was familiar with the meter commonly known as the Simpson 260 and Cary Instruments had, at its last inventory, 208 of these meters. His testimony was to the effect that the Simpson meter involved here is only used as a trouble shooting tool and it is not a laboratory standard. The evidence is void of any testimony by Brooks on behalf of Camp that he had ever calibrated or had seen the meter involved here which the Commission engineers used in the test transmissions of Camp's station.

26. Brooks' testimony primarily delved into techniques of calibration. He recited that there were certain conditions that would affect the accuracy of a meter such as excessive voltage, external magnetic influences, dropping, and others. There is no evidence, however, here that the Simpson meter had been subjected to any of the conditions which could conceivably affect its accuracy when the transmission tests were made. While the testimony of this witness is not particularly in dispute, it cannot be related directly to the Simpson meter involved here. Brooks, for instance, testified that the Simpson meter model 260–3 is not used for precision measurement. However, he testified that:

> Every company has different standards. Some are as bad as catch as catch can. But being we are in a business of precise measurements, we are very fussy on this point in our particular facility.

27. Brooks testified that the manufacturer of the Simpson meter regarded the accuracy that can reasonably be expected is 3 percent of the full scale reading. Wallace, the Commission engineer, who directed the taking of the test transmissions, testified in his opinion that the advertised accuracy of the Simpson model 260–3 meter is as follows:

> * * * on the 5,000-v scale, which we were using to measure the plate voltage, the manufacturer states it is 4 percent of full scale reading, and on the 500-ma scale, which we were using, it is 2 percent of full scale reading.

28. As pointed out above, Brooks' testimony largely dealt with technical aspects of meters and the reading of meters, rather than presenting any evidence relating to the Simpson meter utilized in the inspection of Camp's station. Throughout his testimony Brooks did not voice any opinion as to the accuracy of the readings taken from the Commission's meter on March 18, 1967. At best, his testimony could remotely be construed as sheer speculation, as something that could or could not have happened, and more especially is this true because the record is void of any evidence that Brooks ever saw the Commission's meter used on March 18, 1967.

CONCLUSIONS

1. The sole question presented for consideration here is whether Ronnie J. Camp of Temple City, Calif., through the operation of his amateur transmitter, was operating on March 18, 1967, with a power input exceeding 1 kw to the plate circuit of the final RF amplifier stage.

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2. The Bureau had the burden of proof as to whether there was a violation by Camp on the day here involved. The Bureau has sustained that burden of proof.

3. There were three engineers of the Los Angeles field office, all of whom may be regarded as experts in the field of electronics, who were involved in the monitoring of Camp's station on the day in question.

4. Walter W. Wallace, assistant engineer-in-charge of the Los Angeles field office explained in detail the techniques employed by the three engineers in monitoring Camp's station. The details are set out in the *Findings of Fact* and will not be repeated here.

5. The numerous complaints received by the field office from amateurs of overpower operation on amateur radio frequencies in the vicinity of Camp's home gave rise to this proceeding. Camp was not the only one suspected of engaging in overpower activities.

6. Because of these complaints Wallace, along with two associates, Robert M. Smith and Lawrence D. Guy, started monitoring in Camp's neighborhood about 1 p.m. on March 18, 1967. As the result of monitoring Camp's station, Wallace went to Camp's house at about 3 p.m. on the day in question and knocked at the door of Camp's home and was received by Mrs. Camp, the respondent's wife.

7. Wallace and Smith then advised Mrs. Camp that the object of their mission was to inspect the Camp station and Mrs. Camp stalled the two engineers before admission to the Camp home for approximately 5 or 6 minutes. As observed in the *Findings of Fact* the Camp ham shack is at the rear of the Camp premises. In the intervening time of 5 or 6 minutes after the appearance of Wallace and Smith at the Camp front door and entry to the ham shack, Guy who was in contact with Smith via walkie-talkie radio, advised Smith that there had been a decided drop in the relative strength of Camp's signal. Camp, on the record, was unable to account for this unusual occurrence in his operation. The measurements of voltage and current to the plate circuit of the final amplifier stage were read from the licensee's own meters by Wallace. These measurements indicated a plate voltage of 3900 v and a plate current of 350 ma. These figures when multiplied together yield a computed input power of 1365 w, which is 365 w above the 1 kw permitted in the Commission's rules (sec. 97.67).

8. Three test transmissions were taken on Camp's station. The two test transmissions at 310°, where the beam heading was found when Wallace and Smith entered Camp's ham shack, indicated very little variance. However, Camp told Wallace that prior to the entry of Wallace and Smith he had been transmitting on 340° which might account for some overpowering.

9. As the result of Camp's contention a third test transmission was taken on 340° which resulted in Guy observing a drop in signal strength of approximately 8 db.

10. The point the Bureau makes is that if the respondent had previously turned his antenna from a heading of 340° to a heading of 310°, as Camp alleged, there would have been an increase in signal strength and not a drop of 3° as earlier reported by Guy.

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11. The web in which Camp now finds himself enmeshed was brought about by his transmission activities. Without elaborating, it is appropriate to say that Camp engaged in considerable "shadow-boxing" in an endeavor to explain the predicament in which he was caught by the Commission's employees. He has offered conjectures along with sheer speculation and arguments which are immaterial and irrelevant. For instance, he casts doubt on the meter used by the Commission's staff in the test transmissions. Also he endeavors to make a point that the meter was 4 years old which is meaningless because he offered no evidence to show what the relationship between meter and age is. Another quibble is the time element. Camp testified that Wallace and Smith entered the ham shack on March 18, 1967, shortly after 2 p.m.; he maintained on cross-examination his log shows that it was 2: 29 p.m. and the two witnesses of the Commission testified that entry was made around 3 p.m. It matters not what the particular hour in the afternoon of March 18, 1967, was, the fact still remains that the inspection of Camp's station was made and results were adverse to him.

12. The conclusion is reached here that Ronnie J. Camp, Temple City, Calif., violated section 97.67 of the Commission's rules on March 18, 1967, by operating his amateur radio station with power input to the plate circuit of the final RF amplifier stage of the transmitter of such station in excess of 1 kw, which is in direct violation of the Commission's rules. Therefore, the suspension order released on June 19, 1967, should be affirmed.

Accordingly, *It is ordered*, That unless an appeal to the Commission from this *Initial Decision* is taken by any of the parties or the Commission reviews the *Initial Decision* on its own motion in accordance with the provisions of section 1.276 of the rules, the order released on June 19, 1967, which suspended the general class amateur radio operator license (K6EVR) of Ronnie J. Camp, 9861 East Estelle Avenue, Temple City, Calif., for 6 months *Is affirmed;* and,

It is further ordered, That this order shall be in full force and effect commencing October 1, 1968.

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FCC 68-1136

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORPORATION For Authority To Operate the Transportable Earth Station Facility at Andover, Maine, in Emergencies, To Maintain Continuity of Authorized Services	File No. 55-A-CSG-L-69

ORDER AND AUTHORIZATION

(Adopted November 26, 1968)

BY THE COMMISSION:

The Commission having under consideration a letter dated November 19, 1968, filed by the Communications Satellite Corp. (Comsat), requesting that the Commission reconsider the request in its application, file No. 55-A-CSG-L-69 for authority to operate the transportable earth station at Andover, Maine, in emergencies, to maintain continuity of its previously authorized services;

It appearing, That, by the Commission's *Memorandum Opinion, Order and Authorization* released November 8, 1968 (file No. 53-CSG-AP-69, et al. mimeo 68-1092), Comsat is authorized to acquire the transportable earth station at Andover, Maine, and to operate such facility to provide telemetry, command and control, monitoring, and tracking services in conjunction with INTELSAT satellites subject to the conditions set forth therein;

It further appearing, That the transportable earth station at Andover, Maine, has limited, but useful backup capabilities for the large antenna at Andover, Maine, to maintain continuity of Comsat's previously authorized services via the latter antenna;

It further appearing, That the large antenna at Andover, Maine, is used for the transmission and reception of large volumes of important communication services and any interruption thereof would cause serious inconvenience to the public and to all commercial carriers providing communication services between the east coast of mainland United States and points in Europe, South America, and Central America;

It further appearing, That, in view of the foregoing, a grant of the aforementioned request of Comsat would serve the public interest, convenience and necessity;

It is ordered, That the request of the Communications Satellite Corp. for reconsideration *Is granted*, and the Communications Satellite Corp. *Is authorized* to operate the transportable earth station at

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Andover, Maine, to provide and maintain continuity of commercial service during periods of emergency in which communications facilities normally used for commercial service are unavailable by reason of causes beyond the control of the licensee; *Provided, however*, That the Communications Satellite Corp. shall immediately notify the Commission of the nature of such emergency condition, its expected duration, and the use being made of the transportable earth station; *Provided, further*, That such operation of the transportable earth station shall be conducted in accordance with the technical characteristics specified in the Commission's *Memorandum Opinion, Order and Authorization* released November 8, 1969 (file No. 53–CSG–AP–69, et al., mimeo 68–1092); and *Provided further*, That the Commission may, at any time, suspend the operation of this authorization, upon reasonable notice to the Communications Satellite Corp.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

15 F.C.C. 2d

106-517—68—3

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FCC 68-1135

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORP., HAWAIIAN TELEPHONE CO., ITT WORLD COMMUNICATIONS INC., RCA GLOBAL COMMUNICATIONS, INC., WESTERN UNION INTERNATIONAL, INC. For Termination of Outstanding Authorizations, and Transfer to Communications Satellite Corp. of Outstanding Construction Permit Pertaining to the Transportable Earth Station Facility at Paumalu, Hawaii.	57-CSG-AP-69
In the Matter of the Application of COMMUNICATIONS SATELLITE CORP. For Authority To Acquire and Operate the Transportable Earth Station Facility at Paumalu, Hawaii, To Provide Telemetry, Command and Control, Monitoring and Tracking (T&C) Services to INTELSAT.	58-CSG-L-69

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted November 26, 1968)

BY THE COMMISSION:

1. The above-entitled applications, filed August 21, 1968, request authority (*a*) to transfer and assign to Communications Satellite Corp. (Comsat) the outstanding construction permit (7-CSG-P-66, as modified, 47-CSG-ML-68; 63-CSG-MP-69) for the Paumalu, Hawaii, transportable earth station jointly issued to Communications Satellite Corp. (Comsat), Hawaiian Telephone Co. (HTC), ITT World Communications Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA Globcom), and Western Union International, Inc. (WUI); (*b*) to terminate the outstanding special temporary authority first issued February 11, 1967 to operate commercially said facility; (*c*) to dismiss the pending application (40-CSG-TC-67) filed April 6, 1967, jointly by the above-named applicants for regular authority to operate commercially said facility; and (*d*) upon grant of the foregoing, to authorize Comsat on its own behalf to operate the Paumalu transportable station to provide telemetry, command and control, monitoring and tracking (T&C) services in conjunction with satellites owned and operated by INTELSAT, and, in cases of emergencies, to operate the transportable station to maintain continuity of commercial services.

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2. The applications were accepted for filing by issuance of public notice on August 26, 1968, and no objections or other comments have been filed with respect thereto.

3. Joint construction, ownership and operation of the Paumalu transportable was authorized by the Commission on July 19, 1967 (40–CSG–TC–67), which designated the ownership interests in said facility in the following proportions: Comsat 50 percent, HTC 30 percent, ITT Worldcom 6.0 percent, RCA Globcom 11.0 percent, and WUI 3.0 percent, in accordance with the *Second Report and Order* in docket No. 15735 (5 FCC 2d 812).

4. On February 20, 1968, the Commission authorized (file No. 47–CSG–ML–68, as amended, 63–CSG–MP–69) the modification of the construction permit (7–CSG–P–66) relating to the Paumalu transportable to enable said facility to provide T&C services in conjunction with the INTELSAT III series satellites. The application informed the Commission of the decision of the INTELSAT members to use the services of the Paumalu transportable for T&C functions. On June 10, 1968, the joint owners, having determined that the transportable station in the near future no longer would be required on a regular basis for commercial communication service and, to accommodate the INTELSAT members' interest in the availability of said station for T&C purposes, entered into an agreement for the purchase and sale of said station, the execution of which was made subject to Commission approval. A copy of the agreement is attached as annex A of the applications.

5. On November 13, 1968, Comsat informed the Commission that the modification program had been substantially completed in accordance with the technical characteristics specified in the foregoing authorizations.

6. The agreement for purchase and sale of the station provides, inter alia, for a purchase price equal to 50 percent of the capital cost of the station and related equipment, determined on the basis of the book cost thereof, less depreciation (net of retirements) accrued to the closing date on the basis of Comsat's depreciation rates.

7. With respect to the T&C services, the INTELSAT members agree (*a*) to reimburse Comsat for the costs incurred by it which are allocable to the provision of such service, including but not limited to the costs of modification, depreciation, operation and maintenance of the station, repair and replacement of parts, and (*b*) to pay Comsat an annual rate of compensation of $91,000 for the rendition of the T&C services.

8. Upon review and consideration of the subject applications and the associated information and data, it appears that applicants are legally, technically, financially, and otherwise qualified to effectuate the requested transfers and that Comsat possesses the necessary qualifications to acquire and operate said facility on its own behalf in the manner requested. The operation proposed to be rendered by the station will provide facilities intended to serve the communications needs of the United States and others on a global basis and thereby advance the objectives of the Communications Satellite Act of 1962. We shall, therefore, grant the subject applications with appropriate conditions, it appearing that such action will serve the public interest, convenience, and necessity.

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ORDER AND AUTHORIZATION

It is ordered, pursuant to section 310(b) of the Communications Act of 1934, and section 201(c)(7) of the Communications Satellite Act of 1962, that consent is hereby given to the transfer of the outstanding construction permit for the Paumalu transportable earth station (7-CSG-P-66, as amended, 47-CSG-ML-68; 63-CSG-MP-69) and the transfer of the ownership interests of said station and associated equipment, more particularly described in exhibit A of annex A of the application, from the above-named joint applicants to Comsat;

It is further ordered, That upon transfer of the ownership interests in the subject facilities, no further change whatever shall be made therein except upon grant of an appropriate application;

It is further ordered, That upon transfer of said construction permit and the ownership interests in the subject facilities, the outstanding special temporary authority first granted February 11, 1967, to operate said station commercially *Be terminated;*

It is further ordered, That the application for operating license 22-CSG-L-67, as amended April 6, 1967, 40-CSG-TC-67, to include the joint owners as applicants, *Be, and hereby is, dismissed;*

It is further ordered, That Comsat, effective upon transfer of said construction permit and transfer of the ownership interests in the subject facilities, *Is authorized* for the period commencing with the effective date of the transfers herein authorized and ending August 30, 1971, to operate the Paumalu transportable earth station to provide telemetry, command and control, monitoring and tracking services in conjunction with INTELSAT satellites subject to the following technical specifications:

Call sign: KA25.
Nature of service: Communication-Satellite Service.
Class of station: Satellite earth station (transportable).
Location of station: Paumalu, Oahu, Hawaii.
Geographical coordinates: 21°40'23" N. Lat.
158°02'13" W. Long.

Communications transmitter:
Type: Composite with type VA-884 Klystron.
Frequencies of operation: The frequency band 5925-6425 MHz has been cleared for operation. Exact frequencies within the band will be notified to the Commission as they become operational.
Frequency tolerance: 0.03 percent.
Emission: 30.000 AO/A3/A9/F3/F5/F9 maximum per carrier.
Power at antenna feed: 12.5 KW.
Azimuth of radiation: 0—360°.[1]

Antenna (transmit):
Type: Casshorn parabolic reflector, rotatable, 42 feet effective diameter.
Gain: 55 db at 6 GHz.
Maximum radiation in horizontal plane: 45 dbW per 4 kHz.
Beamwidth: 0.28° (half power points).
Height above ground: 67 feet.
Polarization: Linear with any orientation, or right or left circular.
Minimum elevation: 5° above horizontal plane except at reduced power for boresight tests.

[1] Based on coordination calculations conducted with reference to application, file No. 5-CSG-P-66, July 12, 1965.

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Antenna (receive):
Type: Same as communications transmit antenna.
Gain: 52.5 db at 4 GHz.
Receive frequencies: Within the band 3700–4200 MHz.
Receiving system noise temperature: 100° Kelvin above 5° elevation.

It is further ordered, That Comsat is authorized to operate the transportable station to provide and maintain continuity of commercial service during periods of emergency in which communication facilities normally used for commercial service are unavailable by reason of causes beyond the control of the licensee; *Provided however*, That Comsat shall promptly notify the Commission of the nature of such emergency conditions, its expected duration, and the use to which the station is being put; that such operation shall be conducted in accordance with the technical characteristics hereinabove specified; and that the Commission may at any time suspend the operation of this authority upon reasonable notice to Comsat;

It is further ordered, That this authorization is subject to the following terms and conditions:

(1) That this authorization shall not vest in Comsat any right to operate the station nor any right to the use of the frequencies designated in the permit except as herein authorized;

(2) That neither the facilities acquired nor the rights granted hereunder shall be assigned or otherwise transferred except upon grant of an appropriate application;

(3) That this authorization is subject to the right of use or control by the government of the United States conferred by section 606 of the Communications Act.

It is further ordered, That the acts necessary to effectuate the transfer herein authorized shall be completed within 5 days from the date of the release of this *Order and Authorization*, and notice shall forthwith be furnished to the Commission by the applicants showing when the acts necessary to effect the transfer of the authorizations and facilities constructed or operated pursuant thereto were completed, and upon furnishing the Commission with such notice the transfers for which authority is granted will be considered completed.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
PAUL CHAMBERS, WATERLOO, IOWA
Against Station KWWL–TV Concerning
Fairness Doctrine

(November 8, 1968)

PAUL CHAMBERS,
1221 Julian,
Waterloo, Iowa 50701

DEAR MR. CHAMBERS: This is with further reference to your letter of September 24, 1968, concerning an editorial broadcast by station KWWL–TV on September 19, 1968. We note that you are chairman of the neighborhood group, a number of whose members have written to the Commission concerning this matter.

Briefly, the complainants allege that the editorial accused those opposing the housing project for low-income families of being racists, and that the station was unfair in its treatment of the matter because the opponents were denied time to rebut the station's position and present their viewpoint.

The basic Commission policy applicable in the use of broadcasting stations for discussions of controversial issues of public importance is that the licensee maintain a standard of fairness in the allocation of time to differing viewpoints. Accordingly, where a licensee affords time over his facilities for an opinion on a controversial issue of public importance he is under obligation to afford reasonable opportunities for the presentation of opposing views. This policy, known as the fairness doctrine, is enunciated in the Commission's *Report on Editorializing by Broadcast Licensees.* That report is included as appendix A to the enclosed *Public Notice* of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." Unlike the equal opportunities provision of section 315, which deals with legally qualified candidates, the question under the fairness doctrine is one of the reasonableness of the station's actions and not whether an absolute equality in the allocation of time has been achieved.

This Commission, since 1949, has encouraged broadcast stations to editorialize on issues of interest to their communities. In its programing statement of July 29, 1960, the Commission recognized editorializing as one of 14 major elements, developed by the industry, which are usually necessary to meet the public interest, needs, and desires of the community. Editorializing is, however, subject to the Commission's fairness doctrine.

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There is no mechanical requirement or formula for achieving fairness. The broadcaster need not balance editorial for editorial or viewpoint for viewpoint. Moreover, there is no requirement that a licensee achieve a balance of opposing views within a single broadcast or even that he present opposing views on the same program or series of programs. What is required is that the broadcaster make an affirmative, reasonable effort to present contrasting viewpoints on controversial issues of public importance in the station's overall programing.

On October 11, 1968, the Commission received the licensee's response to the Commission's inquiry of October 1, 1968. Neither you nor Wallace Butler, attorney for your group, have replied to the response.

Examination of licensee's response indicates that during September 1968, it broadcast a number of news stories concerning the housing project for low-income families and that these broadcasts included presentation of both sides of the issue. The response also indicates that, on September 22, 1968, the station's news broadcasts included Butler's comments regarding the September 19 editorial. Licensee has further informed the Commission that the editorial was broadcast twice over KWWL–TV on September 19 and six times over KWWL on September 20, and that the reporting of Butler's position over KWWL–TV was broadcast twice on September 22, and twice on September 23, in addition to being included in 10 news programs broadcast over KWWL on September 22d and 23d.

As indicated above, the licensee has considerable discretion as to the format of programs devoted to issues of public importance, the different shades of opinion to be presented, and the spokesman for each point of view, and on the basis of the licensee's actions, we cannot conclude that licensee operated in violation of the fairness doctrine.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief Broadcast Bureau.

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FCC 68R-504

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LORAIN COMMUNITY BROADCASTING CO., LORAIN, OHIO	Docket No. 16876 File No. BP-16940
ALLIED BROADCASTING, INC., LORAIN, OHIO	Docket No. 16877 File No. BP-17297
MIDWEST BROADCASTING CO., LORAIN, OHIO	Docket No. 16878 File No. BP-17302
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 4, 1968)

BY THE REVIEW BOARD: NELSON, SLONE AND PINCOCK.

1. This proceeding involves the mutually exclusive applications of Lorain Community Broadcasting Co. (Lorain Community), Allied Broadcasting, Inc. (Allied), and Midwest Broadcasting Co. (Midwest), for authority to construct a new standard broadcast station to operate on the frequency (1380 kHz) formerly utilized by station WWIZ in Lorain, Ohio. On June 4, 1968, the Review Board released a *Decision* (FCC 68R-223, 13 FCC 2d 106, 13 R.R. 2d 382) granting the application of Lorain Community and denying the applications of Allied and Midwest. On July 5, 1968, Allied filed a petition for reconsideration or in the alternative for rehearing, seeking reconsideration of that portion of the Board's *Decision* dealing with the diversification of control of the media of mass communications. The Review Board, on September 13, 1968, released a *Memorandum Opinion and Order* (FCC 68R-377, 14 FCC 2d 604, 14 R.R. 2d 655) denying Allied's petition for reconsideration. Now before the Review Board is a petition for rehearing, filed by Allied on October 9, 1968.[1]

2. The Review Board is of the view that Allied's petition must be dismissed. Section 405 of the Communications Act of 1934, as amended, provides that "a petition for rehearing must be filed within 30 days from the date upon which public notice is given of the order, decision, report, or action complained of." See also section 1.106(f) of the Commission's rules. It is clear that the action complained of by Allied is the grant of Lorain Community's application in our *Decision* released on June 4, 1968. Since the petition for rehearing was filed on October 9, 1968, almost 3 months after the statutory period of jurisdiction had

[1] Also before the Review Board are the following related pleadings: (*a*) comment, filed Oct. 23, 1968, by the Broadcast Bureau; (*b*) motion to dismiss second petition for rehearing, filed Oct. 24, 1968, by Lorain Community; (*c*) reply, filed Nov. 5, 1968, by Allied; (*d*) supplement to (*b*), filed Nov. 12, 1968, by Lorain Community; and (*e*) further supplement to (*b*), filed Nov. 29, 1968, by Lorain Community. The Bureau's comment is addressed to the Commission, which, according to the Bureau, "now has jurisdiction of the proceeding."

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expired, the Review Board has no authority to consider the merits of the request. Finally, we do not believe that Allied's intervening petition for reconsideration permits a different result. That petition and our disposition thereof, which occurred prior to the filing of the instant petition, in no way are related to the instant petition's requests for a reopening of the record and further hearing on additional issues. Under these circumstances, we agree with the Broadcast Bureau's contention that Allied's petition should have been directed to the Commission, which now has jurisdiction of the proceeding.[2] Cf. *Brainerd Broadcasting Co.* (*KLIZ*), FCC 63–337, 25 R.R. 297; *City of Jacksonville* (*WJAX–TV*), 7 R.R. 261 (1951); *E. D. Rivers, Jr.* (*WJIV*), 6 R.R. 765 (1950).

3. Accordingly, *It is ordered*, That the motion to dismiss second petition for rehearing, filed on October 24, 1968, by Lorain Community Broadcasting Co. *Is granted* to the extent indicated herein and *Is denied* in all other respects; and that the petition for rehearing, filed on October 9, 1968, by Allied Broadcasting, Inc., *Is dismissed.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] Presently pending before the Commission in this proceeding are the following pleadings: (*a*) application for review, filed July 15, 1968, by Midwest, and pleadings relating thereto; and (*b*) application for review, filed Oct. 21, 1968, by Allied, and pleadings relating thereto. On Nov. 1, 1968, Lorain Community filed with the Commission a motion for expedited consideration.

106–517—68——4

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FCC 68–1172

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR RENEWAL OF LICENSE FOR SHIP RADIO STATION WX–7988 ABOARD THE VESSEL "AMERICAN," FILED BY JOSEPH MONTI AND JOSEPH MARINO, A PARTNERSHIP

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it the captioned application, filed on February 15, 1968, by Joseph Monti and Joseph Marino, a partnership, acting on behalf of local 33, Fishermen and Allied Workers Union, ILWU. An interim ship radio station license was first issued to applicant in 1961 for station WX–7988 and periodic authorizations have been issued since that time.

2. The license now sought to be renewed is for ship radio station WX–7988 aboard the vessel *American* which was granted on February 24, 1967, for a 1-year term. The license was issued on the express representation of the applicant that the vessel on which the ship radio station was located would be navigated at regular intervals and would not be permanently moored. In addition, licensee was specifically advised that the license did not authorize any communications other than normal ship communications.

3. Subsequent investigation by the Commission has disclosed that the vessel *American* is permanently moored and that ship radio station WX–7988 is used for retransmission of messages which originate at or are destined for, points on shore. The messages which are relayed on an intership frequency are ship to shore rather than intership communications. In essence, the station is being used as a coast station. In response to correspondence sent to the licensee after the investigation, it concedes that the vessel has not been navigated since July 1964; is now permanently moored; and the ship radio station is providing a ship-to-shore message relay service. In view of the foregoing, the subject application does not meet the requirements of sections 83.3(d), 83.303(c) and 83.358(a) of the Commission's rules, and, therefore, may not be granted.

4. Applicant requests that it be authorized to continue operating ship radio station WX–7988 pending the establishment of a limited coast station using single sideband radiotelephony. This request must be considered in the light of the facts surrounding this case. The Commission notified applicant in September 1964 of the adoption of rules

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(docket 15068) providing for the licensing of limited coast stations using single sideband radiotelephony. Thereafter, in November 1964, applicant requested an extension of its temporary authority to operate ship radio station WX–7988 pending its consideration of the practicability of limited coast station operations using single sideband radiotelephony and the availability of such equipment. Periodically, on nine separate occasions thereafter, it has filed substantially the same request representing that it was considering applying for a limited coast station. On the basis of those representations, temporary authorizations were granted for the continued operation of the station. Subsequently, in a letter of March 12, 1968, applicant states that it cannot employ single sideband (SSB) radiotelephony because only five vessels of the fishing fleet have converted to single sideband equipment; that the number of vessels so converted does not warrant going to SSB operation; and that when a substantial number of the vessels of the fishing fleet convert to SSB it will then be able to apply for a limited coast station license. It is noted that type acceptance was first granted to SSB equipment in 1965 and that today there are approximately 80 different models of type accepted SSB transmitters. It appears that little progress has been made toward conversion to a single sideband system. There is no indication of any past substantial effort toward that goal by the parties concerned nor of any definite schedule to do so in the future.

5. Applicant has known since at least March 6, 1962, that ship stations could not be authorized aboard permanently moored vessels. It evidenced this by its letter of that date advising the Commission that the *American* was not permanently moored and stated that it was incumbent upon it to keep it navigable and seagoing. Further, as to the type of communications authorized for ship radio stations, as early as 1962, applicant was advised that ship stations may not engage in a ship-to-shore message service which is a function of a coast station. Finally, as indicated above, when the grant of February 24, 1967, was made, the applicant was again specifically informed as to the requirement that the vessel could not be permanently moored and that the license authorized only normal ship station communications. Thus, applicant has been dilatory in its efforts to bring its operations into compliance with the Commission's rules and has knowingly operated ship radio station WX–7988 in violation of the Commission's rules.

6. Various communications systems are provided in the Commission's rules for maritime ship-to-shore communications. Applicant can elect to utilize the facilities of a public coast station for its communications needs or it can apply for its own limited coast station.

7. The Pacific Telephone & Telegraph Co. is the licensee of public coast station KOU at San Pedro, Calif., and has previously indicated that it could provide the necessary radiocommunications service. If applicant should desire to file an application for its own limited coast station, there are three possibilities. It could apply for such a station in either the high frequency band using single sideband frequencies between 4 and 27.5 Mc/s, or in the very high frequency band using frequencies between 156 and 174 Mc/s. The third possibility would be

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to apply for a station using the frequency 2738 kc/s. That latter frequency may be assigned to a limited coast station upon a showing that: (1) Existing public coast station facilities could not provide the desired communications service; (2) that frequencies above 30 Mc/s cannot be used; and (3) that harmful interference will not be caused to the intership use of the frequency 2738 kc/s.[1] But applicant has never filed an application for any limited coast station operation.

8. The action herein ordered is consistent with the Commission's policy to eliminate ship radio stations which are located on permanently moored vessels and which are operating as coast stations by handling ship-to-shore message traffic. This policy is designed to prevent the degrading of intership service on the frequency 2738 kc/s and to assure that ship-to-shore message traffic is channeled through stations operating on frequencies allotted for that purpose.

Accordingly, *It is ordered*, pursuant to section 4(i) of the Communications Act of 1934, as amended, and section 1.958 of the Commission's rules, that the captioned application of Joseph Monti and Joseph Marino for renewal of the license for ship radio station WX–7988 aboard the vessel *American*, *Is hereby dismissed.*

It is further ordered, That operation of radio station WX–7988 *Shall be terminated* on or before February 3, 1969.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] In the rulemaking proceeding in docket No. 18307, released Sept. 12, 1968, the Commission has proposed to amend its rules to provide for the use of the frequency 2738 kc/s by limited coast stations solely for communications with ships relating to safety of navigation at bridges, waterways, causeways, and similar locations. No final action has been taken on this proposal.

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FCC 68-1173

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FARNELL O'QUINN, STATESBORO, GA.	Docket No. 17722
Requests: 850 kc, 1 kw, Day	File No. BP-17351
MORRIS' INC., JESUP, GA.	Docket No. 18395
Requests: 1080 kc, 5 kw, Day	File No. BP-17116
JOHN M. MASTERS, REIDSVILLE, GA.	Docket No. 18396
Requests: 1080 kc, 1 kw, Day	File No. BP-17561
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER COX ABSENT.

1. The Commission has before it the above-captioned and described applications; a petition to deny the application of Morris', Inc. (Morris), filed by Wayne Broadcasting, Inc. (WLOP), licensee of station WLOP in Jesup, Ga.; Morris' opposition; and WLOP's reply.

2. By *Order* of September 13, 1967, the O'Quinn application was designated for hearing to determine whether a grant of the Statesboro proposal would result in an undue concentration of control within the meaning of section 73.35(b) of the Commission's rules. The question arose because of the present interests of O'Quinn and his wife in standard broadcast stations in southeastern Georgia (WUFF, Eastman; WULF (formerly WCQS), Alma; and WHAB, Baxley) and because a grant of O'Quinn's application would permit the establishment of a fourth standard broadcast station in the same general area. As noted hereinafter, there are common issues to be resolved before disposing of the O'Quinn and Morris applications. The Commission, therefore, will consolidate the two applications for hearing in accordance with the procedure contemplated by section 1.227(a)(1) of the rules. The Masters application is mutually exclusive with the Morris application inasmuch as the respective 0.025-mv/m contours completely encompass the proposed 0.5-mv/m contours in contravention of section 73.37 of the rules. Accordingly, the Masters application will also be considered in this proceeding.

3. Before considering the WLOP petition, the Commission notes the pendency of an application of WWNS, Inc., licensee of station WWNS, Statesboro, Ga., and a respondent in the O'Quinn proceeding, requesting the Commission to review an action of the Commission's Review Board in denying a petition to enlarge the issues herein. *Farnell O'Quinn*, released February 21, 1968, 11 FCC 2d 801, 12 R.R.

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2d 422, Board Chairman Berkemeyer and Board Member Nelson dissenting. The Commission does not at this time dispose of the WWNS application but will consider it at a later date in the light of the present action.

4. WLOP claims standing to oppose a grant of the Morris application as the licensee of the standard broadcast station in Jesup, and the Commission finds that WLOP does have standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 9 R.R. 2008 (1940).

5. In its petition, WLOP requests that the Morris application be denied or that it be designated for hearing to determine whether the proposal is in contravention of the Commission's multiple ownership rule (sec. 73.35(a)), whether the applicant has made misrepresentations concerning its program survey, whether the applicant has made a bona fide effort to ascertain community needs, whether the Morris proposal would meet any significant need in Jesup, and whether the applicant is financially qualified.

6. WLOP's contention that the Morris application presents a multiple ownership question is based on the following circumstances: Morris' principals are L. O. Morris, Earl Morris and Carroll Morris, Earl and Carroll being the sons of L. O. Morris. L. O. Morris is the father of Mrs. Evona Morris O'Quinn and the father-in-law of Farnell O'Quinn. Earl and Carroll Morris are brothers of Mrs. O'Quinn and brothers-in-law of O'Quinn. O'Quinn is licensee of station WUFF, Eastman, Ga., and owner of majority interests (80 percent each) in WULF, Alma, Ga., and WHAB, Baxley, Ga. O'Quinn's wife, Evona Morris O'Quinn, holds interests of 5 percent and 19.6 percent in stations WULF and WHAB, respectively. There will be substantial overlap of the proposed Jesup 1-mv/m contour and the 1-mv/m contours of WULF and WHAB, and the proposed Jesup 1-mv/m contour will overlap the 1-mv/m contour of the proposed Statesboro station. Morris proposes to finance the Jesup station, in large part, with funds to be borrowed from the Baxley State Bank of which O'Quinn is a director. Carroll Morris and O'Quinn have interests in a CATV system in Baxley where the Morrises and the O'Quinns reside. O'Quinn has admitted copying parts of section IV–A (FCC Form 301) of the Morris application in preparing his application for Statesboro. WLOP infers that the Jesup application represents an effort on O'Quinn's part to do indirectly what he could not do directly; i.e., apply for a Jesup station in his own name.

7. In opposition to WLOP's contention regarding the multiple ownership question, Morris cites Commission precedent to the effect that family relationship alone does not raise a question of duopoly or concentration. Morris disclaims any interest in the O'Quinn stations or the Statesboro application, and O'Quinn states that he did not assist in the planning, preparation or financing of the proposed Jesup station. In response to a suggestion that the Morrises would not reasonably be expected to be interested in a broadcast venture in Jesup when they are without broadcast experience and have no ties in Jesup and when they are engaged in the retail dry goods and clothing business in Baxley where they reside and work, Carroll Morris gives vari-

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ous personal and economic reasons for desiring to enter the broadcasting field in Jesup rather than in Baxley.

8. While it is true that the Commission has held that family relationship standing alone is insufficient to create the presumption of common control (e.g., *L & S Broadcasting Co.*, et al., 9 R.R. 2d 423 (1967)), under the present circumstances where O'Quinn seeks to increase his broadcast holding by establishing a station in Statesboro and the Morrises with family and other ties with O'Quinn propose to enter broadcasting in the same general area, the question already at issue in connection with the O'Quinn application and the dispute over multiple ownership and concentration of control raised in connection with Morris' application can best be resolved on the basis of a record after a consolidated hearing on both the Statesboro and Jesup proposals. Since the matters bearing on the question are within the personal knowledge of O'Quinn and the Morrises, the burden of the proceeding with introduction of the evidence and the burden of proof shall be upon the applicants.

9. WLOP is critical of Morris' statement of program service, first, because of its marked similarity with the corresponding section of the O'Quinn application. WLOP also alleges that persons which Morris claims to have consulted either were not consulted at all or, if consulted, did not express the opinion that an additional station in Jesup is needed as the applicant's statement of the result of its survey seems to imply. WLOP infers that the applicant's mention of certain organizations is a representation that those organizations have endorsed the establishment of an additional standard broadcast station in Jesup when, in fact, there has been no such official endorsement of the applicant's proposal. WLOP states that the applicant's suggestion that the WLOP program service is limited to general "Country and Western" format is erroneous. Thus, WLOP asserts, the applicant's conclusion that Jesup needs a more diversified program service is based on a false premise.

10. In opposition to WLOP's program allegations, Morris concedes the similarity of the Jesup and Statesboro proposals resulting from O'Quinn's use of the Jesup application in preparing his Statesboro application, but claims that the program services will be based on different surveys of the respective service areas and the content will be designed for the specific area involved. Morris states that it did consult leaders in the community as represented and that persons not originally mentioned were also interviewed. On the basis of the survey, Morris asserts it was reasonable to conclude that there is interest in additional broadcast service. Morris disclaims having represented that official endorsement of any organization had been received, but argues that individuals connected with the organizations mentioned were consulted. Morris claims that the conclusion that a more diversified program service is needed is reasonable in the light of the fact that WLOP, in its most recent renewal application, represented that 36 percent of its broadcast day was devoted to country and western music.

11. In addition to the controversy over the adequacy of the Morris survey and the accuracy of the representations, the showing submitted

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is basically defective. There is little in the way of specific suggestions the applicant may have received and the application does not otherwise supply sufficient information to provide the requisite showing. See *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968). Therefore, an issue will be specified so that Morris may demonstrate its efforts to ascertain the needs and interests of the Jesup area and the manner in which it proposes to meet those needs and interests.

12. Examination of the Masters application indicates that statements submitted in connection with his program proposal are vague and not responsive to the requirements of section IV–A of the application form. Therefore, Masters will be given an opportunity to demonstrate what efforts have been made to determine the needs and interests of the area and how its program service will be responsive to those needs.

13. In support of its contention that Morris is not financially qualified, WLOP alleges that, under Georgia law, a banking institution may not lend more than 20 percent of its capital and unimpaired surplus for any single enterprise. The applicant proposes to borrow a total of $65,000 from the Baxley State Bank which, according to WLOP, has $100,000 in capital and a surplus of $100,000. Two letters from the Baxley State Bank have been submitted, one extending a line of credit in the amount of $50,000 and the other a line of credit in the amount of $15,000. WLOP points out that neither letter indicates the terms and conditions on which the credit is extended and neither indicates what security may be required.

14. In opposition to the request for a financial issue, Morris states that the figures purportedly showing the condition of the bank are in error and submits a statement of the bank president which indicates that, as of December 31, 1966, there were $150,000 in the bank's capital account and $200,000 in the surplus account. Morris does not comment on the absence of a statement of the terms, conditions and security for the lines of credit.

15. The Commission finds that a more satisfactory basis for determining whether Morris is financially qualified would be current information rather than the obsolete material now contained in the application. Therefore, an issue will be specified to permit a determination of Morris' present financial condition and the present availability of additional funds as needed as well as the terms, conditions, and security in connection with any available loans or lines of credit.[1]

16. On the basis of figures submitted by Masters, it appears that a total of $42,881 will be required for construction costs and operating expenses during the first year. Items comprising that total are the following: down payment on equipment, $2,550; 1 year's payments on equipment with interest, $2,931; land, $4,000; building, $6,000; miscellaneous, $500; 1 year's working capital, $26,000. To meet these costs and expenses, Masters showed $3,700 in cash on hand and in banks, a bank loan of $35,000 and an apparent reliance on anticipated revenues estimated at $36,000. In addition, Masters claims as an asset copyrights on published song compositions valued at $65,700. In a

[1] Based on Morris' 1966 estimate, $53,341 will be required for construction costs and operating expenses during the first year consisting of the following: down payment on equipment, $7,318; first year's payments on equipment with interest, $8,023; miscellaneous, $2,000; 1 year's working capital, $36,000.

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letter submitted by Masters from an official of what appears to be a publishing firm, that official estimates that the value of the copyrights held by Masters in that publisher's catalog is between $30,000 and $50,000. It is not clear whether those compositions in the publisher's catalog comprise all or just a part of the copyrighted material on which the applicant places a value of $65,700, and neither the estimate of anticipated revenue nor the alleged value of copyrighted material is sufficiently supported to permit a finding that funds from these sources are available. With respect to the applicant's estimate of $26,000 working capital for the first year's operating expenses, it does not appear that this would be adequate to sustain the type of operation proposed. Accordingly, Masters will be given an opportunity to establish the basis of his estimate for a determination as to whether the estimate is reasonable.

17. The aerial photograph of Masters' proposed transmitter site is not sufficiently clear to permit a determination of whether the area is free of any structures (manmade or otherwise) which would distort the proposed nondirectional pattern. Therefore, Masters will be afforded an opportunity to make an appropriate showing.

18. Except as indicated below, each of the applicants is qualified to construct and operate as proposed. However, because of the matters indicated above, the Commission is unable to make the statutory finding that a grant of the applications would serve the public interest, convenience, and necessity, and is of the opinion that they must be designated for hearing on the issues set forth below:

19. Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, and section 1.227(a)(1) of the Commission's rules, the applications of Morris', Inc., and John M. Masters *Are consolidated for hearing* in the proceeding on the application of Farnell O'Quinn, at a time and place to be specified in a subsequent *Order*, upon the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations of Morris', Inc., and John M. Masters and the availability of other primary service to such areas and populations.

2. To determine whether Farnell O'Quinn has an undisclosed interest, direct or indirect, in the application of Morris', Inc.

3. To determine, in the event issue 2 is resolved in the affirmative, whether Farnell O'Quinn or any of the principals of Morris', Inc., have concealed this ownership interest from the Commission or have made misrepresentations concerning this interest to the Commission.

4. To determine, in the event issues 2 and 3 are resolved in the affirmative, whether Farnell O'Quinn or the principals of Morris', Inc., have the requisite qualifications to be licensees of broadcast facilities.

5. To determine, in the light of the evidence adduced pursuant to issue 2, the family and other relationships between Farnell O'Quinn and the principals of Morris', Inc., and other relevant evidence, whether a grant of the applications of Farnell O'Quinn

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and/or Morris', Inc., would contravene section 73.35 (a) and/or (b) of the Commission's rules with respect to duopoly and concentration of control.

6. To determine the efforts made by Morris', Inc., and John M. Masters to ascertain the community needs and interests of the respective areas to be served and the means by which they propose to meet those needs and interests.

7. To determine with respect to the application of Morris', Inc.:

(*a*) The current financial position of the applicant;

(*b*) The present availability of additional funds as required and upon what terms and conditions; and

(*c*) Whether, in the light of the evidence adduced pursuant to (*a*) and (*b*) above, Morris', Inc., is financially qualified.

8. To determine, with respect to the application of John M. Masters:

(*a*) The current financial position of the applicant;

(*b*) The present availability of additional funds as required and upon what terms and conditions;

(*c*) The basis for the estimate of the first year's operating expenses and whether such estimate is reasonable;

(*d*) In the event the applicant will depend upon operating revenues during the first year of operation to meet fixed costs and operating expenses, the basis of such estimated revenues;

(*e*) Whether, in the light of the evidence adduced pursuant to (*a*), (*b*), (*c*) and (*d*) above, John M. Masters is financially qualified.

9. To determine whether the transmitter site proposed by John M. Masters is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern.

10. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, whether the proposal of Morris', Inc., or that of John M. Masters would better provide a fair, efficient, and equitable distribution of radio service.

11. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

20. *It is further ordered*, That Wayne Broadcasting, Inc., licensee of station WLOP, Jesup, Ga., *Is made a party* to the proceeding.

21. *It is further ordered*, That the *Petition to Deny* the application of Morris', Inc., filed by Wayne Broadcasting, Inc., *Is granted* to the extent indicated above and *Is denied* in all other respects.

22. *It is further ordered*, That the specification of issues herein shall supersede the specification of issues in the Commission's *Order* of September 13, 1967 (FCC 67–1038) in this proceeding.

23. *It is further ordered*, That the burden of proceeding with the introduction of the evidence and the burden of proof with respect to all issues herein shall be upon the applicants to which they relate.

24. *It is further ordered*, That, to avail themselves of the opportunity to be heard, Morris', Inc., John M. Masters and Wayne Broad-

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casting, Inc., pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this *Order*, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

25. *It is further ordered*, That Morris', Inc., and John M. Masters shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R-505

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SUMITON BROADCASTING CO., INC., SUMITON, ALA.	Docket No. 18204 File No. BP-17108
DAN COLE MITCHELL AND LEON A. MURPHREE, D.B.A. CULLMAN MUSIC BROADCASTING CO., CULLMAN, ALA.	Docket No. 18205 File No. BP-17193
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 4, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding involves the mutually exclusive applications of Sumiton Broadcasting Co., Inc. (Sumiton) and Cullman Music Broadcasting Co. (Cullman), seeking authority to construct new standard broadcast stations at Sumiton, Ala., and Cullman, Ala., respectively. The applications were designated for consolidated hearing by *Order*, FCC 68-576, released June 4, 1968, 13 FCC 2d 221, 33 Fed. Reg. 8467, on issues relating to areas and populations, financial qualifications, ascertainment of needs (*Suburban* issue) and section 307(b). Presently before the Review Board is a petition to enlarge issues, filed on June 24, 1968, by Cullman,[1] which seeks the addition of the following issues:

> 1. To determine the facts and circumstances attending the preparation and filing of the Sumiton Broadcasting Co., Inc., application, and whether the application of Sumiton Broadcasting Co., Inc., was filed for the principal or incidental purpose of obstructing or delaying the establishment of a standard broadcast facility at Cullman, Ala.
>
> 2. To determine, regarding the application of Sumiton Broadcasting Co., Inc., who are the real parties in interest in such application.
>
> 3. To determine whether the application of Sumiton Broadcasting Co., Inc., failed to reveal that funds, credit, services or other things of value had been or would be furnished by others, and whether failure was deliberate and intentional.

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[1] Also before the Board are the following related pleadings: (*a*) Broadcast Bureau's partial support, filed Aug. 7, 1968; (*b*) opposition, filed Aug. 8, 1968, by Sumiton; (*c*) comments, filed Aug. 8, 1968, by Hudson C. Millar, Jr. and James Jerdan Bullard (intervenors); (*d*) exhibit No. 7 to (*c*), filed Aug. 9, 1968, by Millar and Bullard; (*e*) supplement to (*b*) filed Aug. 16, 1968, by Sumiton; (*f*) supplementary comments, filed Sept. 3, 1968, by Millar and Bullard; (*g*) erratum to (*c*), filed Sept. 6, 1968, by Millar and Bullard; (*h*) reply to (*b*) and (*c*), filed Sept. 16, 1968, by Cullman; (*i*) errata, filed Sept. 24, 1968, by Cullman; (*j*) reply to (*f*), filed Oct. 10, 1968, by Cullman; (*k*) comments on (*f*), filed Oct. 18, 1968, by the Broadcast Bureau; (*l*) request for leave to submit an additional by Cullman; (*j*) reply to (*f*), filed Oct. 10, 1968, by Cullman; (*k*) comments on (*f*), filed Oct. 25, 1968, by Millar and Bullard; (*n*) opposition to (*l*), filed Nov. 7, 1968, by Cullman; and (*o*) reply to (*n*), filed Nov. 22, 1968, by Millar and Bullard. By *Memorandum Opinion and Order* released Aug. 7, 1968, Millar and Bullard were made parties to this proceeding for the limited purpose of filing a pleading in response to the petition to enlarge issues, filed on June 24, 1968, by Cullman. FCC 68R-328, 14 FCC 2d 256, 13 R.R. 2d 1143.

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4. To determine the extent to which the operating and program proposals set forth in the application of Sumiton Broadcasting Co., Inc., represent the intentions of the applicant.

5. To determine whether, in light of the facts adduced pursuant to the foregoing issues, the applicant possesses the necessary character qualifications to be a licensee, and whether a grant of the application of Sumiton Broadcasting Co., Inc., would serve the public interest, convenience, and necessity.

6. To determine the circumstances attending the filing of the October 13, 1967, letter from the Sumiton Bank to Sumiton Broadcasting Co., Inc., and whether the letter represents the applicant's present financial proposal.

7. To determine the present financial status of Sumiton Broadcasting Co., Inc., and to determine the nature and extent of the financial interest in the applicant of its principals.

8. To determine whether, in light of the evidence adduced pursuant to the prior issue, the applicant has available to it $3,000 in existing capital for the construction and operation of its proposed facility.

9. To determine whether there exists an agreement between Sumiton Broadcasting Co., Inc., and Sartain, and, if so, to determine the terms and conditions of that agreement.

10. To determine whether there was a failure to disclose either the true financial status of Sumiton Broadcasting Co., Inc., or an agreement between the applicant and Sartain, and, if so, whether such failure was intentional.

"Strike" and "Real Party in Interest" Issues

2. The thrust of Cullman's position in support of the requested "strike" and "real party in interest" issues is that the Sumiton application was a result of the coordinated efforts of Hudson Millar and James Jerdan Bullard (principals of standard broadcast station WKUL, Cullman, Ala.) and the four Sumiton principals, and that Millar and Bullard's purpose was to block Cullman's application. Hudson C. Millar, Jr., is president, director, and majority stockholder of Airmedia, Inc., which, in turn, controls Cullman Broadcasting Co., Inc., licensee of standard broadcast station WKUL, Cullman, Ala. James Jerdan Bullard is vice president, treasurer, director, and stockholder of Airmedia, Inc., and president and director of WKUL. Bullard has been associated with Millar in connection with the latter's radio broadcasting enterprises since 1958. Cullman maintains that blocking or delaying the institution of Cullman's new radio service would result in an economic benefit to WKUL; that Millar and Bullard were directly involved in the promotion, preparation, and filing of the Sumiton application for the express purpose of blocking Cullman's application; and that there were direct dealings between the present Sumiton principals and Millar and Bullard, and either an active participation in the plan to block Cullman Music, or an acquiescence in the Millar-Bullard plan.

3. Essentially, petitioner predicates its request for the strike and related issues on two incidents involving Hudson Millar, each of which is described in separate sworn statements attached to Cullman's petition. On May 26, 1965, Cullman filed an application for a construction permit for a new standard broadcast station to operate on the frequency 1540 kHz at Cullman, Ala. It is not disputed that shortly thereafter, in June 1965, following newspaper publication giving notice of the filing, Millar telephoned Dan Cole Mitchell, a Cullman partner, requesting a meeting to discuss some business. The meeting was held

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later that day at Mitchell Motors, Inc., Mitchell's place of business in Cullman, Ala. According to Mitchell, in his sworn affidavit, and reaffirmed in an affidavit attached to Cullman's reply pleading, the following transpired during that meeting:

> Millar indicated his awareness of our pending application, and wanted to know why [Leon A.] Murphree [Mitchell's partner] and I wanted a radio station in Cullman. I indicated that Murphree and I felt that Cullman could support another station, and that we wanted to provide a new locally oriented broadcast service to the community. Millar asked whether I knew how expensive it could be to obtain a license from the FCC. I suggested that whatever the expense, we were prepared to undertake the project.
>
> Millar, then stated—and my recollection of his words is—"I will make it cost you $30,000 before you get FCC approval," and that in addition, "I will make it cost you 5 or 6 years of hard work" before FCC approval.
>
> Millar suggested that if we were that interested in a station in Cullman, he would be prepared to discuss selling us his station, or would sell us stock in Airmedia, Inc. (which was then being formed). * * * I declined his offers. Millar left abruptly.

In his affidavit, Mitchell also maintains that in a telephone conversation with * * * Bullard * * * on June 19, 1968 [he] stated to me that he had personally prepared the application which was filed by Sumiton * * * in January 1966.

4. On November 18, 1965, Cullman's application was returned by the Commission on the grounds that it violated section 73.187 of the Commission's rules which limits station radiation during critical hours. In the late fall of 1965, subsequent to the return of Cullman's application, Millar contacted Thomas Wayne Sims, a former employee of Millar's at the latter's radio station (WKUL, Cullman, and WARF (AM), Jasper, Ala.), and requested a meeting with him to talk over a business proposition. At the meeting, which was attended by Sims, Millar, and Bullard, Millar allegedly proposed a plan whereby Sims and others (now the Sumiton principals) would file an application for 1540 kHz in Sumiton, Ala., in order to block Cullman's application, which had already been returned by the Commission for technical reasons. According to Sims, in an affidavit attached to Cullman's petition, Millar acknowledged his awareness of the return of Cullman's application and stated that he wanted to have an application for Sumiton filed before Cullman refiled its application.[2] Millar allegedly offered financial support to Sims if the latter would participate in the plan to block Cullman's application. Following that meeting, Sims maintains that Millar and Bullard encouraged him several times via telephone to pursue the Sumiton venture, but Sims subsequently dropped out of the alleged plan because, among other things, he was too busy with other matters. These allegations are specifically reaffirmed by Sims in an affidavit attached to Cullman's reply. Finally, Cullman submits the affidavit of its consulting engineer, which purports to show that frequencies other than 1540 kHz; i.e., 1500 kHz, 1520 kHz, and 1560 kHz—could have been applied for in Sumiton on a nondirectional basis. It is argued that none of these frequencies would have been in conflict with the Cullman proposal, and none could have been utilized in Cullman consistent with the Commission's rules and regulations.

[2] Cullman's application was refiled on Apr. 14, 1966. Sumiton's application was filed on Jan. 24, 1966.

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5. The Broadcast Bureau supports the addition of the strike issue and the real party in interest issue, but maintains that since the next three requested issues are largely derivative, and are based on the same facts as are germane to issues 1 and 2, they should not be added. Sumiton, Millar and Bullard, in extensive pleadings with affidavits attached thereto, oppose the addition of all of the requested issues. In essence, it is Sumiton's position that the Sumiton application, which, when filed, was not in conflict with any pending application, was not filed for the purpose of blocking any application and that no collusion or conspiracy ever existed between Millar, Bullard, Sims, and the Sumiton principals. Sumiton maintains that no one associated with WKUL was responsible for filing the Sumiton application; that no consideration was given directly or indirectly by Millar or Bullard; that none of the Sumiton principals contacted Millar directly or indirectly in the preparation and filing of the Sumiton application; that Bullard, who was paid for his assistance in the preparation of the Sumiton application, was contacted after the plan to file the application had been made; that only one of the Sumiton principals knew that Bullard was associated with WKUL; and, finally, that the Sumiton principals were and are motivated by a desire to construct and operate a station and not by any ulterior purposes.

6. In their comments, Millar and Bullard deny that they attempted to block the Cullman application.[3] While admitting the truth of some of the allegations set forth in Cullman's petition, Millar and Bullard deny the damaging assertions contained in Mitchell and Sims' affidavits, particularly Mitchell's charge that Millar impliedly threatened to block Cullman's application and Sims' charge that Millar told him that he [Millar] wanted to block the Cullman application. In brief, Millar and Bullard contend that they did nothing until Cullman's May 1965 application was returned by the Commission; that Millar and Bullard, being free to file an application for 1540 kHz themselves, could bring to the attention of others the availability of the frequency and assist them in attempting to secure Commission consent to utilize the frequency; that other frequencies than 1540 kHz could have been applied for in Cullman and therefore that a filing on 1540 kHz would not have prevented Cullman from filing in Cullman, Ala., on one of the other frequencies; that neither Millar nor Bullard knew that Cullman would refile its application for 1540 kHz; and, lastly, that Cullman failed to make the essential threshold showing that either Sumiton or its principals knew or had reason to know of Millar and Bullard's alleged intent to block Cullman's application.[4] Detailed

[3] Millar and Bullard's request for leave to submit an additional pleading, filed on Oct. 25, 1968, will be denied. Contrary to Millar and Bullard's assertions, Cullman's reply pleadings do not raise new matters, but merely respond to matters raised by Millar and Bullard in their comments and supplementary comments. As the Board stated in *D. H. Overmyer Communications Co.*, 4 FCC 2d 496, 505, 8 R.R. 2d 96, 107 (1966): "Only in the most compelling and unusual circumstances where it is felt that basic fairness to a party requires such action will the Board permit the filing of pleadings beyond the limits prescribed in the rules, either in terms of number or of length." Millar and Bullard have failed to show either that basic fairness requires us to accept their unauthorized pleading or that we should depart from clearly defined precedent in this case.

[4] We reject Millar and Bullard's unsupported charge that Cullman's instant petition is an abuse of the Commission's processes. We likewise reject their charges concerning the character of Cullman, Wayne Sims, Dwight Cleveland, and Houston Pearce, principal of standard broadcast station WARF, Jasper, Ala. (Among other things, Millar and Bullard assert that the Cullman principals along with Sims and Pearce are seeking to undermine the Sumiton application by unfair tactics.) Besides being irrelevant to the issues before us, these allegations are based solely on speculation and surmise.

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affidavits of Millar and Bullard, among others, supporting these contentions accompany the comments. Finally, Millar and Bullard request oral argument because of the complex factual questions presented.

7. In our view, the conflicts in the affidavits submitted by the parties should be resolved on the basis of an evidentiary record.[5] See *Verne M. Miller*, FCC 64R-275, 2 R.R. 2d 813, 816; *Five Cities Broadcasting Co., Inc.*, FCC 62R-153, 24 R.R. 743, 745. In addition to the conflicting affidavits, however, there are a number of undisputed facts, which, taken together, also indicate the necessity of an evidentiary inquiry to determine whether the Sumiton application was filed either solely or in part for the purpose of delaying, blocking or frustrating the Cullman application.[6] First, Jerdan Bullard admittedly assisted in the physical preparation of the Sumiton application and the application fails to disclose this fact.[7] According to Bullard, his assistance, which was allegedly solicited by one of the Sumiton principals, consisted of making suggestions * * * about [Sumiton's] community needs survey, inspecting possible tower sites, and working directly with J. L. Sartain (a Sumiton principal) on the applicant's preparation of FCC Form 301 and some associated exhibits. Bullard was paid for his services by three of the Sumiton principals who purchased clock advertisements from Bullard. Next, Millar and Bullard have a motive for blocking Cullman's application. Cullman's proposed station would compete for revenues in Cullman with WKUL, and a blocking or delaying of the institution of this new service would obviously result in an economic benefit to WKUL. In fact, Millar admits to his belief that Cullman cannot support another standard broadcast station and alleges that that was one of the reasons for calling the now controversial meeting with Dan Mitchell in June 1965. Finally, Sumiton admittedly failed to investigate the possibility of using any other frequency than 1540 kHz.[8] The Sumiton principals chose the frequency upon the advice of Millar, Bullard, and Sims. Sumiton's consulting engineer was asked by J. L. Sartain to de-

[5] Millar and Bullard's request for oral argument will be denied. It is not the Board's practice to hold oral argument with respect to interlocutory matters except in the most unusual circumstances. *Ottawa Broadcasting Corp.* (*WJBL*), FCC 64R-382, 3 R.R. 2d 575, 578.

[6] Sumiton erroneously maintains that, "Before an application might be classified as a strike application, it is essential for an application with which it (the so-called strike application) is mutually exclusive to be pending before the Commission. * * * This element is completely lacking [here]." The timing of filing is merely one of several factors to be considered in determining whether an application has been filed for the purpose of delaying, blocking or frustrating another application. *Blue Ridge Mountain Broadcasting Co., Inc.*, 37 FCC 791, 796, 2 R.R. 2d 511, 517 (1964), review denied FCC 65-5, released Jan. 7, 1965, affirmed per curiam sub nom. *Gordon County Broadcasting Co.* v. *FCC*, Case No. 19, 165, 6 R.R. 2d 2044 (D.C. Cir. 1965). Cf. *Hartford County Broadcasting Corp.*, 9 FCC 2d 698, 699, 10 R.R. 2d 1083, 1087 (1967). Moreover, Cullman's original application was filed before Sumiton's and there is a factual dispute in the pleadings as to whether Millar and Bullard and/or Sumiton knew, or had reason to know, that Cullman would refile.

[7] We agree with Cullman that Bullard's assistance should have been disclosed in the Sumiton application, *Waco Radio Co.*, FCC 59-1238, 19 R.R. 538, 539, but do not believe that the failure to do so, standing alone, warrants the addition of a separate issue. Likewise, the other, essentially derivative, issues requested by petitioner will not be added for the reasons advanced by the Broadcast Bureau. The fifth requested issue is conclusionary and is being incorporated in the issue being added herein. See par. 16, infra.

[8] The failure to conduct a frequency study is, under certain circumstances, a valid consideration in determining an applicant's intentions. *A1-Or Broadcasting Co.*, 37 FCC 917, 922, 3 R.R. 2d 889, 896 (1964) (footnote 7), review denied FCC 65-99, released Feb. 11, 1965, affirmed per curiam sub nom. *Corbett* v. *FCC*, Case No. 19,221, 6 R.R. 2d 2023 (D.C. Cir. 1965). There is a factual dispute as to whether other frequencies are in fact available in Sumiton. Cullman alleges that there are; Millar and Bullard contend that there are not. In view of this dispute, the matter should be resolved at the hearing.

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termine whether 1540 kHz could be used at Sumiton and, if such frequency could be used, to prepare an application for a new * * * station at Sumiton * * * utilizing 1540 kHz. The same engineer prepared a study of available frequencies in Cullman in June 1965, at the express request of Hudson Millar. The engineer was not asked by the Sumiton principals to undertake a frequency study in the Sumiton area. In fact, the only person who allegedly conducted a frequency study in the Sumiton area was Jerdan Bullard, who is not an engineer. In view of all of the foregoing, a strike issue will be added.

8. In support of its request for a real party in interest issue Cullman relies solely on the allegations advanced in support of the strike issue, namely, that the Sumiton application was primarily the result of the efforts of Millar and Bullard, and that offers of financial and other assistance had been made by Millar and Bullard. In our view, Cullman's showing is insufficient to warrant the addition of a real party in interest issue. While the strike and real party in interest issues are related, there are meaningful distinctions between them and petitioner has failed to make the requisite connection in order to add the latter issue in this proceeding. Thus, the strike issue inquires into the purpose for filing an application,[9] while the test for determining whether a third person is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station.[10] In this case, while Cullman has successfully raised the question of whether the Sumiton application is, in fact, a strike application (see par. 7, supra), it has failed to make the requisite threshold showing to support its contention that Millar and Bullard are the real parties behind the Sumiton application. Thus, while Millar and Bullard may have assisted in the preparation of the Sumiton application in order to block Cullman, petitioner has not substantiated its charge that they [Millar and Bullard], and not the Sumiton principals, are the real parties in interest. In particular, petitioner did not show either that Sumiton or its principals received any consideration, directly or indirectly, from anyone in connection with the preparation, filing and prosecution of the Sumiton application, or that Millar or Bullard or anyone associated with WKUL has ever given any consideration, directly or indirectly, to any person associated with the Sumiton application. On the other hand, the Sumiton principals, in affidavits attached to the opposition, unequivocally state that no consideration was given by anyone, including the principals of WKUL, to the Sumiton principals or to the corporation; and that all costs incurred in the prosecution of the application were paid by Sumiton. Furthermore, Millar, in an affidavit attached to Millar and Bullard's comments, unequivocally states that neither he nor anybody associated with WKUL has ever given any consideration, directly or indirectly to any person associated with the Sumiton application. Significantly, Cullman has not shown the contrary. Therefore, Cullman's request for a real party in interest issue will be denied.

[9] See *Blue Ridge Mountain Broadcasting Co., Inc.*, supra.
[10] See *WLOX Broadcasting Co. v. FCC*, 104 U.S. App. D.C. 194, 260 F. 2d 712, 17 R.R. 2120 (1958).

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Financial and Misrepresentation Issues

9. Cullman's requests for financial qualifications and misrepresentation issues (see par. 1, supra) are based upon alleged inconsistencies and contradictions in Sumiton's application, and upon Sumiton's failure to submit a copy of its agreement with J. L. Sartain, a Sumiton principal and the proposed general manager of Sumiton's station. In brief, Cullman raises questions concerning: (1) a bank letter attached to a Sumiton amendment; (2) Sumiton's existing capital; (3) the accuracy of certain exhibits filed with Sumiton's application; (4) Sumiton's candor in its representations concerning its financial status; and (5) the agreement with Sartain. The Bureau supports an inquiry into Sumiton's financial qualifications but would expand it to include the entirety of Sumiton's financial plans. Sumiton opposes the addition of all of the requested issues.

10. First, to support its request for an issue inquiring into the availability of Sumiton's proposed bank loan (requested issue No. 6, par. 1, supra), Cullman relies solely on the undisputed fact that the letter in question, showing the availability of a $65,000 loan, bore a date later than that of the amendment with which it was submitted. The bank letter is dated October 13, 1967, and the amendment is dated October 10, 1967. However, this discrepancy, standing alone, is insufficient to warrant an evidentiary inquiry for two reasons: (1) J. L. Sartain, president and stockholder of Sumiton, in an affidavit attached to the opposition, unequivocally states that the discrepancy in dates is attributed to human error only and Cullman does not challenge Sartain's explanation; and (2) Sumiton recently amended its application to reflect a new bank letter, dated August 2, 1968, which demonstrates the continued availability of the $65,000 bank loan.[11] Thus, there is no basis for Cullman's proposed inquiry.

11. Next, Cullman questions Sumiton's existing capital of $3,000 on the following grounds: (1) the "possible" financial involvement of Millar and Bullard in Sumiton's activities; and (2) the absence of a "true" balance sheet in the Sumiton application. In our opinion, there is no basis for an inquiry into Sumiton's existing capital. First, petitioner fails to allege specific facts to support the contention that either Millar or Bullard are or have been financially involved in the Sumiton application. In this respect, Cullman's petition is based on speculation and surmise. Second, Sumiton has attached to its opposition a balance sheet dated July 1, 1968,[12] which shows that Sumiton has assets of $68,000, consisting of $1,150.47 in cash, a loan commitment of $65,000, and $1,849.53 in organizational expenses. The balance sheet also shows liabilities totaling $68,000, consisting of $1,000 in a stockholders' advancement, a $65,000 bank loan (see par. 10, supra),[13] and $2,000 in capital stock. Thus, while Sumiton's original capital has been reduced because of the payment of expenses, the most recent balance

[11] Sumiton's unopposed petition for leave to amend was granted by the hearing examiner on Sept. 24, 1968, FCC 68M-1333, released Sept. 25, 1968.

[12] The balance sheet accompanying Sumiton's application (exhibit 3) is dated January 3, 1966. That balance sheet shows assets of $3,000 in cash and no liabilities.

[13] The Commission designated a limited issue with respect to the bank loan. Issue 2, FCC 68-576, supra, 13 FCC 2d 221, 222.

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sheet clearly shows that Sumiton has sufficient capital and other assets ($66,150.47) to meet its estimated construction and first year operation costs ($52,158).[14] Accordingly, there is no basis for expanding the financial issue.

12. Cullman argues that there is "confusion" regarding the accuracy of two exhibits (exhibits 2 and 3), filed with Sumiton's application. Thus, while exhibit 3 states that three Sumiton stockholders paid $3,000 into Sumiton's bank account and exhibit 2 states that "the applicant corporation has realized $3,000 from the sale of stock," exhibit 1 states that only "$2,000 has been paid in cash" for the capital stock by the four Sumiton principals. The Board believes that an issue inquiring into the accuracy of exhibits 2 and 3 is unnecessary. The only "error" in the application appears in exhibit 2, wherein it is stated that Sumiton "has realized $3,000 from the sale of stock." In its opposition, Sumiton explains that Sumiton "has realized $2,000 from the sale of stock and has an additional $1,000 as advancements by stockholders." (See par. 11, supra.) The reason for the "confusion," explains Sumiton, is that there was a "last minute" change in capitalization from $3,000 to $2,000, the minimum in the State of Alabama.[15] With respect to the other matter (i.e., which stockholders actually paid in cash) it is clearly indicated in exhibits 1, 2, and 3 that three stockholders (Dr. Chapman and Messrs. Ballenger and Fowler) paid in the entire $3,000 and that the fourth stockholder (Mr. Sartain) received his shares of stock "for his effort in organizing the company, preparing [the] application, and in return for his [unwritten] agreement to serve as general manager of the station on full-time basis." Exhibit 2.

13. Cullman also questions Sumiton's candor in its representations to the Commission concerning the corporation's financial status and requests an issue relating thereto. We agree with Sumiton that such an issue is not warranted. The "true financial status" of Sumiton, the subject of petitioner's proposed inquiry (see requested issue No. 10, par. 1, supra), has, in fact, been disclosed in Sumiton's application and further clarified in the opposition pleading. (See pars. 10–12, supra.) Thus, the pertinent facts relating to the bank letter, to Sumiton's existing capital, and to the stockholders' financial interest in the corporate applicant, are now before the Board and in our opinion no issue inquiring into these matters is justified. In essence, Cullman failed to raise a substantial question as to whether Sumiton, which had no apparent motive to misrepresent its financial status, actually misrepresented any facts to the Commission in its application, or whether the explanations contained in the opposition are erroneous.

14. Finally, Cullman requests an inquiry into an agreement between Sumiton and J. L. Sartain, a Sumiton principal, whereby the latter agrees to serve as the station's proposed full-time general manager.

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[14] In its reply pleading, petitioner questions Sumiton's estimated miscellaneous and first year expense figures. However, these allegations cannot be accepted since they are speculative and are raised for the first time in a reply pleading. See *Great River Broadcasting, Inc.*, 11 FCC 2d 338, 340, 12 R.R. 2d 80, 83 (1968) (footnote 9).

[15] J. L. Sartain, the Sumiton principal who prepared the application, was not aware of this change of capitalization, apparently because he was not required to put in any money. See affidavit of Dr. Jerry Chapman, exhibit 1, p. 9, Sumiton opposition.

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Cullman argues that while the agreement itself is disclosed in the Sumiton application,[16] the precise terms of said agreement have not been submitted in response to paragraph 22(d) of section II of FCC Form 301. That provision reads in pertinent part as follows: "Are there any documents, instruments, contracts or understandings relating to ownership, management, use or control of the station or facilities, or any right or interest therein?" Sumiton answered "no" to this question. In Cullman's view, the agreement between Sumiton and Sartain falls within the proscriptions of paragraph 22(d), requiring a full disclosure by the applicant. However, Sumiton, in opposition, contends that no written agreement with Sartain was entered into and that the pertinent portions of the understanding with Sartain have already been disclosed to the Commission. The Board finds merit to these contentions. Moreover, the emphasis of paragraph 22, section II, clearly appears to be on control of the station, rather than the management of the station. Subsection (d) of paragraph 22 "must be answered in the light of" this ultimate objective. As correctly stated by Sumiton in its opposition, this is not an agreement which involves "ownership, control or operation of the station." Sartain is already a Sumiton stockholder and will merely serve as the station's general manager. In any event, an attachment to the opposition, disclosing the understandings of the parties, shows that all four stockholders, including Sartain, will be involved in policy decisions affecting the station. Thus, while Sumiton may have technically been required to submit additional information with its application, we do not believe that under all of the circumstances here, a disqualification issue inquiring into this matter is warranted.

Millar and Bullard's Supplementary Comments

15. Millar and Bullard were made parties to this proceeding for the limited purpose of filing a pleading in response to the petition to enlarge issues, filed on June 24, 1968, by Cullman. *Memorandum Opinion and Order*, FCC 68R–628, supra, footnote 1. Nevertheless, Millar and Bullard have filed supplementary comments in this proceeding alleging that the Cullman proposal will result in prohibited overlap with the existing 0.5-mv/m contour of standard broadcast station WLCB, Moulton, Ala., in violation of Commission rule 73.37. Engineering data is attached to support this contention. While Millar and Bullard maintain that Cullman's application should not have been accepted for filing in the first place and should now be dismissed summarily, they recognize the limited nature of their intervention and accordingly invite a motion to dismiss by the other parties to this case or, in the alternative, appropriate action by the Review Board on its own motion. It is clear that Millar and Bullard's supplementary comments, which deal with a subject totally unrelated to the strike issue, are not filed by a proper party to this proceeding. The pleading is in direct contravention of the limited intervention

[16] Sec. IV–A of the Sumiton application refers to Sartain's proposed service as general manager, and exhibit 2 refers to Sartain's agreement to serve as general manager.

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granted by the Review Board in August, 1968 (FCC 68R–628, supra), and therefore will not be considered.[17]

16. Accordingly, *It is ordered*, That the request for leave to submit an additional pleading, filed October 25, 1968, by Hudson C. Millar, Jr., and James Jerdan Bullard, *Is denied;* that the request for oral argument, contained in the comments, filed by Millar and Bullard on August 8, 1968, *Is denied;* that the petition to enlarge issues, filed June 24, 1968, by Cullman Music Broadcasting Co., *Is granted* to the extent indicated below, and *Is denied* in all other respects; and that the issues in this proceeding *Are enlarged* by the addition of the following issue:

> To determine whether the application of Sumiton Broadcasting Co., Inc., was filed for the principal or incidental purpose of obstructing or delaying the establishment of a standard broadcast facility at Cullman, Ala., and whether, in light of the facts adduced, a grant of the application of Sumiton Broadcasting Co., Inc., would serve the public interest, convenience, and necessity.

17. *It is further ordered*, That the burden of proceeding with the introduction of evidence under the issue added herein will be on Cullman Music Broadcasting Co., and the burden of proof under that issue will be on Sumiton Broadcasting Co., Inc.

18. *It is further ordered*, That Hudson C. Millar, Jr., and James Jerdan Bullard *Are made parties* to this proceeding solely with respect to the foregoing issue.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[17] It may be noted in passing, however, that on Oct. 31, 1968, Sumiton, in a petition for reconsideration and to dismiss, requested the Commission to dismiss Cullman's application on the grounds cited by Millar and Bullard in their supplementary comments.

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FCC 68R-506

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of SUMITON BROADCASTING CO., INC., SUMITON, ALA. DAN COLE MITCHELL AND LEON A. MURPHREE, D.B.A. CULLMAN MUSIC BROADCASTING CO., CULLMAN, ALA. For Construction Permits	Docket No. 18204 File No. BP-17108 Docket No. 18205 File No. BP-17193

MEMORANDUM OPINION AND ORDER

(Adopted December 4, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding involves the mutually exclusive applications of Sumiton Broadcasting Co., Inc. (Sumiton) and Cullman Music Broadcasting Co. (Cullman). Each seeks a license for a standard broadcast station in its respective community to operate on 1540 kHz. The applications were designated for hearing by the Commission (FCC 68-576, 13 FCC 2d 221, 33 F.R. 8467, published on June 7, 1968) on areas and populations, financial qualifications, ascertainment of needs and section 307(b) issues. Presently before the Review Board is a petition to enlarge issues, filed September 26, 1968, by Cullman, seeking the addition of issues to determine whether the Sumiton principals violated the Internal Revenue Code or other Federal laws, and whether, in light of the foregoing, Sumiton possesses the requisite character qualifications to be a licensee of the Commission.[1]

2. In regard to the procedural propriety of the instant request, petitioner contends that, even though the 15-day filing period has expired (sec. 1.229 of the Commission's rules),[2] "good cause" for the late filing exists and acceptance of the petition is warranted. In support of that contention, it is alleged that the facts which form the basis of the petition were not revealed to the petitioner until August 8, 1968. On that date, Cullman received Sumiton's opposition pleading and Millar

[1] The following pleadings are also before the Review Board: (*a*) opposition, filed Oct. 9, 1968, by the Broadcast Bureau; (*b*) opposition, filed Oct. 18, 1968, by Sumiton; (*c*) comments, filed Oct. 18, 1968, by Hudson Millar, Jr., and James Jerdan Bullard; and (*d*) reply to (*a*) and (*b*), filed Oct. 30, 1968, by Cullman. Millar and Bullard, principals of standard broadcast station WKUL, Cullman, Ala., did not request general permission to file pleadings in this proceeding. By *Memorandum Opinion and Order* released Aug. 7, 1968 (FCC 68R-328, 14 FCC 2d 256, 13 R.R. 2d 1143), the Review Board granted Millar and Bullard's petition for limited intervention and made them parties to this proceeding "for the limited purpose of filing a pleading in response to" a Cullman petition to enlarge issues, filed on June 24, 1968. That petition, unlike the instant one, contained serious charges against Millar and Bullard, and we accordingly granted them an opportunity to respond to those charges. (Millar and Bullard filed comments to Cullman's June 24, 1968, petition on Aug. 8, 1968. See par. 2, infra). In view of the foregoing, Millar and Bullard's comments will not be considered. See footnote 3, infra.

[2] The order designating this proceeding for hearing was published in the Federal Register on June 7, 1968, over 3 months prior to the filing of the instant petition.

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and Bullard's comments with respect to a previously filed Cullman petition requesting, inter alia, the addition of a strike issue against Sumiton. See footnote 1, supra.[3] The facts upon which the petition is based were contained in affidavits attached to the opposition and comments, setting forth the method by which the Sumiton principals compensated James Jerdan Bullard for his services in connection with preparing the Sumiton application. The instant petition was submitted on September 26, 1968. Sumiton opposes the petition on procedural (as well as substantive) grounds, noting that it was filed some 7 weeks after the Sumiton opposition and Millar and Bullard comments of August 8, 1968. Thus, Sumiton asserts petitioner failed to establish good cause for its late filing.[4] In reply, Cullman argues that it had to devote substantial time to investigating and analyzing the contents of Sumiton's, Millar, and Bullard's lengthy responsive pleadings, which, together, totaled more than 140 pages, including several affidavits and exhibits; that its reply to those pleadings was filed on September 16, 1968; and that it began working on the instant petition immediately following the completion of that reply pleading.

3. The Board is persuaded that good cause for the late filing of the Cullman petition has been shown. We have previously held that new matter proffered in an opposing applicant's pleading may form the basis for a finding of good cause. "*What the Bible Says, Inc.*," FCC 68R–37, 11 FCC 2d 625, 626–627. Such is the case here. While Cullman did not begin its preparation of the instant petition until 5 weeks after it obtained the two pleadings on which it relies, petitioner has advanced sufficient reasons for the delay. Thus, Cullman had to prepare a timely reply to the lengthy and extensive pleadings filed by Sumiton, Millar, and Bullard. Under these circumstances, Cullman appears to have proceeded diligently.

4. With respect to the merits of the petition, Cullman submits the following: James Jerdan Bullard was employed by the Sumiton principals to help prepare its application. Upon completion of the application, it was decided that the principals would compensate Bullard for his services by purchasing clock advertisements for their respective businesses from Bullard's advertising business.[5] Bullard admittedly charged each advertiser "slightly more than [he] normally charged for ads. * * *" Furthermore, according to Dr. Chapman, a Sumiton principal, "[T]he arrangement had the added advantage of permitting the three stockholders to charge the costs [of the advertisements] to their respective businesses." Cullman maintains that the transaction thus described constitutes a clear violation of both the deduction and fraud provisions of the Internal Revenue Code. In particular, petitioner charges that the Sumiton principals violated sections 162(a) and 7201 of the Internal Revenue Code (26 U.S.C. sec. 162(a), 26 U.S.C.

[3] The request for this issue is being granted by the Review Board in a companion document adopted this date. In that document, we are making Millar and Bullard parties solely with respect to the strike issue.

[4] The Broadcast Bureau does not comment on the timeliness of the petition but opposes the addition of the issues solely on substantive grounds.

[5] Sumiton is a corporation comprised of four stockholders, each with a 25-percent stock interest. Involved here are three principals: Dr. Jerry Chapman, part owner of the La Petite Beauty Salon, Jasper, Ala.; John L. Fowler, partner, B & F Lumber Co., Sumiton, Ala., and principal of the Sumiton Gas Co., Inc., Sumiton; and Cecil F. Ballenger, partner, B & F Lumber Co., and principal of the Sumiton Gas Co.

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sec. 7201). The former provision permits the deduction of ordinary and necessary business expenses and the latter relates to the fraudulent evasion of the payment of Federal income taxes. Cullman cites a number of Federal court cases dealing with the deduction of ordinary and necessary business expenses and the fraudulent evasion of taxes and concludes therefrom that the Sumiton principals knowingly violated the cited provisions of the Internal Revenue Code.

5. We agree with Sumiton and the Bureau that Cullman's petition should be denied. We note first that the conduct underlying the alleged violation of tax law is not such as would reflect on an applicant's character qualifications if that conduct did not, in fact, constitute a violation of law. However, the cases cited by Cullman,[6] none of which is directly in point, show that there is a broad area for interpretation of the terms ordinary and necessary, and that the tax question presented by Cullman is a uniquely factual one to be decided by the appropriate authority, i.e., the Internal Revenue Service. (It is noteworthy that Cullman does not show what action, if any, the Internal Revenue Service has taken with respect to the deductions allegedly taken by the Sumiton principals.) The Commission has previously held that it is not the proper forum for making such a determination. In *Port Arthur College*, 11 R.R. 520, 525–526, review denied 11 R.R. 526a (1954), it was held that whether an applicant has violated tax laws * * * [is a matter] concerning which this Commission has no primary jurisdiction and cannot make a definitive ruling. *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67, 79 (1944). (Cf. *Florida-Georgia Television Co., Inc.*, 11 FCC 2d 643, 644, 12 R.R. 2d 297, 299 (1968), where the Commission stated that this is not the proper forum to try * * * [an antitrust] case.) Thus, while the Commission is not precluded, in appropriate circumstances, from considering a violation of law by an applicant, even where, as here, no suit alleging illegal conduct has been filed, the Commission must be in possession of facts showing that the applicant has violated the law. *Report on Uniform Policy as to Violation by Applicants of Laws of United States*, 1 R.R. (pt. 3) 91:495, 499 (1951). In this case, petitioner has failed to submit facts which show that the Sumiton principals have violated the Internal Revenue Code or other applicable Federal statutes. In view of the foregoing, Cullman's petition will be denied.

6. Accordingly, *It is ordered*, That the petition to enlarge issues, filed September 26, 1968, by Cullman Music Broadcasting Co. *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[6] E.g., *Deputy* v. *Du Pont*, 308 U.S. 488 (1940); *Interstate Drop Forge Co.* v. *C.I.R.*, 326 F. 2d 743 (7th Cir. 1964); *Swed Distributing Co.* v. *C.I.R.*, 323 F. 2d 480 (5th Cir. 1963).

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FCC 68-1113

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petition by TOP VISION CABLE CO., OWENSBORO, KY. For Authority Pursuant to Section 74.1107 of the Rules To Operate a CATV System in the Evansville Television Market (ARB 94)	Docket No. 18378 File No. CATV 100-113

MEMORANDUM OPINION AND ORDER

(Adopted November 20, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. This petitioner seeks waiver of the hearing requirements in order to import distant television signals into the Evansville, Ind. market (ARB 94), which has a net weekly circulation of 204,400. Channel assignments in the market and their status are:

Evansville.—7 (ABC), *9 (app.), 14 (NBC), 25 (CBS), 44 (CP-Ind.).
Vincennes.—*22 (Educ.), lic. granted 10-22-68 (BLET-202).
Owensboro.—19 (CP-Ind.), 31 (idle).[1]

2. The Evansville market encompasses a tristate area: Indiana, Kentucky, and Illinois. Petitioner is located in Kentucky. Top Vision is an existing CATV system which was the subject of a cease and desist order in docket No. 17535, released August 18, 1967.[2] In that proceeding, the CATV system was required to delete from its service the distant signals of three Louisville stations and one Paducah station, which the Commission found had been carried without Commission approval as required by section 74.1107 of the rules, and without obtaining a waiver of that section. Top Vision's petition for waiver was filed during the pendency of the cease and desist proceedings, and the distant signals requested are the same as were involved there.

3. The proposal, and contentions in support and opposition, are as follows:

Top Vision Cable Co. (CATV 100-113) presently operates in Owensboro, Ky. (48,900), which is located 30 miles southeast of Evansville. Petitioner

[1] A construction permit, held by Daviess All Channel Cablevision, Inc., for this channel was surrendered on Mar. 25, 1968.
[2] *Top Vision Cable Co.*, FCC 67-963, 9 FCC 2d 776.

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carries the following local stations and proposes to carry the following distant stations:

Local signals:[3]	
Channels:	
7 (ABC)	Evansville, Ind.
14 (NBC)	Evansville, Ind.
25 (CBS)	Evansville, Ind.
13 (ABC)	Bowling Green, Ky.
Distant signals:	
Channels:	
32 (ABC)	Louisville, Ky.
3 (NBC)	Louisville, Ky.
11 (CBS)	Louisville, Ky.
6 (NBC)	Paducah, Ky.

In support of its request,[4] petitioner claims: (1) reception conditions in Owensboro are variable, requiring installation of unusually high antennae; (2) that the only instate television service to the city is provided by channel 13, Bowling Green; (3) that there is a lack of Kentucky-oriented programing from Evansville stations serving the area; (4) that the outstanding construction permits for Evansville and Owensboro channels may not be activated;[5] (5) that Evansville stations' report increasing profits, despite CATV operations in the market; (6) that the impact of the proposed distant signal carriage will be de minimus because of Owensboro's size and distance from Evansville;[6] (7) that Top Vision poses no pay TV threat because of limitations in its franchise; (8) that the program exclusivity provisions of section 74.1103 of the rules would protect the economic viability of the operating Evansville stations, and that importation of distant signals—all of which are network affiliates—would not affect the development of independent UHF broadcasting; (9) that immediate and irreparable financial injury to the CATV operators will force a closing down of the Owensboro system unless relief is granted;[7] (10) that the construction permit for channel 19, Owensboro, has been modified to allow the transmitter and studio to be moved to a site nearer Evansville; (11) and that the construction permit held for channel 31, Owensboro, has been rendered.

Opposition comes from Evansville Television, Inc., licensee of television broadcast station WTVW, Evansville; Owensboro On the Air, Inc., permittee of channel 19, Owensboro; Gilmore Broadcasting Corp. of Indiana, licensee of television broadcast station WEHT, Evansville; and WFIE, Inc., licensee of station WFIE–TV, Evansville.[8] It is argued that: (1) grant of the waiver petition could delay or defeat establishment of independent UHF television service in Owensboro as well as Evansville; (2) the program ex-

[3] Petitioner also stated that it would carry local channel *35, Madisonville, Ky., when that station goes on the air (BPET–170). Operations commenced on Sept. 23, 1968, under program test authority.

[4] Petitioner has filed, in addition to its waiver request and reply pleadings, two petitions for interim relief, which have also been opposed. Petitioner has replied. All matters raised by the parties in these and related pleadings are considered in our action below.

[5] Construction permits were issued on the following dates: Channel 44, Aug. 31, 1967; channel 19, July 27, 1966; channel *9, application for construction permit filed July 28, 1967.

[6] Owensboro, according to petitioner, contains less than 5 percent of the TV households in the market, and estimated CATV saturation would involve only 3.26 percent of the market homes.

[7] This allegation is contained in petitioner's second petition for interim relief, which requests permission to import the distant signals pending final Commission action on the top-100 waiver request. Petitioner refers to a 90-percent subscriber loss and the necessity of providing CATV service for 7 months without charge in order to prevent the exodus of the remaining 10 percent who were still connected to the system; to sums borrowed by Top Vision's principals in order to cover monthly operating losses; and to impending bankruptcy of the system and the business owned by petitioner's stockholders, and foreclosure on loans obtained to cover Top Vision's operation expenses.

[8] WFIE–TV and WEHT have also opposed Top Vision's petitions for interim relief.

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clusivity provisions of section 74.1103 will not protect nonnetwork programing of existing or proposed stations in the market, nor prevent audience fragmentation caused by the nonnetwork programing of the distant signals; (3) Evansville stations devote significant air time to Kentucky-oriented programs at present, and Owensboro citizens receive instate programing from Kentucky station WLTV; (4) Top Vision's allegations concerning reception conditions are irrelevant and outdated, and its allegations concerning the quantity of Kentucky programing fail to take into account the increased service which will result when all construction permits are activated; (5) Owensboro accounts for 12 percent of the market population and is the single largest city in ARB 92 outside of Evansville; (6) authorization to import distant signals to Owensboro would encourage other CATVs to seek similar permission, to the further detriment of local broadcasters; (7) there are indications that Top Vision plans further distant signal importation; (8) petitioner originally commenced operations knowing that they were in violation of the Commission's rules, without legal obligation to so operate under its local franchise; (9) cutbacks in local programing which would result from CATV impact on local broadcasters would injure ARB–92's substantial rural population which is unable to obtain cable service; (10) importation of network-affiliated stations would add little program diversity; (11) a great community of interest exists between Owensboro and Evansville; (12) aggregate income and expense figures for all market stations which include the VHF, do not accurately reflect the condition of the two operating UHF stations, nor are they probative of the proposed stations' financial condition; (13) and if, as alleged, television reception conditions in Owensboro are poor, petitioner's financial difficulties do not stem uniquely from the inability to carry distant signals.

4. We have carefully considered Top Vision's request for waiver of section 74.1107 but in view of all of the circumstances of the proposal—and particularly with respect to the channel 19 allocation in Owensboro—we believe that the effects of waiver here require full exploration in hearing. As to Top Vision's requests for interim relief (see footnotes 4 and 7), we note that the difficulties of which Top Vision complains stem at least in part from its own actions (see par. 2). Accordingly, and since Top Vision's showing with regard to the requests for interim relief is not adequately supported, the interim relief will be denied.

Accordingly, *It is ordered*, That the petition for interim relief filed by Top Vision, the second petition for interim relief filed by Top Vision, and the supplement thereto, *Are denied.*

It is further ordered, That the petition of Top Vision Cable Co. for waiver of the hearing provisions of section 74.1107 of the rules for its proposed CATV system at Owensboro, Ky., *Is denied* and, pursuant to section 74.1107 of the Commission's rules, *Hearing is ordered* as to said matter on the following issues:

1. To determine the present and proposed penetration and extent of CATV service in the Evansville market.

2. To determine the effects of current and proposed CATV service in the Evansville market upon existing, proposed and potential television broadcast stations in the market.

3. To determine (*a*) the present policy and proposed future plans of petitioner with respect to the furnishing of any service other than the relay of the signals of broadcast stations; (*b*) the potential for such services; and (*c*) the impact of such services upon television broadcast stations in the market.

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4. To determine in light of the above whether the proposal is consistent with the public interest.

Top Vision Cable Co., Gilmore Broadcasting Corp. of Indiana, Evansville Television, Inc., WFIE, Inc., Owensboro On the Air, Inc., and Argus Broadcasting Co., *Are made parties* to this proceeding and, to participate, must comply with the applicable provisions of section 1.221 of the Commission's rules. The burden of proof is upon the petitioner. A time and place for hearing will be specified in a further order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

U.S. GOVERNMENT PRINTING OFFICE: 1968

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FCC 68-1176

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART K, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO COMMUNITY ANTENNA TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF COMMUNICATIONS TECHNOLOGY AND SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS COX AND ROBERT E. LEE CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Notice is hereby given of proposed rulemaking and inquiry in the above-entitled matter.

I. Nature and Scope of This Proceeding

2. The purpose of this proceeding is to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services, and the nature of any regulations and/or proposed legislation that may be necessary or desirable to further this goal. Many of the matters discussed below (see pts. II and V) have wide ramifications and pertain to other industries in addition to CATV. While this exploration is sparked by CATV development, our consideration of these matters necessarily entails a much broader perspective. We believe that a far-ranging, overall view is necessary if the Commission is to come to grips with this dynamic field and succeed in its efforts to assure the public of the most efficient and effective nationwide communications service possible.

3. The Commission is hopeful that this proceeding will provide meaningful and practical assistance to its consideration of regulatory problems which may require resolution within the next decade or so. We plan to utilize the proceeding to obtain informed opinion, technical information, and present viewpoints of interested persons, for the inauguration of discussion of new questions as they arise, as a vehicle

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for rulemaking action at appropriate stages, and as a basis for the formulation of legislative proposals. Therefore, further notices expanding or altering the scope of this *Rulemaking and Inquiry* may subsequently be issued as necessary or appropriate. Any of the matters encompassed in this proceeding may be the subject of rulemaking actions within the Commission's present statutory authority or within any authority subsequently conferred by the Congress. Moreover, certain of the topics we intend to explore, particularly those requiring consideration of extensive economic or technical analysis, may be contracted out for special studies.[1] At the same time, some of the areas delineated below are of particular and immediate concern, and may require prompt regulatory action within the Commission's present authority. Accordingly, it is contemplated that rules may be adopted in some areas specified below, without issuance of a further notice.

II. Background

4. The Commission has long recognized that CATV is rapidly evolving from its original role as a small, five-channel, reception service bringing television broadcast signals to areas which lack broadcast service or do not receive the full services of the three national networks. In the *First* and *Second CATV Reports*,[2] we discussed at some length the trend of CATV, at that time, toward 12 channel systems and its proposed entry into large metropolitan centers. It now appears that cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned.

5. Thus, we note that the CATV industry generally is placing increased emphasis on program origination, both of a local public service nature and of the entertainment type,[3] and on the provision of other services to the public. The Commission recently authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage of broadcast signals by one system upon a requirement that it operate to a significant extent as an outlet for noncommercial community self-expression. *Midwest Television, Inc.*, 13 FCC 478, 503–508, 510. In so doing, the Commission stated (13 FCC 2d at 505–506):

> CATV program origination offers promise as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of spectrum. Whereas television broadcast stations are usually located in or near a central community and are intended to serve a much broader area encompassing other communities, almost every community of any appreciable size could have its own CATV system and therefore its own local outlet. The CATV system is not handicapped by limited channel capacity, having 12 channels in comparison to the one channel of the individual broadcaster, and

[1] Moreover, it may be necessary for the Commission to expand its own research efforts in order not only to keep abreast of technology, but also to conduct studies (technical, economic, and social) of a type which would not normally be conducted by private industry or other government agencies. Such studies would be in keeping with the responsibilities assigned to the Commission by the Communications Act, and are essential if the Commission is to be responsive to public needs and requirements in the field of communications.

[2] *First Report and Order in Dockets Nos. 14895 and 15233*, 38 FCC 683 (1965); *Second Report and Order in Dockets Nos. 14895, 15233, and 15971*, 2 FCC 2d 725 (1966).

[3] See, e.g., *Television Digest*, Mar. 11, 1968, p. 5; New York Times, Oct. 18, 1968, p. 87M.

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> thus has the technical flexibility to provide different types of programs or services on some channels without affecting the service simultaneously provided on other channels. Moreover, since the CATV operation is based on subscriber fees for the total package, the CATV operator is largely free of the broadcaster's economic requirement that the programing on each channel be such as to attract sufficient audience and advertising revenue to make operations on that channel viable per se. The CATV operator has more flexibility to present programing of minority interest on some channels. And, finally, CATV program origination does not entail the question of "unfair competition" posed by CATV importation of broadcast signals from another market (*Second Report*, 2 FCC 2d at 778–781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations. [Footnote omitted.]

The Commission also has pending before it a rulemaking proceeding to determine whether frequencies in the community antenna relay service should be used for the transmission of CATV originated program material (*Notice of Proposed Rulemaking* in docket No. 17999, 33 F.R. 3188).[4] The matter of cable subscription television is included among the issues in docket No. 11279 (*Further Notice of Proposed Rulemaking and Notice of Inquiry* in docket No. 11279, 31 F.R. 5136).

6. There are other indications of impending CATV operations on a broader scale and in new areas of potential use. In New York City the Mayor's Advisory Task Force on CATV and Telecommunications has recommended, in a report dated September 14, 1968, that cable television service be made available to every home in that city within the next 2 or 3 years. It is contemplated that these CATV systems would initially have a minimum of 18 channels, of which 11 would be used to carry local television broadcast signals, three would be reserved for the exclusive use of the city (without charge to the latter), and four would be used for program origination. Each authorized cable television company would be permitted to use two of the program origination channels, one for the presentation of public service programs and the other for whatever programing it wished to offer, and would operate the other two channels as a common carrier making them available by lease to outside users who wish to present original programs.

7. The report to the mayor of New York City also contemplates that new uses for cable television channels will develop as channel capacity is enlarged over the coming years. In a letter accompanying the report, the task force chairman states:

> In conclusion, the promise of cable television remains a glittering one. While progress toward realizing this promise has been slow, there is now an abundance of venture capital ready and able to extend cable television throughout the city. For venture capital sees the possibility of rich rewards. Those who own these electronic circuits will one day be the ones who will bring to the public much of its entertainment, news, and information, and will supply the communications links for much of the city's banking, merchandising, and other commercial activities. With a proper master plan these conduits can at the same time be made to serve the city's social, cultural, and educational needs. A master plan can be effective now. It will not be a decade hence if stop-gap expedients prevail.

8. It has been suggested that the expanding multichannel capacity of cable systems could be utilized to provide a variety of new com-

[4] The Commission's rules governing the common carrier services do not prohibit such service to CATV systems.

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munications services to homes and businesses within a community, in addition to services now commonly offered such as time, weather, news, stock exchange ticker, etc. While we shall not attempt an all-inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State, and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution, and traffic; various educational and training programs; e.g., job and literacy training, preschool programs in the nature of "Project Headstart," and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.

9. It has been suggested further that there might be interconnection of local cable systems and the terminal facilities of high capacity terrestrial and/or satellite intercity systems, to provide numerous communications services to the home, business, and educational or other center on a regional or national basis. The advent of CATV program origination in such cities as New York and Los Angeles (where there is also CATV activity) gives rise to the possibility of a CATV origination network or networks. The so-called "wired city" concept embraces the possibility that television broadcasting might eventually be converted, in whole or in part, to cable transmission (coupled with the use of microwave or other intercity relay facilities), thereby freeing some broadcast spectrum for other uses and making it technically feasible to have a greater number of national and regional television networks and local outlets. More broadly in the area of general communications, the present and future development of intercity facilities with very high communications capacity—e.g., the L5 coaxial cable, millimeter wave guides, communications by laser beams—coupled with the potentital of the computer and communications satellite technologies,[5] may stimulate the provision of new nationwide or regional services of various kinds, which would require connection to high capacity communications facilities within the locality and from the street to the premises of the consumer. Another matter to be explored

[5] E.g., an increasing link between bulk data transmission and computers, and the special attributes of the satellite technology in the provision of service from one transmission point to many reception points, and in greater system flexibility as compared to fixed terrestrial facilities. As the satellite technology becomes more sophisticated, it might be utilized for multiple access data services and computer links, specialized switched networks, and random networks utilizing some mobile ground equipment for occasional service requirements.

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in this area is the expanding multichannel capacity of CATV (together with its proposed auxiliary use of high capacity, local microwave links),[6] including the question of whether it is technically and economically feasible for CATV to develop capability for two-way and switched services.

10. We shall first set forth the Commission's rulemaking proposals in the area of CATV program origination and related matters.

III. Proposed Rules Concerning CATV Program Origination and Related Matters; Technical Standards; and Reporting Requirements

Program origination

11. The increasing focus of the CATV industry on program origination raises questions which are imminent and require prompt rulemaking decisions by the Commission. We believe that the proposed rules discussed below are within the Commission's present statutory authority. However, here again, as we have previously stressed,[7] the Commission is clearly concerned with new and important questions of policy and law in the communications field, and would welcome congressional guidance as to policy and legislation conferring direct general authority over CATV.

12. Preliminarily, we point out that we discuss below the possibility of the CATV operator leasing some channels on the system to others for the purpose of program origination or other communications services (see par. 26). The Commission is concerned about a common carrier acting as a program originator, and intends to return to this issue as the industry develops. Meanwhile, we believe that experimentation is most likely to come from CATV operators and that they should be encouraged both to originate themselves and to operate as common carriers on available channels to test the possible market.

13. It is the Commission's tentative conclusion that, for now and in general, CATV program origination is in the public interest. The Commission has also noted that there may be a need for some regulation thereof, in order to insure operation fully consistent with the public interest in the larger and more effective use of radio. (Sec. 303(g) of the Communications Act, as amended.) In *Midwest Television, Inc., et al.*, 13 FCC 2d 478, 505–506, the Commission recognized the promise of CATV program origination as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of broadcast spectrum (see quote in par. 5 above). We pointed out that almost every community of any appreciable size could have its own local CATV outlet, and that the CATV operator has greater technical and economic flexibility than the broadcaster to present programing of minority interest on some channels. We further noted that "CATV program origination does not entail the question of 'unfair competition' posed by CATV importation of broadcast signals

[6] E.g., *Teleprompter Corp.*, 12 FCC 2d 936, 940–945 (files Nos. 3766–ER–ML–66; 4609–ER–CP–68; 4610–ER–CP–68); *Chromalloy American Corp.*, experimental licenses for stations KB2XGW and KB2XFL (files Nos. 4536–ER–PL–68 and 4482–ER–PL–68).

[7] See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971*, 1 FCC 2d 453, 465–466.

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from another market (*Second Report*, 2 FCC 2d at 778–781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations." (Ibid.)

14. There are, of course, other important considerations, as we recognized in San Diego (13 FCC 2d at 505): "such as whether television broadcast service would be adversely affected through a siphoning-off of popular program material now or potentially available on the free service or a loss of audience and advertising revenue; whether measures are needed to avoid an undue concentration of control of the media of mass communication; and whether CATV systems should be subject to requirements in the nature of section 315 of the Communications Act (equal time for political candidates), section 317 (sponsorship identification), and the 'fairness doctrine' (fair presentation of both sides of controversial issues of public importance), etc." However, the Commission's authority to regulate the use of broadcast signals as a base for CATV program origination encompasses power to adopt regulations reasonably designed to prevent such operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefits to the public. On balance, we think that CATV origination offers sufficient promise to be encouraged. The proposed rules discussed below are the minimum measures we believe to be presently essential or desirable in the public interest.

Required origination

15. The Commission is proposing, first, to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating. In allocating frequencies and granting broadcast licenses, the Commission has long sought to effectuate the goal of section 307(b) of the Communications Act by having as large a number of local outlets in as many communities as possible. We have noted above the potential contribution of CATV in this respect, both as a means of providing a local outlet to communities which have no television broadcast outlet of their own and as a means of enhancing diversity in communities which do have broadcast outlets. We have also previously determined that the Commission's concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies. *Shen-Heights TV Association*, 11 FCC 2d 814; *Midwest Television, Inc.*, 13 FCC 2d at 502–503, 510.

16. We think it generally appropriate to condition CATV's use of broadcast signals upon a requirement that it further the allocations policy of achieving a multiplicity of local outlets. There may, however, be practical limitations stemming from the size of some CATV systems. Accordingly, consideration will be given to exempting the smallest systems. Comments are requested as to a reasonable cutoff point in light of the cost of the equipment and personnel minimally necessary for local originations. (See also par. 26, below.)

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Economic basis for origination—Advertising

17. We turn now to the complex issue of regulation of advertising material in connection with CATV origination. The Commission has reached no definitive conclusion as to the number of possible alternatives here. One, of course, is no regulation at all of this aspect. Another proposal would be to adopt rules, along the lines of the provision in the San Diego order, which would generally prohibit CATV systems from carrying the signal of any television broadcast station if the system originates advertising material (except as indicated in par. 26, below). In placing this condition on the San Diego test of CATV program origination, the Commission set out specific grounds (*Midwest Television, Inc.*, 13 FCC 2d at 508), which are pertinent to this general proceeding and need not be repeated here. We seek to explore in this proceeding all aspects of the above-cited factors, including the effect of originations with advertising upon the viability of stations in both the top-100 television markets and in the smaller television markets, as against the effect of any prohibition of advertising upon originations by CATV systems. In that respect, we wish to explore fully the issue of financing of original programing on CATV systems and particularly whether subscriber fees could afford an ample financial base for such operations.[8] There is also the possibility, as an alternative or as a supplement, of CATV originations on a per program charge or higher monthly fee basis. There is the further approach of permitting limited commercials, such as only at natural breaks, with no interruption of program material. Persons commenting on this aspect and paragraph 18 below should address themselves to the following situations: (1) communities with no broadcast service; (2) communities served by a radio station(s), but not a television station; (3) smaller television markets; and (4) major television markets. We also seek information as to existing advertising by a CATV system, the experience of broadcasters with respect to such advertising, the rates charged, and the nature of the advertisers; e.g., are the advertisers new to television or have they previously utilized television and/or radio broadcast facilities?

18. Assuming that there were a prohibition on commercials, there is then the issue whether such a prohibition should apply to CATV systems in communities which receive no television broadcast service, or only one such service, and which may therefore have a shortage of advertising outlets. Comments are invited as to any special considerations pertaining to such areas, including the effect of a possible exception on local radio stations. We are also concerned about the situation

[8] For example, we request comments upon the following: If $1 per month of the $5 monthly fee from 1 to 2 million subscribers in a city like New York was allocated to program origination, the programing fund would amount to $12 to $24 million annually. If CATV network operations were supported by a portion of the monthly subscriber fees paid to affiliated CATV systems throughout the country, the resulting financial base for network program origination and interconnection might well exceed the annual amount paid by a national television broadcast network for such purposes The three television networks together annually spend about $750 million on programing and $45 million for interconnection, or an average of approximately $267 million apiece for both. Assuming widespread CATV operations in major cities as well as smaller communities and a subscriber base of 45 million of the present 58 million television homes in the Nation, $1 per month per subscriber would provide annual funds on the order of $540 million. The foregoing is, of course, hypothetical. Comments requested on the economic feasibility of CATV systems allocating $1 per month per subscriber to program origination.

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of the small advertiser who may not be able to afford the rates of the television broadcast media. While the proposal discussed in paragraph 26 below may be a better way of dealing with this aspect, comments are requested on the desirability of permitting CATV systems to originate advertising by small advertisers on the program origination channel, again provided that there is no interruption of program continuity, i.e., that the advertising precedes or follows the program. Further, there is the issue of the applicability of the approaches delineated in this paragraph and paragraphs 17 and 20 as to originations on any common carrier channel of the CATV system (see par. 26), and what regulation of the lessee would be necessary or appropriate. Finally, we stress that while we have reached no conclusions in this important area and will do so only after careful consideration of the pleadings, all interested persons are expressly put on notice that no "grandfathering" is contemplated. In other words, the Commission is proposing to make any rules adopted applicable, upon their effective date, to all CATV service now in existence or commenced during the pendency of this preceeding, as well as to future CATV service.[9]

Equal time, sponsorship, identification, fairness

19. The Commission further believes that a number of important national policies, now applicable to broadcasters, are equally relevant to CATV systems engaging in program origination. At a minimum, these comprise the policies embodied in section 315 of the Communications Act relative to "equal time" for political candidates and the "fairness doctrine," section 317 relative to sponsorship identification, and the national policies relative to diversification of control of the media of mass communications. While the parties are free to suggest other relevant policies or areas for further rulemaking, we are at this time proposing rules only on these three aspects, as indicated below (pars. 20, 23–25).

20. As conditions to the carriage of broadcast signals by any CATV system which engages in program origination, the Commission proposes the following to be applicable to such originations:

> (*a*) A rule condition analogous to section 315 of the Communications Act and section 73.657 of the Commission's rules concerning broadcasts by candidates for public office;
>
> (*b*) A rule condition analogous to section 317 of the Communications Act and section 73.654 of the Commission's rules concerning announcement of sponsored programs;[10] and
>
> (*c*) A rule condition analogous to the obligation, referred to in section 315(a) of the Communications Act and the rules promulgated thereunder, to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

It is contemplated that the obligations imposed by these conditions would be clarified through rulings upon complaints, as in the case of broadcasters, and that they would be enforced pursuant to the cease and desist procedure contained in section 312 of the Communications Act. Finally, we also request comments upon the possible application

[9] Further, as in the case of previous proposals in the CATV field (see 1 FCC 2d 439, 472, par. 50), we would expect that franchising authorities will give due regard to the fact that this matter is thus under Commission consideration.

[10] The nature of this condition will be affected by the resolution of the general issue of a proposed prohibition against origination of advertising material.

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to CATV operations of obscenity and lottery provisions similar to those in the broadcast field (see U.S.C. 1304, 1964; sec. 73.656).

Areas for local concern

21. The foregoing represents the Commission's proposed area of concern with respect to this aspect of origination; e.g., provisions along the lines of sections 315, 317. In other respects, the Commission intends, at least initially, to rely largely on local authorities to see to it that CATV meets local communications requirements and interests to the satisfaction of the community.[11] While we are proposing to condition carriage of broadcast signals on a requirement that CATV operate to a significant extent as a local outlet by originating, this obligation might be met in a variety of ways and would be an appropriate area for additional requirements by the locality. Although we think commendable the suggestion that municipalities reserve some channel capacity for their own use without charge, a requirement of this nature is appropriately the function of local or State franchising authorities.

22. Cable television service has tended to develop on a noncompetitive, monopolistic basis in the areas served. The normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to the cable television subscriber. This consideration involves such matters as quality of service and repair, the reasonableness of the rates charged, technical standards, and so forth. Such protection has traditionally been provided the public by some form of government regulation of monopoly services. We do not now urge the application of our jurisdiction to the licensing of CATV systems by the FCC. We do, however, believe that local, State and Federal governmental agencies must face up to providing some means of consumer protection in this area. While we recognize that other problems are involved (such as rates to the public and regulation of any common carrier activities of CATV operators, see par. 26 below), it follows that local entities, either at the State or municipal level depending on State law, should—among other things—be concerned with various licensing considerations pertinent to the public interest, judgment to be made by the local authority—e.g., the legal, technical, financial, and character qualifications of the franchise applicant; the area to be served; the showing as to plans or arrangements for pole-line attachments with a public utility or arrangements with a common carrier or other appropriate feasibility plans; the provision of channels for public or municipal use. Such regulation, while called for in the case of present CATV operations, would be particularly appropriate in light of CATV operations with originations. Indeed, a question is presented whether these are matters as to which we should strongly urge local consideration or should make their consideration and disposition by local authorities, where appropriate under local law, a condition for the carriage of broadcast signals. Finally, in those relatively few instances where there need be no local franchise con-

[11] The reporting requirements discussed infra, the Commission's complaint procedures, and the statutory cease and desist procedure would, however, provide a check against flagrant abuse of the conditions on carriage of broadcast signals. The Commission would, of course, assume an active enforcement role with respect to the requirements relating to sections 315, 317, and diversification of control.

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sideration, we request comments on whether Federal consideration is not then appropriate, and if so, our authority so to proceed (see secs. 2(a), 3(b) (d) and (e), and 301 of the Communications Act of 1934, as amended). We specifically invite comments on the matters discussed in this paragraph from interested State and local authorities, such as the mayors of CATV communities.

Diversification

23. In the area of diversification of control of the media of mass communications, the Commission is proposing three measures, particularly in view of the origination aspect discussed above. Here again, we stress that no grandfathering is contemplated, although consideration will be given to the question of affording an appropriate period within which compliance with the first two requirements is to be achieved. We are proposing, first, to prohibit cross-ownership of television broadcast stations and CATV systems within the station's grade B contour. While the grade B contour appears to be an appropriate standard in view of the Commission's policy of encouraging television broadcast licensees to establish translator facilities in pockets of poor reception within that contour, comments are invited on the desirability of prescribing some other area, such as the 35-mile zone (see pt. IV herein). Comments are also requested on the desirability of prohibiting cross-ownership of CATV systems and all broadcast facilities (including radio) assigned to the same community, and what consideration, if any, should be given to ownership of other local media, such as newspapers.[12]

24. Second, the Commission is proposing rulemaking in the area of multiple ownership of CATV systems. It is contemplated that such rules would limit the total number of systems on a nationwide basis, based on the number of subscribers, the size of the communities, and the regional concentration. In other words, in addition to prescribing the maximum number of CATV systems which any one entity could own, or have an interest in, based upon the number of subscribers and the size of the communities, the proposed rules would limit the number of these that could be located within the same State or adjoining States (taking into account again the number that could be located in major metropolitan areas—e.g., there clearly should be a prohibition of common ownership of CATV systems in cities—i.e., the standard metropolitan statistical area—such as New York, Los Angeles, and Chicago). Comments are requested on the desirability of counting commonly owned systems within the same standard metropolitan statistical area as one system for some or all purposes. In addition to submitting suggestions as to appropriate limitations and the nature of the interest to be counted, interested persons are invited to address themselves to our view that smaller limitations should obviously apply if the CATV operator also has broadcast interests, particularly in television broadcasting.

25. The third measure stems from the Commission's concern, particularly in view of expanding cable-channel capacity, that any one

[12] Comments filed in docket No. 17371 (32 F.R. 6221) will be considered in this proceeding.

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entity should have control over what programing is presented to the public on a large number of channels. We are therefore proposing to limit the number of channels on which CATV originated programing may be presented to one, not including any channels devoted to services of an automatic nature such as time and weather, news ticker, stock market ticker, etc.[13] As to the latter automatic services, we raise the issue whether they should not be subject to displacement, if demand develops among channel lessees (see par. 26 below). Moreover, to the extent that scarcity of CATV channels is presently a factor, a limitation on the number of channels devoted to CATV origination would facilitate operations of the nature next discussed.

Common carrier operations

26. We believe that the public interest would be served by encouraging CATV to operate as a common carrier on any remaining channels not utilized for carriage of broadcast signals and CATV origination. This would provide an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content except as required by the Commission's rules or applicable law. It might also provide a low cost outlet for political candidates, possibly advertisers, programs on a subscription basis, and various modestly funded organizations and entities in the community who may be unable to afford time on or obtain access to broadcast facilities. And it might further provide a means for municipal authorities to fulfill any of their communications needs that are not sufficiently met through CATV's obligation to act as a local outlet. We do not here propose to condition CATV's carriage of broadcast signals on a requirement that it operate as a common carrier on some channel or channels.[14] We simply point out that, subject to necessary State or local authorization and regulation, the CATV operator may do so, if it chooses. Indeed, this is another area where a local or State requirement might appropriately be imposed.

Reporting requirement

27. There are two further areas of proposed rulemaking that appear to warrant exploration at this time. One is the matter of requiring CATV operators to file information on a regular basis. In the *Second Report* the Commission called for a single submission and deferred the question of regular filings pending consideration of the responses to its questionnaire (FCC form 325). *Second Report*, 2 FCC 2d 725, 765; *Memorandum Opinion and Order* denying reconsideration, 6 FCC 2d 308, 322–323. The information then submitted is now, of course, out-of-date. In order to enable the Commission to keep abreast of CATV developments and fulfill its responsibilities in this field, as well as to assist the Congress in its consideration of any legislative proposal, we think it essential that there be periodic filings by CATV operators.

[13] The proposed rule again would be in terms of a condition upon carriage of broadcast signals.

[14] Since the areas of general inquiry set forth in pt. V above may be pertinent in this respect, we think that consideration of this question should be deferred to a later stage in this proceeding.

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28. The Commission thus is proposing to require by rule that CATV operators file annual reports which will provide current information on such matters as the location of the system, number of subscribers, channel capacity, broadcast signals carried, extent, and nature of program origination, any other operations conducted on the system, financial data, ownership, and interests in other CATV systems, broadcast media and other business interests. As a starting point, comments are requested as to what additions, deletions, or other changes in FCC form 325 (app. A hereto) would be appropriate in light of the matters discussed in this *Notice*. Interested persons are also requested to address themselves to the possibility of an abbreviated form for smaller systems, the appropriate cutoff standard, and the minimum information that should be obtained from such systems. Comments are further requested on whether CATV systems should be required to keep records, available for inspection, to assist the Commission in enforcing the rules proposed in paragraph 20 above, and if so, the appropriate nature of such records.

Technical standards

29. The second area of proposed rulemaking is the question of technical standards for CATV systems. It has been repeatedly suggested that the Commission should undertake to prescribe uniform technical standards to further high quality service to the public, both broadcast signals and CATV originated material, and compatibility among systems for purposes of interconnection. In the *First Report*, we declined to do so for carriage of broadcast signals, noting that minimum standards might fall short of what could be voluntarily achieved by the CATV operator and that the development of appropriate technical criteria would take some time (38 FCC 683, 731). While the matter of technical standards was included in docket No. 15971 (1 FCC 2d 453, 476), the Commission is not yet in a position to propose specific criteria.

30. We think the time has come to make a start in this direction. Accordingly, interested persons are invited to make concrete and detailed suggestions as to what technical criteria might appropriately be prescribed. After consideration of the comments, the Commission may establish a committee to assist in the formulation of specific proposed criteria. Persons commenting on this aspect should indicate in their comments whether they would be interested in participating on such a committee. In any event, it is contemplated that a further notice will be issued proposing specific criteria prior to the adoption of any rules prescribing technical standards.

IV. Proposed Rules Relative to Importation of Television Signals

A. BACKGROUND CONSIDERATIONS

31. The Commission has previously considered the question of integrating CATV in an appropriate and fair manner in the national television system in two recent reports—the *First Report and Order in Dockets Nos. 14895 and 15233*, 38 FCC 683 (1965), and the *Second Report and Order in Dockets Nos. 14895, 15233 and 15971*, 2 FCC 2d

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725 (1966). We recognized the important contribution which CATV can make; for example, by bringing much needed television service to areas where reception of off-the-air signals is poor or nonexistent because of terrain or distance from a television market. (*First Report*, supra, at pp. 698–699.) We sought to promote this contribution by making microwave facilities available to the CATV systems. At the same time, in order to insure the establishment and healthy maintenance of the local television broadcast service—so vital to the public interest for the reasons set forth in paragraphs 44 and 45 (*First Report*, at p. 699)—we specified that the CATV system using microwave facilities must carry the local signal and must afford same-day nonduplication protection to the programing of the local stations. In this way, the local station would continue to have access to the television set of the CATV subscriber, and its audience for network programing would remain largely unfragmented—factors which we believed would contribute substantially to the station's continued healthy local service to all the people within its area. In the *Second Report* we extended these requirements to all CATV systems, whether or not they use microwave, and our authority to regulate the nonmicrowave system was sustained in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Finally, in the *Second Report*, we considered the economic impact and unfair competition issues raised by the entry of CATV, operating with distant signals, on television broadcast service in the major markets, particularly on the establishment and healthy maintenance of the new UHF stations coming on the air as a result of the all-channel television receiver law. Because the nonduplication requirement is wholly ineffective in affording protection to the independent (nonnetwork) programing of such new stations, we devised the so-called major market, distant signal policy, discussed in the next paragraph. We further stressed that we would revise our rules as we gained added insight and experience. The purpose of this part of the *Notice* is to set forth proposed rule revisions, based upon that experience. We shall discuss, first, revision of the major market policy, and then our proposed policies in the smaller television markets.

B. IMPORTATION OF SIGNALS IN MAJOR MARKETS

32. The Commission is thus proposing rulemaking to revise the procedure adopted in the *Second Report and Order in Dockets Nos. 14895, 15233 and 15971*, 2 FCC 2d 725 (1966), relative to the carriage of television broadcast signals by CATV systems in major markets. Under section 74.1107, no CATV system may carry a distant signal—i.e., a signal carried beyond the grade B contour of the station—within the grade A contour of any station in the 100 largest television markets except upon a showing in an evidentiary hearing that such operation will be consistent with the public interest and, particularly, the establishment and healthy maintenance of television broadcast service in the area. We are here proposing, principally, to substitute a definitive policy for the evidentiary hearing procedure and for this purpose to replace the grade A contour with a mileage zone.

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33. The major market hearing procedure was based on two main concerns: (1) That a CATV growth of substantial order in major markets might have a serious adverse impact on the development of UHF independent stations in these markets, thereby jeopardizing the achievement of an effective and equitable nationwide system of local television outlets—the goal of the all-channel receiver legislation; and (2) That, in view of the disparate position of broadcasters and CATV systems in acquiring programs in the TV program distribution market, these independent stations might face substantial competition of a patently unfair nature against which the same-day nonduplication requirement would be of virtually no assistance. (*Second Report*, 2 FCC 2d at 770–781.) Upon the basis of the record compiled in that proceeding, the Commission was unable to resolve the critical dispute as to whether CATV growth in major markets would in fact be substantial. (*Second Report*, 2 FCC 2d at 773.) It concluded that these questions should be explored and resolved in evidentiary hearing before CATV operations became entrenched, in view of the impracticability of effective action to roll back an established operation upon which the public has come to rely. (*Second Report*, 2 FCC 2d at 782.) The Commission further stated (2 FCC at 786): "As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as experience dictates."

34. In the 2½ years since the *Second Report* was issued, the Commission has gained more experience with the matter of potential CATV penetration in major markets and the probable effect on potential UHF development. For example, the then existing uncertainty as to whether CATV growth in major markets would be minimal or substantial has been removed by the San Diego hearing and other proceedings involving areas which receive three full-network services. (*Midwest Television, Inc.*, 13 FCC 2d 478.) The San Diego proceeding established that potential CATV penetration is likely to be substantial, on the order of half the homes in that market (*Midwest*, 13 FCC 2d at 490–491). We were also convinced that a penetration of this order could pose a real threat to UHF development and that the unfair competition would be significant (13 FCC 2d at 492–502). San Diego, as the 50th market, is not a fringe sample but rather fairly typical of the top 100 markets as a whole. Finally, the Commission in Midwest pointed out that its longstanding allocations policies do not contemplate that a major television market should become, to a significant extent, merely a satellite of another major market for television purposes, since that would thwart the local service concept of the Communications Act (see secs. 307(b), 303(h); see legislative history of sec. 303(s); *Second Report*, 2 FCC 2d at 770–771). As stated in the *Midwest* case (13 FCC at 501), if such a result were deemed in the public interest, the Commission would follow the direct approach of granting increased height and power to stations in the largest communities and authorizing them to operate translator and satellite facilities in other sizable communities.

35. With this experience as background, we have re-examined one of the fundamental policy questions in this area—the element of un-

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fair competition. This facet was discussed at length in the *Second Report*, 2 FCC 2d at 778–781. We pointed out that because CATV presently stands outside the competitive TV program distribution market (pars. 132–133, *Second Report*), an anomalous and completely unfair situation is presented. Namely, the UHF station has no protection against duplication by CATV systems bringing in distant signals of its film programing upon which it depends for an adequate economic base to serve as an outlet for local expression for all the people in its service area (par. 134).[15] And, even more important, both the CATV system and the broadcast station are large scale operations competing for audience—yet the one pays for its product and the other, without any payment, brings the same material into the community by simply importing the distant signals (par. 135, *Second Report*). Similar anomalies in the field of sports telecasts were pointed up (par. 136). We found that while "on its face, this competitive situation would appear to be a most unfair one," no final determination could be made until further exploration in the hearing process, since "it may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF broadcasting service." (2 FCC 2d at pp. 780–781.)

36. The experience we have obtained in the hearing process now affords us the answer: CATV operating with distant signals can achieve significant penetration figures in the major markets—most probably in the order of 50 percent. (See *Midwest*, supra.)[16] With such penetration, the unfair competition of CATV, described above, will be a significant factor in the development or healthy maintenance of television broadcast service. We stress here that we are not focusing on the issue of whether CATV operations with distant signals will kill or severely cripple UHF operations—but rather believe that it is sufficient to find that the unfair competitive effect is a significant one, in view of the very significant penetration figure, and therefore should be eliminated under the public interest standard of the Communications Act.

37. The latter point also deserves stress. We are not proceeding on some notion of unfair competition from the viewpoint of the Federal Trade Commission Act or the *Compco* or *Sears* cases (*Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234; *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225). Nor are we concerned here with unfair competition from the aspect of the copyright owner. Rather, our concern is the public interest in the broadcast field—"the larger and more effective use of radio" (sec. 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. 303(g)). See also *Black Hills Video Corp.* v. *United States*, 399 F. 2d 65, 71 (C.A. 8). That being the case, we must proceed to consider regulations to eliminate this aspect of unfair competition. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

[15] The same-day nonduplication requirement is not effective to avoid the element of unfair competition. *Second Report*, 2 FCC 2d at 768–769; *Memorandum Opinion and Order* denying reconsideration, 6 FCC 2d 309, 313, 315, 317. We declined to "explore any fundamentally different approach while the copyright question is being actively considered by the Congress and the courts and before the outcome is known." (6 FCC 2d at 317.)

[16] Indeed, even the CATV systems in Midwest estimated a 33-percent figure, again establishing CATV as a significant factor. Thus, no one seriously argues that CATV, operating with distant signals, will not achieve significant penetration in the major markets.

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Requirement for retransmission consent of the originating station

38. We believe that the most appropriate and simplest way to eliminate this element of unfair competition is by adoption of a rule permitting the importation of distant signals, but requiring the CATV system which proposes to operate with distant signals in a major market to obtain retransmission consent of the originating stations. See the proposed rules relative to this part set forth in appendix C hereto. Such a rule would parallel section 325(a) of the Communications Act, which is applicable to broadcast stations (but not to CATV systems: see *First Report*, 38 FCC 683, 704) and which has been effective in dealing with the similar problems raised by analogous auxiliary services such as translators, boosters or satellites. We therefore seek to explore in this rulemaking whether the Commission, by rule, should follow the general congressional guidance in section 325(a) by adopting a retransmission requirement for CATV systems in the above-noted situations, and thus eliminate the unfair competitive aspect through direct application of market forces now operative as to analogous services. The alternative of adopting detailed nonduplication requirements effective as to non-network programs appears to us to be less desirable than the above simpler device of permitting market forces to eliminate the unfair competition.[17] It may be that a retransmission regulation will not be fully effective or may have drawbacks not now foreseen, requiring further revision or rulemaking. The purpose of this proceeding is to obtain all such relevant information, so that we may be in a position to make an informed judgment as to what regulation would best serve the public interest.[18]

39. While we believe that we must proceed to take appropriate steps to end the unfair competition aspect, both for reasons discussed above and within (par. 41), we are also cognizant of other important developments which we should take into account. We refer specifically to important congressional developments in the copyright field that bear directly on this issue of unfair competition. Congress is much interested in enactment of a new copyright act, the House having passed H.R. 2512 in the 90th Congress and the Senate being actively engaged in consideration of such a measure. Following the Supreme Court's decision in *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390, there are substantial indications that in the 91st Congress there will be enactment of a copyright law providing for a fair

[17] With the adoption of such a requirement, there might be some need, upon appropriate occasions, of Commission review (cf. *Memorandum Opinion and Order in Docket No. 9808*, 17 F.R. 10309, 10310; Commission letter to station KLTV, Tyler, Tex., and station KSLA, Shreveport, La., FCC 64-942, Oct. 14, 1964).

[18] Our proposal, with one exception noted below, is limited to the major markets. In the smaller markets, where there may well be a need for supplementary services, our general policies have sought to promote auxiliary services, including CATV operation. Thus, besides our microwave policies, we have supported the concept in the then pending copyright bill (H.R. 2512, 90th Cong.) that CATV systems operating in inadequately served areas should be able to bring in signals on a reasonable compulsory licensing basis. See letter to Chairman Staggers on H.R. 2512, dated Mar. 31, 1967. In line with that policy, we do not propose the retransmission requirement on an across-the-board fashion for the smaller television markets. Rather, we shall rely there upon the new proposals discussed within (pars. 56–58) and upon the nonduplication requirement, which is effective as to the substantial network programing of the stations in these markets, which are uniformly affiliated with networks. Where the system would propose to bring in signals in addition to those permitted under the proposal set forth in par. 57, the retransmission requirement would be applicable. In short, we seek to facilitate CATV operation in the smaller markets in a fair and appropriate manner.

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and reasonable revision as to CATV. Such a revision may well reflect not just copyright but also communications and antitrust policies (see *Fortnightly* case, 392 U.S. at p. 401). Indeed, section 111 of H.R. 2512, dealing extensively with CATV copyright matters, was not passed by the House largely because it had not been considered by the committee charged with communications policy. (See 113 Congressional Record H3624–3626, 3636–3637, 3644–3647, 3857–3859; cf. *Fortnightly Corp.* v. *United Artists*, 392 U.S. at 401, footnote 33.) In short, any revision, dealing as it must with concepts such as adequately and inadequately serviced areas, originations, etc., might well be a meld of copyright, communications and antitrust policies. It would thus constitute, to a significant degree, the legislative guideline which the Commission has long sought and would welcome in an important new field such as CATV.[19] The Commission would, of course, cooperate fully in this most important congressional endeavor.

40. As stated, we must take the above consideration into account. For, our retransmission proposal, while stemming from our responsibilities under the Communications Act (see *United States* v. *Southwestern Cable Co.*, supra), necessarily also embodies considerations like copyright in its practical applications. (Cf. *Report on Rebroadcasting*, 17 F.R. 4711, 17 F.R. 10309.) Since Congress is considering the copyright matter, we should afford the opportunity for congressional resolution of the unfair competition aspect, particularly since, as discussed, such resolution would constitute the congressional guidance sought in this important area. We therefore propose to proceed with our rulemaking proceeding, to obtain comments and reply comments, and to be in a position to take definitive action. We shall, however, not take such action until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition, with indeed congressional guidance in this whole field.

41. In view of the foregoing, it is clear that our policy of holding evidentiary hearings in the top 100 markets should be revised. First, the hearings have served their purpose, by giving us added insight. In the light of that insight and the conclusion we now reach on the unfair competition aspect (par. 36, supra), continuation of the hearings on the economic impact issue would serve little useful purpose. The unfair competition aspect must be eliminated. When it is eliminated, a new type of CATV operation would appear likely to eventuate in these major markets. Indeed, this new type of CATV operation is largely the basis for other parts of this *Notice*. (See pts. III and V.) Whether or what further regulation of this new type may be necessary because of other public interest considerations, we cannot say, since we cannot now foretell precisely the nature of the new operation, nor, if it should eventuate, the congressional guidance embodied in any new copyright-communications legislation. Clearly, then, it makes little sense to continue these lengthy, complex evidentiary hearings on the economic impact issue—hearings which, we also

[19] See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971*, 1 FCC 2d 453, 464, 465–466; *Second Report*, 2 FCC 2d at 734, 787.

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note, have imposed a considerable burden upon the Commission and the participating parties.

42. In sum, the Supreme Court has sustained the Commission's jurisdiction over CATV systems and its authority to take regulatory action "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." (*United States* v. *Southwestern Cable Co.*, supra, at 178.) We conclude that it would not be consistent with such responsibilities to permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated.

43. Accordingly, the Commission proposes to close down the burdensome major market hearings except for those few involving issues other than impact upon the local broadcasting stations, where hearing on such issues might still be appropriate, and to proceed to elimination of the unfair competition aspect, either upon the basis of this rulemaking proceeding or upon congressional action on copyright-communications legislation. The Commission therefore proposes to adopt a policy, embodied in the attached proposed rules, which will clearly delineate the areas where carriage of distant signals is authorized only upon satisfaction of the requirement for retransmission consent of the originating station. The proposed major market rules would apply across the board and do away with the necessity for case-by-case consideration in evidentiary hearing or upon petition for waiver. Should the rules be adopted and then there be enactment of a new law, the Commission would, of course, reconsider its regulations in light of the new situation and the congressional guidance.

Top 100 markets

44. We are proposing to adhere to the 100 largest television markets as the basic dividing line. These are the markets where UHF independent stations are most likely to develop and the unfair competition problem would be most significant. It can be argued that as we go below the 50th market the likelihood of imminent UHF activity becomes smaller. But fourth stations have already developed in many of the top 50 (including San Diego, the 50th market) and this could have a snowballing effect on UHF development in the markets below 50.[20] It has been the Commission's experience that broadcasters generally seek to enter first the markets offering the largest audience potential and then turn to smaller markets as the more attractive locations become saturated. By the same token, as noted in the *Midwest* case, if UHF's chances for success in the smaller markets are more marginal, the "likelihood of serious adverse impact from any substantial CATV penetration is correspondingly greater" (*Midwest Television, Inc.*, 13 FCC 2d at 493). Moreover, the increasing availability of programing for independent stations in the top 50 markets may well stimulate new independents in the 50–100 markets. In addition, it is hoped that the promise of satellite technology as an economic means of providing service from one transmission point to

[20] We note that considerable interest has been expressed in the UHF facilities allocated to the top 100 markets. See app. B hereto.

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many reception points will soon be realized domestically and that lower interconnection charges will encourage the development of a fourth network, regional networks and additional nonnetwork program sources for stations. In short, for so long as the achievement of an adequate commercial television system—"available, so far as possible, to all people of the United States" (sec. 1 of the Communications Act)—is dependent significantly upon the development of UHF, it would appear that as a minimum we should strive to preserve a fair opportunity for achieving additional local services on the UHF channels allocated to the top 100 markets. (See *Second Report*, 2 FCC 2d at 770–771.)

45. There are further important considerations here. Thus, while as stated there is an argument concerning the likelihood of UHF independent stations as we go below the 50th market, we think it important to eliminate the unfair competition factor vis-a-vis all stations in as many markets as possible. Though competing considerations should be weighed in underserved areas and thus different policies developed there (see pars. 57 and 58), the top 100 markets generally do not fall in this category. (*Second Report*, 2 FCC 2d at 783.) Moreover, we are here concerned with what should be in our proposed *Notice*, keeping in mind that we wish to process during the pendency of the rulemaking proceeding (see par. 51, infra). This, in turn, clearly calls for adherence to the 100 largest television markets, since while we can always open a market to unrestricted CATV operation with distant signals (i.e., operation without retransmission authorization), it is difficult, and indeed could be impracticable, to halt or roll back such an operation, once entrenched. See *Second Report*, 2 FCC 2d at 782; *Memorandum and Opinion on Reconsideration*, 6 FCC 2d 309, 317.

46. Finally, we are also seeking to encourage a new kind of CATV operation in the largest markets—one which may well bring a new dimension of diversity to these markets. See part III of this *Notice*. That being so, there is also the fundamental policy question whether the public interest in the relatively large markets—i.e., the 100 largest—would be better served by CATV operating in the new fashion, as is proposed in part III of this *Notice*, and as we are seeking to promote in San Diego, the 50th market, or by CATV operations with distant signals, without the requirement of retransmission consent. We recognize that this is a complex issue, and request comments thereon. It is however, an additional policy reason for adhering to the 100 largest markets during this period while the matter is being resolved.

47. We have also determined that it would be more appropriate, in the interest of a clear and definitive rule, to list in the rule the relevant major television markets, on the basis of the 1967 rating of the American Research Bureau (ARB) based on net weekly circulation.[21] The ARB rating may vary somewhat from year to year, and this could be most disruptive in the few markets involved. We therefore propose the definitive and fixed list. We have also set forth in our proposal the

[21] While the 1968 ratings have now been issued, we think that it would cause less disruption to continue to use the ratings which have been in effect during most of the past year.

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name of each community in the market from which a 35-mile zone is to extend, where we believe it to be appropriate in view of the nature of the market.

Fixed mileage standard

48. We are also proposing to adopt a mileage standard, in place of the grade A contour, for measuring the area in which carriage of distant signals is permitted upon the retransmission consent condition. The predicted grade A contour varies from station to station and may go out as far as 60 miles from the station's transmitter. A fixed mileage standard, which would be adhered to in every case, would have the advantage of administrative ease and provide certainty to the affected industries. A zone measured by air miles from the main post office in the designated market community can be readily calculated without resort to contour maps in the Commission's files or the necessity for evidentiary hearing to resolve disputes. The zone proposed in the attached rules is the area extending 35 miles from the main post office in each of the market cities designated in the major market listing. This would protect the essential area for stations' development in the market against unfair competition, largely avoid the cumulative impact aspect, and preserve the basic integrity of the major markets from an allocations standpoint. In connection with this latter aspect, we stress that from a practical or allocations standpoint, it makes no sense to preserve the main city itself and let CATV operate with distant signals (without the retransmission consent being required) in adjacent or relatively nearby smaller communities. Rather, proper allocations procedure calls for this adoption of an appropriate zone around the main city or cities, with all TV homes within the appropriate zone treated alike. Finally, we note that the 35-mile zone accords generally with our waiver practices under the present section 74.1107(a).

"Footnote 69" situations

49. We are proposing further to codify in the rules the so-called "footnote 69" situation; i.e., where a central metropolitan area of one major market falls within the predicted contours of stations in another major market, so as to avoid the San Diego type of hearing and preserve the local character of such markets against the element of unfair competition. For this purpose it appears that the same 35-mile zone may be appropriate. The attached rules would prohibit a CATV system operating in a community located wholly within the 35-mile zone of a television station in a major market from carrying the signal of a television station in another major market unless the community of the system is also located wholly within the 35-mile zone of the station in the other market or unless the retransmission consent requirement is fulfilled. This would eliminate the unfair competition aspect as to the local market stations in the essential area where their off-the-air signals are of higher grade than those from the other market, while not affecting CATV carriage of signals from both markets in the area where such signals are of approximately equal grade or in the area which lies outside the 35-mile zones. And, here again, allocations policies would be furthered. (See discussion, par. 48,

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supra.) We recognize that arguments can be advanced for other mileage proposals—for example, for a 40-mile zone, with a 30-mile zone in the "footnote 69" situation, or for an across-the-board 30-mile zone. It is our tentative judgment that the 35-mile zone is most appropriate, and we have therefore used that standard in the proposed rules (and also as our interim guideline—see par. 51). We specifically invite comment on this aspect.

50. We also recognize that in drawing lines of this nature there will inevitably be some borderline cases which might more appropriately fall on the other side of the line. But the thrust of the proposed rules is to cover the crux of this matter, rather than to achieve a multiplicity of refinements tailored to the precise circumstances of all conceivable situations. The latter course would simply perpetuate the present burdensome hearing and waiver procedure with its unpredictable consequences. We think that the goals of certainty and administrative ease to be obtained from strict adherence to a definitive policy outweigh any advantages that might flow from flexible administration with its attendant drawbacks. Therefore, the proposed rules do not contemplate the grant of waivers. [22]

Interim procedures

51. We turn now to the procedure to be followed by the Commissions while this rulemaking is pending. Effective upon the issuance of this notice, the Commission will halt the hearing process in all top 100 market proceedings (including those with a "footnote 69" issue) wherever it stands, even at the Review Board or Commission level.[23] There is no point in requiring the parties and the Commission to expend the resources and effort necessary to continue such hearings if the definitive policy is to supplant that process. We will also stop processing petitions for waiver of the hearing requirement. However, parties to pending hearings, and those who have pending petitions for waiver, or who desire to file new petitions for waiver of the existing section 74.1107(a), may request authority to commence distant signal operations which would be permissible because they fall outside the zones in the attached proposed rules. The Commission will grant such requests only if they are entirely consistent with the proposed rules. We believe it appropriate to proceed this way, since, as stated, waiver policies under the existing rules have largely paralleled the proposed 35-mile zone. Action on all other requests for authority or petitions for waiver to carry signals coming within the hearing requirement of the existing rules will be held in abeyance pending the outcome of this proceeding. We would, however, consider the authorization, during this interim period, of some operations within the proposed 35-mile zone by systems which would operate in accordance with the retransmission consent requirement of the proposed rules. We believe that authorization to effect this waiver in some instances would give us valuable information concerning the actual operation

[22] We have in mind the past situation where waivers were sought in the ordinary course pursuant to sec. 74.1109. The provisions of sec. 1.3 of the Commission's general rules of practice and procedure are applicable, of course, to every rule of the Commission.

[23] We will, however, consider the appropriateness of resolving issues in hearings which do not involve the question of impact upon broadcasting stations.

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of systems under the proposed rules and thus would assist us in resolution of the rulemaking.

52. CATV systems now carrying grade B signals from a major market within the grade B contour of a station in another major market, or those proposing to do so, are not proscribed by the existing rules except where the filing of a timely section 74.1109 petition continues the operative effect of section 74.1105(c). Commission action on pending and future section 74.1109 petitions of this nature will be held in abeyance pending the outcome of this proceeding. However, a CATV system may request relief from the proscription of section 74.1105(c) in order to carry such signals in areas which would be permissible under the attached proposed rules. Such relief will be granted only to the extent that the request is entirely consistent with the proposed rules and with the public interest, as evidenced by the considerations in the particular case. [24]

53. We are proposing to "grandfather" the present service of CATV systems which would otherwise be prohibited or restricted by the proposed rules, in order to avoid substantial disruption to the CATV subscribers.[25] The proposed grandfathering date is the date of publication of this *Notice* in the Federal Register (Dec. 20, 1968). Thus, any rules adopted would be applicable upon their effective date to all CATV service commenced after December 20, 1968, including service not barred by section 74.1105(c). However, in the event that the rules finally adopted differ from the proposed rules, service authorized by the Commission to commence during the pendency of this proceeding will be grandfathered; also grandfathered is any service previously authorized by the Commission, whatever the commencement date of such service.

54. We believe that the proposed rules and the interim processing procedures outlined above are necessary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting and the proper dispatch of the Commission's business (sec. 4(j) of the act). At the same time, we are not unmindful of the promising potential of CATV and the cable technology as a means for increasing the number of local outlets for community self-expression, for augmenting the public's choice of programs and types of program service, and for providing a variety of other communications services. Parts III and V of this proceeding are directed toward the broader and more important questions of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of CATV for the public and what Commission actions or legislative recommendations would be appropriate to encourage such development. Those parts may well determine basic issues as to the long-range structure of the cable industry and its relationship to the broadcasting and communications common carrier industries. The proposals in this part are required by present circumstances and are interim in nature, in the sense that if relevant legislation is forthcoming,

[24] The procedures to be followed in filing requests pursuant to pars. 51–52 of this notice, and responsive pleadings thereto, are the same as those set forth in sec. 74.1109 (b), (c) and (d) of the existing rules.

[25] Such "grandfathering" does not, of course, include present service which is in violation of our existing rules.

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or if there are new significant industry changes or some revolutionary technological development, the Commission will of course reexamine this matter upon the basis of the new circumstances.

C. Distant signals in smaller television markets

55. We are not proposing any blanket prohibition against carriage of distant signals or blanket retransmission consent requirement in the television markets below the top 100, for the reasons already developed (see note 18, above), except as indicated in paragraph 57 below. However, we will continue to examine such markets on an ad hoc basis, upon petition filed pursuant to section 74.1109.[26] With the end of the hearing load in the major market proceedings, the Commission hopes to be able to devote more attention to the smaller markets and to take such action as may be appropriate (including any evidentiary hearings required to resolve disputed issues of fact) in those few instances where there is a substantial public interest showing, e.g., that a proposed new station would be independent or largely independent in operation or that the cumulative effect of existing and proposed CATV operations in the market would jeopardize the likelihood of obtaining or retaining a network affiliation or of maintaining audiences large enough to attract needed advertiser support. Most important, we are proposing to adopt rules regulating the carriage of distant signals in the smaller markets which may substantially alleviate potential problems in such markets and thus cut down greatly upon the need for any evidentiary hearings in this respect.

56. While recognizing the need for underserved areas to obtain additional services through CATV systems, the Commission is concerned lest CATV should undercut our basic allocations policies and structure by importing signals from unnecessarily distant centers or in such quantity as to unduly fractionalize the relatively small potential audience of stations in these smaller markets. Thus, a substantial question is presented as to whether it is consistent with fundamental allocations policies to permit CATV systems to engage in the practice of "leapfrogging;" e.g., to bring the signals of Los Angeles stations into Texas or the signals of New York City stations into Ohio instead of carrying the signals of stations of the same type that are located closer to the system and thus are much more apt to have regional or in-State programing more attuned to the needs and interests of the community. Further, such "leapfrogging" with its concentration on the signals of the large cities such as New York and Los Angeles, raises questions of diversification of media of mass communications. To deal with these questions, we put forth for comment the proposal that communities being inadequately served should receive additional service from the nearest full network, independent and educational stations in their region, or within the same State. Moreover, a serious question is raised when such additional services are supplemented by further network or independent signals from more distant centers where the CATV system is located within the 35-mile zone of local stations providing the only television service available to persons within their service areas

[26] The same policy will apply also to areas outside the specified zones in the top 100 markets.

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who are not served by CATV systems. There is the danger that a plethora of competing signals, brought in wholly without regard to the "fair competition" concept integral to the retransmission consent requirement, may cause a loss of deterioration of service to the substantial portion of the public dependent upon television broadcast stations—a loss which would outweigh any incremental value of the extra signals to the CATV subscribers for the reasons set forth in the *First and Second Reports*.[27] At least, in view of the burgeoning proposals to bring, for example, Los Angeles signals into the Mountain or Southwestern States, this is a matter warranting thorough exploration.

Within specified zones

57. The attached proposed rules would permit a CATV system operating within the 35-mile zone of a station in a smaller market to carry only such distant signals as may be necessary to furnish its subscribers (counting local signals) the signal of one full network station of each of the national television networks and one independent station,[28] provided that the supplementary distant signals were obtained from the closest source in the region or in the State of the system. The system could also carry the signal of any independent station that subsequently commences operation at a location closer to the system, and the signals of any in-State or nearby educational stations in the absence of objection by local or State educational interests. However, carriage of other distant signals would be prohibited, unless the CATV system has the retransmission consent of the originating stations with respect to such additional signals. See proposed section 74.1107(d) in appendix C. Based upon our experience, systems operating with the above number of signals in the smaller markets have been successful, and indeed operation with such numbers is very frequently encountered. In those few instances where a more varied operation may be appropriate, we stress again the origination aspect (see pt. III herein). The proposed limitation in this paragraph thus also complements the Commission's determination that originations serve the public interest.

Outside specified zones

58. CATV systems located outside the 35-mile zone of any station in a major or smaller market would be permitted to carry such distant signals as they chose so long as they refrained from leapfrogging; i.e., did not carry a more distant station before carrying a closer station of the same type (e.g., full network stations of the same network, independent or educational stations). Since some flexibility may be appropriate in the administration of the latter provision, the proposed rules contemplate the grant of waivers for good cause shown; e.g., that the more distant station is located in the same

[27] In this connection, we also note that while the nonduplication requirement is effective as to network programing, roughly 45 percent of a network affiliate's time is devoted to nonnetwork material; and it is this segment which is particularly vulnerable to continued fractionalization by a plethora of distant signals.

[28] The question of whether a station, which is not affiliated with a national network, qualifies as an independent station within the meaning of this section would be treated on petition pursuant to sec. 74.1109.

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State or that the system's subscribers have a greater community of interest with the region of the more distant station. See proposed section 74.1107(e)(2). Here again the systems could, and under the proposal in part III herein, would originate. Indeed, we would expect such originations to be facilitated to some extent by the fact that nearby systems within the 35-mile zone might well be engaged in originations.

Grandfathering and interim procedures on microwave applications

59. As in the case of the major market provisions, the Commission is proposing to grandfather existing CATV service in the smaller markets and outside the specified zones, in view of the general impracticability of rolling back established service. The proposed grandfathering date is the same; i.e., the date of publication of this *Notice* in the Federal Register (Dec. 20, 1968). Since any rules adopted will be applicable upon their effective date to all CATV service commenced after December 20, 1968, CATV systems commencing operations inconsistent with the proposed rules during the pendency of this proceeding will do so at their own risk. Many of the distant signals covered by the proposed rules would involve microwave authorizations. In view of the substantial public interest questions posed by microwave applications to relay signals which would be inconsistent with the proposed rules and in order to avoid unnecessary disruption to the public, Commission action on inconsistent applications for new microwave service to a CATV system will be held in abeyance during the pendency of this proceeding. Consistent microwave applications will be processed and considered by the Commission in normal course, and any service provided pursuant to such a grant will be grandfathered. Where the microwave application is for service to a system located outside of the 35-mile zone of any station, the Commission will consider applications containing requests for special relief along the lines contemplated by section 74.1107(e)(2) of the proposed rules in appendix C, in order to maintain its flexibility during the interim period to take action consistent with the public interest in the particular circumstances.

V. General Areas of Inquiry

60. The possibility of a multipurpose local CATV communications system, and of national interconnection of such systems (see pt. II above), raises a number of questions pertinent to the Commission's responsibilities and national communications policy, which not only must be considered in the context of the immediate issues before us relating to CATV systems, but affect other areas as well.[29] It is difficult to be specific in an area of rapidly changing technology and before concrete proposals have been advanced, the identity of those willing and able to provide various services has been ascertained, the services have come into being, and public demands and preferences are known.

[29] Some of the potential services that have been suggested for cable systems (see pt. II above) obviously could have far-reaching social and economic implications and broad impact on industries and institutions not subject to the Commission's jurisdiction. We intend to explore these issues in the context of the discharge of Commission's responsibilities.

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Nevertheless, at least the following general questions occur to us initially:

(1) What is the appropriate relationship between CATV, communications common carriers, and other entities (e.g., the broadcasters, computer industry, etc.) which now provide, or may in the future seek to provide, communications services in the locality?

(2) What is likely to be the nature of the services that could be offered to the home or business under present and anticipated technology, and how would home and business requirements for communications facilities differ in light of services that might be economically practicable only for business use?

(3) Would the public interest be best served for the immediate future by:

(*a*) Permitting or encouraging the entry of all would-be newcomers, services, technologies, and facilities in an atmosphere of free competition, letting the market place determine the survival of the fittest, subject to such minimum regulation as may presently be required in the execution of the Commission's statutory responsibilities and to such future regulation as may become necessary or desirable in the public interest or as a result of legislation; or

(*b*) Permitting tests of different systems or services by different entities in various cities to afford some basis in experience for decisions as to the best ultimate structure before any particular system or service becomes established on a widespread basis; or

(*c*) Undertaking to devise a master plan now, before new facilities and services are inaugurated, to guide their development?

(4) Is it necessary or desirable that there should ultimately be a single cable (or bundle of cables) providing multiple means of communication to and from the home and/or business and, if so, should the complete system be owned by one entity or should there be diversity of ownership or control of some aspects of such a multipurpose communications system (e.g., joint ownership or indefeasible right of use)? What considerations should govern access to such system by communications common carriers and others offering communications services to the public? What should be the nature of the service offering by the entity or entities which would provide the cable (or bundle of cables) to the home?

(5) Is it necessary or desirable that there be multiple facilities providing means of communication to and from the home or business—e.g., some combination of radio, cable and wire—and, if so, what kinds of services should in general be provided by what kinds of facilities?

(*a*) Is it technically and economically feasible for CATV to provide some two-way services, particularly two-way video, and switched services to and from the home and/or business and, if so, what would be the role of such services vis-a-vis other services such as videotelephone service?

(*b*) Assuming that some services could be provided by the facilities of more than one entity (by communications common carriers such as the telephone and telegraph companies, by CATV or some other enterprise), should duplication of facilities and competition in the provision of services be permitted, at least initially, or should there be some allocation of services among different entities?

(*c*) Assuming multiple facilities owned by different entities, would it be necessary or desirable to have a common junction at the premises of the consumer to facilitate interconnection of facilities and the provision of some services one way by one facility and the other way by another facility?

(*d*) Assuming multiple facilities owned or controlled by different entities, would it be necessary or desirable that the entire complex (or an essential portion thereof) be engineered according to uniform standards or by one entity to further technical compatibility, efficiency and economy?

(6) What facilities would be necessary or desirable for transmission through the streets, as opposed to from the street to consumer's premises,

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and what are the comparative advantages or disadvantages of radio, cable, or some other mode?

(a) Should there be a variety of intracity distribution systems or only one and, if the latter, of what nature?

(b) Assuming a single intracity distribution system and a single cable (or bundle of cables) providing access to the premises of the consumer, should the complete system be owned by one entity or should there be diversity of ownership and control of some aspects? In either event, should there be limitations on common ownership or control of facilities in different cities?

(c) Apart from the question of ownership and control of facilities, should all entities desiring to provide a communications service to the public have nondiscriminatory and equitable access to the local distribution facilities for the purpose of so doing and, if so, on what basis?

(7) How should the local communication system or systems tie into intercity terrestrial and satellite facilities?

(8) What technical standards would be necessary or desirable to achieve national and local compatibility and good quality service to the public?

(9) How could the same communications services available to homes in the city be provided to homes in rural or other areas not now economically reached by cable?

(a) To what extent could this problem be alleviated by the use of radio links such as those involved in the experimentation of Teleprompter Corp. and Chromalloy American Corp. (see footnote 6 above).

(b) Would it be necessary or desirable for the Federal Government to subsidize construction of communications facilities in rural areas in a program akin to rural electrification?

(10) What should be the division of regulatory functions between Federal and State or local authorities with respect to the local communications system or systems; e.g., construction of facilities, terms and conditions of access by those offering communications services, services and charges to the public, licensing, etc.?

(a) Which aspects of the local system or systems would require uniformity and centralized regulation or would be important to the effectuation of national communications policies, which aspects would be primarily of local concern and appropriately subject to State or local regulation, and which aspects might better be left unregulated?

(b) What amendments to the Communications Act of 1934 might be necessary or desirable to effectuate the public interest and national communications policies in this area?

61. The foregoing merely touches on some of the questions which occur to us initially and is by no means an all-inclusive listing. Among other things, the Commission is also concerned about the effect of potential new specialized communications developments on present communications technologies and services and, particularly, the social, political, and economic considerations raised by such developments. We recognize that these questions range over a broad field. Moreover, it is apparent that the field is one of many variables, difficult to assess at this time. These questions have implications which may affect the resolution of our specific rulemaking proposals and should be kept in mind by persons commenting on parts III and IV herein. As stated at the outset, we believe that a continuing inquiry is needed, with the ability to take action at different phases as the problem becomes clarified and the need for action is shown. Accordingly, to inaugurate the discussion, interested persons are invited to comment on the questions indicated above and to suggest other problems and possible courses of action in this complex field.

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VI. Miscellaneous

62. In view of the matters encompassed in this proceeding, the Commission is concurrently issuing an order terminating the proceeding in docket No. 15971. Matters at issue in docket No. 15971, which have not been resolved or which have not been specifically mentioned in this *Notice*, can be raised in this proceeding. (See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971* (30 F.R. 6078), par. 63, concerning the effect of CATV distribution of aural signals on local standard broadcast or FM radio stations.)

63. Since the proposed rules discussed in part IV above, and set forth in appendix C hereto, are intended to embody a clear-cut and definitive policy, particularly in the major markets, interested persons are requested to point out in their comments any respects in which the proposed provisions appear ambiguous or open to factual dispute.

64. It should be noted that the Commission is proposing in appendix C to make an editorial change in section 74.1103(d) to make explicit a requirement embodied in the present rules. In the *Second Report* the Commission stated that the carriage provisions contained an implicit requirement that CATV systems "refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules" except as required by the program exclusivity provisions (2 FCC 2d at 753, 756). The Commission further stated that it would so rule upon complaint (2 FCC 2d at 756). While no explicit statement in the rules was then deemed necessary, we now think that an express provision may be helpful in avoiding any possible misunderstanding as to the existing obligation of the CATV system.

Authority for the proposed rulemaking and inquiry instituted herein is contained in sections 2, 3, 4 (i), (j), and (k), 301, 303, 307, 308, 309, and 403 of the Communications Act; cf. also sections 315, 317, and 325(a) of the Communications Act.

65. In view of the importance and complexity of the issues in this proceeding, the Commission intends to afford oral argument at an early date to assist in crystalizing the issues prior to the submission of written comments, and may schedule further oral argument after consideration of such comments. Oral argument on all matters discussed in parts III and IV herein will be scheduled to be held during the latter part of January 1969; oral presentations may be made by interested persons (such as industry spokesmen) or their attorneys. All interested persons are invited to file written comments on the rulemaking proposals set forth in parts III and IV herein and in appendix C on or before March 3, 1969, and reply comments on or before April 3, 1969. In view of the importance of a prompt resolution of various aspects of the rulemaking proposals in part III, the Commission expects to adhere to the filing times for comments on part III, absent a compelling showing of unusual circumstances. Comments on the inquiry in part V herein may be filed on or before June 16, 1969, and reply comments on or before August 15, 1969. In reaching its decision in this matter, the Commission may also take into account

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any other relevant information before it, in addition to the comments invited by this *Notice*. The Commission, after consideration of the comments, will also determine whether further oral argument should be scheduled.

66. In accordance with the provisions of section 1.419 of the Commission's rules and regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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APPENDIX A

INSTRUCTIONS
(FCC Form 325)

1. The certificate is to be signed by the individual owning the system, if individually owned, by a partner, if a partnership, or by an officer of the corporation, if the report is prepared for a corporation.

2. List in Block 03 the community currently being served by this CATV system, the total population in the community, and the state and county where the community is located. If more than one community is being served, give data for each community. Record also the total number of subscribers in each community served by the system. In stating the number of subscribers, insofar as apartment house installations are concemed, count each apartment unit receiving service (estimate where the exact total is unknown). In all other instances (hotels, motels, etc.), count as one installation or subscriber. If more space is needed, continue on a separate sheet.

List in Block 04 the total population in the communities and the total number of subscribers.

3. Attached is the most recent listing of the top 100 television markets as ranked by American Research Bureau. The markets are listed alphabetically. If you have a question as to whether your system is located within the predicted Grade A contour of a television station in the largest 100 television markets, please write to the Commission. Such requests for information will be afforded expedited action.

4. If the reporting individual, partnership or corporation is a broadcast permittee or licensee and has filed the ownership report called for by the Commission's rules, then the information requested in Blocks 09, 10, 11, and 14 need not be filed. Instead, simply indicate that such information is on file with the Commission, specifying date and file number, if any.

If the reporting system is a corporation, supply the information requested of corporations in Block 08 and the succeeding blocks. The system is requested to include the information to be furnished by the other corporations named in Blocks 08e and 08f, or to indicate that such corporations have been requested to supply directly the information to the Commission.

The reporting system and each corporation listed in Blocks 08e and 08f are requested to supply for its officers or directors, whether they own stock or not, and for stockholders having an ownership interest of 5% or more the information called for in Blocks 09, 10, 11, 12, 13, and 14. If the reporting corporation does not have the information concerning the interest of stockholders owning a 5% interest or more of the appropriate corporations and the close relatives of such stockholders, it is requested that the reporting corporation furnish each such stockholder with a separate set of pages 4 through 7 of this form (with the information requested in Block 09 filled in) and request the stockholder to fill in the information requested in Blocks 10 thru 14 and file the material with the Commission. If the corporation does not have the social security or IRS information requested in Block 09, the stockholder should be requested also to fill in that part of the Block 09.

Additional sets of pages 4 through 7 of this form may be obtained from the Commission upon request. When the information is submitted separately by a stockholder or a parent corporation, the information contained in Blocks 10, 11, 12, 13 and 14 shall be certified by signing and dating page 7.

Where stock is held temporarily by a stockholder in a street name, this fact should be noted, but no further information concerning such stockholder need be furnished.

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FCC Form 325
August 1966

Form Approved
Budget Bureau No. 52-R197

SUBMIT ONE ORIGINAL COPY TO:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

CATV INFORMATION REPORT

I certify that I am _____ of
(Position with CATV system)

_____;
(Exact legal title or name of the CATV system as shown in item 01.)

that I have examined this report and read the instructions; that to the best of my knowledge, information, and belief, all statements of fact contained in the report are true and the report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter set forth herein. (See Instruction No. 1).

_____ _____ 1966
(Signature of person certifying report)

Willful false statements on this report are punishable by fine or imprisonment. U. S. Code, Title 18, Section 1001.

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(Refer to instructions on last page of this form)

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Name and post office address of the CATV system (fill out a separate report for each CATV system)

	Name	Street address	City	State	Zip code
01					

Name and address of person to receive communications concerning this system if other than above

	Name	Street address	City	State	Zip code
02					

Service Data (Refer to instruction Number 2)

	Community served	Population (1960 Census)	State	County	Total No. of Subscribers	Date Service Began	Total Channel Capacity
	a.						
	b.						
	c.						
03	d.						
04	a. Total population ▶			b. No. of subscribers ▶			

Provide the following information concerning television stations carried on your CATV system

	Station call letters	City	State	Channel No.		Reception of signal (check)	
				Broadcast	Cable	Microwave	Off-Air
	a.						
	b.						
	c.						
05	d.						
	e.						
	f.						
	g.						
	h.						
	i.						
	j.						
	k.						

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Additional services. Enter under column "Now" the number of channels currently used to transmit the respective service. If you have made a public announcement of plans to provide in the future additional services, enter under the column "Announced" the number of channels you intend to use to transmit such service. Also enter the total number of hours per week [to the nearest hour] devoted and announced to be devoted to each such service. "Program Origination: Local (live) events" (block 06-e) includes any local program which uses live talent exclusively, including any local program recorded by the system for later transmission by the system. Programs furnished to the system by others are not local live programs.

	TYPE	NOW		ANNOUNCED	
		No. of Channels	Hours/week	No. of Channels	Hours/week
06	a. Time and weather				
	b. FM				
	c. News Ticker				
	d. Program Origination: Film				
	e. Program Origination: Local (live) events				
	f. Other (Specify):				

07 Top 100 Markets Information: (See Instruction No. 3)

7a. Is the system located in a community or communities within the predicted Grade A contour of a station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation of the largest station in the market) ..... ? Yes ☐ No ☐

7b. If you have answered "Yes" to 7a, state the total number of subscribers to the system on February 15, 1966 ..... : _____ (Total No. of subscribers)

7c. If you have answered "Yes" to 7a, you are requested to retain in your files the information which will enable you to prepare a map showing the location, by street, of all cable lines which were being used to serve subscribers on February 15, 1966.

THE REMAINING PAGES OF THIS FORM NEED NOT BE SUBMITTED, if the total number of subscribers to the CATV System as shown in Item 7b above is less than 500 and the population of the Community served is less than 5,000.

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When stockholders named in Block 09 and corporations named in Blocks 08e and 08f submit separate sets of pages 4 through 7 of this report (see instruction 4), repeat here the name of the CATV System as it appears in Block 01: .....

Organization Information

(check appropriate box to indicate type of this CATV organization)

a. ☐ Individual
b. ☐ Partnership
c. ☐ Corporation
d. ☐ Other

Number of persons having ownership interest in this CATV System

If less than 50 give number _____ (number)

If more than 50 check box ☐ (x)

08

e. Is there any corporation owning 50% or more of the stock of this CATV? ..... ▶ Yes ☐ No ☐

If "Yes", give name of corporation: .....

f. Is the corporation named in 08e in turn owned 50% or more by another corporation? ..... ▶ Yes ☐ No ☐

If "Yes", give the name of each such other corporation, to and including the final parent corporation owning 50% or more: .....

▶ A separate set of pages 4 thru 7 of this form must be submitted for each corporation named in 08e and 08f above (see instruction 4)

Name of organization reporting below: .....

For partnerships, list the name, social security or Internal Revenue No., address and percent of interest in the partnership of each partner. For corporations, list all officers and directors (whether they own stock or not), and stockholders who own 5 percent or more interest in the corporation. For each entry, if that person is a director, place a check mark in the space for that line in the column headed "Dir." If an officer, enter the title or principal title, if that person has more than one. If an ownership interest exists, record this to the nearest whole percent based on the total number of shares of voting stock outstanding, exclusive of treasury stock (see instruction 4)

09

Name. Last	First	Social Security or Internal Revenue No.	City	State	Dir.	Officer Title	Percent Interest

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Is there any close family relationship (i.e., husband, wife, father, mother, brother, sister, son or daughter) between any of the officers, directors or stockholders listed in block 09)?

➡ Yes ☐ No ☐

If "Yes", state below the names of the persons, the relationship, and the name of the related person.

	Name		Social Security or I R S No.	Relationship	Name of related person	
	Last	First			Last	First
10						

Is any of the corporate stock listed in block 09 held for any other person who is the beneficial owner of stock of this corporation?

➡ Yes ☐ No ☐

If "Yes", state below the name of the beneficial owner and the name of the fiduciary.

	Name		Social Security or I R S No.	Name of officer, director or stockholder having a fiduciary relationship.	
	Last	First		Last	First
11					

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Does the reporting individual, the partnership, the individual partners, the corporation, any corporate officer, director, or stockholder listed in block 09, or any close family member (Block 10), or the persons for whom stock is beneficially owned (Block 11) have an interest of 10% or more in any of the following:

a. Any standard, FM, or television broadcast station (BCS) ..... : Yes ☐ No ☐

b. Any communication common carrier serving primarily CATV systems (CC) ..... : Yes ☐ No ☐

c. Any other CATV system (CATV) ..... : Yes ☐ No ☐

d. Any manufacturer of primarily CATV communications equipment (MCE) ..... : Yes ☐ No ☐

If any of the answers above is "Yes", fill in below the appropriate information (for "Type" use abbreviations in above parenthesis). If a relative's interest, record relationship on first line and name of person to whom related on second line. If interest is a fiduciary one, e.g., trustee, etc., check column F.

	Name of Individual or entity having the interest Last First	(If an individual) Social Security or IRS No.	Name of Communication Entity or Station Call Sign	Type: BCS, CC, CATV, MCE	Int. %	Relation	F.
12							

If additional space is needed continue on a separate sheet.

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	CATV INFORMATION REPORT (Refer to instructions on last page of this form)	FCC Form 325 7 of 7

13 Has any person named in blocks 09 or 11 been found guilty of any felony in any federal or state court within the past 10 years? ➡ Yes ☐ No ☐

If the answer is "Yes," submit as Exhibit No. _____ a statement disclosing the person and matters involved and identifying the court and proceeding (by date and file numbers).

14 If any of the persons listed in block 09 or 11 are aliens, submit as Exhibit No. _____ a list of their names and respective addresses.

If the information requested in blocks 10, 11, 12, 13, and 14 is submitted directly by a stockholder, as provided by Instruction No. 4, such stockholder should sign and date this page in the space indicated below.

I certify that the information contained in blocks 10, 11, 12, 13, and 14 is true and correct to the best of my knowledge and information.

_____ (Name of stockholder if submitted for stockholder)

_____ (Signature of stockholder if submitted by stockholder)

_____ (Date)

_____ (Name of parent corporation supplying information directly)

_____ (Signature of person signing for parent corporation supplying information directly)

_____ (Title)

_____ (Date)

Willful false statements on this report are punishable by fine or imprisonment. U. S. Code, Title 18, Section 1001.

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Attachment to FCC Form 325
(see instruction 3)

(DO NOT RETURN THIS LISTING TO THE COMMISSION)

ALPHABETICAL RANKINGS OF TOP 100 TV MARKETS - 1965 ARB

Market	Rank	Market Area Commercial TV Stations
Albany-Schenectady-Troy, N.Y.	37	WAST, WRGB, WTEN
Albuquerque, N.M.	100	KGGM-TV, KOAT-TV, KOB-TV
Altoona, Pa. (see Johnstown-Altoona)		
Asheville, N.C. (see Greenville-Spartanburg-Asheville)		
Atlanta, Ga.	19	WAGA-TV, WAII-TV, WSB-TV
Augusta, Ga.	96	WJBF, WRDW-TV
Baltimore, Md.	11	WBAL-TV, WJZ-TV, WMAR-TV
Baton Rouge, La.	85	WAFB-TV, WBRZ
Bay City, Mich. (see Saginaw-Bay City-Flint)		
Binghamton, N.Y.	82	WBJA-TV, WINR-TV, WNBF-TV
Birmingham, Ala.	39	WIMG, WAPI-TV, WBRC-TV
Boston, Mass.	5	WBZ-TV, WHDH-TV, WHS-TV, WNAC-TV
Buffalo, N.Y.	22	WBEN-TV, WGR-TV, WKBW-TV
Cape Girardeau, Mo.-Paducah, Ky.-Harrisburg, Ill.	87	KFVS-TV, WPSD-TV, WSIL-TV
Cedar Rapids-Waterloo, Iowa	74	KCRG-TV, KWWL-TV, WMT-TV
Champaign-Decatur-Springfield, Ill.	73	WCIA, WICS, WAND(formerly WTVP), WCHU
Charleston-Huntington, W. Va.	45	WCHS-TV, WHTN-TV, WSAZ-TV
Charlotte, N.C.	29	WBTV, WCCB-TV, WSOC-TV
Chattanooga, Tenn.	92	WDEF-TV, WRCB-TV, WTVC
Chicago, Ill.	3	WBBM-TV, WBKB, WCIU, WFLD, WGN-TV, WMAQ-TV
Cincinnati, O.	16	WCPO-TV, WKRC-TV, WLWT, WKYC
Cleveland, O.	8	WEWS, WJW-TV, WKYC-TV
Columbia, S.C.	83	WIS-TV, WNOK-TV, WOLO-TV
Columbus, Ga.	84	WRBL-TV, WTVM
Columbus, O.	30	WBNS-TV, WLWC, WTVN-TV
Dallas-Ft. Worth, Tex.	15	KRLD-TV, KTVT, WBAP-TV, WFAA-TV
Davenport, Iowa (see Quad City)		
Dayton, O.	28	WHIO-TV, WKEF, WLWD
Daytona Beach, Fla. (see Orlando-Daytona Beach)		
Decatur, Ill. (see Champaign-Decatur-Springfield)		
Denver, Colo.	40	KBTV, KWGN-TV(formerly KCTO) KLZ-TV, KOA-TV
Des Moines, Iowa	76	KRNT-TV, WHO-TV, WOI-TV
Detroit, Mich.	6	CKLW-TV, WJBK-TV, WKBD, WWJ-TV, WXYZ-TV
Durham, N.C. (see Raleigh-Durham)		
Elkhart, Ind. (see South Bend-Elkhart)		
Evansville, Ind.	88	WEHT, WFIE-TV, WTVW
Flint, Mich. (see Saginaw-Bay City-Flint)		
Fort Wayne, Ind.	99	WANE-TV, WKJG-TV, WPTA
Fort Worth, Tex. (see Dallas-Fort Worth)		
Fresno, Cal.	91	KAIL, KFRE-TV, KJEO, KMJ-TV
Grand Rapids-Kalamazoo, Mich.	38	WKZO-TV, WOOD-TV, WZZM-TV
Green Bay, Wisc.	64	WBAY-TV, WFRV-TV, WLUK-TV
Greensboro-Winston Salem-High Point, N.C.	49	WFMY-TV, WGHP-TV, WSJS-TV
Greenville-Spartanburg, S.C.-Asheville, N.C.	44	WFBC-TV, WISE-TV, WLOS-TV, WSPA-TV
Greenville-Washington-New Bern, N.C.	89	WITN-TV, WNBE-TV, WNCT-TV
Hampton, Va. (see Norfolk-Portsmouth-Newport News-Hampton)		
Harrisburg-Lancaster-Lebanon-York, Pa.	33	WGAL-TV, WHP-TV, WLYH-TV, WSBA-TV, WTPA
Harrisburg, Ill. (see Cape Girardeau-Paducah-Harrisburg)		
Hartford-New Haven, Conn.	13	WHCT, WTIC-TV, WNHC-TV
Hastings, Neb. (see Lincoln-Hastings-Kearney)		
High Point, N.C. (see Greensboro-Winston Salem-High Point)		
Holyoke, Mass. (see Springfield-Holyoke)		
Houston, Tex.	25	KHOU-TV, KPRC-TV, KTRK-TV
Huntington, W. Va. (see Charleston-Huntington)		
Indianapolis, Ind.	18	WFBM-TV, WISH-TV, WLWI, WTTV
Jackson, Miss.	79	WJTV, WLBT
Jacksonville, Fla.	72	WFGA-TV, WJXT
Johnstown-Altoona, Pa.	41	WARD-TV, WFBG-TV, WJAC-TV
Kalamazoo, Mich. (see Grand Rapids-Kalamazoo)		
Kansas City, Mo.	24	KCMO-TV, KMBC-TV, WDAF-TV
Kearney, Neb. (see Lincoln-Hastings-Kearney)		
Knoxville, Tenn.	80	WATE-TV, WBIR-TV, WTVK
Lancaster, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Lansing, Mich.	47	WILX-TV, WJIM-TV
Lebanon, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Lincoln-Hastings-Kearney, Neb.	93	KHAS-TV, KHOL-TV, KOLN-TV
Little Rock, Ark.	71	KARK-TV, KATV, KTHV
Los Angeles, Cal.	2	KABC-TV, KCOP, KHJ-TV, KMEX-TV, KNBC, KNXT KPOL-TV, KTLA, KTTV

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Market	Rank	Market Area Commercial TV Stations
Louisville, Ky.	46	WAVE-TV, WHAS-TV, WLKY-TV
Madison, Wis.	81	WISC-TV, WKOW-TV, WMTV
Manchester, N.H.	53	WMUR-TV
Memphis, Tenn.	34	WHBQ-TV, WMCT, WREC-TV
Miami, Fla.	20	WCKT, WLBW-TV, WTVJ
Milwaukee, Wis.	23	WISN-TV, WITI-TV, WTMJ-TV, WUHF
Minneapolis-St. Paul, Minn.	17	KMSP-TV, KSTP-TV, WCCO-TV, WTCN-TV
Mobile, Ala.-Pensacola, Fla.	75	WALA-TV, WEAR-TV, WKRG-TV
Moline, Ill. (see Quad City)		
Monterey, Cal. (see Salinas-Monterey-Santa Cruz)		
Nashville, Tenn.	42	WLAC-TV, WSIX-TV, WSM-TV
New Bern, N.C. (see Greenville-Washington-New Bern)		
New Haven, Conn. (see Hartford-New Haven)		
New Orleans, La.	49	WDSU-TV, WVUE, WWL-TV
Newport News, Va. (see Norfolk-Portsmouth-Newport News-Hampton)		
New York, N.Y.	1	WABC-TV, WCBS-TV, WNBC-TV, WNEW-TV, WNJU-TV, WOR-TV, WPIX, WNYC-TV
Norfolk-Portsmouth-Newport News-Hampton, Va.	55	WAVY-TV, WTAR-TV, WVEC-TV, WYAH-TV
Ogden, Utah (see Salt Lake City-Ogden-Provo)		
Oklahoma City, Okla.	51	KOCO-TV, KWTV, WKY-TV
Omaha, Neb.	60	KETV, KMTV, WOW-TV
Orlando-Daytona Beach, Fla.	67	WDBO-TV, WESH-TV, WFTV
Paducah, Ky. (see Cape Girardeau-Paducah-Harrisburg)		
Pensacola, Fla. (see Mobile-Pensacola)		
Peoria, Ill.	98	WEEK-TV, WIRL-TV, WMBD-TV
Philadelphia, Pa.	4	KYW-TV, WCAU-TV, WFIL-TV, WIBF-TV, WKBS, WPHL-TV
Phoenix, Ariz.	62	KOOL-TV, KPHO-TV, KTAR-TV, KTVK
Pittsburgh, Pa.	9	KDKA-TV, WIIC-TV, WTAE
Poland Spring, Me. (see Portland-Poland Spring)		
Portland, Ore.	36	KATU, KGW-TV, KOIN-TV, KPTV
Portland-Poland Spring, Me.	59	WCSH-TV, WGAN-TV, WMTW-TV
Portsmouth, Va. (see Norfolk-Portsmouth-Newport News-Hampton)		
Providence, R.I.	14	WJAR-TV, WPRO-TV, WTEV
Provo, Utah (see Salt Lake City-Ogden-Provo)		
Quad City (Davenport, Iowa-Rock Island-Moline, Ill.)	66	WHBF-TV, WOC-TV, WQAD-TV
Raleigh-Durham, N.C.	50	WRAL-TV, WTVD
Richmond, Va.	65	WRVA-TV, WTVR, WXEX-TV
Roanoke, Va.	61	WDBJ-TV, WLVA-TV, WSLS-TV
Rochester, N.Y.	68	WHEC-TV, WOKR, WROC-TV
Rockford, Ill.	94	WCEE-TV, WREX-TV, WTVO
Rock Island, Ill. (see Quad City)		
Sacramento-Stockton, Cal.	27	KCRA-TV, KOVR, KXTV
Saginaw-Bay City-Flint, Mich.	46	WJRT-TV, WKNX-TV, WNEM-TV
St. Louis, Mo.	12	KMOX-TV, KPLR-TV, KSD-TV, KTVI
St. Paul, Minn. (see Minneapolis-St. Paul)		
St. Petersburg, Fla. (see Tampa-St. Petersburg)		
Salinas-Monterey-Santa Cruz, Cal.	52	KNTV (San Jose), KSBW-TV
Salt Lake City-Ogden-Provo, Utah	63	KCPX-TV, KSL-TV, KUTV
San Antonio, Tex.	57	KENS-TV, KONO-TV, KWEX-TV, WOAI-TV
San Diego, Cal.	54	KFMB, KOGO-TV, KAAR, XETV, XEWT-TV
San Francisco, Cal.	7	KGO-TV, KPIX, KRON-TV, KTVU
Santa Cruz, Cal. (see Salinas-Monterey-Santa Cruz)		
Schenectady, N.Y. (see Albany-Schenectady-Troy)		
Scranton, Pa. (see Wilkes-Barre-Scranton)		
Seattle-Tacoma, Wash.	21	KING-TV, KIRO-TV, KOMO-TV, KTNT-TV, KTVW
Shreveport, La.	69	KSLA-TV, KTAL-TV, KTBS-TV
Sioux Falls, S.D.	90	KELO-TV, KSOO-TV
South Bend-Elkhart, Ind.	97	WNDU-TV, WSBT-TV, WSJV
Spartanburg, S.C. (see Greenville-Spartanburg-Asheville)		
Spokane, Wash.	77	KHQ-TV, KREM-TV, KXLY-TV
Springfield, Ill. (see Champaign-Decatur-Springfield)		
Springfield-Holyoke, Mass.	78	WHYN-TV, WWLP
Steubenville, O. (see Wheeling-Steubenville)		
Stockton, Cal. (see Sacramento-Stockton)		
Syracuse, N.Y.	35	WHEN-TV, WNYS-TV, WSYR-TV
Tacoma, Wash. (see Seattle-Tacoma)		
Tampa-St. Petersburg, Fla.	32	WFLA-TV, WLCY-TV, WSUN-TV, WTVT
Toledo, O.	26	WSPD-TV, WTOL-TV
Troy, N.Y. (see Albany-Schenectady-Troy)		
Tulsa, Okla.	58	KOTV, KTUL-TV, KVOO-TV
Washington, D.C.	10	WMAL-TV, WOOK-TV, WRC-TV, WTOP-TV, WTTG, WDCA-TV
Washington, N.C. (see Greenville-Washington-New Bern)		
Waterloo, Iowa (see Cedar Rapids-Waterloo)		
West Palm Beach, Fla.	85	WEAT-TV, WPTV
Wheeling-Steubenville, O.	31	WSTV-TV, WTRF-TV
Wichita, Kan.	56	KAKE-TV, KARD-TV, KTVH
Wilkes-Barre-Scranton, Pa.	70	WBRE-TV, WDAU-TV, WNEP-TV
Winston-Salem, N.C. (see Greensboro-Winston Salem-High Point)		
York, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Youngstown, O.	95	WFMJ-TV, WKBN-TV, WYTV

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Appendix B

TV channel allocation and usage—top 100 markets as of August 31, 1968

ARB rank (NWC)	Market	Commercial										Non-commercial									
		Channels allocated		Stations on the air		Authorized Stations not on the air		Channels applied for		Available channels		Channels reserved		Stations on the air		Authorized Stations not on the air		Channels applied for		Available channels	
		V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
1	New York (Linden, New Brunswick, Newark, and Paterson, N.J.)	[1]6	[1]3	6	2	.....	.....	.....	1	.....	.....	[1]1	[1]3	[1]1	[1]2	.....	1	.....	.....	.....	.....
2	Los Angeles (Corona, San Bernardino, Riverside, Fontana, and Guasti)	7	7	7	4	.....	3	.....	.....	.....	.....	1	3	.....	2	.....	.....	.....	1	.....	.....
3	Chicago (Aurora, Elgin, Joliet, Gary, and Hammond, Ind.)	4	9	4	2	.....	7	.....	.....	.....	.....	1	2	1	2	.....	.....	.....	.....	.....	.....
4	Philadelphia (Burlington, N.J., and Wilmington, Del.)	[2]3	5	3	3	.....	1	.....	1	.....	.....	[2]1	2	[2]1	1	.....	.....	.....	.....	.....	1
5	Boston	3	4	3	2	.....	1	.....	1	.....	.....	1	1	1	1	.....	.....	.....	.....	.....	.....
6	Detroit	3	3	3	1	.....	2	.....	.....	.....	.....	.....	1	.....	1	.....	.....	.....	.....	.....	.....
7	San Francisco, Oakland	4	5	4	2	.....	3	.....	.....	.....	.....	1	1	1	1	.....	.....	.....	.....	.....	.....
8	Cleveland (Lorain)	3	3	3	1	.....	2	.....	.....	.....	.....	.....	1	.....	1	.....	.....	.....	.....	.....	.....
9	Washington	4	3	4	2	.....	1	.....	.....	.....	.....	.....	2	.....	1	.....	1	.....	.....	.....	.....
10	Pittsburgh (Greensburg)	3	3	3	.....	.....	2	.....	.....	1	1	1	1	1	.....	.....	.....	.....	.....	.....	.....
11	Baltimore	3	3	3	1	.....	1	.....	1	.....	.....	.....	1	.....	.....	.....	1	.....	.....	.....	.....
12	St. Louis	4	2	4	.....	.....	2	.....	.....	.....	.....	1	1	1	.....	.....	.....	.....	.....	.....	1
13	Hartford, New Haven, New Britain (Waterbury)	2	5	2	3	.....	2	.....	.....	.....	.....	.....	2	.....	1	.....	.....	.....	.....	.....	1
14	Providence (New Bedford, Mass.)	3	3	3	.....	.....	1	.....	.....	2	.....	.....	2	.....	1	.....	.....	.....	.....	.....	1
15	Dallas, Fort Worth (Richardson)	4	[1]4	4	3	.....	1	.....	.....	.....	.....	1	[2]2	1	[1]1	.....	.....	.....	.....	.....	1
16	Cincinnati	3	2	3	1	.....	.....	.....	1	.....	.....	.....	1	.....	1	.....	.....	.....	.....	.....	.....
17	Minneapolis, St. Paul	4	2	4	.....	.....	1	.....	1	.....	.....	1	1	1	1	.....	.....	.....	.....	.....	.....
18	Indianapolis (Bloomington)	4	3	4	.....	.....	1	.....	1	.....	1	.....	3	.....	.....	.....	1	.....	1	.....	1
19	Atlanta	3	3	3	1	.....	2	.....	.....	.....	.....	.....	2	.....	1	.....	.....	.....	.....	.....	1
20	Miami	4	4	4	1	.....	1	.....	1	.....	1	1	1	1	1	.....	.....	.....	.....	.....	.....
21	Buffalo	3	[1]2	3	.....	.....	2	.....	.....	.....	.....	.....	[1]2	1	[1]1	.....	1	.....	.....	.....	.....
22	Seattle, Tacoma	5	2	5	.....	.....	2	.....	.....	.....	.....	1	3	1	2	.....	.....	.....	.....	.....	1
23	Kansas City, Mo.	3	3	3	.....	.....	3	.....	.....	.....	.....	.....	2	.....	1	.....	.....	.....	.....	.....	1
24	Milwaukee	3	3	3	1	.....	1	.....	.....	1	1	1	1	1	1	.....	.....	.....	.....	.....	.....
25	Sacramento, Stockton	3	4	3	.....	.....	3	.....	1	.....	.....	1	.....	1	.....	.....	.....	.....	.....	.....	.....
26	Houston (Galveston, Rosenberg)	3	5	3	2	.....	3	.....	.....	.....	.....	1	2	1	.....	.....	.....	.....	.....	.....	2
27	Dayton	2	3	2	3	.....	.....	.....	.....	.....	.....	.....	2	.....	.....	.....	.....	.....	.....	.....	2
28	Columbia, Ohio	3	1	3	.....	.....	1	.....	.....	.....	.....	.....	2	.....	1	.....	.....	.....	.....	.....	1
29	Johnstown, Altoona	2	3	2	1	.....	.....	.....	.....	2	.....	.....	1	.....	.....	.....	.....	.....	.....	.....	1
30	Harrisburg, Lancaster, Lebanon, York	1	6	1	4	.....	.....	.....	1	.....	1	.....	1	.....	1	.....	.....	.....	.....	.....	.....
31	Tampa, St. Petersburg (Clearwater)	3	4	3	1	.....	3	.....	.....	.....	.....	1	1	1	1	.....	.....	.....	.....	.....	.....

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32	Memphis	3	2	3		2			1	1	1					1
33	Charlotte, N.C. (Rock Hill, S.C.)	2	3	2	2			1		2						2
34	Syracuse, N.H	3	2	3		1	1			1		1				
35	Toledo	2	3	2	1	1	1			1		1				
36	Portland, Oreg	4	1	4				1		1						1
37	Wheeling, Steubenville	2	2	2		1		1		1						1
38	Grand Rapids, Kalamazoo (Battle Creek)	3	2	3		1		1		2						2
39	Denver (Boulder)	4	3	4		2	1		2	1	1				1	1
40	Birmingham	2	3	2	1	1	1		1	1	1					1
41	Nashville	3	2	3	1	1			1	1	1					1
42	Albany, Schenectady, Troy (Amsterdam)	3	3	3		2		1		3		1				2
43	New Orleans	3	3	3	1	1		1	1	1	1					1
44	Greenville, Spartanburg, S.C.; Asheville, N.C.	3	4	3	1			3		2		2				
45	Greensboro, Winston-Salem, High Point	3	3	3	1			2		2						2
46	Flint, Saginaw, Bay City	2	4	2	1		1	2		2		1				1
47	Louisville	2	3	2	1	2				2		1				1
48	Charleston, Huntington (Berkley, W. Va.; Ashland, Ky.)	4	3	4		1		2		3			2			1
49	Lansing (East Lansing, Parma)	[5] 2	3	2				3	(5)	1	(5)					1
50	San Diego	2	2	2	1	1				1		1				
51	Oklahoma City	3	[6] 3	3		1		2	1	[6] 1	1	[6] 1				
52	Raleigh, Durham	2	2	2		2				1						1
53	Norfolk, Portsmouth, Newport News, Hampton	3	3	3	1	2				2		1				1
54	Manchester (Concord), N.H	1	3	1		1		2								
55	Omaha	3	2	3		2				2		1				1
56	Wichita, Hutchinson	3	3	3		1		2	1	2				1		2
57	San Antonio	3	2	3	1	1			1	1	1					1
58	Tulsa	3	3	3		3			1	1	1					1
59	Salt Lake City, Ogden, Provo	3	5	3			1	4	3	2	3	1				1
60	Salinas, Monterey	1	2	1		1		1		1						1
61	Phoenix (Mesa)	4	3	4	1	1		1	1	1	1					1
62	Davenport, Rock Island, Moline	3	2	3		1		1								2
63	Portland, Poland, Maine	3	2	3				2		1						1
64	Rochester	3	2	3		1		1		1		1				
65	Orlando, Daytona Beach	3	2	3		1		1		2		2				
66	Richmond (Petersburg)	3	2	3		1		1		2		2				
67	Roanoke, Lynchburg	3	2	3	1			1		2		1				1
68	Shreveport, La. (Texarkana, Tex.)	3	2	3				2		2						2
69	Wilkes-Barre, Scranton		5		3			2		1		1				
70	Green Bay	3	1	3				1		1						1
71	Little Rock	3	1	3		1			1	1	1					1
72	Champaign, Decatur, Springfield (Danville, Urbana)	1	8	1	3	1		4	1	1	1					1
73	Mobile, Ala.; Pensacola, Fla	3	4	3				4		3		2				1
74	Cedar Rapids; Waterloo	3	2	3				2		1						1
75	Jacksonville	2	3	2	1	1		1	1	1	1					1
76	Spokane	3	2	3				2	1		1					
77	Knoxville	2	2	2	1			1		1						1

Footnotes on last page of table.

TV channel allocation and usage—top 100 markets as of August 31, 1968—continued

ARB rank (NWC)	Market	Commercial										Non-commercial									
		Channels allocated		Stations on the air		Authorized Stations not on the air		Channels applied for		Available channels		Channels reserved		Stations on the air		Authorized Stations not on the air		Channels applied for		Available channels	
		V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
78	Des Moines (Ames)	3	4	3			2				2	1	2	1							2
79	Jackson, Miss	2	2	2			2						1				1				
80	Cape Girardeau, Mo.; Paducah, Ky.; Harrisburg, Ill	3	2	3			1				1		1								1
81	Columbus, Ga	2	2	2			1				1		1		1						
82	Youngstown		4		3						1		1								1
83	Columbia, S.C	1	3	1	2						1		1		1						
84	Baton Rouge	2	1	2			1										1				1
85	Springfield, Holyoke		2		2								1						1		
86	Greenville, Washington, New Bern, N.C	3	1	3							1		1								1
87	Binghamton	1	2	1	2								1		1						
88	Madison	1	3	1	2						1		1		1						
89	Lincoln, Hastings, Kearney (Albion, Grand Island, Superior)	6	3	6							3	1	2	1			1				1
90	Fresno (Hanford, Visalia)		6		5		1						1						1		
91	Chattanooga	3	1	3			1						1				1				
92	Evansville	1	3	1	2		1						1						1		
93	Sioux Falls	2	2	2							2		1								1
94	South Bend, Elkhart		4		3						1		1								1
95	West Palm Beach	2	2	2			1				1		1								1
96	Ft. Wayne		4		3						1		1								1
97	Rockford, Ill. (Freeport)	1	3	1	2						1		1								1
98	Peoria, Ill		4		3						1		1								1
99	Augusta	2	2	2			1				1										
100	Terre Haute	2	1	2					1				1								1
	Subtotal—Top 50 markets	157	163	157	53		68		15		27	21	79	20	36		7		4	1	32
	Subtotal—51 through 100	107	134	107	41		34		2		57	14	59	13	16		3	1	3		37
	Total 100 markets	264	297	264	94		102		17		84	35	138	33	52		10	1	7	1	69

[1] Channels 13 and 31—Commercial channels used by ETV.
[2] Channel 12—Commercial channel used by ETV.
[3] Channel 23—Commercial channel used by ETV.
[4] Channel 17—Commercial channel used by ETV.
[5] WILX—Channel 10 shares time with WMSB-ETV station.
[6] Channel 25—Commercial channel used by ETV.

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APPENDIX C

Part 74, subpart K, is amended as follows:

1. In section 74.1101, paragraph (i) is amended and paragraphs (j), (k), (l), (m), (n), and (o) are added as follows:

§ 74.1101 Definitions.

* * * * * * *

(*i*) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the predicted grade B contour of that station.

(*j*) *Major television market.* The term "major television market" means a television market listed in § 74.1107(a) of this chapter.

(*k*) *Designated community in a major television market.* The term "designated community in a major television market" means a community named in the list of major television markets in § 74.1107(a) of this chapter.

(*l*) *Smaller television market.* The term "smaller television market" means a television market which is not listed in § 74.1107(a) of this chapter.

(*m*) *Specified zone of television broadcast stations.* The term "specified zone of a television broadcast station" means the area extending 35-air miles from the main post office in the community or communities to which that station is assigned by the *Table of Assignments* contained in § 73.606 of this chapter.

(*n*) *Full network station.* The term "full network station" means a television broadcast station which is owned by a national television network or which has a primary affiliation contract with a single such networl: and no secondary affiliation with any other network.

(*o*) *Partial network station.* The term "partial network station" means a television broadcast station which is affiliated with more than one national television network or which has a secondary affiliation contract with a single such network.

2. In section 74.1103, new subparagraphs (b)(5) and (d)(4) are added to read as follows:

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

* * * * * * *

(*b*) *Exceptions.* * * *

(5) No system shall carry the signal of any station if the carriage of such signal would be inconsistent with § 74.1107(c) of this chapter.

* * * * * * *

(*d*) *Manner of carriage.* * * *

(4) The signal shall be carried in full, without deletion or alteration of any portion except as required by paragraph (f) of this section.

* * * * * * *

3. Section 74.1107 is revised to read as follows:

§ 74.1107 Requirements applicable to carriage of television broadcast signals in specified zones and in areas outside of specified zones.

(*a*) The major television markets and their designated communities are:

(1) New York, N.Y.
(2) Los Angeles, Calif.
(3) Chicago, Ill.
(4) Philadelphia, Pa.
(5) Boston, Mass.
(6) Detroit, Mich.
(7) San Francisco, Calif.
(8) Cleveland, Ohio
(9) Washington, D.C.
(10) Pittsburgh, Pa.
(11) Baltimore, Md.
(12) St. Louis, Mo.
(13) Hartford, New Haven, Conn.
(14) Providence, R.I.; New Bedford, Mass.

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(15) Dallas, Fort Worth, Tex.
(16) Cincinnati, Ohio
(17) Minneapolis, St. Paul, Minn.
(18) Indianapolis, Ind.
(19) Atlanta, Ga.
(20) Miami, Fla.
(21) Buffalo, N.Y.
(22) Seattle, Tacoma, Wash.
(23) Kansas City, Mo.
(24) Milwaukee, Wis.
(25) Sacramento, Stockton, Calif.
(26) Houston, Galveston, Tex.
(27) Dayton, Ohio
(28) Columbus, Ohio
(29) Johnstown, Altoona, Pa.
(30) Harrisburg, Lancaster, Lebanon, York, Pa.
(31) Tampa, St. Petersburg, Fla.
(32) Memphis, Tenn.
(33) Charlotte, N.C.
(34) Syracuse, N.Y.
(35) Toledo, Ohio
(36) Portland, Oreg.
(37) Wheeling, W. Va.; Steubenville, Ohio
(38) Grand Rapids, Kalamazoo, Mich.
(39) Denver, Colo.
(40) Birmingham, Ala.
(41) Nashville, Tenn.
(42) Albany, Schenectady, Troy, N.Y.
(43) New Orleans, La.
(44) Greenville, Spartanburg, S.C.; Asheville, N.C.
(45) Greensboro, Winston-Salem, High Point, N.C.
(46) Flint, Saginaw, Bay City, Mich.
(47) Louisville, Ky.
(48) Charleston, Huntington, W. Va.
(49) Lansing, Mich.
(50) San Diego, Calif.
(51) Oklahoma City, Okla.
(52) Raleigh, Durham, N.C.
(53) Norfolk, Portsmouth, Newport News, Hampton, Va.
(54) Manchester, N.H.
(55) Omaha, Nebr.
(56) Wichita, Hutchinson, Kans.
(57) San Antonio, Tex.
(58) Tulsa, Okla.
(59) Salt Lake City, Ogden, Provo, Utah
(60) Salinas, Monterey, Calif.
(61) Phoenix, Ariz.
(62) Davenport, Iowa; Rock Island, Moline, Ill.
(63) Portland, Poland Spring, Maine
(64) Rochester, N.Y.
(65) Orlando, Daytona Beach, Fla.
(66) Richmond, Petersburg, Va.
(67) Roanoke, Lynchburg, Va.
(68) Shreveport, La.; Texarkana, Tex.
(69) Wilkes-Barre, Scranton, Pa.
(70) Green Bay, Wis.
(71) Little Rock, Ark.
(72) Champaign, Decatur, Springfield, Ill.
(73) Mobile, Ala.; Pensacola, Fla.
(74) Cedar Rapids, Waterloo, Iowa
(75) Jacksonville, Fla.
(76) Spokane, Wash.
(77) Knoxville, Tenn.

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(78) Des Moines, Fort Dodge, Iowa
(79) Jackson, Miss.
(80) Cape Girardeau, Mo.; Paducah, Ky.; Harrisburg, Ill.
(81) Columbus, Ga.
(82) Youngstown, Ohio
(83) Columbia, S.C.
(84) Baton Rouge, La.
(85) Springfield, Holyoke, Mass.
(86) Greenville, Washington, New Bern, N.C.
(87) Binghamton, N.Y.
(88) Madison, Wis.
(89) Lincoln, Hastings, Kearney, Nebr.
(90) Fresno, Calif.
(91) Chattanooga, Tenn.
(92) Evansville, Ind.
(93) Sioux Falls, S. Dak.
(94) South Bend, Elkhart, Ind.
(95) West Palm Beach, Fla.
(96) Fort Wayne, Ind.
(97) Rockford, Ill.
(98) Peoria, Ill.
(99) Augusta, Ga.
(100) Terre Haute, Ind.

(*b*) *Carriage of distant signals in major television markets.*—No CATV system operating in a community located in whole or in part, within the specified zone of a television broadcast station assigned to a designated community in a major television market shall extend the signal of a commercial television broadcast station beyond the predicted grade B contour of the station, unless such station has expressly authorized the system to retransmit the program or programs on the signal to be extended: *Provided, however,* That the system may carry the signal of any noncommercial educational station, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local educational station or by any local or State educational television agencies: *Provided, further,* That priority of carriage is afforded to the signals of educational stations located in the same State or closest to the system.

(*c*) *Carriage of signals from a major television market in another major market.*—No CATV system operating in a community located wholly within the specified zone of a television broadcast station assigned to a designated community in a major television market shall carry the signal of a commercial television broadcast station assigned to a designated community in another major television market, unless the community of the CATV system is also located wholly within the specified zone of the station in the other major market or unless the system has the express authorization of the originating station to retransmit the program or programs on the signal to be extended: *Provided, however,* That the system may carry the signal of any noncommercial educational station assigned to such other major market, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local market educational station or by any local or State educational television agencies.

(*d*) *Carriage of distant signals in smaller television markets.*—(1) No CATV system operating in a community located in whole or in part, within the specified zone of a television broadcast station assigned to a smaller television market shall extend the signal of a television broadcast station beyond the predicted grade B contour of such station, except as authorized in subparagraphs (2), (3), and (4) of this paragraph: *Provided, however,* That such a system may carry additional distant signals if the system has the express authorization of the originating station to retransmit the program or programs on any additional signals to be extended.

(2) The system may carry such distant signals as may be necessary to furnish to its subscribers the signals of a full network station of each of the national television networks counting any full network stations carried on the system pursuant to section 74.1103(a) of this chapter, provided that

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the distant signals are obtained from the closest full network station in the region or in the State of the system and do not include more than one full network station of the same network.

(3) The system may carry the distant signal of one independent station obtained from the nearest community with an operating independent station or stations. In the event that such community has more than one operating independent station, the system shall select the signal of whichever independent station it chooses to carry. The system may also carry the distant signal of any independent station that may subsequently commence operation at a location closer to the community of the system.

(4) The system may carry the signal of any noncommercial educational television station, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local educational station or by any local or State educational television agencies, provided that priority of carriage is afforded to the signals of educational stations located in the same State or closest to the system.

(e) *Carriage of distant signals in areas outside any specified zone.*—(1) No CATV system operating outside the specified zones of all television broadcast stations shall extend the signal of any television broadcast station beyond the station's predicted grade B contour unless the system is carrying the signals of all television broadcast stations in the same class that are operating in communities located closer to the system. The classes of television broadcast stations to which this subparagraph is applicable are the following:

(i) Stations that are full network stations of the same network.

(ii) Stations that are partial network stations of the same network or networks.

(iii) Independent stations.

(iv) Noncommercial educational stations.

(2) The Commission may waive the provisions of subparagraph (1) of this paragraph for good cause shown in a petition filed pursuant to section 74.1109 of this chapter, such as a showing that (i) the community of the more distant station is located in the same State or (ii) the system's subscribers have a greater community of interest with the region served by the more distant station.

(f) *Applicability of this section.*—The provisions of this section do not apply to any signals which a CATV was supplying to subscribers in its community on December 20, 1968 (or pursuant to prior Commission authorization, whenever given), or to carriage of the same signals by any other CATV system that subsequently commences operation in the same community, unless it is proposed to extend lines into another community. Where a CATV system is limited by order of the Commission to carrying signals governed by this section only in particular geographic areas of a community, the provisions of this section shall apply to carriage of such signals by any CATV system in all other areas of that community.

4. In section 74.1109, a new note is added as follows:

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional, or different requirements and rulings on complaints or disputes.

* * * * * * *

NOTE.—It is not contemplated that the provisions of section 74.1107 (b), (c), and (d) of this chapter, relating to carriage of television broadcast signals in specified zones, will be waived.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent.

The *Notice of Proposed Rulemaking and Notice of Inquiry* adopted this day by the Commission majority is a complex document divided into five parts:

I. Nature and scope of proceeding.

II. Background.

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III. Proposed CATV rules on required program origination, advertising, equal time, sponsor identification, fairness doctrine, ownership, common carrier leasing of channels, reporting requirements, and technical standards.

IV. Proposed rules on CATV importation of signals in a 35-mile zone of TV stations and retransmission permission of stations in the top 100 markets, plus Interim Procedures.

V. General areas of inquiry on CATV's role in the national communications structure.

The Interim Procedures of part IV are crucial because they immediately apply new rules which will obtain during the pendency of this proceeding. I believe that such application now of the new "interim" rules is fatally defective because the rules are substantive and are applied without rulemaking as required by the Administrative Procedure Act. The Commission majority makes no showing, as required by section 4 of the APA, that the "situation [is one] in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

It appears to me that the interim procedures will either compound the administrative quagmire the Commission got itself into with the *Second Report and Order* or they will completely stifle further development of CATV. I am satisfied that the latter is a distinct possibility since only the most daring will be willing to gamble additionally on the outcome of the proposals in part III without some prospect of grandfathering protection which the *Notice* explicitly precludes.

The basic new rule is a revision of section 74.1107 and provides, among other things, that no CATV system within a 35-mile zone of a TV station can carry distant signals unless (*a*) in the top 100 markets, it has retransmission permission of the TV station, and (*b*) in markets below the top 100, it uses the nearest distant signals necessary to fill its complement of three networks, one independent and one educational station (no retransmission permission is required).

I disagree with the new rule which imposes on CATVs the concept in section 325(a) of the Communications Act of requiring express authority from the originating station to retransmit its programing—which Congress has, to date, refused to impose. The requirement has the effect of copyright clearance. The Supreme Court ruled in the *Fortnightly* case that carriage of a television station's programing is not a performance under the Copyright Act and CATVs are not subject to the act. Thus, CATVs do not now need to secure copyright clearance from TV stations, as they may be required to, in effect, under the interim rule here put into force.

The Interim Procedures, are, I believe, contrary to the public interest because they deny to the people of the United States a communications service for which they have shown a demand in the market place.

I have long urged the Commission to hold public hearings on CATV to determine what role it can best play in communications service to the public and, upon such determination, issue notices of proposed rulemaking to implement the conclusions. I believe that the adopted proceeding puts the cart before the horse in proposing rules

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without first determining what CATV's overall role is to be and in prejudging the role by proposals which are presently unsupported.

STATEMENT OF COMMISSIONERS KENNETH A. COX AND ROBERT E. LEE CONCURRING IN PART AND DISSENTING IN PART

We agree with the main thrust of the action taken here. Some change in our approach to CATV matters is clearly necessary in order to permit the orderly integration of cable service into our basic over-the-air television service without undue disruption of the latter. We agree that the shift in emphasis involved in the retransmission concept is a sound one.

However, we believe that the reduction in the area to be preserved against unfair competition is too extreme. The radius of the grade A coverage of a full powered VHF station is commonly 60 miles or more. Cutting back from the grade A standard of the *Second Report and Order* to the proposed zone with a radius of 35 miles reduces the area of concern by almost exactly two-thirds. While in many markets the bulk of the audience may be within this smaller zone, in other cases a significant percentage of the market's net weekly circulation will be outside that area. We would have preferred to use the predicted grade A contour, or something approximating it, to the 35-mile standard here proposed.

Furthermore, while we think this proposal deals with the problems of the smaller markets more realistically than did the *Second Report and Order*, we are not satisfied that it adequately protects small market stations from harmful fragmentation of their audiences.

Although there are other matters of detail about which we have some question, we believe that the proposal in its entirety is generally sound and represents a most constructive step forward.

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FCC 68–1204

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of: AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSTAINING FROM VOTING; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. In its *Second Report and Order* (2 FCC 2d 725, 789), the Commission did not terminate the proceedings in docket No. 15971, but rather reserved jurisdiction to amend the rules there adopted or to adopt additional rules in light of the comments filed on part II of docket No. 15971 and/or such further proceedings as the Commission might order. In view of the matters set forth in the *Notice of Proposed Rulemaking and Notice of Inquiry* in docket No. 18397 (FCC 68–1176), we think that the unresolved questions in docket No. 15971 would be more appropriately considered in the newly instituted proceeding.

2. Accordingly, *It is ordered*, That the proceedings in docket No. 15971 *Are terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

15 F.C.C. 2d

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FCC 68-1174

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS (RADIO BROADCAST SERVICES) TO PROVIDE FOR SUBSCRIPTION TELEVISION SERVICE	Docket No. 11279

FOURTH REPORT AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER WADSWORTH CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

INTRODUCTION

1. The Commission has the following before it for consideration:

(*a*) *Further Notice of Proposed Rulemaking and Notice of Inquiry* released in this proceeding on March 24, 1966,[1] and comments, reply comments, and technical submissions filed in response thereto.

(*b*) Proposed *Fourth Report and Order* in this proceeding submitted to the Commission on July 3, 1967, by its Subscription Television Committee.[2]

(*c*) Transcript of oral argument, addressed to the proposed *Fourth Report and Order*, held before the Commission en banc on October 2, and 3, 1967.

(*d*) Written comments submitted in conjunction with the oral argument.

(*e*) Record of hearings on subscription television held on October 9, 10, 11, 12, 13, and 16, 1967, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce of the House of Representatives, 90th Congress, First Session, on H.R. 12435, a bill to amend the Communications Act of 1934 so as to prohibit the granting of authority to broadcast pay television programs (serial No. 90-15).

2. To set the foregoing material in perspective, the course of events from the commencement of this proceeding to the present is sketched in the next few paragraphs.

3. In 1955 the Commission adopted a *Notice of Proposed Rulemaking*[3] inviting comments to help it decide whether it would be in the public interest to adopt rules authorizing television broadcast stations to transmit programs paid for on a subscription basis. A *Notice of Further Proceedings*,[4] released in 1957, announced that although the comments responding to the 1955 *Notice* had been useful, they did not provide a fully adequate basis for arriving at final decisions on the matter, and that trial demonstrations would be necessary to aid in arriving

[1] 31 F.R. 5136, 7 Pike & Fischer, R.R. 2d 1501 (1966).
[2] 10 Pike & Fischer, R.R. 2d 1617 (1967).
[3] 20 F.R. 988 (1955).
[4] 22 F.R. 3758 (1957).

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at conclusions thereon. Later in 1957, a *First Report*[5] announced the conditions under which applications for trial operations would be accepted. In 1958, a *Second Report*[6] gave notice that any such applications filed would not be processed until after the adjournment of the 85th Congress because of the interest and activity of that Congress with regard to subscription television (hereinafter called STV), the delay being for the purpose of affording the Congress an opportunity to consider public policy questions which the subject raised. A *Third Report*,[7] issued in 1959, made some amendments to the *First Report*, otherwise readopted and affirmed it, and stated that the Commission was ready to give consideration to applications for trial operations.

4. Three applications for trial authorizations were filed. One was denied, one was granted but operation never commenced and the authorization was later relinquished, and the third was granted and operation began in the summer of 1962 over UHF station WHCT, Hartford, Conn.[8] The last-mentioned grant was affirmed by the U.S. Court of Appeals.[9] The Hartford trial uses Phonevision equipment of which Zenith Radio Corp. is the manufacturer and the patent holder. Teco, Inc., is the patent licensee of Zenith.

5. In 1965 Zenith and Teco jointly filed a petition for further rulemaking to authorize nationwide STV on a permanent basis. The petition was based on data derived from the Hartford trial. The first part of the *Further Notice of Proposed Rulemaking and Notice of Inquiry* (hereinafter called *Further Notice*) mentioned in paragraph 1(a) above is responsive to the Zenith-Teco petition. It contains a discussion of over-the-air STV[10] and invites comments on proposed rules for such a service. In the second part, the Commission, on its own motion, instituted an inquiry into what the appropriate Federal role, if any, should be with respect to the establishment and manner of operation of wire or cable STV. This type of STV was previously outside the scope of this proceeding, and was made a matter of inquiry because of the change of conditions since 1955 when the proceeding began.

6. In 1967, the Subscription Television Committee of the Commission, having carefully studied the *Further Notice*, comments and submissions filed in response thereto, and other material in the record, submitted for Commission consideration a proposed *Fourth Report and Order* (par. 1(b) supra) which, if adopted by the Commission, would establish an over-the-air subscription television service and rules governing that service.[11]

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[5] 23 FCC 532, 16 Pike & Fischer, R.R. 1509 (1957).
[6] 16 Pike & Fischer, R.R. 1539 (1958).
[7] 26 FCC 265, 16 Pike & Fischer, R.R. 154a (1959).
[8] 30 FCC 301, 20 Pike & Fischer, R.R. 754 (1961). The original authorization was for a period of 3 years. In 1965, and again in 1968, it was extended for a period of 3 years or (if it occurs sooner) until such time as the Commission terminates the present proceeding and enters an order with respect to the authorization.
[9] *Connecticut Committee Against Pay TV* v. *FCC*, 301 F. 2d 835 (C.A.D.C., 1958), 23 Pike & Fischer, R. R. 2001, cert. denied, 371 U.S. 816.
[10] In over-the-air subscription television, usually both the audio and video signals are transmitted over the air in "scrambled" form by television stations and may be viewed intelligibly only by those having "unscrambling" devices attached to their sets. Some systems scramble only the video and not the audio.
[11] The Subscription Television Committee consists of three Commissioners, two of whom recommended that the Commission adopt the *Fourth Report and Order*, and the third of whom agreed that it should be presented for Commission consideration but stated that this did not imply that he endorsed adoption of it.

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7. Acting in the belief that study and resolution of this important matter would be aided by oral argument directed at the proposed *Fourth Report and Order*, the Commission released that document to the public and announced that it was planning to hold the argument at a date to be specified later. It also stated that interested parties could submit written comments or outlines of their arguments.[12]

8. Written submissions were duly filed (par. 1(d), supra) and oral argument before the Commission en banc was held (par. 1(c), supra). About a week after the oral presentations, the Communications and Power Subcommittee of the House of Representatives held hearings on subscription television. (Both the hearings and the printed record thereof (par. 1(e), supra) are hereinafter referred to as congressional hearings.) The Chairman of the Commission testified at those hearings, the proposed *Fourth Report and Order* was inserted in the record, and many participating parties directed testimony at that document. In concluding his prepared statement which traced the history of the Commission's subscription television proceeding from its inception to the date of the congressional hearings, the Chairman indicated that because the matter was pending before the Commission he was not in a position to express the Commission's conclusions on the substantive issues involved. He further said that in arriving at decisions in the instant proceeding the Commission would not only consider the views appearing in the record herein, but would also give consideration to those expressed at the congressional hearings.

9. After a careful study of the proposed *Fourth Report and Order* and related material, we are today adopting that document with some modifications based on the oral argument, the congressional hearings, and on other developments since July 3, 1967.[13] The remainder of the present document is therefore in large part identical with the proposed *Fourth Report and Order*, the reasoning of which we believe to be as valid and relevant today as it was when it was originally prepared by the Subscription Television Committee.

10. It will be recalled that the first part of the *Further Notice* contained proposed rules for over-the-air STV; the second part expanded the proceeding to include an inquiry into wire or cable STV. We shall first consider over-the-air STV and then turn to the inquiry.

Over-the-Air Subscription Television

PRELIMINARY MATTERS

11. The Commission is of the opinion that it is in the public interest to authorize over-the-air STV on a nationwide basis to the extent described in the following discussion and crystallized in the rules adopted today (app. D).

Jurisdiction

12. The *Notice of Further Proceedings* announced the Commission's conclusion that it has statutory authority to authorize over-the-air

[12] 32 F.R. 10606. 10 Pike & Fischer, R.R. 2d 1617 (1967).

[13] Many of the views expressed at the oral argument and the congressional hearings had previously been presented and considered in this proceeding. They are given no further discussion herein. The modifications are based on new material or developments.

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STV operations. The *First Report* affirmed that conclusion and presented in detail (in pars. 20–40) the reasons underlying it. The *Third Report* readopted and affirmed those paragraphs of the *First Report.* In the *Further Notice* (par. 19) we adverted to our views expressed in the *First Report* and also observed that the circuit court, in affirming our grant of the Hartford authorization, supported our jurisdictional conclusion. The record of the congressional hearings contains a letter from the Chairman of the Commission to the chairman of the subcommittee which details the views of the Commission concerning the import of that court decision.[14] It is attached as appendix E hereto. Some parties opposing STV raise the jurisdictional issue once more in their most recent comments. Since the arguments raised have been given thorough consideration in the preparation of the *First Report* and appendix E, and since we are still of the opinion that statutory authority exists for the action which we take, it would serve no useful purpose to evaluate them.

Congressional guidance

13. Various opponents of STV urge that the Commission should not act in this area without congressional guidance. In support thereof, many arguments are presented, some of which are: (1) STV is a basic modification of the American system of broadcasting—a modification which should originate with Congress and not the Commission; (2) the jurisdiction of the Commission to act is questionable, so guidance should be sought from Congress; (3) the Commerce Committees of both Houses of Congress have expressed their views either questioning the jurisdiction of the Commission to license STV operations or stating that such operations should not be authorized by the Commission without specific authorization by law,[15] and that congressional inaction therefore cannot be construed as meaning that the Congress approves of the Commission's establishing an over-the-air STV service; (4) if STV is established, its rates should be regulated to protect the public, but, if it is broadcasting as the Commission has found, there is no authority in the act to regulate rates thereof and the Commission should go to Congress for guidance.

14. The question of seeking congressional guidance was raised in pleadings considered prior to issuance of the *Further Notice.* In that document, after having expressed our belief that we possess adequate statutory authority to authorize STV on a permanent basis, we said that we could not at that time determine whether amendments to the act were needed to serve as guidelines for STV service. We also said that if STV service were ultimately established we would, on the basis of information then before us in this proceeding, decide whether amendments were needed and, if so, what recommendations should be made to Congress. We allowed a lengthy period for filing comments in this complex proceeding and announced in so doing that such a period would afford the Congress time to act with regard to STV before the termination of this proceeding if it so desired.

[14] Congressional hearings, pp. 149–151.
[15] These views appear in the *Second Report*, supra note 6.

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15. Although the Congress had not acted on the matter by the time that comments were filed and the Subscription Television Committee had submitted the proposed *Fourth Report and Order* to the Commission, it held the aforementioned congressional hearings about 1 week after the oral argument before the Commission and on November 16, 1967, the Committee on Interstate and Foreign Commerce of the House of Representatives adopted the following resolution:

Whereas the experimental subscription television systems thus far tested have proved to be inconclusive as to acceptability to the public generally, and as to whether the public interest would best be served; and

Whereas such experimental systems have been unable to demonstrate the ability of subscription television to offer new, different, or higher quality viewing for potential subscribers; and

Whereas the long term effects of subscription television on commercial television and upon the established national policy with regard to localization and public service aspects of television are unclear; and

Whereas the development of public television may fill adequately the need for additional viewing fare and cultural programing; and

Whereas the many complex issues and interrelationships among radio, commercial television, public television, community antenna television, subscription television, networks, satellites, and spectrum allocation require additional Committee attention and comprehensive consideration; and

Whereas it has not been established to the satisfaction of this Committee that authority to license subscription television operations comes within the power of the Commission under the provisions of the Communications Act of 1934;

Now, therefore, be it resolved, That it is the sense of the Committee on Interstate and Foreign Commerce that the Federal Communications Commission should refrain from further action upon its *Fourth Report and Order* for 1 year, or, until the Communications Act of 1934 is amended to authorize subscription television.

16. On September 3, 1968, the Commission sent the following letter to the chairman of the Commerce Committee:

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C. 20515

DEAR MR. CHAIRMAN: I am writing this letter in keeping with the desire of the Committee on Interstate and Foreign Commerce to be kept informed of the progress of the Commission's consideration of subscription television, and in light of the committee's resolution of November 16, 1967, expressing the sense of the committee that the Commission should refrain from further action in this field for 1 year or until the Communications Act of 1934 is amended to authorize subscription television.

As you know, the Commission, prior to the adoption of the resolution, had heard oral argument en banc after receiving a report from its Subscription Television Committee transmitting a proposed *Fourth Report and Order and a Second Further Notice of Proposed Rulemaking* to establish a subscription television service. Subscription television has been the subject of formal Commission consideration for some 13 years and, in view of that background and the present circumstances, the Commission has found it necessary to determine its future course of action. We believe that we cannot, consistent with our responsibilities to the public, continue to delay resolution of this important question.

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Indeed, further substantial delay in this matter would constitute, in effect, a failure of the administrative process. We therefore propose to take up the matter for consideration at an early date looking toward further Commission action on the long-pending issues before the end of this year.

If the Commission should adopt rules authorizing subscription television, the opportunity would remain not only for judicial review but also full congressional review prior to the authorization of any particular subscription television service. Fully cognizant of the many serious questions in this area, we believe that our proposed course of action will be most conducive ot their appropriate resolution.

Sincerely yours,

(S) Rosel H. Hyde
ROSEL H. HYDE,
Chairman.

17. On September 11, 1968, the Commerce Committee adopted the following resolution:

Whereas the committee has heretofore expressed its concern over implementation by the Federal Communications Commission of its *Fourth Report and Order* dealing with the subject of pay television; and

Whereas those same concerns and considerations pertain today as they did in November 1967 when stated by the committee; and

Whereas the development of public television has been delayed because the corporation provided for in legislation passed by the Congress has been but recently formed and has had no opportunity to this time to carry out the responsibilities assigned to it; and

Whereas the pressures of legislation have made it impractical if not impossible for the committee to take action on the subject of pay television during the second session of the 90th Congress;

Now, therefore, be it resolved, That (*a*) it is the sense of the committee that the Federal Communications Commission should further refrain from acting upon its *Fourth Report and Order* until the end of the first session of the 91st Congress or completion of action upon legislation if by the end of said first session legislation pertaining to the subject of pay television and amendment of the Communications Act of 1934 to authorize same is under consideration; and (*b*) it is further the sense of this committee that to avoid further delay in considering the matter hearings on the subject of subscription television should be scheduled by the end of May 1969.

18. On September 12, 1968, the following letter was sent to the Commission by nine members of the Commerce Committee:

Hon. ROSEL H. HYDE,
Chairman, Federal Communications Commission, Washington, D.C. 20554

DEAR MR. CHAIRMAN: The Commerce Committee resolution requesting the Commission to suspend any action in the area of pay TV represents the thinking of the barest majority of those present at the Commerce Committee meeting on September 11, 1968.

The motion to recommit the resolution to the Communications Subcommittee failed by a tie vote of 14–14. The final passage did secure, finally, 16 votes for, 13 against. Quite clearly, this does not represent a mandate to the Commission, nor should it be so construed.

The failure of the Congress during 10 years of suspended activities in this important field to accept its responsibility to give legislative guidance is unexcusable, and we who voted against the resolution cannot condone a policy of endless and futile delay. In our opinion, the failure of the FCC to act promptly to decide the 13-year-old rulemaking proceeding on subscription television would be inconsistent with your responsibilities imposed by the Administrative Procedure Act

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and contrary to the public interest in an early ruling on this important subject.

Sincerely,

(S) John E. Moss
JOHN E. MOSS, M.C.
(S) Torbert H. Macdonald
TORBERT H. MACDONALD, M.C.
(S) Lionel Van Deerlin
LIONEL VAN DEERLIN, M.C.
(S) Richard L. Ottinger
RICHARD L. OTTINGER, M.C.
(S) W. S. Stuckey
W. S. STUCKEY, M.C.
(S) Fred B. Rooney
FRED B. ROONEY, M.C.
(S) Daniel J. Ronan
DANIEL J. RONAN, M.C.
(S) Brock Adams
BROCK ADAMS, M.C.
(S) Peter N. Kyros
PETER N. KYROS, M.C.

19. Consistent with the views expressed in the Commission's letter of September 3, 1968, we are taking our action of today establishing a nationwide over-the-air subscription television service and we are making the rules governing the service effective 6 months from now to afford an opportunity for judicial and congressional review of that action before the granting of any application for a particular STV service to a community.

20. At the present time, we do not believe that any amendments to the act are necessary to serve as guidelines for the new service. In this connection, we note that whether the Commission has statutory authority to regulate rates for the new service—a broadcast service—is open to question. Since we do not believe that such regulation is necessary (see pars. 258–260) the matter need not now be analyzed. However, we shall carefully observe all aspects of the new service in operation, and if amendments are indicated shall make appropriate recommendations concerning rate regulation or other matters.

STV is broadcasting

21. In the *Further Notice* we concluded that STV is broadcasting within the meaning of section 3(o) of the act, and set forth in detail our views on the subject (pars. 22–29). As stated there, we regard intent to provide a radio or television program service without discrimination to as many members of the general public as can be interested in the programs as of primary importance in our determination. We further said that intent may be inferred from the circumstances under which the programs are transmitted and that the number of actual or potential viewers is not significant.

22. In our discussion we cited the Functional Music case [16] and the Muzak case.[17] Both involved the use of special equipment attached to the receivers of subscribers in order to receive the service. ABC, urging that STV cannot be classified as broadcasting, cites early decisions of the Commission [18] that certain activities over broadcast stations constituted point-to-point communications rather than broadcasting and argues that the interpretations in those decisions are worthy of more weight than the Muzak case. Motorola questions whether Functional Music is authority for the proposition that STV is broadcasting. We should note that we cited Muzak, as well as Functional Music, merely

[16] *Functional Music, Inc.* v. *FCC*, 274 F. 2d 543 (C.A.D.C., 1958), cert. denied, 361 U.S. 813.
[17] *Muzak Corp.*, 8 F.C.C. 581 (1941).
[18] *Scroggin & Co. Bank*, 1 F.C.C. 194 (1935); *Standard Cahill Co., Inc.*, 1 F.C.C. 227 (1935); *Bremer Broadcasting Company*, 2 F.C.C. 79 (1935); *Adelaide Lillian Carrell*, 7 F.C.C. 219 (1939).

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to illustrate that payment of a charge by subscribers for a special type of service is not in itself determinative of the question of intent that the programs be received by the public.

Parties filing

23. Parties filing comments, reply comments, and technical descriptions of STV systems in response to the *Further Notice* are listed in appendix A. Those opposing permanent STV are the three networks (ABC, CBS, NBC), the National Association of Broadcasters (NAB), the Association of Maximum Service Telecasters, Inc. (AMST), the Joint Committee Against Toll TV (Joint Committee), Motorola, Inc. (Motorola), and the Colorado Translator Association. All other parties favor permanent STV (some with qualifications). These parties include proponents of various STV technical systems, licensees of television broadcast stations who contemplate entering into STV operations if nationwide over-the-air STV is authorized, and other groups, such as the American Civil Liberties Union.

24. Parties who participated in the oral argument and those who filed written comments in connection therewith are also listed in appendix A. All parties mentioned in this document hereinafter are referred to by short designations which appear in parentheses following the names of the parties in that appendix. "Comments" and "reply comments," as used herein, refer to those filed in response to the *Further Notice*. The transcript of the oral argument and written comments filed in connection with the oral argument will both be referred to as "oral argument." The comments were filed in October, 1966, and oral argument was held in October, 1967, so that the record on which the present document is largely based is 1 to 2 years old. Since repeatedly pointing out this fact in the discussion which follows would impede its flow, the document is written in the present tense.

Should STV be authorized on a permanent basis?

25. Paragraph 45(a) of the *Further Notice* invited comments on whether STV should be authorized on a permanent basis. Paragraph 45(b) requested comments on 15 specific matters of concern to the Commission in regulating STV if it is so authorized. We shall first deal with the fundamental problem of 45(a) and then treat the issues in 45(b).

26. In the *First Report* (pars. 47, 56, 65, 66)[19] the Commission mentioned what sort of information it hoped to obtain from trial operations to help it make public interest determinations. This information included the following:

> (*a*) Whether STV would provide a beneficial supplement[20] to the program choices now available to the public.
>
> (*b*) Whether STV would provide an increase in financial resources which would facilitate significant increases in the numbers of services available to the public under the present system.
>
> (*c*) The degree of acceptance and support which STV might be able to obtain from members of the public in a position to make a free choice.

[19] These paragraphs were affirmed by the *Third Report*.

[20] The term "beneficial supplement" merely means STV programing that is not duplicative of the programing of free TV and that is desired or needed by at least a portion of the viewing public. It has no connotation of lack of impact upon free TV, which is a separate question.

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(*d*) Whether STV would seriously impair the capacity of the present system to continue to provide advertiser-financed programing of the present or foreseeable quantity and quality, free of direct charge to the public. This is closely related to the question of whether STV would result in significant audience diversion from conventional television and siphoning of programs and talent away from free television into STV service.

(*e*) Other information, such as (1) modus operandi of the service; (2) the technical performance of the systems; (3) the nature of the programs offered; (4) the methods to be employed; (5) the role of participating broadcast station licensees; (6) possible monopolistic features of STV.

Comments on the question of whether STV should be authorized on a permanent basis generally fall into categories a, b, c, d, and e above.

Whether STV would provide a beneficial supplement to the program choices now available to the public

27. *Hartford Programing.* In joint comments filed March 10, 1965, in support of their petition for further rulemaking (prior to the issuance of the *Further Notice*) Zenith and Teco set forth in detail the STV programing offered by WHCT during the first 2 years of the Hartford trial. Their comments [21] filed in response to the *Further Notice* supply no additional data but incorporate by reference the March 10 material. As we pointed out in the *Further Notice* (par. 12), that information showed an average of about 1,500 hours of STV programing, consisting of about 300 separate programs were presented each year.[22] The programs were not available on free television either in Hartford or elsewhere in the United States. The breakdown of the programs is as follows:

Category	Approximate number of programs	Approximate number of showings	Average number of showings per program	Percentage of total showings
Feature films	216	768	3.55	86.5
Sports	40	40	1.0	4.5
Special entertainment	18	49	2.7	5.5
Educational	26	32	1.2	3.5
Total	300	889	2.96	100.0

Of the 216 feature films shown during each year, one was a first-run U.S. film, 58 (27 percent) were first-subsequent-run U.S. films (i.e., films shown several weeks after their first showing in theaters, which corresponds to the time when pictures are released to neighborhood theaters), about 149 (69 percent) were U.S. films of over 6 months in theater release, and 9 (4 percent) were foreign language films with English titles or dialogue dubbed in. The sports programs were live broadcasts of events not carried on conventional television, such as championship boxing, high school, college, and professional basketball, college football, and professional hockey. The special entertainment included plays, opera and ballet, concerts and recitals, variety, and nightclub programs. Educational features included, among other programs, three for doctors only.

[21] To avoid needless repetition, RKO—which conducted the Hartford trial—filed brief comments stating that it fully agreed with the recommendations and conclusions of Zenith and Teco.

[22] During the same period WHCT averaged about 1,812 hours of conventional programing per year.

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28. Zenith and Teco state that when the Hartford trial was authorized various theater-owner organizations tried to induce picture producers and distributors not to supply films for the trial, but that a number of independent and most major producers nevertheless did supply films. However, we are told, two major producers were unwilling to do so. In March 1964, RKO filed an antitrust action against them which was settled out of court in June 1964, and at the end of the second year of the trial those companies were supplying both first-subsequent-run and older films for the trial.

29. Although producers and distributors have been unwilling to supply films on a first-run basis (only one such film has been broadcast since the trial began), Zenith and Teco state that this is mainly because the operation is on a trial basis. They express the opinion that if nationwide STV were authorized, first-run films could be made available, if it were considered important, on the date of their release to first-run theaters.

30. Concerning sports programs, Zenith and Teco mention that heavyweight championship boxing matches, which consisted of about 0.3 percent of the total STV programing during the first 2 years of the trial, were the most popular of all STV programs since, on the average, they had audience ratings of about 63 percent of all subscribers. They observe that before the Hartford trial there had been no such fights on television for more than 10 years because promoters of such events found it much more profitable to show them by way of closed-circuit theater outlets. They also point out the savings to the public that can accrue from viewing such events on STV. As an example, they cite the following figures for one of the Liston-Clay fights: An average of nine persons per tuned-in subscribing set watched the fight at a cost of $3 for all of them as compared to a cost of $5 a head (or a total of $45) at several local theaters which showed the fight on closed circuit.

31. As to college sports, they state that none of the football games shown on STV could have been broadcast over free TV under the restrictions of the National Collegiate Athletic Association (NCAA). These restrictions, they point out, were designed to protect college football teams from loss of gate receipts (similar rules prevail for college basketball). They limit the number of games that may be viewed in any part of the country to one game per week. As a result, viewers in the Midwest, for example, may be deprived of viewing a conference title game between two "Big Ten" teams because the game of the week is between teams from another part of the country. Zenith and Teco argue that STV would protect gate receipts and thereby make it possible to show local and regional games in which there might be great interest so that viewers would not be limited to the NCAA game of the week. Robert Hall, former chairman of the board of athletic control and director of athletics at Yale University, and principal architect of the NCAA controlled football plan for television, testified on behalf of Skiatron at the oral argument and at the congressional hearings. His views bear out those of Zenith-Teco. He states that he foresees no chance that the NCAA television plan will lessen its restrictions so as to permit conventional television to obtain more games. He

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says that, as far as he can determine, there would be no easing of the restriction that prohibits the telecasting of a game within a 75-mile radius of where it is being played. Thus the game might be sold out, but free TV will not be able to show it in that area. He testifies that "the NCAA very easily could, and in his opinion very definitely would, say that the game may, however, go on STV in that area."

32. Zenith and Teco also mention that in both the American and National Football Leagues home games are blacked out and that home games of many major league baseball teams are either blacked out or their number is restricted in many cities. They state that the Chicago Bears and the Detroit Lions have permitted closed circuit theater operators to carry home games because the stadium seats are usually sold out. Zenith and Teco express the opinion that theater television of home games of professional football teams will increase in the next few years and say that STV could provide a beneficial supplement to free TV by carrying such games to a larger audience than that of the theaters.

33. As to special entertainment, the programs shown during the 2-year period are discussed. They claim that the economic limitations of the trial prohibited a steady supply of Broadway plays, but that with a broader economic base which nationwide STV would provide these limitations would not exist.

34. We are told that there were difficulties in obtaining programs of box office caliber in the educational and instructional category, and that the audience ratings for such programs were low. It is stated that possibly the primary use of STV operations in the future in this programing area would be the use of commercial STV facilities by educational groups for the broadcast of educational programs for a fee. Especial reference is made to programs available only to doctors. Three such programs were shown in the 2-year period and since then more have been shown. The programs were designed to aid doctors in keeping abreast of medical advances within the confines of their busy schedules, were supervised by a noted physician, and had considerable professional support.

35. *Etobicoke programing.*—Telemeter's comments incorporate by reference all material in previous submissions (June 5, 1955; May 25, 1965; and June 17, 1965) to the extent that it does not vary from its present comments. We note that in its May 1965 filing, in setting forth information about the 5-year Etobicoke (a suburb of Toronto, Canada) cable STV experimental operation, it stated that "the prime pillars of programing were motion pictures and 'blacked out' sports," which is consistent with the experience of the over-the-air trial at Hartford. Special entertainment productions were also shown. Telemeter's experience in obtaining feature films for its experiment supplements the Hartford information.[23] Telemeter states that "many—but not all—major film distributors as well as other leading companies were reasonably cooperative in supplying some of their current

[23] The May 1965 filing was a "statement of International Telemeter Corp. in support of [Zenith-Teco] rulemaking petition for authorization of Nation-Wide Subscription Television." Although the Etobicoke operation was a three-channel cable rather than an over-the-air operation and therefore dissimilar in many respects to the Hartford trial, in terms of programing experience it can shed light on STV operations generally.

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product for subscription TV use. However, except for three 'road-show attractions,' which were exhibited on Telemeter during their general release to theaters, none of the other so-called 'road-shows' produced in the past 5 years or earlier were made available and, since not all major distributors permitted current feature pictures to be shown on the cable system, Telemeter subscribers had no access in their homes to a large number of desirable pictures released to theaters." (For meaning of "road-show" and "general release," see note 56 infra.)

36. The sports programing at Etobicoke constituted only a small portion of the total STV offerings, but was the most consistently favored. Among other things, it included away-from-home games of the Toronto Maple Leafs ice hockey team. Such games had not previously been available to Etobicoke. It also showed blacked-out home games of the Toronto Argonauts professional football team, as well as some professional championship boxing bouts not carried on free TV in Canada or the United States.

37. *Conventional TV programing.*—Opponents of STV devote many pages of their comments and part of their oral argument attempting to show that the STV programing of the Hartford station did not provide a beneficial supplement since it was of the same general type as that shown on conventional television; i.e., motion pictures, sporting events, special entertainment, and educational presentations. Illustrative of the mass of data submitted to document their case is the material in the immediately following paragraphs.

38. *Feature films.*—Of the 73½ hours of network programing between the hours of 7:30 and 11 p.m. each week over the three networks combined, 10 hours are feature films (CBS–2 films, NBC–2, ABC–1). Such films are available 5 nights per week. (The figures are now 14 hrs. of films available 7 nights per week, because since the record was made herein, ABC has begun to show two films per week in this time period, and NBC now shows three.) In addition, local stations also offer feature films in prime time. Viewers in some cities; e.g., Los Angeles, can see as many as 35 films per week during prime time. No figures are given for the number of films shown by free television stations in the Hartford market per week during the first 2 years of the Hartford trial, but it is said that the networks offered 160 films to their affiliates during that period. Moreover, we are told that although it is true that when his proceeding began motion picture producers were selling pictures of relatively minor caliber to free television, the number of major feature films released to free TV increased rapidly during the late 1950's and continues to increase today, so that presently there are over 1,200 films available for conventional television. During the 1966–67 season, 120 films of high caliber were scheduled by the networks alone. Examples of such films include: "The Bridge on the River Kwai" (1957) which is said to have been viewed by more than 60 million people, "Lilies of the Field" (1963), and "Breakfast at Tiffany's" (1961).

39. As to recency of films shown on free TV, it is stated that the bulk of those shown by the networks 5 nights a week are relatively current and that not only have producers released more major pictures

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to free TV since the proceeding commenced, but also they have been releasing more recent films. Cited as evidence are purchases announced in September 1966 by ABC and CBS whereby the two networks acquired the right to show, over a period of 5 years, more than 112 feature films, including some that have enjoyed record box office grosses. Of the films acquired by CBS, at least 14, we are informed, were films released to theaters in 1965 and 1966. It is stated that the trend toward showing more recent films on free TV will continue because the heavy demand is drying up the source of supply. Indeed, because of this, feature films are now being produced specifically for conventional television. To illustrate the trend toward recency, NBC states that for all feature films shown by networks on free TV the average elapsed time between theatrical release and exhibition on TV has decreased at an average rate of 6 months per broadcast season during the past 6 years. It states that more than 10 percent of the feature films carried by the networks during the 1966–67 broadcast season were less than 2 years old.

40. It is pointed out by STV opponents that of the 432 films shown during the first 2 years of the trial at Hartford, only 116 (27 percent) were first subsequent run, and the remaining 297 were over 6 months old, the average release date of those films having been 1960. We are told, moreover, that of the films shown during that period in the Hartford trial, over 60 percent have already been made available to free TV, some as soon as 5 months after their showing on STV, the average being less than 2 years after STV showing. Of the remaining ones, many have already been purchased or are under option.

41. *Sports.*—Opponents of STV state that there is virtually no major sports attraction that is not presently being broadcast on free TV. They list in overwhelming detail the kinds of sports and sports programs that free TV carries, and we shall not here repeat them. They state that the quantity and quality of sports programs exceed all expectations of about 10 years ago when this proceeding began. They concede what cannot be denied—that STV at Hartford carried heavyweight championship boxing matches, a type of program that in recent years has not generally been carried by free TV; and they would appear to admit that other sports events carried by WHCT were not otherwise available in the market, but argue that differences between sports programing on free TV and proposed STV will probably narrow because of programing developments currently taking place in free TV.

42. *Special entertainment and educational programs.*—As with sports, opponents describe at length the great variety and quality of special entertainment programing carried by free TV to show that it is of the same type that STV offered at Hartford, and mention that since the issuance of the *First Report* such programs have expanded in number and quality. Mention is also made of the growth of educational television service in this country which provides educational and cultural programing, the programing of National Educational Television (NET), the fact that since this proceeding started the number of educational television stations has increased from 23 to over 100.[24]

[24] Since the filing of the comments, the number has increased to 175 on the air as of Oct. 1, 1968.

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and the fact that recent developments suggest that there may be new financing available in the near future for programing in the educational television service which would further improve its already excellent offerings. Some advert to the role of the proposed Corporation for Public Broadcasting in adding to the diversity of programing.[25] In addition, the Oxtoby-Smith "Study of Consumer Response to Pay Television" is quoted to the effect that "the ratings for educational and cultural programs and even available stage plays have been low. * * * The operation of a ready market for cultural programing has not materialized." Along the same line, they advert to the very limited viewing of such programing by Hartford subscribers (average of only 22 subscribers viewing educational programs).

43. As mentioned above, STV opponents, in connection with the foregoing data submitted by them, make the argument that the Hartford trial did not provide a beneficial supplement because programing of the same general type appears on free TV. With regard to feature films, the only possible advantage of STV, we are told, is that of reducing the time lag between theater release and TV viewings. At least one party says that STV will not allow viewers to see films at a significantly earlier time. Several admit that it is possible that STV can provide films somewhat earlier or that STV can somewhat accelerate their presentation to the public. However, it is argued, because conventional television is getting more and more recent films of high quality, the difference in time of presentation over STV and free TV would be less and less important. This time differential, it is said, does not justify the use of scarce channels for STV. Opponents say that the representations were originally made to the Commission that STV would show first-run films, but that such films have not been made available to STV nor is there anything to indicate that if STV were authorized on a nationwide basis they would be. As a matter of fact, they state, only first-subsequent-run films and films 6 months or more old have been made available, and only 27 percent of the Hartford films were first subsequent run.

44. The following is also contended: the promise of STV was that it would provide viewing for members of the public interested in the fine arts, opera, educational and informative programing, and similar programing—i.e., programing for minority tastes and not for mass appeal—but Hartford has not fulfilled that promise—its programing was largely of a mass appeal type, directed at those who watch free TV the most. Its own research firm reported that it should be directed at that audience, which is less demanding in its expectations than the minority who expect more from STV. The Oxtoby–Smith study shows that there is no ready market for cultural programing. Therefore, if STV became a national service, it would be unreasonable to assume that it would do other than show the mass appeal type of programing as Hartford did, for that is where the profits would be. Thus,

[25] The Corporation for Public Broadcasting has since been established under authority granted in the Public Broadcasting Act of 1967, Public Law 90–129, 81 Stat. 365. Pursuant to the financing provision of that act (sec. 396(k)(1) of the Communications Act of 1934) as amended in 1968 by Public Law 90–294, 82 Stat. 108, the sum of $5 million has been appropriated by Congress for expenses of the corporation for the fiscal year ending June 30, 1969.

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Hartford (allegedly because of the limitations of a one-city trial) did not provide the diversity of programing that STV promised, and national STV would not either. Whatever the facts may have been in 1955, the broadcasting environment has since changed and today, present conventional television, the all-channel bill, syndication, and the networks all provide a great diversity and the trend is toward greater diversity so that STV would merely be duplicative of free TV.

45. Other arguments offered are that STV promised quality programs and that most of the films shown at Hartford were run-of-the-mill films; that STV would deter the formation of a fourth national TV network; that the game-of-the-week and black-out restrictions imposed by college and professional sports are a reasonable accommodation of conflicting economic and social interests, and to the extent that STV would derogate from these policies it would undermine amateur and professional sports; and that Zenith and Teco should have given information about the more recent programing of the Hartford trial in their comments since the information of the first 2 years of the trial may be out of date.

46. In their reply comments, Zenith, Teco, and Telemeter take issue with the contentions of the opponents of STV. Zenith and Teco say that the opponents have compared the programing of a single STV experimental operation with that of the combined networks with nearly $700 million to spend for programing and that it would be more realistic to have compared the programing of the networks in 1948—the second year of their operation when the weekly schedule of all four networks during the hours of 7 to 11 p.m. consisted of about 40 percent unprogramed hours and 23 percent boxing and wrestling, with only four 1-hour dramatic productions, and a feature film library of about 50 titles. They aver that given 20 years, STV may also make strides. Telemeter offers a similar argument, stating that during the formative years of TV broadcasting which parallel the start of STV broadcasting around 1960, broadcasters competing for channel assignments made a plethora or programing promises which were not fulfilled until many years later, because a large enough audience did not exist at the beginning. Before such audiences were obtained, Telemeter states, TV stations sustained great losses, losing millions of dollars according to published records of the Commission.

47. Also controverted is the argument that free TV supplies in quantity all the types of programs that STV would provide, so that the latter would not provide a beneficial supplement. Zenith and Teco observe that the types of which opponents speak are general categories such as feature films, sports, opera, mass entertainment, and the like. By using such broad categories, they state, it would even be possible to condemn the formation of a fourth free TV network on the grounds the the present networks provide ample amounts of all conceivable types of programing that a fourth network might offer. Telemeter says that when opponents speak of feature films as a type, they ignore such differences as age of the film, quality, and the desires and habits of the public.

48. With regard to the age of the film, Zenith and Teco contend that the opponents belittle the matter of time delay that now exists

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between theater release and showing of films on free TV, and that they imply the public does not mind waiting 3 to 10 years to see a film on TV after it has been shown in a theater. This, they state, is contrary to the economics of show business and human behavior, for "[f]reshness, immediacy and currency have long been essential ingredients in arousing the public's interest in entertainment."

49. In connection with the question of currency, Zenith and Teco say that although opponents mention the recent purchase by CBS and ABC of 112 feature films as examples of the kind of current pictures the networks are showing, they fail to state that many of those pictures will not be shown on free TV until 1970 or 1971, and that many of them have already been shown on STV during the past several years at Hartford. Similarly, Telemeter, in referring to the argument of opponents that the bulk of the films shown on free TV in prime time are relatively current, mentions a compilation from a list of films in the July 27, 1966, Variety, presented by ABC, which suggests that (exclusive of two movies made originally for free TV) the films to be shown on the networks in prime time in the 1966–67 season had their theater releases anywhere from 1960 to 1965. However, Telemeter calls attention to the fact that the ABC compilation does not include the total list that appeared in Variety, an examination of which shows that more than 60 percent of the films to be shown are from 4 to 15 years old. Telemeter also states that 40 of the 116 films mentioned in the list were shown at Etobicoke. In addition, Telemeter names 24 pictures shown at Hartford during the start of the 1966–67 season (prior to the date of filing of its reply comments on Nov. 10, 1966) which, it says, probably will not be available to free TV until 1969 to 1971. It points out, too, that many of the films shown at Etobicoke have still not appeared on free TV.

50. Zenith and Teco, responding to the assertion that only 27 percent of the films shown at Hartford in the first 2 years of the trial were first subsequent run and that the remainder were 6 months old or more, advert to RKO's previous programing difficulties (see par. 28), characterizing them as water over the dam, and state that during the 1-year period of October 1, 1965, to September 30, 1966, 70 percent of the 174 feature films shown were first subsequent run.[26] The other 30 percent were shown within the first year of theater release, with a few exceptions which included "Bambi" and "Mary Poppins" which were road-showed on a hard-ticket basis for over a year before they were given general release in theaters. In his testimony at the congressional hearings, Joseph S. Wright, president of Zenith, states that of the top 35 feature films of the previous year—i.e., the films that grossed $4 million or more for that year—only seven were not shown at Hartford. Five were unavailable because they were still being shown on a hard-ticket basis, and two were turned down by Hartford because

[26] In oral argument, AMST uses the 27 percent and 70 percent figures to argue against the importance of recency of feature films. It states that recency as such is not determinative of whether STV feature films would in fact be a beneficial supplement to free TV. "The Bridge on the River Kwai," it says, was a success on free TV not because it was of recent vintage, but because it was an outstanding Academy Award winner. It then adverts to the fact that the average subscriber at Hartford spent $1.20 per week for programs whether 27 percent or 70 percent of the feature films shown were first subsequent run (see pars. 109 and 122). This, it says, shows that recency is virtually irrelevant. The joint committee, in oral argument, makes a similar point.

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they were too "blue" (not the kind that the station would want to show in the home).

51. With respect to the argument that of the 432 films shown in the first 2 years of the Hartford trial 273 have since been released to free TV, Zenith and Teco point out that they never represented that such films would not some day reach that medium, but, rather, that they would be shown at an earlier date on STV.

52. They further state that the feature films which the opponents of STV seems to indicate are so important on network and local station programing could not be made available to free TV without support from box office receipts. In the same vein, Telemeter says that current films—which are available on STV at the same time that they are being shown in local theaters—are not now and, under the economics of motion picture production and commercial TV broadcasting, never will be available on free TV while they are in current release in theaters. The reason given is that the films must first recoup their "negative cost" and at least some portion of their box office potential prior to being made available to free TV. Numerous examples are cited. Thus, "The Bridge on the River Kwai," frequently referred to by the STV opponents as an example of free TV film fare, cost ABC $2 million 8 years after its release to theaters. Its negative cost was about $6 million on top of which were publicity promotion, and distribution costs, so that the amount that ABC was able to pay for the film under the economics of commercial television would not have paid a third of the total costs of the film, let alone absorb a part of its potential theater box office gross of $17 million.

53. Telemeter goes on to say the following: according to industry sources, the average motion picture is seen by only 5 percent of the population. A major picture is viewed by only 8 percent or, in rare cases, 10 percent of the population. Many who would like to see the current movie do not do so because of inconvenience or cost. A Broadway show in a 1,200-seat theater that runs a year with every performance sold out is seen by 499,200 persons. Many of the nine and a half million residents of New York or the millions of persons in the rest of the country would like to see the show but cannot because of distance or cost. STV would aid the box office potential of a motion picture or a Broadway play by showing it to an additional audience at a price, whereas free TV would impair the box office potential. Therefore, STV may well stimulate additional quantity and quality of films, Broadway plays, operas, and the like. Additional programs so stimulated by STV would redound to the ultimate benefit of free TV.[27]

54. Telemeter states that there are thus three levels of viewing films: (1) the theater, (2) STV, and (3) free TV. The public, it urges, should be entitled to choose at which level it wishes to view.

[27] With regard to films, for example, Zenith and Teco mention that the increased use of films by the networks is making such product more scarce, and, citing figures, they say that except for second and third reruns free TV will not be able to show the quantity of first-commercial-TV-run film that it has in the past. They state that if STV were to generate an increase in film production, this would not only aid STV, but would aid free TV as well. Comments of ABC state that because the supply of films is growing smaller, feature films are now being produced specifically for conventional TV exhibition and that such films may ultimately become a network staple.

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It says that, after having been viewed in theaters or over STV, there will still be large audiences waiting to see them on free TV 3 to 5 years later and they will no doubt make for sizable ratings for sponsoring advertisers just as they do now.

55. Along the same line, Kahn says that STV constitutes a new box office for film makers and will stimulate them to produce more and better films to take advantage of that box office. Moreover, according to Kahn, since film makers should be recouping their investments first through theater exhibition and then through STV showings, they will no doubt be willing to release their pictures to conventional TV years earlier than they have in the past. Zenith and Teco express a similar view about earlier availability of films for free TV as a result of more rapid realization of box office revenues through showing the films on STV.

56. Telemeter, Zenith, and Teco all make a further contention—that films shown on free TV are cut and edited to fit appropriate time segments, and are often interrupted by commercials which, it is said, distort and destroy the artistic continuity of the films.[28] In STV, the full feature is shown without cutting and without commercials. Moreover, another advantage of STV is said to be that the films may be shown more than once so that viewers may see them at their convenience.

57. Finally, concerning sports, special entertainment, and educational programing, Telemeter avers that STV will considerably expand the sports events available—events that are not now shown and in the foreseeable future will not appear on free TV. It is stated that although opponents belittle the fact that an average of only 17 doctors viewed each of the three medical programs at Hartford, it must be remembered that there were not more than 5,000 subscribers. If STV were nationwide, Telemeter says, there would be millions of subscribers. As an example, it assumes 10 million subscribers which is less than 20 percent of the total TV homes. With such penetration, 17 viewing doctors at Hartford would translate into 34,000 viewing doctors nationally. This is, Telemeter says, 12 percent of all doctors in the United States, who would be furnished a not inconsiderable and unique service by STV. Similarly, with regard to cultural programs, Telemeter states that opponents play down their import and play up the fact that these programs achieved very low ratings. Thus, NAB points out that *The Consul* had an average rating of only 3.5 percent at Hartford. However, Telemeter says, if STV had millions of subscribers, even with such small ratings enough revenues would be generated to reward the producer of the opera. On the other hand, it is argued, such programs are viewed as deadly by commercial TV and get short shrift even in nonprime time, so that the minority audiences that would be interested in seeing them do not have the opportunity to do so.

58. *Conclusions.*—One of the most important single issues in this proceeding is whether STV would provide a beneficial supplement to

[28] Telemeter cites two instances in which producers of films brought legal actions in efforts to prevent this sort of distortion on the part of free TV.

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the offerings of free TV.[29] If it would, even its opponents agree that doubts about other public interest aspects of STV might possibly be resolved in its favor. However, if the programing of STV is merely duplicative of types of programs now appearing on free TV in quantity, opponents urge—and we would be inclined to agree—that it would not appear that other public interest considerations could justify the authorization of STV using broadcast channels. We believe, for the reasons given below, that STV will provide a beneficial supplement to free TV.

59. Of course, the programing of a single over-the-air trial operation at Hartford and an experimental cable operation at Etobicoke cannot form the basis for completely certain predictions about the programing that would be shown if nationwide STV were authorized. However, programing different from free TV programing was available for the STV trials, and no arguments have been made that convince us that such programing would not continue to be available for STV if it becomes a nationwide service.[30] If anything, it seems that nationwide activity would strengthen the position of STV in obtaining such programing, or even better programing. Proponents suggest that nationwide STV would follow the pattern of the trials and that the major portion of its programing would consist of feature films and sports (91 percent of Hartford programing). This appears to be a reasonable forecast, and the rules which we adopt herein take cognizance of it. Should STV programing change as it develops, and should the change require amendments of our rules in the public interest, we, of course, stand ready to make them.

60. It may be useful first to analyze STV programing on the basis of the Hartford trial. We begin with sports. Opponents of STV urge that because a cascade of sports events is shown on free TV, sporting events shown on STV would be duplicative because they would be of the same type. This is unrealistic. It is elementary that if a man wishes to view a heavyweight championship fight he will not be satisfied with viewing a tennis match, a football game, or a motorcycle race instead. Such fights were generally not carried on free TV for many years. To let him see the fight on STV is clearly to supplement present sport-events programing on free TV.[30] The same is true with respect to blacked out home games of amateur or professional teams. If one wishes to view on TV the local teams in which he has a strong interest, it is at best a poor substitute to let him view other teams playing in other parts of the country. It is a fact of life that just as heavyweight title fights are not now generally shown on free TV, home games are blacked out. The promoters and team owners do not permit them to be shown on free TV for fear of harming box office revenues.

[29] The question of impact of STV on free TV, discussed hereinafter, is also of great importance.

[30] Since the comments were filed in this proceeding, a question has developed as to whether heavyweight championship fights will be available to STV, to free TV, or both. For many years, including the period when the Hartford STV trial operation showed them, they were not available on free TV. Recently, however, ABC has shown several Clay defenses from Europe by satellite. It has also broadcast a series of heavyweight elimination fights, including the final fight in which Ellis won the title. Whether this indicates a changing pattern or a lack of interest in the fights that meant they could not command a theater closed circuit audience is not known (see par. 303 infra).

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The testimony of Robert Hall indicates that this situation will probably continue for college teams, and it would appear that it will also prevail for professional sports since like reasons dictate the blackouts in both cases. Opponents speak of the present blackout restrictions as "a reasonable accommodation of conflicting economic and social interests." This may be so, but it is not the only possible accommodation. If the teams which now protect their box office revenues by blacking out home games find that they can permit the games to be shown locally on STV and still benefit financially, perhaps a new balance of economic and social interests will be struck. It is argued that other factors than protecting the gate are involved. Thus, we are told that the Commissioner of the National Football League has said that he "does not want to follow the path of professional boxing—with teams playing in comparatively empty arenas with national television audiences." If the league believes that this would happen, there is nothing to force it to allow its football games to be shown on STV. They can only be shown if the league consents. The record suggests that at least in some cities where the pro-football stadia are completely sold out and people cannot obtain tickets, STV might provide a beneficial supplement and the arenas would not be empty.

61. Another benefit to the public that should not be overlooked is the fact that many viewers may see a sports event over a single STV subscriber's set for a relatively modest per-capita cost. Thus, for example, a Hartford survey showed that during one heavyweight title fight an average of nine viewers was watching each STV set that was tuned in, and the cost for all nine was $3. The same fight on closed circuit TV at theaters in Hartford cost $5 per person.

62. Turning now to feature films, we observe that, generally speaking, people like to see fresh, new films. That is one reason that theaters showing first-run films can charge more than those with later showings. The fact that there are some exceptions to this observation, such as "blockbusters" that are not recent films, does not destroy its general validity. Nor does the fact that Hartford viewers spent about the same amount whether 27 percent or 70 percent of the feature films shown were first subsequent run. The constancy of the amount spent points more to a limitation on the sums a family will spend on a certain kind of recreation rather than to the unimportance of recency. Moreover, the record indicates that the cumulative audience rating for first-subsequent-run films was about 27 percent whereas it was 18 percent for other films. Just as a person wishing a heavyweight fight will not be satisfied with a tennis match, the chances are that generally a person wishing to see a widely-advertised, favorably-reviewed, new movie will not be satisfied with a substantially older film on free TV. They are both entertainment of the same type, i.e., films, but there is a difference. It may be noted that although the opponents of STV attempt to minimize the importance of recency, at the same time they attempt to show that films being presented on free television are current.

63. In large part we agree with the proponents of STV who state that under the cost-per-thousand economics of conventional television, current films, such as first-subsequent-run films, cannot be shown on

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that service, because free TV cannot pay enough to cover production costs and potential box office revenues that would be lost because of the free showing. On the other hand, Zenith and Teco report that after difficulties in program procurement were ironed out, 70 percent of the films exhibited in the Hartford trial in a recent year were first subsequent run (and in roughly the same period Hartford showed 28 of the top 35 films). It may also be recalled that although only 27 percent of the films shown in the first 2 years of the trial were first subsequent run, the rest were, on the average, shown 2 years after theater release.

64. Although the comments of opponents make an effort to show how recent the films on free TV are, there can be no doubt from the data they submit, or from a perusal of TV program schedules, that the average age of the films on free TV is far above the Hartford average. As an example, we refer to the list of films to be shown by networks in prime time during the 1966–67 season which ABC compiled from the July 27, 1966, issue of Variety. Except for two films made expressly for original run on free TV, it consisted of 26 films that were, on the average, to be shown 3½ years after theater release. Moreover, the complete Variety list of films to be shown by networks during the 1966–67 season, from which the ABC list was selected, shows 60 percent of the films to be from 4 to 15 years old. Calculations based on this list show the average age of the films to be about 5½ years. In oral argument, AMST states that the July 26, 1967, Variety lists 130 films to be shown by the networks in prime time during the 1967–68 season and that about 20 percent of them might be shown less than 2 years after theater release. A check made since the end of that season shows that of the films receiving their first TV showing on the networks, about 6 percent, rather than 20 percent, were less than 2 years old. (This may be compared with the 10 percent figure for the 1966–67 season mentioned in par. 39.) They were, on the average, presented about 5 years after theater release. (This may be compared with the 5½-year figure for the 1966–67 season mentioned above.) Finally, although not indicative of what the entire season will bring, we note that during the first 6 weeks of the 1968–69 season the average age of the films shown by the networks was about 3¾ years, and about 8 percent were less than 2 years old.

65. A final point should be mentioned with regard to feature films. Opponents suggest that, in pleadings filed about 12 years ago in this proceeding, the Commission was led to believe that STV would supply first-run feature films, but that it has only furnished first-subsequent-run pictures. Zenith and Teco state that although first-run films have generally not been made available for STV, if the service were authorized on a nationwide basis they could no doubt be obtained if desired. We would point out that, as indicated in paragraphs 67–68 below, the Commission was of the opinion that claims of both proponents and opponents might not be free of exaggeration and the very purpose of trial operations was to aid in ascertaining where reality lay. The Hartford trial has shown that, at the least, first-subsequent-run films are available. Whether first-run features would be similarly at hand if STV is authorized on a national scale is not controlling at

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this juncture, since we are convinced that even without their availability the films to be shown on STV constitute a beneficial supplement. This supplement permits the public to have three methods of viewing motion pictures: (1) first or later runs in theaters, (2) first-subsequent or later runs on STV, and (3) later runs on conventional television. If first-run films were made available to STV the same three methods of viewing would still prevail with STV being even more of a beneficial supplement.

66. Several opponents have stated that the Hartford trial has shown that STV has disproved the proponents' statements that STV would diversify television programing. They quote from paragraph 48 of the *First Report* to the effect that proponents "allege that subscriber financed broadcasts could and would provide a wider choice to members of the public interested in the fine arts, operas, educational and informative material, and other similar kinds of programs." Instead of diversity, it is argued, Hartford has shown that most of the programing will be that which appeals to a mass audience—films and sports. Therefore, we are told, since it will not provide the diversity promised, STV should not be authorized.

67. This argument overlooks the context in which the quoted statement was made. Therefore we quote in full paragraphs 48, 49, and 51 of the *First Report:*

> 48. Insofar as a judgment can be made on the present record the Commission believes that in some respects the claims of proponents and opponents alike are not free from exaggeration. Proponents, for example, have tended to stress the capacity of subscription television to bring to the public new kinds of programing hitherto unavailable or available on a very limited basis. In support of this argument proponents refer to the incentive to the advertiser to concentrate his support on programs of wide general interest. They allege that subscriber financed broadcasts could and would provide a wider choice to members of the public interested in the fine arts, operas, educational and informative material, and other similar kinds of programs.
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> 49. As against this picture of greatly enhanced variety of programs, the opponents insist that the incentive to offer programs of the widest popular appeal would be if anything greater in subscription television. Time availabilities, it is claimed, which could yield substantially greater returns for programs of wider popular appeal would not be sacrificed to any appreciable extent for the transmission of programs which may be expected to attract such smaller audiences.
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> 51. It is not possible, however, without a demonstration of the service in operation, to determine reliably where the practical realities lie—in the glowing prospects pictured by proponents, with the alarms raised by the opponents, or somewhere between these extremes.

Comments of proponents filed in 1955, and paragraph 50 of the *First Report* not quoted here, make it clear that proponents not only stated that STV would provide wider diversity, but that it might offer sports events not shown on free TV, as well as movies.

68. In view of the foregoing, it may be seen that we expressed an inability to determine where the realities of the matter lay without help from trial operations. We now have the results of the Hartford trial, as well as some information concerning Etobicoke. It would appear, at least at present, that the reality is that the major part of the programing, as opponents had argued, will be of a kind that would

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appeal to a mass audience. To say this, however, is not to say that it would not be in the public interest to authorize STV for, as indicated above, we believe that such programing does provide a beneficial supplement to present television fare, albeit the diversity promised may not be fully achieved. Since most of STV programing may well be that which appeals to mass audiences, the argument that STV should not be authorized because diversified programing appealing to small audiences is being supplied by noncommercial educational TV stations (and is expected to be supplied by the Corporation for Public Broadcasting) loses weight. To the extent that STV does provide such programing, it may well provide a healthy stimulus to improve the quality of that material televised in both services.

69. It is difficult at this stage to arrive at any definite conclusions about the cultural or educational type of programing that was to make for diversification. Hartford did offer some. So did Etobicoke. Audience response was not great, but there was a response. On a national scale, total audiences would be greater. Zenith and Teco state that the limitations of the trial prevented more such programing. Larger audiences might permit it. The joint committee says that RKO promised the Commission that it was prepared to lose up to $10 million on the trial. It lost money, but not that much. The joint committee argues that had it spent and lost more, as it promised it was willing to do, it might have provided the Commission with more information about such programing. This is obviously an area where we know little. In any event, the rules we adopt today adjust to the reality of the situation—the expected predominance of films and sports—but provide assurance of programing for other tastes as well by establishing a maximum percentage of STV hours on the air that may be devoted to films and sports.

Whether STV would provide an increase in financial resources which would facilitate significant increases in the numbers of services available to the public under the present system

The degree of acceptance and support which STV might be able to obtain from members of the public in a position to make a free choice

70. These two categories are discussed together because they are so closely intertwined. Zenith and Teco give business projections based on the Hartford experience which indicate that an over-the-air STV operation would break even with 20,000 subscribers. They then assume what they characterize as a conservative estimate that 10 percent of the TV households in a community would subscribe to STV. Under these assumptions, the top 91 markets would have sufficient TV homes to support viable STV operations. From this they argue that STV has a reasonable potential of supporting 91 more stations in addition to those already in operation, and that, depending on the marketplace, it might do even more than that. Thus STV would facilitate increases in the number of services to the public. Whether STV could provide an increase in financial resources depends, of course, not only on the validity of the assumptions that went into the preparation of the business projections that suggest a 20,000 subscriber break-even point, but also on whether public support would be such as to produce more than 20,000

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subscribers in various communities. We turn first to the business projections.

71. *Business projections based on Hartford trial information.*—Although the Hartford trial lost over $3½ million in the first 3 years of operation, Zenith and Teco remind us that RKO mentioned at the hearing prior to the grant of the trial authorization that even under the best conditions it expected to lose more than a million dollars. They aver that the objectives of the trial were to obtain operating experience and that in this respect it was a success. Thanks to the trial, they say, for the first time reliable data are at hand from which reasonable business projections may be made about the potential of STV to provide an increase in financial and program resources which would facilitate significant increases in the numbers of services available to the public.

72. The Zenith-Teco business projections were summarized in paragraphs 10 and 11 of appendix A of the *Further Notice.* That appendix is attached hereto as appendix B. The assumptions used in preparation of the projections are stated briefly in paragraph 11 thereof and will not be repeated here.

73. Opponents variously criticize those assumptions. Thus, for example, it is said that the projections assume payments of $65 per year per subscriber for program charges, but that at Hartford the average for the first year was $67.47 and it fell to $56.84 the second year, so that the figure of $65 is not based on the trial data.

74. It is also argued that if STV pays only 35 percent of total subscriber program expenditures for payment to program suppliers (this is the figure assumed in the projections; the percentage was slightly higher at Hartford) it will obtain little more than the programing that was obtained for Hartford which produced less than 1 percent penetration rather than 10 percent or more. Quality films, we are informed, can command as much as 90 percent for a first-run showing in New York or Los Angeles, and often obtain as much as 50 percent or more for first subsequent run. Closed-circuit television in theaters can expect to pay 50 to 60 percent of the gross, it is said.

75. Other arguments are that in calculating the projections, the turnover rate (the number of subscriber homes disconnected as a percent of the average number of subscriber homes) is taken to be 20 percent, but it was higher at Hartford; and that the assumption of payments of $300,000–$400,000 per year for station time is too low.

76. *Penetration.*—As to penetration of STV, opponents state the following: The so-called conservative assumption of 10 percent has no basis in fact. At Hartford the penetration was less than 0.75 percent of the TV homes in the market. If the trial is to be used as the basis of projection then one should assume not more than roughly 1 percent penetration. Using that figure, STV would be viable in only the top four markets and not in 91.[31]

77. In addition, the following is argued: The revenues of the projection include not only program charges of $65 per year per subscriber, but weekly decoder rental charges of 75 cents that come to $39

[31] It is also urged that the high turnover rate at Hartford shows subscriber dissatisfaction and is significant in showing that STV lacks ability to attract sufficient subscribers.

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per year, for a total of about $105 per year. According to the most recent Department of Labor statistics, the average family spends only $27.67 per year on all spectator admissions, yet Zenith and Teco expect them to quadruple that amount for box office admissions and spend the entire amount on STV. There is no empirical basis in fact for expecting this to happen, and the trial results show that only 0.75 percent might do so, which is a far cry from 10 percent. Thus the revenues are overstated insofar as they purport to be based on the Hartford data.

78. *Channel allocations and station growth.*—Zenith and Teco present their projections and penetration material against a background of information concerning channel allocations and station growth in order to show that STV would provide an increase in financial and program resources for the Nation's competitive television system. They briefly mention the activity of the Commission in allocating television channels throughout the country on the basis of priorities designed to provide the setting for a national competitive television system. But they emphasize that establishing stations using the allocated channels is the province of private enterprise. Figures are presented to show the number of television broadcast licensees and the number of permittees as of January 1, 1964 (shortly before they filed their joint petition for further rulemaking), and the number of idle channels. In addition, information is given about television stations that went off the air and construction permits for TV stations that were surrendered or cancelled between the lifting of the freeze in 1952 and January 1, 1964. Zenith and Teco also point to the Commission's sponsorship of the all-channel law as another example of what the Commission has done to develop the television system. They then conclude that the Commission has perhaps done all it can to achieve a nationwide television system and foster UHF except for promoting economic support and program sources through the authorization of STV.

79. Responsive to the foregoing, the joint committee points out that the Zenith-Teco figures stop at January 1, 1964, but that between that date and September 29, 1966, the number of commercial UHF stations increased from 88 to 115 and the number of VHF stations, from 476 to 490. Also, during that period the number of UHF construction permits increased from 61 to 139. This UHF growth, it is suggested, was brought about by the fact that the UHF problem was caused by the lack of set conversion, a situation that was corrected by the all-channel law without the aid of STV.

80. *Necessary showing for establishment of new service.*—In their reply comments and elsewhere in the record [32] Zenith and Teco place stress on the question of what sort of showing is necessary in order for the Commission to establish a new service. They say that opponents hold that the Hartford trial did not supply enough information to permit valid projections of viability of STV, and that without absolute proof the Commission cannot establish a new service or otherwise encourage the larger and more effective use of radio because it would

[32] "Reply to opposition by joint committee against toll TV to joint petition for further rulemaking," filed July 29, 1965.

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result in waste of spectrum space. Opponents also say that without a showing of demand or need, use of broadcast channels for STV is not justified. Zenith and Teco, while not conceding that there is no demand, maintain that nothing in the act indicates that establishment of a new service must be preceded by absolute proof that it will be viable, and that authorizing a new service does not require evidence of a widespread public demand. Such proof, they say, was not made when the Commission allocated for UHF in 1952 or when it reserved channels for educational TV in 1952; and there was no great demand for FM or TV services when they were commenced. The Hartford trial, they state, provided useful information on which to make projections. Citing *American Airlines, Inc.* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C., 1951), they argue that the Commission, in encouraging and developing new broadcast service in the public interest, should consider not only present facts but estimates of the future. Along the same line, in response to the argument that the 10 percent penetration figure is too optimistic, Telemeter states in its reply comments that one of the opponents of STV (NAB) misjudged the future of commercial television when it was beginning, but that service grew from 8,500 TV homes to 94 percent of all homes in the Nation.

81. *Conclusions.*—We agree with the views of Zenith and Teco expressed in the preceding paragraph. We observe that the results of a single trial cannot be projected into the future to indicate with complete accuracy the nature of a new service. However, a trial can, and the Hartford trial did, supply us with information that does afford a projective basis with some attachment to reality as opposed to mere conjecture that existed before. We recognize that there are some weaknesses in the assumptions underlying the Hartford business projections, but do not consider them to be overriding. For example, the estimated $65 figure for program revenue per year per subscriber is slightly higher than the Hartford experience. However, in making the projections Zenith and Teco state that it only approximates the average program expenditure of the Hartford subscriber. They also point out that with nationwide STV more, and in some respects better, program product might be available and it is not unreasonable to expect that subscribers might spend more on programs because of this. In any event, even if the $65 figure were shaved by a few dollars to make it correspond exactly to the average Hartford expenditure, it would only result in a relatively minor change in the projections.

82. Nor, for example, do we gainsay the validity of the fact that the projections assumed a revenue of about $105 per year per subscriber for STV alone, whereas the average family spends only $27.67 per year on all spectator admissions. However, the fact remains that the average subscriber at Hartford did spend close to $65 per year for programs and, with discounts, did pay a weekly decoder rental fee. To say that the average family spends $27.67 is not to say that no families spend more than that amount, for it is the nature of an average that many lie above it and many below. Unfortunately, we have not been told what percentage of American families spend far above the average. Nor do we have information about the possibility that expenditures for

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STV might come out of a nonrecreational part of the budget as has apparently been the case with amounts paid for purchase of television sets.

83. Concerning the argument that the estimate of payments of $300,000 to $400,000 per year for use of station time for broadcasting of STV programs is too low, we would point out that even in the largest markets some TV stations charge rates comparable to those of the larger radio stations in the area. This indicates that the figures of $300,000 to $400,000 is not unreasonable.

84. As to the argument that the high turnover rate shows public dissatisfaction with STV and that the public will not support it, we conclude that not enough is now known about the causes of turnover to permit drawing valid conclusions. We agree that, based on the experience of telephone companies, Zenith and Teco assume too low a turnover rate. However, we have no reason at this time to believe that with STV authorized on a nationwide basis this factor would be of such magnitude as to result in insufficient support of STV. In any event, the rule we adopt today provides for lease rather than purchase of decoders by subscribers, and thus provides protection to subscribers who may wish to withdraw.

85. As to the estimate that program costs would run about 35 percent of program revenues, it is said that unless STV spends more than that for quality product it will not achieve a better penetration than it did in Hartford and it will fail; and that quality product sometimes costs more. Yet we are not told how much quality product there is that costs more, or how much more it costs other than that it will bring as high as 90 percent for first-run exhibition in New York or Los Angeles, or that it often obtains as much as 50 percent or more for first-subsequent-run and that closed circuit television in theaters can expect to pay 50 to 60 percent of the gross. We believe that the question of what programs STV can obtain and how attractive they will be to how many people cannot be answered with any great degree of certainty. It is conceivable, for example, that a nationwide STV system, even if only moderately successful, could provide an audience sufficiently large to make payments of 35 percent of program revenues very attractive to suppliers of quality product. In fact, with larger audiences, suppliers might be willing to charge lower percentages. Moreover, there is the possibility that if more than 35 percent had to be paid to obtain quality programs, STV operators could charge more for the better product. In any event, the question of STV penetration and what it might take to obtain greater penetration is one about which there can only be speculation at this stage. At worst, using a 1 percent penetration, and accepting the other assumptions of the projections, presumably STV could be viable in the top four markets (New York, Los Angeles, Chicago, Philadelphia). At best, it would be successful in many more. Having decided that STVcan provide a beneficial supplement to present TV programing, we are content to let this aspect work itself out in actual operations under our new rules and under a requirement (as a matter of policy) that applicants for STV authorizations make a showing that they have the financial capacity to operate for at least a year.

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86. Although not previously mentioned, we here note with regard to the matter of potential penetration of STV that it has been argued that STV would be something which only the very wealthy could afford. Zenith and Teco provide the following table, based on the Hartford trial, controverting this:

Income levels	4633 Hartford subscribers		
	Proportion of total U.S. families [1]	Proportion total subscribers	Average weekly program expenditure
	Percent	*Percent*	
0-$3,999	29.1	1.5	$0.00
$4,000-$6,999	32.5	40.8	1.25
$7,000-$9,999	21.0	43.3	1.23
$10,000 and over	17.7	14.4	1.18
Totals (rounded)	100.0	100.0	1.22

[1] Statistical Abstract of the United States 1964, Table No. 457, p. 338.

It would appear, if the trial is any indication, that STV would appeal especially to the more than 50 percent of the population in the middle-income groups, and not mainly to the upper-income level which includes only about 18 percent of the population. As to the 30 percent of the population in the lower-income category, Zenith and Teco state that an annual income of $3,000 has been called a poverty income and that therefore many of those in the less than $4,000 bracket in the table might not be able to afford other than basic necessities; and some might not even be able to afford TV sets, let alone STV.

87. STV opponents contend that 30 percent of the Nation would appear to be unable to afford STV and that therefore authorizing such a service would not be in the public interest, for it would divide viewers along economic lines. It would deprive the poor, we are told, of access to the broadcast channels used by STV stations. Moreover, it urged, it would leave them a smaller choice of free TV stations to view and on those stations the programing would be degraded because of siphoning of programs from free TV to STV (see note 34, infra). Assuming that the figures of the trial would carry over into permanent STV so that this economic group in fact could not subscribe, we still do not find these arguments persuasive. Among other things, we observe that under the rules which we adopt (STV permitted only in communities with signals from five or more stations, and on only one station in any such community) all those in the lower-income group who own TV sets will be able to continue to see ample amounts of free TV programing, while at the same time a substantial portion of the population (70 percent) will be given the opportunity to view STV if it so desires. We believe it in the public interest to afford such a large segment of the population the beneficial supplement of STV programing and concomitant advantages of monetary savings and convenience that group viewing of an STV set affords. We have in mind, for example, the viewing of STV films by a family for a single charge, without the expense of parking, or babysitters. As for the argument that remaining free TV program fare would be degraded because of siphoning, we are adopting rules today which we believe will prevent

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siphoning that would be seriously detrimental to free TV, and which could quite possibly improve free TV programing through healthy competition.

88. Opponents argue that, in a five-station community, permitting one station to engage in STV means that viewers in that community are deprived of free programing which they could have seen on the station had it not been broadcasting subscription programing. This overlooks the fact that some STV operations may well be on new stations which but for the STV authorization would not have gone on the air. Since the rules we adopt will require all STV stations to show some free programing, this means that the new STV station would add to the total amount of free programing available to the market. In addition to new stations, it is not unlikely that stations seeking STV authorizations may be those which are having financial difficulties operating as conventional TV stations. Such stations may well have had a type of programing that families might not have been inclined to watch and which was viewed by them very little.

89. Finally, we are gratified that the all-channel law is apparently acting as a stimulus to UHF development, for this was our hope when we sponsored it.[38] However, our commitment to aid UHF is not limited to that law, and it is well known that our continuing policy is to foster UHF development. We are pursuing many paths toward that end, and to the extent that STV may act as a stimulus, we will pursue that path as well. One opponent has argued that the financial resources of STV would not be used to strengthen free TV on the same station that carried on STV operations, but that they would be used to strengthen STV since STV and free TV would compete with each other, and that this would impair rather than promote the capacity of such stations to yield an expanding service envisioned by the all-channel law. As with other aspects of this or any other new service, this cannot be known until the actual operations commence. However, we note that our new rules require that STV stations carry at least the minimum of conventional service specified by our present rules.

Whether STV would seriously impair the capacity of the present system to continue to provide advertiser-financed programing of the present or foreseeable quantity, free of direct charge to the public. The closely related question of whether STV would result in significant audience diversion from conventional television and siphoning of programs and talent away from free television into STV service

90. With regard to the matter of impact of STV on free TV and the related subject of siphoning, we stated in the *Further Notice* (par. 16):

> In our judgment, our consideration of subscription television should proceed with due regard both for its potential benefits and disadvantages and for the inherent strengths and advantages of the existing system. That subscription television on a nationwide scale can be effectively integrated

[38] U.S. Census reports that in June 1967, 94.1 percent of households had TV sets and 42.1 percent of households had sets equipped for UHF reception. (Current Housing Reports, series H-121, No. 14, January 1968.)

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into a total TV system, with advantages to the viewing audience, appears to be a reasonably sound conclusion at this point. While * * * there may be some impact on free TV, we do not believe that this is in itself necessarily bad or that it need occur to a degree contrary to the public interest, particularly if safeguards such as those previously mentioned are adopted. Our concern, as it must be, is with the overall public interest and not with protection of any existing service as such. It may well be that competition between conventional and subscription TV for viewing audience and program material may result in improved and more varied fare, both for subscription viewers and those who continue to rely on conventional television. But we also emphasize that we regard the preservation of conventional television service and the continued availability of good program material to the free service as extremely important considerations * * *.

91. We also stated in the *Further Notice* (pars. 13–14) that although no final conclusions could be drawn from the Hartford trial about the extent to which STV would divert audience from conventional TV, the trial data suggest that such diversion would not be destructive of the latter service. In connection with that statement we adverted to the fact that the average Hartford STV audience at any particular time was 5.5 percent of the subscribers, and that the number of subscribers was less than 1 percent of the net weekly circulation of the market. We stated that even with 10 percent penetration and 10 percent average subscription audience (as compared with the 5.5 percent of the trial), the average STV audience in prime viewing time would only be 1 percent of all the TV homes in the United States. This diversion and whatever effect on revenues it might have we felt would not seriously impair the free TV service.

92. We went on to say that conceivably the audience diversion might be substantially greater if STV should result in "siphoning" [34] of programs and talent from free TV to STV. And, aside from audience diversion, should siphoning occur, we stated, it could make free TV a less rich and varied medium for those continuing to view it. Because we found it difficult, on the basis of the Hartford or any other information, to arrive at conclusions about siphoning, we invited comments on the extent to which it might be likely to occur and on what rules or policies, if any, should be adopted to prevent it from occurring to a degree contrary to the public interest. Paragraph 14 mentioned and invited comments on possible regulative approaches to the problem—the safeguards mentioned in the quotation in paragraph 90 above.[35]

[34] A matter of key importance is the possibility of diversion of talent and programs from free TV to STV, a process often called "siphoning."

[35] The pertinent portion of par. 14 is as follows:

It is difficult, on the basis of the Hartford trial or any other information which we have, to arrive at well-founded conclusions concerning siphoning of programs or talent. We invite comments on the extent to which such developments are likely to occur, and what rules or policies, if any, should be adopted to prevent them from occurring to a degree contrary to the public interest. For example, such regulations might include: (1) Rules preventing or limiting interconnection of pay TV operations by microwave or otherwise; (2) rules prohibiting a system manufacturer or franchise-holder (who might hold francises in numerous markets) from engaging in subscription program procurement and supply, which could be made the responsibility of the individual licensee; or (3) rules to assure that subscription television entrepreneurs do not unreasonbly contract with performers in such a way as to prevent or discourage their appearing on conventional television. Another possible approach to this question, urged by Zenith and Teco, is that subscription television be limited to kinds of programs not presently available in substantial amounts on conventional TV. This is discussed in pars. 41–42 below. We anticipate that, if subscription TV operations are authorized, the licensees thereof will be expected to furnish the Commission, on a continuing basis, with information as to number of subscribers, per subscriber expenditures, and programs presented so that we may be periodically informed as to the factors bearing on their potential for siphoning programs or talent from conventional television.

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93. *Comments of proponents of STV.*—Comments received are summarized in this and the succeeding paragraphs.[36] They are followed by material submitted in oral argument, and then by our conclusions. Zenith and Teco, incorporating by reference previously submitted material, state that audience siphoning would be minimal because the average subscriber at Hartford had an STV viewing time of approximately 2 hours per week as compared to the average U.S. free TV viewing of about 38 hours per week. This is about 5 percent of the hours the public now views free TV. If every home were to become an STV home, which is unlikely, there would thus be a loss of 5 percent of viewing time to STV. But if 10 percent penetration of STV were achieved, the loss would be one half of 1 percent. Moreover, since even in prime time between 35 and 50 percent of TV homes do not use their sets, some of those viewing STV might be those whose sets would otherwise have been dark so that their viewing would be additive rather than subtractive. They also demonstrate the minimal audience siphoning effect by stating that the average STV audience at any particular time was 5.5 percent of the subscribers. Thus even if there were 100-percent penetration by STV, only 5.5 percent of the subscribers would be diverted at any given time, leaving 94.5 percent of TV homes available to watch free TV.

94. Concerning preempting of time now used by free TV, it is stated that WHCT at Hartford broadcasts an average of 30 hours per week of subscription programing and that, because of the limitation on the number of box office programs and the size of the recreational budget of families, that number is unlikely to vary in other STV operations.[37] Since typical TV stations broadcast about 115 or 120 hours per week, in a multiple-station market of three or more stations STV could not absorb more than 10 to 15 percent of the total broadcast time available. Moreover, it is argued, because conventional TV stations affiliated with networks probably would not wish to desert profitable operations by giving up network programing for STV programing, it is likely STV will have to support the establishment of new stations if it is to get off the ground. New stations would not siphon time that would otherwise be available to free TV. They would add to the total amount of time.

95. As to program siphoning, Zenith and Teco inform us that none of the programs shown at Hartford were available on free TV. With regard to talent siphoning, they remind us that stars, producers, directors, and writers often work for more than one medium and there is no more reason to assume that STV will siphon talent than there is to suppose that the motion picture industry would do so, since for much of its programing STV merely would substitute for the motion picture theater. They contend that STV will not siphon programs or talent from free TV and that the two services will not bid for the same product. In any event, they aver, the economic resources of STV

[36] Many of the arguments made in the comments have been previously made in earlier stages of this proceeding.

[37] Zenith and Teco state that because of these limitations a total of about 30 hours of STV programing is all that can be absorbed in any market regardless of the number of STV stations therein.

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are dwarfed by those of the networks, so that STV could not outbid them. In support of these views they state the following:

> The fear that subscription television could outbid conventional television for programing also reflects a basic misconception concerning the fundamental economics of subscription television. Expensive box office programs—such as $10 million current feature-length motion pictures—can admittedly be shown on subscription television long before conventional television. But the reason is not that subscription will necessarily have more money available for program procurement than conventional television. The reason lies primarily in the distribution structure which results from the efforts of product owners to maximize their profits from each production.
>
> Thus, conventional television programing usually has only one source of economic support—the advertising sponsor. The extent of the sponsor's support is controlled by the cost per thousand economics of advertising. On the other hand, box office attractions have several sources of economic support, which include revenue derived from theater release, both domestic and worldwide, in addition to revenue derived from later use of conventional television. Subscription exhibition can be combined with simultaneous theater release and add to the box office revenue of program producers and distributors without reducing the further revenue utilimately obtainable from conventional television. The combined amount of these box office revenues will ordinarily exceed what sponsors can pay for a single conventional television release. Yet the combined box office releases exhaust the residual value of the film to a lesser extent than a single showing on conventional television. In short, subscription television and theater box office release can profitably be permitted simultaneously, whereas release to conventional television must be deferred in the interest of maximizing profits over the life of the production.
>
> Aside from the erroneous presumption that subscription television and conventional television would often be simultaneously seeking the same product, it is a matter of simple business arithmetic that subscription television will not be in a position to outbid conventional television for program product. Thus, in Hartford the average subscriber has been willing to spend approximately $65 a year for subscription programing; and, on the basis of numerous market studies made by Zenith, Teco, and others, this appears to be the approximate portion of the public's recreational budget that it is willing to spend on subscription programs. Of this $65 annual program income, approximately 35 percent (or $22.75) is available for program procurement, with the remaining 65 percent required to support the television station and the subscription system.
>
> For purposes of nationwide projection, the Commission in its *Further Notice* has estimated, on the basis of the Hartford trial, that a 10-percent nationwide penetration of television homes would be a relatively optimistic figure in the foreseeable future. A 10-percent nationwide penetration would amount approximately to 5.5 million subscribers. Five and a half million subscribers spending $65 each per year, of which $22.75 would be available for program procurement, would make available $125,125,000 for subscription programs. This amount is dwarfed by current network expenditures for programing. Thus, in 1965 (latest figures available), the networks and their O. & O.'s spent $686,752,000 and the total broadcast industry spent $953,251,000 on conventional programing. In short with a 10-percent nationwide penetration, subscription would have available for program procurement less than one-fourth of the amount spent by the entire television industry for programing in 1964. Stated otherwise, subscription would have to achieve approximately a 70-percent nationwide penetration of television homes to have an amount available for program procurement which would even approximately the amount already being spent by the television industry for conventional programing. Thus, the fear that subscription could win in a bidding contest with conventional television is simply not realistic.

96. To the often made argument that STV would siphon from free TV the programs that have high ratings and make the public pay for them, Zenith and Teco say that the Hartford experience shows

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that even for box office programs the public is selective. Thus the cumulative audience rating for first-subsequent-run films was about 27 percent but for older films it was 18 percent. Therefore, they argue, it is unreasonable to assume that the public would pay to see the type of program now available on free TV, especially when programs of that type could be seen on some other station free. Even with the 40 top-rated programs on free TV during the fall season of 1964, according to the Nielsen rating, an average of 76 percent of the viewers did not watch them.

97. To the contention that STV would siphon all major sports, they state that even with an STV penetration of 20 percent in the top 175 markets, at an average yearly subscriber program expenditure of $65, there would be $650 million in program revenues. Assuming that 35 percent of this amount would be available for program procurement, there would be $227,500,000 for all STV programing. Citing figures for relative amounts of spending by the public for movies, plays, sports, and other entertainment, assuming that these figures will apply to STV spending, and allocating a proportionate amount for program purchases accordingly, about $32 million would be available for sports programs. This figure they point out is about 60 percent of the sum of approximately $50 million that free TV spends for some, but not all, of the sports programs seen on conventional TV. This reflects the relative abilities of STV and free TV to acquire sports programing. They state that with the money available, the major contribution of STV to sports programing would be that of carrying heavyweight championship fights and blacked-out games (see note 30 supra).

98. Finally, to the argument that STV would siphon all present network conventional programing from free TV, they state that there are just too many such programs to permit them to be absorbed by the public's recreational budget at a rate higher than sponsors will pay for their showing on free TV.

99. Other proponents of STV also present their positions in this area. Telemeter says that STV will not siphon but will show programs not now available to free TV. Teleglobe says that free TV is a giant and can't be hurt, its revenues having increased from $324 million in 1952 to about $2 billion in 1965. With 10-percent penetration, STV revenues would only be about $500 million a year. Jerrold says that phonograph records and tape recordings have not driven radio out of business or decreased quality of radio programing, nor have motion pictures become extinct because of TV. Actually, in Jerrold's view, pictures have improved because of the competition of television. Competition, it is said, should be assumed beneficial until a contrary showing is made and the Government should not inhibit competition for the sake of preferring one kind of communications over another. Acorn says that if STV programing is good enough it is conceivable that free TV would try to siphon it away—a siphoning in reverse.

100. *Comments of opponents of STV.*—Concerning the matter of audience siphoning, the Joint Committee says that the trial gives no information because with an average of 5.5 percent of subscribers watching STV at any one time, only 267 persons (5.5 percent of 4,851)

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would be watching, and in a market with a net weekly circulation of 800,000 there would be little audience siphoning effect; and besides such an STV operation would not long survive. However, they argue, proponents foresee a 10 percent to a 50 percent penetration for STV. With such penetration in Hartford it would mean anywhere from 80,000 to 400,000 subscribers for that market. But if programing of a quantity and quality were available to attract that many subscribers—i.e., to establish a successful STV operation—what would the average viewing time be? Hartford provides no information about that. The Joint Committee points out that the Liston-Clay fight attracted 82.6 percent of the subscribers. With 80,000 to 400,000 subscribers, they state, this would have had a disastrous impact on free TV on the night of the fight. AMST says that although Zenith and Teco allege that audience siphoning would amount to only one-half of 1 percent of the audience available to free TV, by far the greatest part of STV programing would be shown at peak viewing hours and it would therefore have a critical impact at the very time that free TV generates its largest advertising revenues which sustain programing in less profitable periods of the day. Free TV relies on low cost-per-listener economics and would be vulnerable to audience losses. Moreover, AMST urges, the success of STV depends on its ability to penetrate the largest markets, as well as the smaller ones, and the destructive impact of STV through the larger markets would strike at the heart of free TV.

101. Pre-empting by STV of time now used by free TV is a matter toward which ABC, NAB and the Joint Committee direct remarks. The latter party states that the allegation of Zenith-Teco that there would be 30–40 hours of STV programing per week in any market and that this would still leave ample time for free TV overlooks the facts that the 30–40 hours are in prime time and that Zenith-Teco do not propose to limit STV to multiple station markets. The Joint Committee also questions the assumption of a 30–40 hour limitation of STV programing—a limitation based on the restricted amount of box office programing and limitations in the family recreational budget. NAB points out that Zenith and Teco have said that stations would be predominantly STV or free TV because of such factors as prime time demands by both types of programing. If a station has STV programs on the air, the time is taken away from nonsubscribers. In most markets, even the use of one station for STV would seriously restrict the public choice among programs. The concern of ABC about time preempting is expressed somewhat differently. It states that the Commission, recognizing the number of free TV hours would be reduced to some degree by STV, has proposed a limitation on the number of hours of STV broadcasting. In spite of this, it is stated, hours of free TV will be lost. There are relatively few markets with four or more stations where the loss would be less noticeable. To the extent that existing network affiliates use prime time for STV programs, network clearances could be severely compromised. This could be especially serious for ABC, which has the fewest number of primary affiliates and therefore has a greater problem in obtaining clearances for its programs. Failure of a significant number of stations to clear a program

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could badly hurt ABC's position in satisfying advertiser requirements, especially if the lack of clearances occurred in some of ABC's key markets. It could spell the difference between the retention or dropping of a program. Nor do delayed clearances help, because research has shown that programs cleared on a delayed basis frequently do not have sufficient audience to make them economically viable. Finally, ABC argues, the demand for station time of competing sources of entertainment which results in nonclearance of network programs frequently leads stations to drop network public affairs and other public service programs. Pre-empting of station time by STV programing would do this.

102. Several opponents state that the Hartford trial failed to give information about program siphoning. For example, ABC says this is because it was such a small operation that there wasn't even a remote possibility that it could compete for the most popular programs of network television that are sold nationally. CBS says that since the Hartford trial was limited to 5,000 subscribers, rather than 50,000 it originally contemplated as a maximum, meaningful conclusions on program diversion cannot be made. However, it is said, the trial established that STV and free TV rely on the same program sources, and if the Hartford business projections are correct, STV would have financial resources to siphon significant amounts of quality programing from free TV. Owners of box office programs now on free TV would invite offers from both STV and free TV.

103. The latter point—that STV and free TV would compete for the same programs—is made by many opponents. It is variously argued that STV would cater to the same general audience tastes as free TV since the trial at Hartford showed that most of the programing would consist of mass circulation entertainment (movies and sports); that STV would siphon off most of the popular free TV programs with a devastating effect on the latter service; that siphoning of top shows would result in news and public service programing (which involve substantial losses) vanishing from free TV because of loss of financial earnings from the lost shows; that a showing of a program on STV dilutes the potential free TV audience and vice versa; that although talent, absent any contractual limitation, could work for STV and free TV, it cannot do so at the same time; that if the talent is a performer he might suffer the same problem of audience dilution as movies; that STV would bid away selective mass appeal programs such as the world's series and professional football games since those involved would have a choice of whether to use STV or free TV; and that in addition to siphoning the most popular free TV programing STV would siphon other programs as well as producers, writers, and directors of entire serials and specials.

104. Both ABC and CBS discuss selective program siphoning. ABC says that CBS is paying $19 million for the right to show the NFL football games and that it appears that this is near the limit of what free TV can pay. It states that although it is difficult to estimate what STV penetration would be nationally, if only 15 million sets were tuned in to professional football games at a cost of $1 for each game, over a 14-game season revenues of $210 million would be obtained—an

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amount which dwarfs the $19 million that CBS pays. Thus it is implied that STV could outbid free TV for such games.

105. Although questioning some of the reasoning of Zenith and Teco underlying the assumption that about $32 million would be available to STV for procurement of sports events (if there were 20-percent penetration in the top 175 markets), CBS says that even assuming that figure, the Zenith-Teco statement that free TV spends about $50 million for selected sports events so that STV could presumably not outbid free TV for them is not correct. CBS maintains that STV could concentrate its programing dollars on the lion's share of the major events and thereby siphon them from free TV.

106. Finally, ABC argues that there is no effective protection against siphoning. It states that if STV is authorized on a nationwide basis and siphoning then develops, the immense capital investments and the establishment of viewing patterns will make it difficult, if not impossible, for the Commission to take effective regulatory action. ABC says that it was this sort of consideration that led it to urge the Commission to assert jurisdiction over CATV. As to taking action now to prevent siphoning by Commission rule, it is asserted that the limitation of STV programing to box office attractions is impractical, and in any event would raise section 326 and first amendment problems.

107. *Reply comments of proponents.*—Zenith and Teco reply to comments of STV opponents on siphoning as follows: the Joint Committee argues that even though talent might continue to work for free TV and STV, it could not do so at the same time. This completely overlooks the fact that programs may be taped or filmed so that the artist need not perform the impossible task of being in two places at the same time. Recently (citing an example), the same artist appeared on CBS and NBC simultaneously. The argument that if talent appears on both STV and free TV it might dilute its conventional TV audience by self-competition—i.e., by siphoning part of its free TV audience to STV—is poppycock.

108. They advert to the example of ABC which stated that if 15 million STV sets were tuned in to NFL football games at a cost of $1 per television household, then over a season of 14 games $210 million would be generated so that STV could siphon the games from free TV because the latter medium can only afford to pay $19 million for them. To this they reply: the ratings of AFL and NFL football games have averaged between 10 and 14. Therefore, if STV could achieve the same rating by levying a charge as was obtained when the programs were shown free, STV would need a penetration of 100 to 150 million subscribers in order to obtain revenues of $15 million per week. But there are only about 55 million sets in the country. It is more reasonable to assume a 10-percent STV penetration which would result in about 5½ million subscribers. At $1 per game and with a rating of 10, STV would obtain $550,000 per week or $7,700,000 for the 14-week NFL season—an amount far less than that which CBS pays for the games.

109. As to the Joint Committee's questioning of limitations in the family budget that would serve as a brake on pre-empting of time, the Joint Committee had stated that this limitation was incapable of

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measurement. Zenith and Teco reply: It is measurable and was measured at Hartford. Thus, during the first 2 years of the trial only 27 percent of the feature films shown were first subsequent run. Between October 1, 1965, and September 30, 1966, 70 percent were first subsequent run. However, the average weekly expenditure of subscribers was about $1.20 in both situations. Therefore, even with improved programing the amount remains fairly constant and this is proof that there is a family budget limitation.

110. In response to arguments that the trial was too small to give information about siphoning they state that the sample of 5,000 subscribers at Hartford is about five times larger than the Nielsen sample for the whole country on which free TV so heavily relies. It is averred that it gave the data on which estimates of potential may reliably be drawn.

111. Zenith and Teco urge that contrary to hurting free TV by program siphoning, STV may well help free TV because by helping to increase the total box office returns (by adding to the theater returns) it will make for a larger total box office revenue and this in turn will make for the production of more and better quality feature films. They state that this will help free TV because although that service is apparently placing more reliance on feature films, the fact is that the source is drying up. The stimulus that STV will give to motion picture production will, according to them, help to alleviate the situation.

112. Finally, they observe that the Commission stated that if nationwide STV were authorized it would require STV licensees to furnish it with continuing information so that it might take steps to control siphoning if it should appear to be developing. (Supra note 35.)

113. Telemeter also voices the argument that STV will stimulate more and better motion pictures by increasing box office revenues. It points to the fact that only a small percentage of the population sees any particular film (see par. 53, supra) in the theater, and home viewing of current films would add to this number. In addition, it states, millions will still wait for the film to be shown eventually on free TV. Hartford and Etobicoke, Telemeter urges, show that STV and free TV can exist side by side with the latter taking up the interest and attention of viewers 95 percent of the time. STV will be a supplement to the more extensive free programing.

114. *Reply comments of opponents.*—The reply comments of opponents generally do not direct themselves to specific points concerning siphoning, but generally reiterate previous arguments. The most emphatic voice is perhaps that of ABC which emphasizes that it is erroneous to argue that the public will not pay for what it can see free. There are many programs—films, World Series, professional football games—that would command a price if not available on free TV. Thus, ABC argues, if such programs were siphoned to STV, it would not be a question of paying versus seeing the program free, it would be a question of paying or not seeing the program at all.

115. *Oral argument.*—In oral argument, many arguments concerning audience diversion, preempting of time, and program and talent siphoning are presented that were either previously made in this proceeding or made in slightly different form. Some are conjectural. Some

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exaggerate, misconstrue, quote out of context, or overlook parts of the proposed *Fourth Report and Order* drafted by the Subscription Television Committee. Such material is not repeated here. Several points, however, should be mentioned.

116. First, opponents urge that to permit STV under the rules proposed by the Subscription Television Committee (limiting STV to five-station communities and to only one station per community) would have an adverse impact on conventional UHF television stations. Thus, for example, the Joint Committee says that in cities with four stations with three of them network affiliated, the independent station can count on only a small fraction of the audience. Hence, it is urged, the affiliated stations, since they have the majority of the viewers, might be able to withstand the audience diversion of STV, but the independent station (which they appear to indicate might well be a UHF station), with its much smaller audience, would be more seriously affected. They then go on to say that it was just such a harmful effect on UHF stations which formed the basis for adoption of CATV rules pertaining to the importation of distant signals to the larger markets.

117. Second, AMST refers to the rule proposed by the Subscription Television Committee that would have permitted feature films to be presented on STV only if shown within less than 2 years after their theater release, or after more than 10 years. They state, relying on a variety (July 26, 1967) listing of feature films to be shown by the three networks during the 1967–68 season, that under such a rule about 20 percent of the films listed would be available for STV because less than 2 years of age, and about 12 percent would be available to STV because they were more than 10 years old. This, they say, means that "given the potential revenues of STV, STV could consistently outbid free television in the competition" for such films. They argue that the proposed rules would thus permit about one-third of the feature films available to free TV to be siphoned to STV.

118. Third, AMST gives a rather detailed argument attempting to show that STV could generate enough revenues to have an adverse impact on free TV. Briefly, the argument holds that while there is no present public interest in or demand for STV, once established it would create and generate its own demand by siphoning programs that were available free of charge and "snowball" until it destroys free television. It is averred that STV could start this snowballing even with relatively little penetration at the beginning for the following reasons: The national average station rate for prime time is $3 per minute per 1,000 homes. Thus, a program an hour in length delivering 100,000 homes and having 16 commercial minutes would on the average, produce $4,800. On the other hand, if a beginning STV station only had 5,000 or 6,000 subscribers viewing a program an hour in length for $1, it could outbid free TV for the program.

119. From this start, the argument then presents figures and assumptions designed to show how STV could eventually go on to dominate program procurement both locally and nationally. Thus, it says that assuming 20-percent penetration into the markets where STV could be authorized under the proposed rules, and assuming $65 yearly program revenue from each subscribing home, total annual revenues

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would be $945 million—close to half the $2.2 billion total 1966 broadcast revenues of the three TV networks, their owned and operated stations, and all other commercial TV stations in the country. Assuming that 35 percent of annual program revenue goes for program purchases (they question the 35-percent figure), STV would have a potential of $190,750,000 available yearly for program purchases, an amount that would allow them to dominate program procurement.

120. *Conclusions.*—We have given careful consideration to the information supplied by parties concerning the impact of STV on free TV and the related problems of audience diversion, preempting of time, and siphoning of programs and talent. As might have been expected, a considerable amount of the information is speculative. But this is not to say that it has not been helpful in illuminating various facets of the problems. As far as actual facts are concerned, we are left with those provided by the Hartford trial.

121. About audience diversion, we know that at any particular time the average subscription audience was 5.5 percent of the subscribers, although some programs, such as a heavyweight championship fight, generated viewing among 82.6 percent of the subscribers; that most of the programing was during prime time; that the average subscriber viewed STV about 2 hours per week, viewed one program per week, and spent $1.20 per week. In view of the fact that the total number of subscribers was about 5,000 and in view of the foregoing facts, audience diversion was minute.

122. About preempting of time we know that on the average there were about 30 hours of STV programing per week.[38] We also know that the average subscriber paid $1.20 per week for programs whether 27 or 70 percent of the feature films shown on STV were first subsequent run.

123. About siphoning we know that all of the programs shown at Hartford were unavailable over free TV anywhere in the Nation at the time that they were shown. Thus there was no program or talent siphoning.

124. The problem we face is that of whether and to what extent the foregoing facts form a reasonable basis for conclusions about the impact that nationwide STV would have on conventional television service, and the related question of audience diversions, preempting of time, program, and talent siphoning. Opponents state that they afford no basis for meaningful predictions. Proponents aver the contrary. We are of the opinion that the Hartford experience, limited though it may have been, was sufficient to supply information that can serve as an adequate foundation for reasonable estimates about the future. Nevertheless, as with any new and untried service, there are im-

[38] Thirty hours of programing per week is the fact that we shall have to use in our consideration of this topic with regard to authorization of nationwide STV. Whether there was actually preempting of 30 hours per week in Hartford is open to question because at the hearing prior to the grant of the Hartford authorization RKO informed the Commission that WHCT had been operating at a loss and that if the grant were not made it would discontinue operation of the station (30 F.C.C. 301, 307 (1961)). Had the station gone off the air, there would have been no free programing over it. Thus the trial not only provided STV programing, but, since WHCT was required to broadcast at least the minimal number of hours of free programing required by the rules for television stations, it added to the amount of free programing in the market instead of subtracting. The argument of STV proponents, of course, is that nationwide STV would aid marginal or new stations to do just that.

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ponderables.[39] Considering both the Hartford facts and the imponderables, we believe it is in the public interest to establish a nationwide STV system with the regulatory safeguards which we adopt today—safeguards directed at program siphoning and preempting of time.[40]

125. As to audience diversion, no reasons have been presented to lead us to expect that substantially more than an average of 5.5 percent of subscribers will be viewing STV at any particular time. The constancy of the weekly program expenditure per subscriber even with substantially more first-subsequent-run films would indicate that this figure is likely to remain the same regardless of attractiveness of programs. If it be assumed that every TV home in the Nation would become an STV home, this would mean that at any STV viewing time 5.5 percent of the television homes would be watching STV. It is certainly questionable whether such audience diversion and possible loss of revenues that might go along with it would impair the present service.[41] However, in view of the fact that we believe it to be highly unlikely that there would be 100 percent penetration of STV throughout the country, it appears reasonable to assume that audience diversion would be considerably less. Even with as high as 50-percent penetration the audience diversion would only be 2¾ percent. In view of the foregoing, and in view of the fact that the rules we adopt limit STV for the present to communities receiving five or more grade A commercial TV signals, and limit STV to one station in such communities (which would further reduce the nationwide audience diversion), we see no cause for concern. This is especially true because we shall also require STV licensees to furnish the Commission on a continuing basis with information that will show trends with regard to audience siphoning, preempting of time, and program and talent siphoning (see par. 348). To the extent that some STV programs which would result in very high subscriber viewing (e.g., a Clay-Liston fight that produced over 82 percent subscriber viewing) might cause significant audience diversion, we would observe that STV penetration of, say, 20 percent would considerably reduce the magnitude of the diversion. Moreover, such diversion would probably be rare, for such highly attractive presentations are unusual. It could be mentioned, too. that when a "blockbuster" such as "The Bridge on the River Kwai," mentioned on many occasions in the comments, was presented on free TV, audience diversion from the other two networks and from independent stations was considerable. An answer to such diverson might be better competing programing, which would be in the public interest.

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[39] One imponderable, mentioned by the Joint Committee, is the recent development of CATV. That group urges that we should defer action on authorization of STV until the impact of CATV on the present system is known. We find this argument lacking in merit, especially in view of the actions which we have taken by the adoption of rules to govern integration of CATV into the present television structure of the Nation.

[40] Topics such as whether interconnection of STV operations should be prevented or limited, whether STV should be limited to carrying certain kinds of programs, whether STV system manufacturers or franchise holders with franchises in more than one market should be allowed to engage in STV program procurement or supply, and similar problems relating to siphoning are discussed in the subsequent portion of this document which treats of the issues mentioned in par. 45(b) of the *Further Notice* (see par. 25 supra).

[41] Industry figures show that about 61 percent of TV homes are tuned in during prime time. If 100 percent of TV homes were STV subscribers and 5.5 percent were viewing STV in prime time this would mean audience diversion of about 9 percent of the viewers. However, it must be remembered that not all STV viewers would have been watching free TV had they not been watching STV.

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As to the adverse impact of audience diversion on UHF stations suggested in paragraph 116 (see par. 171(2) below).

126. Concerning preempting of free TV time for the showing of STV programs, we are inclined to agree with those who state that if STV is not limited as to the communities in which it may operate, there might be considerable preempting of time, especially in peak viewing hours. Taking the figure of 30 hours per week as about the maximum number of hours which STV will show per week regardless of the number of STV stations in a market (as Zenith and Teco urge), and assuming, as Zenith and Teco mention, that the average TV station operates about 115 to 120 hours per week, if an operating station in a one-station market turned to STV it could reduce the amount of free programing by a fourth, and in prime time could replace free TV entirely. In a two-station market, in prime time the free programing could be halved. Of course, if STV were carried by new stations, any free programing (as well as STV programing) would be additive unless one were to argue that without STV the new station would have carried all free TV programing. On the other hand, the argument could be made that without STV the new station might never have gone on the air.

127. In connection with the last point, Zenith and Teco state, that the Hartford trial indicates that there is a likelihood that TV stations will be primarily STV or free TV in their programing because of the demands of prime time of either service, because of the need of free TV stations to maintain network clearances and continuity of audience, and because existing free TV stations, especially network affiliates, may deem it imprudent to forsake present substantial profits for the speculative profits of STV. For this reason, it is observed that, to develop, STV will probably have to turn to new stations. Such stations, they urge, will not preempt time but will add new STV time plus conventional programing time to the total available to the market.

128. Zenith and Teco say that the limited supply of box office attractions and the limitations on the family recreational budget will serve as brakes so that the number of free TV hours presently available to the public that could be absorbed by STV could not be great. However, it is clear (see par. 126 supra) that although the number might not be great the effect could be great in communities with a limited number of television stations. Moreover, Telemeter informs us that at Etobicoke, on its three-channel cable system, it carried 54½ hours per week per channel for a total of 163½ hours per week for all channels, and that viewing averaged a little under 4 hours per week. Although this Canadian experience might not be typical, it suggests the possibility that more than 30 hours of STV programing might be available to preempt free TV time, but not necessarily to divert audiences from free TV. In view of these considerations, and in view of our desire to assure an adequate number of hours of free TV service to the Nation, the rule we adopt today limits STV operations to communities within the grade A contours of five or more commercial television stations, and limits STV to only one station in such communities. This, we believe, will assure that those communities will usually continue to receive the full three network services plus that of

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an independent station. In such communities, the percentage of time preempted from free TV would be minimal, and the effect of loss of free television programing, even if all STV programing were in prime time, would not be great. Moreover, to the extent that a new fifth station broadcasting STV programs is built in a four-station community, as a consequence of the anticipated revenues from STV broadcasting, the effect would be to add new free TV programing that would otherwise have been unavailable, since our new rules will require STV stations to carry at least a minimum of conventional programing.

129. Program and talent siphoning, as we have stated, did not occur at Hartford. Whether it would occur if STV is authorized on a nationwide scale and were not limited by Commission regulation is one of the most hotly contested points in this proceeding. It is one of the imponderables to which we referred. Most arguments on the topic of program siphoning we find too speculative to influence the action which we take here. Among them we would include that of AMST set forth in paragraphs 118 and 119. To illustrate the speculation and assumptions of the AMST argument, we note the following: (1) It assumes the national average rate for prime time, but the rules suggested by the Subscription Television Committee, which we adopt, would usually limit STV to markets where the rates would be higher. Thus the figure of $4,800 in the example given is too low. (2) It assumes that the 1-hour program over STV would bring $1, but most of the programing may well be feature films, they last close to 2 hours, and the average price for them at Hartford was $1.03. The average overall charge per hour for all kinds of programing was 59 cents. Hence the revenues for an hour's viewing on STV might be half their figure. (3) It assumes 20-percent penetration. As we state in paragraph 168, this could be too great a figure. (4) It gives the predicted amount of money that would be available for purchase of STV programing ($190,750,000), but it fails to state the amount spent by the networks and all of the commercial TV stations. In this connection, attention is invited to the figures given in the fourth quoted paragraph appearing in paragraph 95 above which suggest that the amount spent by the latter might well be upwards of five times more than the amount AMST says would be available to STV for program procurement. (5) It implies that the STV operation has 5,000 to 6,000 subscribers and that they would all be viewing the 1-hour program. However, we have noted that at any one time only about 5.5 percent of STV subscribers are likely to be viewing STV. Therefore, we could only expect from 275 to 330 to be viewing the hypothetical program. To have 5,000 or 6,000 viewing, we would have to assume that the STV station had from roughly 91,000 to 109,000 subscribers. All of the foregoing, it appears, tends to invalidate the AMST argument that from small beginnings STV could proceed forthwith to outbid free TV.

130. Of the various arguments raised by STV opponents, we find that of so-called selective program siphoning most persuasive. It is at least conceivable that a successful nationwide STV system, even though possibly not having as much money as free TV to spend for program product, could, by directing its purchases at select programs, e.g., the World Series or professional football games, take them from free TV

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and require the huge audiences of those programs to pay to see them or not see them at all. We would not consider this to be in the public interest. Zenith and Teco, in discussing the charge that STV would siphon from free TV programs with high ratings, say that it is tortured reasoning to assume that people will pay to see siphoned programs on STV when there are programs of the same conventional type which could be seen on free TV. We disagree. In a different context, in refuting an argument of STV opponents, we said that a viewer wishing to see a heavyweight boxing match will not be satisfied with a tennis match. The same reasoning applies against the views of Zenith and Teco here. If a viewer wishes to see a particular program and that program appears on STV and not on free TV, he may not be satisfied by viewing other programs of the same general type on free TV.

131. The rule which we adopt, and which is discussed more fully in paragraphs 285–338 below, will serve to prevent, or greatly limit, selective program siphoning. First, that rule requires that feature films shown on STV shall not have been given general release in theaters more than 2 years before STV showing. In other words, to the extent that STV shows feature films (and both Hartford and Etobicoke suggest that they will constitute much of STV programing) they must be current films. It appears that such motion pictures infrequently find their way to free TV (see par. 64), and it does not appear that, in the light of box office economics of motion picture production, they may generally do so in the foreseeable future. Thus the older films, which are usually the ones shown on free TV, cannot be shown on STV and there can be no competition between the two services with resulting siphoning to STV of that kind of programing—a kind, incidentally, which opponents seem to indicate is of growing importance to free TV. Two exceptions to the requirement that films shown on STV must be current are the following: (1) The rule will permit STV stations to televise up to twelve feature films per year which had general release over 10 years before STV showing. STV stations may not choose to show that many old films. In any event, even if they do, this could be expected to constitute a very small percentage of all feature films shown per year by an STV station (see par. 59) and any siphoning would be minimal. In this regard, we note that AMST (par. 117) states that about 12 percent of the feature films to be shown on free TV in the 1967–68 season would be over 10 years old. Our calculations at the end of that season show less than 6 percent to have been of that age. During the first 6 weeks of the 1968–69 season, none were that old. (2) The rule permits STV showing of films from 2 to 10 years old that have been offered to and refused by free TV, or that the owner of the televising rights will not permit to be shown on free TV (for reasons mentioned in par. 287 infra). It is clear that use of such films by STV will not siphon them from conventional television.

132. Second, the rule will also require that sports programs shown by STV in a community shall not have been shown on free television in that community on a regular basis within the last 2 years. Thus, for example, the World Series, having been on free TV in October 1964 could not be shown on STV in October 1965. This rule, we believe, will serve effectively to prevent siphoning of key sporting events that might

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prove desirable to STV entrepreneurs, and assure the continued free viewing of programs of that kind now being seen free. It will, however, permit STV to show programs such as "blacked-out" games that presently do not appear on conventional television. (Details of this rule are discussed in pars. 288–305 below.) Finally, the rule will not permit STV to show programs common in free TV in which continuing characters are presented from week to week in a series using a common setting or central program concept. This type of programing constitutes a not inconsiderable portion of free TV programing.

133. In view of the indications that STV programing will consist mainly of feature films and sports events, we believe that the new rules will assure that, with regard to the major part of STV programing, there will be little or no siphoning. The restriction on week-to-week series should further prevent such effects. Admittedly, it is conceivable that this still leaves some types of programs open to siphoning—e.g., specials, and perhaps a few feature films less than 2 years and more than 10 years old—but we believe that these rules represent the extent to which we should regulate at this time. As we have stated (par. 90), although we consider the preservation of conventional television service and the continued availability of free programs to be important, we also believe that the competition between STV and free TV could result in improved and more varied programing for both services. We believe that the rules we adopt, in the light of the information now before us, strike a desirable balance in this area. We shall, of course, as stated in paragraph 125, continue to watch closely the development of the infant STV industry to detect any trends with regard to siphoning.

Other information, such as (1) modus operandi of the service; (2) the technical performance of the systems; (3) the nature of the programs offered; (4) the methods to be employed; (5) the role of participating broadcast station licensees; (6) the possible monopolistic features of STV.

134. *(1) modus operandi of the service; (4) the methods to be employed; (5) the role of participating broadcast station licensees.*[42]— Since these three items are closely interrelated, they will be discussed together. Zenith and Teco say that there are three functional organizations in the operation of STV service: (1) A local franchise organization to scramble programs for stations; to provide for the installation, servicing and maintenance of unscrambling devices attached to television sets of subscribers; to provide information to subscribers so that they will know how to adjust the unscrambling device to obtain desired programs; and to collect and disburse revenues obtained from subscribers. (2) A TV station licensee over whose facilities the STV programs are broadcast. (3) Program sources which supply programs directly to broadcasters.

135. At the Hartford trial, they state, RKO General, Inc. was the franchise holder, and its subsidiary, RKO Phonevision Co., was the licensee of WHCT over the facilities of which the STV programs were transmitted. We are informed that programs were obtained by WHCT

[42] Additional information about these subjects appears in app. B attached hereto.

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in a manner comparable to that now used by conventional TV stations in obtaining programs from networks, syndicators, and other sources. Programs were obtained from many sources (more than 50 sources during the first 2 years of the trial), it is said, such as motion picture producers and distributors, sports promoters, producers of plays, and the like.

136. Zenith and Teco assert that there appears to be no business or public interest reason why there should not be a close ownership relationship between the franchise holder and the station licensee as was the case in Hartford. They also express the opinion that probably in some markets there will be instances in which the two have little or no ownership relationship. One possible reason for this, they say, is that it takes a substantial investment to operate an STV franchise system and some stations could not meet this burden alone. However, they urge that so long as the franchise holder is required to supply STV service to all stations in a market authorized to carry on STV operations, it would appear to make no difference whether the franchise holder is owned entirely by nonbroadcasters, or by one or more TV stations in a market.[43]

137. During the trial, it is said, it became apparent that any of three possible methods of arranging for programs might be used: (1) The licensee, the franchise holder, and the program distributor might agree among themselves upon a division of fixed percentages of gross: (2) the licensee and franchise holder might join together in a cooperative effort to obtain programs from distributors, with revenues in excess of the program costs being divided on a basis agreed to by the licensee and franchise holder; (3) the franchise holder might supply the programs and buy time from the station at a so-called subscription card rate to broadcast them, in much the same manner as networks and affiliates now operate. This approach, they state, might be used particularly when nationwide STV is getting underway in order to induce investors to build new TV stations for the showing of STV programs.

138. We are told that at Hartford the licensee of WHCT had control over the selection of STV programs, the times at which they were to be broadcast, and the charges to be made for them. (This, of course, was in accordance with the provisions of the *Third Report* under which the trial was authorized.) Zenith and Teco express the opinion that as a matter of business policy, as well as regulatory policy, these functions should always be the primary responsibility of the licensee.

139. (*2*) *The technical performance of the systems.*—The Hartford trial, Zenith and Teco state, established that the system could meet the technical requirements of the *Third Report*, namely: (*a*) The operation must not cause interference, either within or without the frequency employed, to any greater extent than is permissible under the present rules and standards of the Commission. (*b*) The operation must not cause perceptible degradation in the quality of video or audio signals on any receivers during either a subscription program or a nonsubscription program.

[43] This argument is based on the assumption that more than one STV operation would be permitted in a market. It is irrelevant since the rules adopted herein permit only one STV operation in a community.

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140. In addition, it is related that the trial established that the Phonevision decoder (unscrambler) could be installed on all makes and models of TV sets if the sets were in good operating condition: that the system provides adequate protection against reception by nonsubscribers; that it functions to permit an accurate allocation of per-program charges to the individual programs, the monthly billing reflecting not only the total amount due for programs but the amount for individual programs; that a credit system will work and is accepted by the public; and that Phonevision equipment will function satisfactorily with a minimum of service calls, home service calls having averaged 89 cents per subscriber per year.

141. Zenith and Teco mention that, as a result of the Hartford experience, a new model decoder is being production-engineered that will accommodate color as well as monochrome, that can be connected to the antenna terminals of the set instead of to the inside wiring, that simplifies the billing function of the new decoder so as to reduce cost and facilitate operations on the part of the subscriber, and that has circuitry changes designed to reduce cost and further improve reliability.

142. In connection with the foregoing statements, Motorola says that it has studied the Zenith and Telemeter proposals (presumably the descriptions of those systems submitted in response to the *Further Notice*) and that both vary widely from any system used in prior field tests. It is averred that the Hartford field test "involved a totally different concept and the field test results can have no meaningful bearing on the technical aspects of the proposed systems." A similar statement is made with regard to the system used by Telemeter in Canada (which was a cable system) and the proposal (for an over-the-air system) submitted by Telemeter in this proceeding. These statements are followed by a suggestion of Motorola that further field testing is therefore needed before STV can be authorized.

143. To this Zenith and Teco reply that the decoder used at Hartford operated in conjunction with certain parts of the subscriber's television set to unscramble the signal, whereas the new proposal uses the same unscrambling principle but does the unscrambling independently of the set, and sends the unscrambled signal directly to the antenna terminals of the subscriber's set. They further state:

> (1) That the television broadcast signals and Zenith scrambling apparatus used in Hartford during the past 4 years were and are exactly the same as those to be used with the new Zenith decoder described in our July 25, 1966 technical submission in this proceeding; (2) that the decoding functions performed by the apparatus under test in Hartford are the same as those accomplished by the decoding apparatus described in Zenith's current technical submission; and (3) that the Hartford test of these signals and the effectiveness of Zenith's scrambling and decoding processes involved several thousands of hours in a field test operation involving thousands of homes. Thus the Hartford operation provided a greater quantity and quality of field testing of the proposed Zenith concept in actual commercial use than any comparable type of service has ever before had. Therefore, Motorola's conclusions with respect to field testing of the Zenith concepts are totally unfounded.

144. (*3*) *The nature of the programs offered.*—This has been fully discussed in relation to the question of whether STV can offer a beneficial supplement of free TV programing and will not be treated here.

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145. (*6*) *The possible monopolistic features of STV.*—Zenith and Teco state that the Hartford trial has established that there are no inherent monopolistic features arising from STV operations. They do not urge that the Commission select Phonevision equipment as the only system to be used for nationwide STV. On the contrary, they suggest that the Commission adopt general standards that will permit the use of multiple systems, and that will result in competition. They do, however, admit that it is unlikely that, as a practical matter, there will be more than one over-the-air STV system in any single community (were we to permit more than one such operation), although there may be competition within a community between cable and over-the-air STV. But within a community, Phonevision could be used with color or monochrome sets, UHF or VHF, and could serve more than one station authorized by the Commission to conduct STV operations. This, they point out, would be under the regulatory control of the Commission.

146. As to programing, they aver the following: there are already in existence numerous producers and distributors of programs of all kinds from which STV may draw. During the Hartford trial, there was no centralized distribution control over the programs chosen for STV broadcast. RKO was free to negotiate with any program supplier for whatever programs it desired on whatever terms it worked out. Ninety percent of the STV programs shown at the trial were obtained on the basis of RKO's paying the program supplier a fixed percentage of the program revenues obtained from subscribers. In a relatively small number of cases—e.g., a Broadway play—it was necessary to pay cash acquisition costs. If requested by RKO, Teco usually provided such funds to RKO in return for receiving a certain percentage of the subscription fees received for the program. It is emphasized that this aid was not given until RKO had negotiated for the program and requested Teco aid. On occasion, and at the request of RKO, Zenith sometimes stepped in to facilitate negotiations for programs, but this was usually by way of using its personal contacts. Zenith also furnished some financial assistance to Teco to aid it in obtaining programing as mentioned above. Zenith states that it does not intend to continue supplying such assistance if STV is operating on a nationwide basis, and it also does not intend to engage in the distribution or production of programs for STV.

147. It is claimed that comments filed in this proceeding in 1955 alleged that Zenith and Teco would exercise control over the distribution and selection of STV programs whereas such has not been the case. These two parties state that because of legal and business reasons they could not enter into any arrangement or tie-in with local franchise holders giving any program supplier the exclusive use of Phonevision facilities. If nationwide STV is authorized, they say, Teco will serve two functions: (1) Granting local franchises and promoting the use of Phonevision equipment. (2) Possibly assisting in obtaining programs for STV, but such assistance will not tie-in with its arrangements with local franchise holders, or with the arrangements that such franchise holders may have with station licensees, so as to give Teco an exclusive position with regard to any other program supplier.

148. The comments of Zenith and Teco on this subject end with a

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statement that monopolistic conditions in any business result from either the intent of parties involved or natural economic forces. These two parties aver that they have no intent to gain monopolistic control over STV in the United States. With regard to station owners, they say, there can be no monopoly because of the Commission's multiple ownership rules. While the natural economic forces that might make for monopoly are difficult to foresee, they state that under the operating proposals which they make there does not appear to be "any immediate or reasonable prospect of monopolistic evils which would require governmental regulatory action. If, after the full play of the natural forces of competition, a condition now unforeseen should arise at some time in the future which would indicate any trend toward monopoly detrimental to the public, the Commission can always exert its present regulatory power to eliminate any antitrust problems that may possibly arise."

149. Combining its comments on the modus operandi, methods to be employed, and possible monopolistic features of STV, Telemeter takes issue with some of the views expressed by Zenith and Teco. The position of Telemeter follows, nearly all of it being best expressed in its own words.

150. There is only one STV operation in the United States today—that at Hartford which numbers but a small minority of the community as subscribers, and they only spend about 5 percent of their time viewing STV.

> **The fact is that subscription television is not even an infant industry. Its opponents have attempted, by raising false issues, to stifle it before it can be born. Any regulations which the Commission makes at this time should recognize the essential truth of this statement.**
>
> **The elements of a subscription television industry have not yet emerged in any clear-cut form. There are no subscription television programing companies, syndicators, maintenance companies or other needed components. The elements of the existing structure which constitutes commercial broadcasting, or which constitutes the motion picture production, distribution and exhibition industry, do not yet exist. The Commission must therefore proceed with caution in adopting rules to regulate an industry whose essential character has not yet begun to emerge, lest its natural and successful growth be unduly restricted and inhibited.**
>
> **The subscription television business, regardless of the form which it will ultimately assume, will have at its core today the subscription television entrepreneur. He is the man, or the corporation which must bring all of the elements required for successful subscription television into existence. At some time in the future, after the business has been started, there will be producers, maintenance firms, syndicators, broadcasters and others, but these elements do not exist today. It serves no useful purpose, therefore, to talk about separating the components and establishing regulations to govern their relationships. If a single firm is not allowed to start a total subscription television business including everything from the production of entertainment through its broadcasting, through its sale to the public, through installation of decoders, and through the collection of money, and every other aspect of the enterprise, subscription television is unlikely to come into existence.**
>
> **Subscription television, in its present stature, is analogous to the motion picture industry in its beginnings. A motion picture theater, like any other theater, is an enclosure containing means for exhibiting entertainment for which the patron must pay. The enclosure of a theater may be analogized to the scrambling and unscrambling means of the broadcast subscription television system, and the box office to its credit or cash charging system.**

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> The projection equipment constitutes a means of communicating the entertainment on film to the public, and is analogous to the transmitting equipment of a broadcast. The theater owner picks his programs and determines the timing and duration of their exhibition and their pricing, incidentally on the basis of his knowledge of his market.
>
> In the early days of motion pictures, exhibitors would not go to the expense of building theaters because there was no entertainment available to be shown in them. Therefore, in order to get the industry under way, a natural identity developed between producers, distributors, and exhibitors. This identity was an absolute necessity if the industry was to come into existence.
>
> At this stage in the development of subscription television, no company (which is truly independent) is going to invest in decoders if it does not control broadcast facilities, and if it is not able to assure itself that it will be able to make its own efforts to obtain programing by every means physically available. * * * The problem of the infant subscription television industry is that even where entertainment is available, it has been withheld, so that it is naive to assume that a subscription television operator, at this stage, can sit in his office and expect purveyors of entertainment of top quality to come to him.
>
> Furthermore, in view of the obvious and manifest hostility of existing media toward subscription television, it is equally naive to suppose that commercial broadcasters in significant numbers will approach a detached subscription television operator—without his own broadcast facilities—for the privilege of showing an occasional subscription television program. *If subscription television is to develop, it is Telemeter's considered judgment that it will have to be started by those in full control of every aspect of the subscription television business with no, or exceedingly few, limitations upon their ability to solve the multifarious problems which experience has shown they cannot avoid.*" (Emphasis in original.)

151. The Joint Committee directs comments at another aspect of the question of monopoly in its reply comments. It states that STV proponents hold that the Commission cannot regulate STV rates to be charged subscribers. However, the Joint Committee says, it would be singular for the Congress to have intended that broadcast frequencies could be used for STV without at the same time having provided power to regulate rates to prevent rate gouging. It is for this reason, it is stated, that the Commission has no authority to authorize STV.

152. The Joint Committee then goes on to say that if, as Zenith and Teco state, it is unlikely that there will be more than one STV system in any single market, then such an STV station would have a monopoly over STV in that community, and it would be unconscionable for the Commission to permit such a situation to exist without having the power to regulate charges. It would be an abdication of Commission responsibility, it is argued, to permit STV operators to use the frequencies and charge subscribers without clear congressional authority to regulate rates and without even considering or deciding whether the Commission already possesses such authority. The Joint Committee also refers to the comments of ADA, a group that favors STV, which indicate that STV should be regulated as a common carrier.

153. *Conclusions.*—In paragraph 25 above, we indicated that we would first consider comments concerning the question of whether an STV service should be established, and that we would then turn to consideration of 15 issues of importance in determining what the pattern of regulation of such a service should be. We mentioned that comments concerning the broad question of whether to establish the

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service fell into five categories. The first four have been fully treated above. As to the fifth—concerning modus operandi, monopoly, and other matters—the immediately preceding paragraphs contain pertinent information and views thereon supplied by the parties. Since the topics in the fifth category are closely related to some of the 15 issues, in the interest of efficient presentation we shall evaluate the information and views about them and state our conclusions thereon in the course of treating the 15 issues to which we now turn our attention.

Fifteen regulatory issues

154. In the following paragraphs, the issues are stated verbatim as they appeared in the *Further Notice*, and are followed by a discussion thereof.[44]

(*1*) *Whether subscription television should be limited to communities receiving a minimum number of television signals; e.g., whether it should be limited to stations the principal communities of which are within the grade A contours of at least four commercial television stations (including that of party proposing to broadcast subscription programing), or whether it should not be so limited but should, in communities not lying within four commercial grade A contours, be restricted to a more limited scope, especially as to hours of operation, than those in four-service communities. (See limitation proposed in section 73.643(d) of appendix C)*

155. This issue may be divided into two parts: (1) whether STV should be limited to communities receiving a minimum number of TV signals; and (2) whether, if there is no such limitation, there should be a limitation as to hours of operation of STV stations. Our discussion here will be restricted to the former. The latter may more properly be dealt with under issue (2) below which has to do with the general topic of hours of operation of STV stations. Both parts of the issue, of course, underscore our concern over possible reduction of free TV hours and services available to the public in communities where STV operates.

156. Some proponents of STV urge that the service be permitted to operate in any community, regardless of the number of TV signals which it receives. Telemeter, for example, states that STV has a potential for usefulness under varying situations in different sizes and types of markets. Thus, in marginal communities it might form the financial basis for building a station that would otherwise not be built. In large communities with three network services it might provide the basis for the development of a viable UHF competitor. Kaiser makes a similar point, stating that "[t]his is particularly true in markets such as Los Angeles, where the number of competing stations is large enough to strain the advertiser-supported system's ability to provide financial and programing support."

157. Zenith and Teco hold the view that section 307(b) of the act, which requires the Commission to make a fair, efficient and equitable distribution of broadcast service among the several communities, dic-

[44] In addition to inviting comments on the issues, the *Further Notice* asked for comments on rules proposed in app. C attached thereto. For convenient reference, that appendix is also attached hereto as app. C.

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tates the conclusion that STV should be made available to all communities where there is a demand for it. In this connection, they mention that if STV could bring about the construction of a first TV station for a community, they would find it difficult to think of any public interest considerations that would justify not permitting the building of such a station. Along the same lines, Teleglobe says that it believes that among the principal objectives of STV is that of aiding UHF broadcasters in their struggle to survive, and a limitation of STV to, for example, markets with two or more stations would defeat that objective. Zenith, Teco, Telemeter, ACTS, and Trigg-Vaughn suggest that questions of whether STV operations should be permitted in a particular community would best be handled on an ad hoc basis.

158. ACLU urges that STV operations should be permitted in any market. Its views are founded on its interest in advancing diversity of expression (which it regards as an application of the first amendment) by way of over-the-air broadcasting. It believes that by providing new and different programing STV can increase diversity. If it is not limited to particular markets, there will be open competition that will also enhance diversity, ACLU states. ADA also believes that STV should be permitted in all markets. ACLU and ADA have additional views which are related to this belief, but they more properly belong with a discussion of hours of operation discussed under issue (2) below and will be treated there.

159. ABC, as previously mentioned, opposes STV. However, in the event that the Commission should decide to authorize such a service, it offers its views on the various issues. It believes that this and the following three issues are related to the question of what rules are necessary to protect the existing structure of conventional commercial television. It states that:

> [u]ntil the impact of pay-TV operations upon the free television structure can be assessed, it would not appear meaningful to adopt restrictive rules which, at this juncture, are necessarily somewhat arbitrary. If the Commission elects to go forward with authorization for pay-TV, ABC urges that it adopt no rules at this time with respect to [this matter] * * * If, based upon meaningful experience with pay-TV, it appears that rules of some kind should be adopted, further rulemaking proceedings are available to the Commission.

ABC adds, however, that the Commission should make it clear that STV is not intended to disrupt the existing structure of free TV, including network service, and that it should place STV proponents on notice that the fact that no restrictive rules are adopted does not mean that they might not be at some future date if found to be necessary to preserve that structure.

160. As opposed to the aforementioned views that there be no limitation in regard to the communities in which STV may operate, both proponents and opponents suggest the contrary. Thus, Acorn, a proponent, believes that STV should not deprive anyone of free TV that he now has, and therefore thinks it inadvisable to allow STV operations over existing stations in one-station communities. The more stations in a community, the less the effect of STV broadcasting over one of them would be, Acorn states. On the other hand, it sees no reason

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arbitrarily to restrict STV only to the larger markets since in some cases it would appear that STV would not undermine free TV service. Wherever possible, Acorn deems it best to conduct STV operations over new stations, for this could only add to the TV service of a community.

161. Munn and Chase, also proponents, are of the view that STV should be limited to communities that have three grade A commercial signals in addition to that of the STV stations, so that there will be three network services available. Of the same view is the Joint Committee which urges that, if STV is to be permitted, it should be limited to communities within the grade A contours of at least four commercial TV stations, for this would be consistent with the goal of the Commission to promote parity among the networks. It was this policy which underlay the conditions of the *Third Report*, it is said, and the Hartford trial provides no basis for changing that policy. However, the Joint Committee would superimpose on such a rule the additional requirement that, if a market is one of the top 100, there be a hearing to determine whether it is in the public interest, and, specifically, consistent with the establishment and healthy maintenance of free TV service in the area, to permit STV therein—a requirement not unlike that used in CATV proposals to extend the signals of TV stations beyond their grade B contours into one of the top 100 markets. The Joint Committee argues that such a requirement exists for CATV in spite of the voluminous information available about CATV which was prepared by Drs. Seiden and Fisher, the National Community Television Association, CBS, and AMST, so that a fortiori there should be such a hearing requirement for STV about which much less is known.

162. AMST, in discussing this as well as other issues, says that the very fact that the issues have been posed recognizes rather than cures the incompatibility of STV and free TV. With regard to this issue it argues that to restrict STV to the largest markets will not prevent the preempting of free time from free TV and that in such markets more people would be deprived of this time. McClendon expresses the view that STV should not be permitted over VHF stations in multiple-station markets having at least one UHF or one independent VHF station if those VHF stations broadcast one or more hours of network programing during prime time. This, it is suggested, would correct the economic imbalance between UHF and VHF stations.

163. *Conclusions.*—Because we believe that STV can furnish a beneficial supplement to the programing of free TV and that it might well provide a wholesome stimulation that would improve free TV and the overall programing available to the public, we believe that it should be authorized. However, as indicated in previous portions of this document, although the Hartford trial did furnish information that has proved helpful in making reasonable estimates of the future, its proscribed nature has left numerous areas about which we are legitimately concerned. Until we know more about how STV will develop on a nationwide scale, we feel it best to proceed with caution. For this reason, the rules which we adopt are designed to strike a reasonable

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balance that will not hamstring the development of the new service and yet will provide safeguards against occurrence of events that might be contrary to the public interest.

164. One area of concern is that of the pre-empting of time by STV from free TV. The *Third Report* provided that STV trial operations might be conducted only in communities lying within the grade A contours of at least four commercial TV stations including the station of the STV applicant. It mentioned that one of the primary reasons for this provision was to assure the continued availability of substantial amounts of free TV programing to the public: i.e., to prevent undue pre-empting of free TV time. We stated in that report that it was our intent to suspend judgment on the question of whether there should be such a market limitation if permanent STV were authorized. The *Further Notice*, having referred in paragraphs 31–32 to the foregoing, announced that, in the light of the Hartford information, we tentatively agreed with the view of Zenith and Teco that STV should not be so restricted. However, we specified this matter as issue (1), the present issue, and invited comments thereon.

165. We have carefully weighed the comments, including those summarized in the immediately preceding paragraphs as well as those mentioned in paragraphs 93, 94, 101, and 122 above, and believe on further consideration that the tentative conclusion of the *Further Notice* should be rejected. For reasons stated below, we are now of the view that, at least for the present, STV should be restricted to communities lying within the grade A contours of at least five commercial TV stations including that of the STV operator, and are adopting a rule to that effect.[45] (It is thus more stringent than the requirement of the *Third Report*.) This conclusion has been anticipated in paragraphs 126–128. The following supplements those paragraphs.

166. Elsewhere (par. 90) we have indicated that we regard the continued availability of free programing as a most important consideration. This is so because we think that the tremendous investment of the public in television receivers based on the expectation of free service ought to be protected and the millions of viewers who rely on that service for free entertainment should be permitted to do so. Although we are aware of the merits of the arguments that STV should be permitted in all communities—the arguments maintaining that permitting STV in all communities might help marginal or new stations in small communities, might aid UHF in such communities, might promote diversity of programing; arguments that section 307(b) of the act requires that STV be allowed in all communities where a demand exists; arguments that we should not regulate in this area

[45] This rule appears in sec. 73.642(a) of app. D. It may be noted that the rule does not require that the five or more stations providing grade A service to a community be licensed to that community. When we speak of a five-station community herein, we mean a station receiving five grade A services regardless of what the communities of license of the stations are. The rule requires the entire community, not merely part of it, to be located within the five grade A contours. It is further noted that the rule, in addition to the five-station requirement, also contains other provisions designed to restrict preempting of time. One, discussed under issue (4) below, provides that in the five-station communities where STV will be permitted, only one station in the community may engage in STV operations. Another is that, not counting the station of the applicant, at least four of the stations must be in operation and providing conventional TV service at the time of the STV grant of authorization.

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until the impact of STV on the free TV structure has been assessed—we are of the opinion that at this stage, where uncertainty about the new service exists with regard to this subject, considerations of protecting against preempting are overriding. In communities with fewer TV services, preempting could substantially reduce the amount of free programing available to the public, as some parties have mentioned. Since it appears likely, from the Hartford trial, that much of the STV programing might be in prime time, the effect would be even more marked, for although the loss in terms of hours is the same regardless of the time of day when the preempting occurs, the loss in prime time would generally be a loss of more popular programs.

167. The rule protects against such loss in communities with fewer TV services. In communities where it permits STV, it usually assures three network services and one independent service. To the extent that existing stations in those communities offer STV, there will be a relatively small amount of time preempted. To the extent that STV operations occur on new stations, there will be no preempting at all. It gives ample assurance against the dangers to networks, mentioned by ABC and the Joint Committee, which could conceivably result in an untoward weakening of the present broadcast structure. At the same time, the rule will permit a not inconsiderable portion of the Nation's population to have the opportunity to use the new service if it so desires.[46] Moreover, this will afford an opportunity to observe what factors evolve in the operation of a nationwide STV service, such as, for example, the broadening of the base for the purchase of programs which Zenith and Teco tell us was lacking in a single-city trial, the possible development of an STV network, audience diversion, preempting of time, program siphoning, or others. With this additional information we should be in a position to take further steps to guide the development of this service in the public interest as it seems appropriate.

168. At the present time there is no certain way of predicting what STV penetration will be after the service has been authorized on a nationwide basis. If we were to hazard a guess, it would be that 10 to 20 percent would be optimistic for the near future. If this is correct, it would appear likely that the most interest in STV would be focused on the largest communities where the potential for more subscribers lies. Our rule, therefore, should not seriously impair the development of STV since it would generally permit it in those communities.

169. We do not adopt the suggestion that the point at issue be handled on an ad hoc basis. This would involve separate hearings, and the results, in our opinion, would not be commensurate with the cost, time, and effort expended thereon. A rule on this subject is clear and automatic in its application. It appears to the be the better way to handle the matter.

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[46] As of Aug. 31, 1968, the Commission had allocated five or more commercial channels to 89 markets which include 81 percent of the Nation's TV homes. STV is potentially available to all of those markets. More immediately, of those markets, 68—including 76 percent of all TV homes—presently have activity on four or more channels; i.e. there are licenses, permits, or pending applications for four or more stations.

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170. We note the suggestion of the Joint Committee that hearings be held on applications requesting authorization to engage in STV operations in the top 100 markets. The Joint Committee maintains that the important factor common to both STV and to CATV proposing to extend television signals beyond the grade B contours of stations to one of the top 100 markets is that of the introduction of programing not otherwise available to free TV in the market. The principal concern of the Commission in the CATV and the STV proceedings, it states, has been over the impact on free TV. Since hearings are required by rule in CATV for the top 100 markets, they should also be required when STV attempts to enter those markets. The point is lacking in merit.

171. In the *Second Report and Order* in docket Nos. 14895, 15233, and 15971, we discussed in detail the reasons for the rule which requires hearings for the top 100 markets,[47] and we shall not repeat that discussion here. Suffice it to say that STV and CATV involve different considerations—of which we shall mention only a few—that clearly indicate that the concern that led us to the conclusion that CATV hearings should be held does not exist here. Thus, (1) in the case of CATV systems entering the top 100 markets, we were concerned with the fact that CATV stands outside the program distribution process through which UHF stations have to obtain their programs. In the case of STV, there is no such element of unfairness since the STV operator would be in a program procurement position similar to that of the UHF free TV operator. (2) In the case of CATV, audience diversion from the UHF station could be large. In the case of STV, it would, as we have said, probably be small. In this connection, we note that CATV systems have multiple channels and thus a single CATV system is a source of multiple competition for local stations, whereas here we are permitting only one STV operation in a market. (3) STV can broadcast over a UHF station. If so, it is because the licensee thereof believes that it will help his station, not harm it. In fact, one of the principal arguments of proponents of STV is that it will aid UHF, not damage it. These few observations should make clear the reasons why we reject the Joint Committee's proposal.

172. The oral argument contains views of various parties directed at the rule proposed in the *Fourth Report and Order* drafted by the Subscription Television Committee, which is the rule which we adopt here. Many of these arguments were previously made and are not mentioned here since they are presented and evaluated above. Some, however, are given consideration now since they either present new suggestions or raise matters concerning the rule which otherwise merit discussion.

173. Telemeter, for example, like some other parties, argues that the rule is unduly restrictive. More particularly, it says that because about 80 percent of the Nation's viewers may be able to enjoy STV under the rule, this is no reason for depriving the other 20 percent of the service. The Commission, it urges should be as much concerned about this as it is about "white" and "grey" areas in aural broadcasting.

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[47] 2 F.C.C. 2d 725, 769–784 (1966).

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Our view that the investment of the public in TV sets based on the expectation of free service should be protected is assailed on the ground that the sets in which the public has invested can be used for STV service, conventional service, or both. The choice, we are told, as to how the public should best use its investment should rest with the public. If the public does not want to pay for STV service, STV will fail. Although in another part of its oral argument Telemeter indirectly recants this view, we would point out that it is true that the public is free to use its sets for conventional television or for STV—with the rule that we adopt. However, this would not be true in a one-station community if the station were engaged in STV operation. The rule is designed to assure that there is a choice between STV and conventional programing, and that the choice will be a fairly broad one.

174. Concerning broadness of choice, ABC doubts that the rule is sufficiently restrictive to attain the desired objective. As an example, it mentions Providence which has three local stations and receives a grade A signal from three Boston stations. It argues that if a Providence station converted to STV, and thus removed one of the three network services from Providence, it would be to the detriment of viewers in outlying areas who do not receive service from the Boston stations. We believe that if a more restrictive standard were to be adopted, such as, for example, one that would permit STV operation only on a station in a community lying within the principal community contours of five or more television broadcast stations, it would unduly shrink the number of communities that could qualify. This, in our opinion, would unduly hamper the development of the new STV service. Moreover, the argument that ABC makes, concerning loss of service by some viewers in a community who are outside the range of television stations licensed to other communities, could be made even with the more restrictive principal-community-contour requirement. It is a question of where to draw the line. Under the circumstances, we believe that the grade A contour provides a fair criterion of eligibility for STV authorizations.

175. ABC also says that to the extent that the rules would provide the stimulus for activation of new stations, the five-grade A rule could have serious adverse economic impact in markets currently supporting three or four stations but which are not profitable or only marginally profitable. They state that the Tucson, Arizona, area has four television stations on the air and allocations for at least a fifth. This market, they observe, has shown an overall loss according to FCC figures so that if a new STV station competed for advertising revenue for periods when it is not programing STV, one or more of the free TV stations would suffer serious economic hardship and might ultimately be forced off the air. In this regard, we note that a Carroll financial issue may be raised with regard to an application for an STV station as well as for a new conventional TV station. Moreover, it must be remembered that the STV station could not accept advertising for a key portion of its broadcast day, since it would probably use prime time for STV programs, and no commercials will be permitted under the rules we adopt during the STV period of broadcasting.

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176. AMST raises a point that requires clarification. The *Fourth Report and Order* drafted by the Subscription Television Committee made clear that the rule would permit STV only in communities within the grade A contours of five or more commercial TV stations. It also clearly set forth the basis for the rule, namely, to prevent undue preempting of time from conventional TV stations. However, AMST appears to assume that the purpose of the rule is to provide STV service to large communities and not to small ones. It then goes on to argue that in some cases STV could, under the rule, be authorized to a station in a small community. Hence, they say, the rule does not accomplish its intended purpose. We wish to make clear that the object of the rule is to limit preempting of time, and not to assure that STV will be brought to large communities rather than small ones. The key is the number of grade A TV services available and not the size of the community.

177. As a practical matter, this probably means that most large communities will be eligible. However, as AMST indicates, some small communities will be eligible too. As an example, AMST mentions Fort Lauderdale, Fla. This community, it says, lies within the grade A contours of three Miami stations and two West Palm Beach stations, so that it would be eligible for an STV authorization. Were this the only factor involved, it would present us with no problem, for it clearly falls within the purport of the rule. However, AMST points out that there is only one TV channel assigned to Fort Lauderdale so that if it were used for STV it would preempt the only channel assigned to that community to provide for local service. First, we would point out that the station, under the rules, will be required to broadcast a certain amount of free programing. It is expected, of course, that in so doing it will meet community needs. Moreover, although we do not write it into the rule, in the rare cases where such situations might arise, we shall as a matter of policy condition the grant of an STV authorization on the applicant's broadcasting some local programing during prime time.

178. Other parties, believing that the rule is too restrictive, suggest a standard other than the five-station rule. Thus, Nationwide, holder of a construction permit for channel 47 in Columbus, Ohio, would prefer a rule that permits STV in communities which lie within the grade A contours of four commercial stations, three of which are VHF stations, and which has a local noncommercial educational station in operation. This situation, which fits that of Columbus, Nationwide urges would give the UHF station a better chance for survival. Skiatron urges that the five-station rule not apply to UHF stations at all and that such stations be permitted to engage in STV operations in any area. It also suggests that if a community receives four commercial TV services from VHF stations, one of those stations be permitted to engage in STV operations even though a UHF station is similarly licensed to serve the community.

179. Teleglobe recommends that STV authorizations be granted in communities with four or more commercial services, including the station of the applicant. It believes that this might help a considerable number of struggling UHF stations, and that the more STV opera-

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tions in existence, the more favorable would be the prospects of developing programs specifically for STV, with resulting improved quality and diversity of programing. Zenith and Teco proposed modification of the rule to provide that STV be permitted in communities to which five or more TV channels have been allocated, but that STV be permitted if only four stations are in operation at the time of the STV authorization (including the station of the STV applicant).

180. We believe that the suggestions of Nationwide, Teleglobe, and Zenith are essentially the same as that made by the Joint Committee (par. 161) and the standard used in the *Third Report*. We believe that, on balance, the overriding importance of protecting against undue preempting of time weighs more heavily than the other benefits claimed to result from a relaxation of the rule as proposed by those parties and by Skiatron. As we have stated in paragraph 167, after having had an opportunity to observe the development of the new service under the rule, we shall be in a position to take whatever steps seem appropriate with regard to this rule.

(2) *Whether stations engaged in subscription operations should be required to broadcast a minimum number of hours of conventional programing and, if so, what the minimum should be (see section 73.643(c) of appendix C). Whether subscription programing should be restricted to certain segments of the broadcast day and, if so, what segments; and whether a minimum or maximum number of hours of subscription programing per day or week should be specified, and, if so, what the number should be. (Concerning this issue, see section 73.643(d) of appendix C which has been drafted on the assumption that only one subscription operation would be permitted in any single community. Comments are invited on alternatives if the issue in paragraph 45(b)(4) is resolved to permit more than one such operation in a community.)*

181. As with *issue (1)*, our concern is with making sure that adequate amounts of free programing remain available to the public in markets where STV operations exist. Requiring STV stations to broadcast a minimum number of hours of free TV would be directed toward that end, as would the establishing of limits on STV broadcasting both as to amount and time of day of such broadcasting. In paragraph 33 of the *Further Notice*, we mentioned that if free TV is to remain available, the amount of permissible STV broadcasting by a station should depend on the amount of free TV available from other stations serving the community. As an example, we suggested that all STV stations be required to broadcast the minimum number of hours of free TV required by section 73.651 of the rules, and that the amount of STV broadcasting (assuming only one STV station in a community) should vary with the number of TV stations serving the community and with the time of day (prime time or nonprime time). The proposed rule to that effect appears in section 73.643 (c) and (d) of appendix C. Comments were invited on the proposal, which assumes one STV station per community, and on what the rule might be if communities were permitted more than one STV station.

182. Many parties agree that STV stations should be required to

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carry the minimum number of hours of free TV required by section 73.651 of the rules in the interest of helping to maintain a supply of free programing for the market. However, this view is not without its opponents. Munn and Chase, for example, say that the free programing of STV stations might be an unwarranted burden on STV stations and could turn out to be programing designed to fill the required number of hours, but of low quality. This could be especially true, they state, in major markets where STV stations would be competing with large, well-equipped and well-staffed stations. Moreover, in communities receiving many TV services, the free programing of STV stations might be purely redundant. For this reason, they urge that no such requirement be adopted, and that STV be allowed to pursue the development of good STV programing without having to present free programing.

183. Trigg-Vaughn also disagrees with the proposal to require a minimum number of hours of free TV over STV stations, and for the same reasons expressed by Munn and Chase. It states that the requirement could impose a severe operating disadvantage on STV licensees who are attempting to pioneer STV, by requiring them to do more than their competitors simply for the right to engage in STV operations. It suggests that, since both STV and free TV are broadcasting, the purpose of section 73.651 would be met by permitting STV licensees to fulfill the requirements of that rule by all STV or any combination of STV and free TV broadcasting.

184. It goes on to say that if at a later time it should appear that such a rule is necessary, the Commission can take necessary action. In the meantime, it is said, absence of such a rule at the outset will permit STV to have greater freedom in the programing area and a better opportunity for development.

185. As to limiting STV to certain segments of the broadcast day, or limiting the number of hours of STV, proponents generally oppose such restrictions, stating that the record shows no need for them, that at this stage they would hamper the development of STV, and that the amount of time of broadcasting of STV programing should be determined in the market place.

186. On the other hand, one proponent—Zenith-Teco—states that because single-station communities present a unique problem, and because there is no problem of time availability for free TV in communities within the grade A contours of five or more stations, the proposed rule with regard to such communities should be adopted. They believe, however, that communities receiving service from two to four grade A signals present different considerations. As a practical matter, it is said, network affiliates in such communities are not likely to give up assured profits to enter the speculative STV area. Moreover, the Hartford trial has shown that STV will have greater demands for STV programing in prime time than the proposed rule would permit. These two factors could operate to confine STV to only a few communities where five grade A signals are received, and where therefore there would be no limit on STV broadcasting. They therefore suggest that the Commission exempt UHF stations in two to four station markets. This would, they urge, permit STV to have

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the same competitive access to UHF that free TV has always had, and would restrict the rule to VHF where most of the free TV is.

187. They also suggest that any time limitations be applied on the basis of an annual average and not a daily or weekly average, as is permitted with the AM–FM nonduplication rule (47 C.F.R. § 73.242), so that programs will not be arbitrarily restricted. Finally, since the meaning of prime time is vague, they propose that the rule define the term as the hours between 6 p.m. and 11 p.m., which is also the period used in the programing portions of the Commission's application forms. Another clarifying suggestion is made by ABC, which points out that ambiguity exists in the proposed rule as to the meaning of community, which may be cured by language making it clear that it is referring to the community to which the station is licensed.

188. AMST does not think that the proposed rules should be adopted because, among other reasons, in a five-station community it would be possible in peak viewing time to have no free TV available, in a four-station community, it would be possible that there would be no free programing available between 7:30 and 9:30 p.m., and so on with regard to communities with fewer TV services. The Joint Committee suggests restrictions more stringent than those in the proposed rule. Among others, it suggests that no STV station be permitted to devote more than 60 percent of its broadcast day to STV programing. Thus, whereas our proposal would have imposed no restrictions on STV stations operating in five-station communities, the Joint Committee would impose the 60-percent restriction on them because the lack of information about the possible impact of STV on free TV "does not warrant the risk of permitting any pay-TV station to operate on unlimited time in any market."

189. ACLU believes that STV should not be viewed as a beneficial supplement to free TV, but as a different and independent system. Therefore, that group argues, both services will have the greatest chance of developing their potentials if stations are exclusively STV or free TV, and they accordingly propose that there be two classes of TV broadcast stations. This, they state, would best promote diversity (see par. 158) because an exclusively STV station would have the incentive to provide diversified programing for all hours of the day and evening. (In addition to working against diversity, they state that to permit STV and free TV over the same station could lead to various problems which they set forth.) ADA has similar views, but they contain additional ramifications which are discussed later in paragraphs 254–257.

190. *Conclusions.*—In discussing issue (1) we stated that we were adopting a rule limiting STV operations to communities within the grade A contours of five commercial TV stations because we believed that assuring adequate amounts of free TV programing to the public was an overriding consideration. We shall not repeat the discussion of the subject which we presented there, but point out that the same considerations lead us to adopt a rule requiring STV stations to broadcast at least the minimum number of free TV hours required by section 73.651 of the rules. We believe that, at least at this point in the development of the new service, such a rule is a necessary safeguard.

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191. We cannot agree with ACLU and ADA that there should be two classes of stations and that STV stations should not only not broadcast the minimum number of conventional TV hours, but should be prohibited from doing so. One of the principal arguments made by proponents of STV is that it will promote development of new or marginal stations and of UHF by supplying needed financial support. Clearly, the development of which they speak is one that envisaged both STV and conventional TV on the same station. We are of the opinion that STV and free TV can exist side by side on the same station, each service supplementing the other to the ultimate benefit of the public, and that free programing will not be an undue burden on STV stations.

192. We are adopting a rule limiting STV to five-or-more-station communities, permitting only one STV operation in a community (see issue (4)), and requiring that STV stations broadcast at least the minimum number of hours of free programing, all in the interest of assuring adequate free programing for the public. We now face the question of whether STV programing should be limited as to segment of the broadcast day and to number of hours of programing. The answer to us is a clear "no." We have made adequate provisions to assure free programing. The new service cannot be completely surrounded with restrictions lest it smother. Some flexibility in operation is needed, and for various reasons we think that this is an area where that flexibility should be preserved. For example, to limit the number of hours of STV programing in prime time could, in the light of the Hartford trial, quite possibly prevent the new service from becoming financially viable. Prime time was the principal programing time at Hartford, and it would appear that it will be in new operations. STV should be permitted to program that or any other time with STV programing if it so wishes, with as many or as few hours as it wishes. A single exception is that of STV over a station using the only channel assigned to a community, in which case we consider it in the public interest to require some local programing in prime time. Such situations should occur rarely (see par. 177).

193. With the limitations which we are adopting, the fears of the Joint Committee about impact should be allayed; and the AMST argument that the proposed rule might allow all STV programing (and no free programing) during prime time in five-station communities vanishes. In the light of the position we take, it becomes unnecessary to discuss some of the other points made in the comments. As with other parts of our rules, should experience indicate the need for modification thereof, such changes can always be made.

(3) *Whether subscription television should be permitted over any television station (subject to possible qualification as in par. 45(b)(4) concerning number of stations in the market), UHF stations only, or some other limitation*

194. Comments on this issue present a mixture of views. Several parties state that STV should be permitted over any station, for to adopt limitations, such as limiting it to UHF stations, is inherently anticompetitive, and no station should be precluded from rendering

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STV service if it wishes. They argue that there is no apparent reason for any limitation of this nature, and that if one were adopted it would foreclose VHF stations in some communities from STV operations and some communities might be deprived of STV, contrary to the public interest. Although Trigg-Vaughn is of the foregoing view, it states that as an interim policy the Commission might, in comparative hearings, favor UHF applicants proposing STV operations. Kaiser, believing that it is too early to decide whether to limit STV to particular types of stations, in effect says that there should be no limitation at the present time. AMST, although opposing STV, apparently would favor not limiting it to UHF stations because, among other reasons, it is irrelevant whether free TV is impaired by STV over UHF or over VHF stations, and because to limit it to UHF would do violence to the principle of an integrated UHF and VHF national television system on which the all-channel law is based. In any event, AMST argues, "the Commission's plans for UHF development are long-range and short-term expedients like this would only divert UHF stations from providing the free television service contemplated for them by the Congress."

195. On the other hand, some parties would have us limit STV operations to UHF. The usual reason for this view is that STV can supply needed economic and program sources for marginal and new UHF stations. The views differ slightly: Skiatron, for example, would limit STV to UHF and marginal VHF stations. Springfield says to limit to UHF but to waive the rule on an adequate showing. Nationwide (in oral argument) suggests that in intermixed markets preferential treatment should be given UHF stations over VHF stations in obtaining STV authorizations. It also would prohibit STV over stations with basic network affiliations. Acorn would limit STV to UHF stations at the outset. It says that a UHF station is morely likely to be a new station and that the public would be more likely to pay for programs over that station than to pay to stations from which they have been receiving programs free. In addition, Acorn observes, since UHF stations are more likely to be new, there is less chance of preempting of free TV time than there is if an established VHF station begins STV operation.

196. *Conclusions.*—Although as a practical matter, STV may turn out to be limited mostly to UHF stations, we do not think it should be so limited by rule. To do so could, as some parties argue, foreclose some VHF stations that wish to engage in STV operations from doing so. With the rules that we adopt today, sufficient restrictions are placed on STV to act as safeguards in areas of concern. We do not find any of the reasons given for restricting STV to UHF of sufficient weight to merit such a rule as this time.

(*4*) *Whether more than one station in a community should be permitted to engage in subscription television operations, and, if so, whether such stations should be permitted to broadcast subscription programs simultaneously*

197. Telemeter states that this is a complex question which should be decided on a case-by-case basis, at least until some pattern emerges.

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It thus appears to oppose a rule restricting STV to a single station in a community. Zenith and Teco mention that as a practical matter it is likely that there will only be one STV station in a community, but to impose such a limitation by rule would apparently go contrary to the Commission's policy of encouraging competition. They suggest deferring this kind of decision until such time as a second station in a community applies for STV authorization, at which time the Commission will have information concerning the operation of the first station therein and could make a judgment on the basis of that information and other local public interest conditions. The opinion of Kaiser that it is too early to decide this issue is consistent with the foregoing.

198. Various parties, including ABC, Teleglobe, and ACLU take a position that STV should not be restricted to a single station because this is anticompetitive. Teleglobe adds that a limitation would also be unfair to another station in the community wishing STV.

199. Munn and Chase say that STV should be limited to one station per community because there is insufficient box office programing for more than one station, and that allowing more than one to engage in STV operations would deteriorate the service. Trigg-Vaughn and AMST state that to limit STV to one station in a community would give the single station a monopoly. Moreover, according to AMST, "the combination of these market monopolies, deeply committed to pay television, would be particularly effective and energetic in efforts to 'siphon' free television audiences and programing." AMST admits, however, that such a restriction would reduce the preempting of free TV time by STV.

200. *Conclusions.*—Our concern about preempting of time has been previously discussed. It has led us to adopt rules restricting STV to certain communities, and requiring STV stations to carry some free TV programing. For the same reason, we adopt a rule that, with the qualification mentioned in paragraph 207 below, restricts STV to one station in a community. If more than one station were licensed to a single commmunity more time could be preempted than we consider to be in the public interest at this juncture. We foresee no serious problems of monopoly in this connection. Opponents state that there will be no competition if there is only one STV station in a community. We observe that there will be competition between the station offering a recent film without commercial interruptions and unedited, and stations offering a usually older film with no direct charge, and with commercials and editing. There will also be competition between STV stations and motion picture theaters. The prices charged by the latter will provide a bench mark that the STV station must heed. And there will be competition between two ways of viewing sports events for pay. It may be noted, too, that there are numerous communities in the Nation which have but a single free TV station, but monopoly problems sufficient to warrant action on our part have not arisen. In paragraph 152, we mentioned the views of the Joint Committee to the effect that it would be unconscionable for the Commission to permit such a monopoly without having clear-cut authority to regulate rates. We do not find it so. In balancing the conflicting considerations of dangers of preempting time against danger of monop-

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oly, the scale tips in favor of protecting against the former. As to the matter of rate regulation, it is discussed under issue (9) below.

201. In oral argument, Teleglobe suggests that the rule which we are adopting be modified to permit two STV stations (using the same technical system) in communities lying within the grade A contours of six or more operating stations. It believes that this would make for additional diversity and supplemental programing. ADA suggests permitting STV on any number of channels in a community if this does not reduce the number of free TV services below four. Although these suggestions may have merit, we think it best at the outset to adhere to the one-station rule until more experience is gained. It is possible that they might be given consideration in the future.

202. In its oral argument directed at the proposed one-station rule in the Committee draft of the *Fourth Report and Order*, AMST, quoting from the draft, states that the rationale of the rule is "if more than one station should broadcast STV programs in a single market more time could be preempted than we consider to be in the public interest at this juncture." It then says that there are many communities in which STV programs from more than one station will be available. As an example it refers to the Springfield-Holyoke, Mass., market, which, it says, possibly would be required to receive the STV programs of three STV stations. Citing from the 1967 Television Factbook, it says that under the "five-grade A rule" STV stations could be authorized in Springfield-Holyoke, in Worcester, Mass., and in Hartford, Conn., and that therefore each of the three STV stations could be required to give STV service to Springfield-Holyoke.[48] It says that Worcester is covered by the grade A signals of three Boston commercial TV stations and by the grade A signal of the Worcester station. It says that Springfield and Holyoke are covered by the grade A's of at least two Hartford stations and by the grade A's of two Springfield-Holyoke stations. It does not say how many grade A signals cover Hartford.

203. The example is inaccurate and strained, and in any event misses the point of the rule. It is inaccurate and strained because, using their source, the 1967 Television Factbook, the following seems evident: An STV station could be authorized at Worcester, as AMST states. It is covered by three Boston stations, one Worcester station, and has two idle channels assigned. If another Boston station increased its facilities to cast a fourth Boston grade A signal over Worcester, the presently operating station in Worcester could apply for an STV authorization. However, that station does not cast a grade A signal over Springfield-Holyoke and would not be required to give STV service to that community. Assuming that there is no fourth grade A signal covering Worcester from Boston, then one of the two idle channels would have to be activated in order to grant an STV authorization for a Worcester station. For purposes of discussion, we shall assume that the new station would cast a grade A signal over Springfield-Holyoke, and that it is granted an STV authorization.

[48] See issue (10) below. Under the rules we adopt, each STV station must, with some exceptions, provide STV service to those requesting it who reside within the grade A contour of the free TV service of the station.

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204. Using the factbook, it is clear that only two Hartford stations include Springfield-Holyoke in their grade A contours. The only other grade A contours covering those communities are those of the two Springfield-Holyoke stations. Since there are only two channels assigned to Springfield-Holyoke, there could not, under the five-station rule, be an STV authorization granted for Springfield-Holyoke. However, for purposes of discussion, we shall assume that a Hartford station increases its facilities and casts a third grade A signal over Springfield-Holyoke so that an STV station could then be authorized in the latter market. We shall further assume that such an STV station is authorized.

205. Finally, according to the factbook, it would appear that Hartford lies within the grade A contours of five commercial TV stations. Stations in that community would therefore be eligible for an STV authorization. For the sake of discussion, we shall assume that a Hartford STV station is authorized.

206. With these multiple assumptions, we arrive at a situation where an STV station is authorized at each of the three markets under consideration. It is, of course, possible that the grant for STV operation in Hartford might be to a station that does not cast a grade A signal over Springfield-Holyoke, so that it would not be required to give STV service to that market. However, for the sake of discussion, we assume that the Hartford STV authorization goes to a station the grade A signal of which covers Springfield-Holyoke. Thus, we now have three STV stations, the one at Springfield-Holyoke, the one on the activated channel at Worcester, and one at Hartford all being required to give STV service to Springfield-Holyoke.

207. This in and of itself is not undesirable, whether or not the STV stations broadcast simultaneously. The one-station rule is not designed to assure that there will be only one STV service to a community. Its purpose is to prevent undue preempting of time. It purports to do this by assuring that, in addition to STV service, there are at least four grade A free services available to a community. Let us examine Springfield-Holyoke with that in mind. That market would be receiving a free service from its non-STV station, none from the non-STV station at Worcester, and two free services from non-STV stations in Hartford. It would thus be receiving three free services, instead of the four that the rule contemplated. This, we believe would not be in the public interest. Hence we are amending the rule as proposed in section 73.642 of the Committee draft. As proposed by the Committee, the rule stated that one STV authorization would be granted to a five or more station community if, not counting the station of the STV applicant, at least four of the stations which include the community of the applicant within their grade A contours are operating stations. We now amend it to state that the STV authorization will be granted if, not counting the station of the STV applicant, at least four of the stations which include the community of the applicants within their grade A contours are operating non-STV stations. This means that if the Worcester and Hartford stations were authorized for STV in the example mentioned above, and subsequently one of the two Springfield-Holyoke free TV stations should apply for STV authorization, the application would

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be denied because if it were granted, Springfield-Holyoke would lie within the grade A contours of only three non-STV stations.

208. We have analyzed Springfield-Holyoke in detail for several reasons. First, it demonstrates that it is unlikely that the situation imagined by AMST would occur, although admittedly it could occur. Second, it serves to sharpen and bring into focus the rationale of the one-station rule, and to provide what we believe to be a desirable amendment to it that will avoid future confusion, since we believe that the problem covered by the amendment could arise. For example, Hartford (using the television factbook) lies within the grade A contours of four Hartford stations and one of the stations in the Springfield-Holyoke market. It is therefore eligible for an STV authorization. Waterbury, Conn., lies within the grade A contour of the Waterbury station and the grade A contours of four Hartford stations. If a Hartford station that placed a grade A signal over Waterbury were to receive an STV authorization, and the Waterbury station subsequently were to apply for STV, its application would be denied.

(5) *Whether more than one subscription television technical system should be authorized, and, if so, whether more than one technical system should be authorized to operate in any one community—assuming that the answer to paragraph 45(b)(4) is such as to permit more than one station in a community to engage in subscription operation—and, if only a single technical system is permitted, what system should it be?*

209. This issue was referred to briefly in paragraphs 36–39 of the *Further Notice* which mentioned that Zenith and Teco favor not limiting STV operations to a single technical system because the underlying policy of the act encouraging competition points to the adoption of general technical standards within which more than one system might operate. We stated, however, that there might be advantages to the adoption of a single technical system—advantages similar to those accruing to the basic broadcast services, color TV, and FM stereo where we have required all broadcast stations in any band to use a single system so that receiving equipment in the hands of the public will be capable of using signals from any station.

210. Possible disadvantages in using multiple systems were mentioned in those paragraphs as well as in appendix B of the *Further Notice*, which consisted of a memorandum from the Chief Engineer of the Commission for the information of commenting parties. These included the following: Viewers living within the service areas of more than one STV station would be put to unnecessary expense and inconvenience if they wished to see the programs of more than one of them. Persons purchasing decoders and later moving to other communities where other STV systems are used would be put to unnecessary expense and inconvenience. Even if decoders were rented rather than bought, there might still be inconvenience and expense in installing more than one kind of decoder in the home. Having multiple systems might restrict competition because viewers with one decoder attached to their sets could not, without additional inconvenience and expense, receive STV programs of other stations. Thus, different systems in the same

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area might have different audiences. Competition between systems in the marketplace might become a popularity contest between competing systems which would be decided largely on the basis of promotional efforts rather than on their respective merits. The competition should occur before the Commission and be decided on the basis of technical merits before the STV service is regularized. With multiple systems, it will be necessary for the Commission to decide on a city-by-city basis what system should be used. This would necessitate detailed technical evaluation of the comparative merits of systems competing for the same market. If different kinds of decoders are used, their price would be greater than if only one kind were manufactured in greater quantity for a single system. In addition to the foregoing, the Chief Engineer's memorandum contained considerable detail about patents, patent holders, and the Commission's revised patent procedures adopted December 6, 1961, which are designed to prevent the public benefits of systems which the Commission specifies shall be used from being derogated by unreasonable exercise of patent rights. That information will not be repeated here.

211. The comments in favor of having a single technical system are very brief. Thus, ABC states that it favors a single system because the public interest would be served, but does not say how. ACLU favors a single system because multiple systems would have a deleterious effect on diversity of expression for the reasons mentioned in paragraph 37 of the *Further Notice*. Motorola gives somewhat more on the matter. It states that authorization of multiple systems would be

> * * * a tragic regulatory mistake for which the public would pay a high price in years to come.
>
> A single technical system provides the basic tools for growth of the service, as it has for television, both monochrome and color and for FM-stereo. A single technical system allows equipment manufacturers a better opportunity to plan, to produce, to control inventory, to control national distribution and service, all of which reflect in higher quality, more reliable, lower priced units for the ultimate consumer.

Motorola urges thorough field testing of all systems before a single one is selected. It states that both the Zenith and the Telemeter systems have not been adequately tested (see pars. 142–143 supra), and urges the Commission to institute a formal program of technical investigation and to request the industry to reconstitute the National Television Systems Committee as a vehicle for obtaining the field performance results for the Commission to evaluate.

212. The most lengthy arguments against limiting STV to a single technical system are presented by Teleglobe, Telemeter, and Zenith-Teco. Teleglobe offers the following: It presents a brief sketch of the history of STV systems including the development of the Teleglobe externally connected decoder (as opposed to decoders that have to be connected to the inside of the TV set), and its centralized metering and billing system which permits immediate knowledge at a central office that a program is being viewed and which entails no coin or token insertion into the decoder or periodic sending in of tapes, code cards or the like for billing purposes. There were three STV systems in existence in 1957 when Teleglobe came on the scene. Had the Commission in 1957 decided to adopt a single technical system for STV,

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technical developments would have been frozen, progress stultified, and Teleglobe's novel concepts of external decoder connection and centralized metering and billing would not have emerged. Moreover—

> [a]ll systems are workable. They are all ready for the marketplace. But only the actual operation of the individual systems—over a period of years—with tens of thousands of subscribers—in a number of markets—will be able to establish conclusively their comparative technical merits, efficiency of collection methods, ease of operation in the subscribers' homes, degree of servicing problems and general applicability. There is no other evidence that will justify the Commission to choose now one system in preference to the others. To make a choice of a single system for nationwide use, merely on the strength of circuit diagrams and written specifications is extremely unsound. * * * A commitment by the Commission to a single system—in the present circumstances—will be a deterrent to progress and inventiveness.
>
> A hands-off policy on the part of the Commission may or may not lead ultimately to the establishment of a single nationwide system. The public will not be hurt, however, since it is our proposal that television decoders should be installed by the pay-TV operator and not sold to the subscriber.

In addition, not only would the adoption of a single system be unfair to the entrepreneurs who have pioneered STV at considerable expense and in the face of difficult opposition, but it would present a single company with a billion dollar monopoly, with profits not only from decoder sales, but from yearly royalties paid by franchise holders for use of the system. Finally, multiple systems should comply with general standards of good engineering practice, and should not be limited to one system per market since there is no technical difficulty in attaching more than one decoder to a set.

213. Telemeter presents arguments like those of Teleglobe with regard to stifling of invention and competition to improve systems if a single system is adopted. In addition, Telemeter says that because having a single system would eliminate competition, it would prematurely necessitate rate regulations, patent license regulations, and other burdens which tend to stifle an industry which does not yet exist. It is premature, we are told, to fix upon a single system because this is not merely a technical question; it goes to the heart of the commercial organization of STV. In addition, as mentioned earlier (par. 150), Telemeter believes that broadcasters, decoder owners and maintainers, and programers will have to be one and the same in the early phases of STV, and it will probably be necessary at the start to grant franchises in order to induce investment in STV. Because of this, it is argued, having multiple systems would be the only way to have competition.

214. Zenith and Teco make the following presentation: Multiple systems are dictated by the underlying policy of the act of encouraging competition. The Commission should adopt general technical standards under which the systems may operate. They could be as follows: (*a*) The system should be compatible with existing TV service (both UHF and VHF, and monochrome and color) so that present TV sets can be used; (*b*) the STV system should not cause interference or have other undesirable effects within or without the assigned frequency; (*c*) it should result in no perceptible degradation of the quality of the video or audio signals received during either an STV program or a conventional program. There is no disagree-

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ment with the policy of single systems for basic broadcasting, color TV, and the like, but the same considerations do not apply here. There is no apparent reason why one method of secrecy to preclude nonsubscribers from seeing STV programs need be used everywhere. Whether one or multiple systems are used, they would all be compatible with existing TV sets.

215. Like Teleglobe and Telemeter, Zenith and Teco are concerned about stifling inventiveness. They believe that establishing a single system would tend to make it impossible to incorporate future improvements—improvements which, among other things, could reduce ultimate costs to subscribers. We are told that based on the Hartford trial experience Zenith has made many new improvements in its equipment. The general technical standards that they have proposed would permit this sort of thing, they state. Moreover, they urge, decoder and encoder design involve other considerations than technical transmission of signal, such as billing, for example; and the Commission need not concern itself with what billing method is used as long as it is compatible with existing transmitter and receiver standards.

216. Zenith-Teco also argue that to have a single system would be contrary to the national policy against enlarging the monopoly of patent holders. To adopt a single system which would be inherently anticompetitive, there must be overriding social interests not presented here, they urge. Other arguments given are that there is a paramount interest in fostering competition and diversification of program sources which should brook no unnecessary delays; that there is an urgent need to increase the box office support of feature films which are now so important to the free TV industry; that delay caused by the selection of a single system could cause TV channels to lie idle and open the door to reallocation of those channels to other services, as Motorola apparently would desire; and that there is no need for extensive field testing of systems as Motorola suggests.

217. Finally, they argue as follows: If multiple systems are used, it is unlikely, because of economic reasons, that there will be more than a single system in a community. This is so because an existing system in a community could also serve other stations subsequently authorized by the Commission to engage in STV operations therein. The later STV operators probably would not bring in new systems because it would be more economical and expeditious to use the existing system. Therefore, the inconvenience foreseen by the chief engineer if there were more than one system in a community is not likely to occur, and financial burden on the subscriber is minimized by renting of decoders. Although there will probably be only a single system used in a community, no reason why there should be a rule requiring this restriction is apparent.

218. As to the last-mentioned subject—limitation of STV to a single system in any one community—Acorn says that it favors STV broadcasting by more than one station in a community, and for that reason urges that only a single technical system be permitted in one community so that all subscribers may receive the programs of all STV stations there. Munn and Chase, on the other hand, believe that STV should be limited to one station per community (because of the limited

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number of box office programs) and say that this view carries with it the requirement of having only one system to a community, although they see no reason for not having multiple systems nationally in nonoverlapping markets. Trigg-Vaughn opposes limitation of one system to a community simply for the sake of confining all STV operation in the community to a single system, on the ground that this would be contrary to the public interest. However, it would apparently favor the adoption of appropriate limitations if having different kinds of STV service in a community would cause loss of the public's investment in receiving equipment or cause incompatibility with such equipment.

219. *Conclusions.*—We have carefully considered the comments of filing parties and the views of the Chief Engineer of the Commission and here decide that it is in the public interest that multiple technical systems of STV be permitted. Many of the negative aspects of having multiple systems that are mentioned by the Chief Engineer are nullified by the fact that we are limiting STV by licensing a single station within a community for such operation. Thus there is no problem of inconvenience and expense to the public caused by having two decoders attached to one receiving set for the purposes of receiving two STV operations in the community. While there may be viewers within the range of STV operations in more than one community, we do not believe these situations will be so numerous that, overall, significant inconvenience will be caused. Because of the foregoing, the argument that multiple systems might tend to restrict competition by dividing STV audiences between two STV stations falls. Our rule requiring that decoders be leased rather than sold (see issue (11) infra) protects those subscribers who move from one community with STV service to another STV community. To the argument that one system may be better than another and that with multiple systems use of one or another may be based on the efforts of salesmanship rather than technical quality, we reply that by establishing standards which multiple systems must meet, we assure that they will be able to transmit satisfactory pictures and sound. Moreover, as to the matter of decoders costing less with a single system as compared to manufacturing fewer of each kind with multiple systems, we believe that competition between systems may well serve to stimulate better methods of production that will tend toward lower costs. We agree that, under the rules which we adopt, if two or more applicants within a community apply for STV authorizations, a comparative consideration in a hearing may be necessary to determine the relative merits of the technical systems, but this fact does not deter us in view of the advantages to the public of the action which we here take.

220. Many of the arguments made by those favoring multiple systems we find to be of a makeshift nature and lacking in merit. Thus, for example, while we can sympathize with the argument that many entrepreneurs who have invested time and money in STV systems will lose if a single system is selected, private interests would have to yield to public interest considerations, as they did in the case of color TV and FM stereo, if the public interest considerations in this case appeared to point to that direction. On the other hand, we believe that there is

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merit to the position that adoption of a single system at this time might well stifle inventiveness and the incentive to improve STV systems. At some future date, depending on the factors then existing, it might be in the public interest to adopt a single system, and STV operators are hereby put on notice to that effect. We believe that a broad trial of multiple systems over a period of years, possibly coupled with the reconstituting of the National Television Systems Committee to aid the Commission, might form the basis for subsequent decisions in this area. However, we do not believe that the testing should be made in the abstract. Standards which we adopt can assure the reception of satisfactory signals on all of the multiple systems used. In view of this, we see no reason why the marketplace should not be the proving ground. Finally, we agree with the argument that there is a paramount public interest in fostering competition and diversification of program sources as quickly as possible. We have already found that STV could provide a beneficial supplement to free TV. In view of this, in view of the paramount public interest just mentioned, and in view of the foregoing observations, nationwide STV—using multiple systems—should begin with a minimum of delay.

(*6*) *Whether a party manufacturing or selling equipment, or a holder of a subscription television franchise in more than one market should be permitted to engage in the procurement and supply of programs to television stations for subscription use*

(*7*) *What requirements should be imposed upon station licensees engaged in subscription television operations to assure licensee control, i.e., whether the licensee should be required to retain sole control of all decisions as to program choice, charges to the public, etc., or whether the requirements should merely concern such matters as the licensee's retention of the right to reject programs, to make free choice of programs, to schedule the time of showing of programs, and to set the maximum price to be paid for a program by subscribers (see section 73.642(e) of appendix C)*

(*12*) *What restrictions should be adopted concerning the nature of arrangements among patent holders, patent licensees, franchise holders, and television station licensees, e.g., concerning such matters as whether, and under what terms and conditions, patents on any particular subscription television system will be required to be made available to franchise holders and station licensees, and whether stations engaged in subscription television operations should be permitted to enter into contracts that would give them exclusive rights to use a system in a particular community*

221. These three issues are dealt with together because of their close interrelation, bearing as they all do on questions relating to monopoly and competition and on the licensee's responsibility for the programing which is broadcast over his station. We have already set forth considerable information about them in paragraphs 134–138 and 145–152 which presented material on the subjects of modus operandi of the STV service, the methods to be employed, the role of participating broadcast station licensees, and the possible monopolistic features of STV. In paragraph 153 we stated that we would evaluate that material in our discussion of the issues, and this will be done in stating our con-

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clusions below. Reference is also made to footnote 40 in which we indicated that such topics as whether interconnection of STV operations should be prevented or limited, and whether STV system manufacturers or franchise holders with franchises in more than one market should be allowed to engage in STV program procurement or supply, and similar problems related to siphoning, would be discussed under the issues. (The question of whether STV should be limited to carrying certain kinds of programing, also mentioned in footnote 40, is treated under issue (14).)

222. *Issue* (*6*).—In paragraph 59 of the *First Report* we stated:

> Opponents of subscription television have charged that the conduct of subscription television operations on the lines proposed in this proceeding would permit or foster monopolistic control of the medium. It is pointed out, for example, that a sole franchise holder in an individual community of a system employed exclusively in the local community for the encoding and decoding of subscription television programs might become the sole medium for the channeling of subscription programs into the community. This, it is argued, would enable the franchise holder, and through him the persons controlling patents on the equipment, to control the program availabilities, determine the terms of services to the subscribers and otherwise control the operation without competition from any other persons performing similar services locally. It is also argued that any system which by virtue of nationwide standardization by the Commission, or otherwise, established a nationwide network of local outlets, may gain monopolistic control over provision of subscription television service for the public in all the communities where that system was exclusively used for subscription television operations.

We then went on to say the following in paragraph 61:

> It is superfluous to say that the Commission favors competition in the conduct of subscription television operations. The conditions set out herein for trial operations have been carefully determined with that objective in view. A trial conducted under these conditions would, we believe, provide useful indication of the extent to which it is possible to create and maintain competition in all phases of subscription television operations: among program producers and distributors, among manufacturers and distributors of equipment, and among stations, to name several. Should a trial disclose that competition among several systems is not feasible, or that the need for standardization of equipment precludes it, there would be ample opportunity, after trial data are available, for deciding whether the continuation of such a service should be prohibited as contrary to the public interest, or whether its continuation and expansion should be governed by new regulatory controls furnished if need be by amendments to the present statute.

As events developed, however, trial operations were not conducted under the provisions of the *First Report*, but under those of the *Third Report* instead. Two fundamental differences exist between these reports: Under the former, more than one STV system could have operated within any one market, and any STV system could have been tried in up to three markets. Under the latter, only one STV system could operate within a single market (although more than one station in the market could engage in STV operations using the system), and any system could be tried in only one market. This fact may have resulted in our obtaining less information about the subject of monopoly than might otherwise have been obtained. However, at the time, other considerations militated in the direction of adopting the revised provisions of the *Third Report*. In any event, it may be seen that our concern in the quoted paragraphs had to do with the matters specified in

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the present issue as well as with that of interconnection of STV stations by a nationwide network—an item mentioned in footnote 40.

223. Proponents of STV commenting on these matters generally favor having no restrictive rules thereon, at least at the outset. As an example, the views of Zenith and Teco are stated in their own words:

> Zenith does not contemplate engaging in program production or distribution if subscription television is authorized. However, we see no reason for a rule prohibiting Zenith from so doing. Other parties manufacturing or selling equipment in more than one market are presently permitted to engage in the procurement and supply of programs to conventional television for either their own or other television stations, or both, while making and selling equipment to those stations or to the public, or both.
>
> In our opinion, a holder of a subscription television franchise in either a single market or in several markets should not be prohibited from engaging in the procurement and supply of programs to television stations for subscription use, so long as the subscription television station is free to use the franchise holder's system, whether or not it uses the programs supplied by the franchise holder. Indeed, in many cases the subscription television station and the franchise holder may be the same party. This, as the Commission knows, is true of RKO in Hartford. This may also occur in the case of two Phonevision franchise options which have been granted to Field Communications in Chicago and Kaiser Broadcasting in Los Angeles.
>
> We believe that so long as any subscription television franchise holder stands willing to provide subscription service to all stations authorized by the Commission to carry subscription programs in a particular market, it should not make any difference whether the franchise holder on some occasions obtains programs which are in turn supplied to the stations. The stations will still have plenty of other sources from which they may obtain programs.
>
> It should be emphasized that because of legal and business considerations involved, Zenith and Teco would be effectively precluded from entering into any arrangement or tie-in with a local franchise holder giving any program supplier exclusive use of Phonevision facilities. Likewise, the same legal and business considerations would preclude a local franchise holder from entering into any tie-in arrangement which would require stations to use only programs supplied by the franchise holder.
>
> We, of course, recognize that the television station should have ultimate control over the final selection of all subscription programs broadcast * * *.

They then refer to the three methods for arranging for programs which involve various degrees of cooperation between the licensee, the franchise holder, and program producers which were mentioned in paragraph 137, and conclude by saying:

> We do not believe that any sound regulatory purpose will be served at this point by putting unnecessary restrictions on a franchise holder's participation in program procurement. Nor do we believe that any useful purpose would be served by putting a program distribution restriction on any other group or classification. At the outset at least, subscription stations will require all the collateral help they can possibly obtain to acquire sufficient box office product to make subscription television a success.

224. The views of Telemeter were set forth in detail in paragraph 150. On the basis of those views, Telemeter urges that, at least at the outset, there be no limitations placed on the system proponent, such as Telemeter, or on the franchise holder with regard to their ability to produce, acquire, obtain or supply STV programing. In one respect, Telemeter disagrees with Zenith-Teco. The position of the latter parties, we are told, would preclude exclusive franchise agreements between Telemeter and TV station licensees. Telemeter believes that an

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exclusive franchise may be the only method for commencing STV in the early days of the service.

225. Without mentioning them by name, we note that other proponents have views similar to those mentioned in portions of the foregoing. However, we specifically mention Kaiser because of its reference to networking of STV programs. It states that the key to the success of STV lies in its ability to obtain programing that will be supported by subscribers, and that to prevent interconnection of STV operations in different markets or to prevent equipment manufacturers from engaging in program procurement or supply would be to impose severe restrictions in this vital area with no real evidence that they are necessary either to protect free TV or to prevent anticompetitive practices. One proponent, ACLU, holds the view that there should be a complete divorce of programing from other facets of STV operation because diversity is limited by monopolizing programing in the hands of those who control distribution, and diversity is broadened by developing new entrepreneurs in programing.

226. Among opponents of STV, ABC believes that the Commission should not presently adopt rules limiting equipment manufacturers or sellers or franchisers with regard to engaging in program procurement and supply for STV. It observes, however, that:

> [a]lthough these combined functions may raise questions under the antitrust laws, the questions are subtle and do not lend themselves to answers in the abstract. The sound course would be for the Commission to adopt no rule at this time and to await development of the subscription television industry.

AMST is of the view that although if such restrictions were adopted they would preclude certain groups from siphoning programing from free TV, they would not prevent siphoning itself. Finally, the Joint Committee, in order to minimize the risk to free TV opposes any form of networking of STV programs or other types of multiple program purchase agreements.

227. *Issue (7).*—Generally, comments favor traditional concepts of licensee responsibility, and most favor the requirements in proposed section 73.642(e) (see appendix C) for assuring licensee control. They are those required by the *Third Report* for trial operations and suggested by Zenith-Teco for final rules, and it is stated that they would be adequate to insure licensee responsibility for STV station operations. Kaiser, however, believes that it is too early to decide on detailed restrictions because we do not yet know along what lines the program procurement process will develop. It might be along the lines of free TV with a network-station relationship, or it might be different and therefore call for more complete control by the licensee over operational details. Munn and Chase state that having rules on licensee control might protect licensees against outside pressures.

228. Telemeter supports the proposal providing it is made clear that exclusive franchise agreements are permitted and that stations may enter into contracts whereby the franchise holder undertakes to broadcast a minimum of STV programs within specified time segments. ABC favors the proposal but states that the Commission should recognize that in order to offer special and unusual attractions some

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kind of network-type distribution structure may be necessary. Because of this, it states:

> [t]he Commission should not foreclose subscription television operators from contractual arrangements necessary to provide a nationwide audience for programing. In the free television and radio areas, a reasonable accommodation between the concepts of licensee responsibility with respect to program selection and national program distribution has been realized, and a comparable relationship would appear appropriate for subscription television.

229. *Issue (12).*—Comments on this issue vary. Teleglobe believes that it would be premature to adopt rules on this subject at this early stage. Telemeter, expressing the same thought, says that if multiple systems are permitted, there may be some cross-licensing and pooling of patents. Some system proponents may manufacture and others not. Therefore, until the pattern of the industry emerges, it would be impractical to attempt to be specific about patent licensing terms and conditions. Trigg-Vaughn believes that the proposed rule in section 73.642(e) concerning licensee control is sufficient to protect against abuses, should any develop, that might be imposed on licensees and ultimately the public by manufacturers of equipment. Zenith and Teco are of a similar view. ABC, on the other hand, believes in having appropriate restrictions to guard against anticompetitive practices. If the Commission should adopt a single technical system and permit more than one STV operation in a community, it then urges that rules be adopted that would permit sharing of rights and that would limit exclusivity arrangements.

230. *Conclusions.*—We have carefully weighed the foregoing material and have arrived at the conclusions in the following paragraphs. Because of the limited scope of the Hartford trial, we lack information about conceivable problems of monopoly with regard to STV. As we said in paragraph 222, this may be partly the result of the more limited conditions which the *Third Report* imposed for trial operations. For example, had one system been tried in three markets, as would have been permitted by the *First Report*, we might now have trial information about interconnection of systems and the purchase of programs from a broader financial base by a franchise holder in more than one community. This lack of information, and other considerations mentioned below, lead us to the conclusion that, at least until such time as the infant STV industry grows to the point where patterns of organization and problems are discernible, we shall not adopt rigid regulations in respect to matters related to issues (6) and (12), and the kindred matter of interconnection of STV operations. Instead, we are adopting rules in respect to issue (7) which are of such breadth that each application may be treated on the basis of its specific fact pattern as to topics therein relating to issues (6), (12), and interconnection.

231. *Issue (6).*—Zenith and Teco have depicted for us the modus operandi and methods used at Hartford which include three functional organizations—the local franchise organization, the TV station, and program sources. At Hartford, the first two were under common ownership. We are told that there appears to be no reason why this should not be, although it often may not be the case. Three

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possible methods for making arrangements among these elements for obtaining programs (par. 137) are mentioned. We are informed that at Hartford programs were obtained from more than 50 sources during the first 2 years of the trial. These parties indicate that Zenith does not intend to engage in program production or distribution, that for business and legal reasons they would be precluded from entering into arrangements with local franchise holders giving any program supplier exclusive use of Phonevision facilities, and that the same considerations would preclude local franchise holders from entering into arrangements with station licensees that would require the latter to use only programs supplied by the franchise holder.

232. Telemeter, with considerable experience in Canada, stresses the importance of permitting a single firm to engage in all phases of STV operations including production of entertainment, broadcasting it to the public, installing decoders, and all other aspects of the business. Without this, they insist, STV may not get off the ground. They are therefore of the opinion, at this stage, that it serves no useful purpose to try to predict and separate the elements of STV and regulate them. Moreover, they strongly favor permitting exclusive franchise arrangements, contrary to the position of Zenith-Teco.

233. Thus, the two entities that have the most actual experience in STV operations appear to have views that differ in some essential respects. This underscores the fact that we are in an uncharted area. There is no real evidence that restriction is necessary. In free TV some manufacturers and licensees have gone into programing to promote competitive free TV. Why should the same not be permitted in STV? We have only conjecture to argue against it.

234. We have, through limiting STV operations to five or more station communities and to one station in those communities, and through limiting the kind of programing that STV stations may broadcast (see issue (14)), taken sufficient steps at this time to protect the existing TV structure. We think it essential that thought be given to what might be necessary to protect the growth of the new STV service. It appears that some sort of broader purchasing base for programs might be effective in making available to viewers programs of little mass appeal—operas, plays and the like—which may not be available on the basis of single-station purchasing. (It might also be helpful in obtaining more and better mass-appeal programs, thereby aiding STV to achieve greater market penetration—a matter about which doubts have been expressed.) As was mentioned in the comments, if a relatively small number of viewers in each of many communities were to view an opera, it might make producing and selling operas an attractive business venture. Lack of such programing on STV trials is one of the areas that STV opponents have chosen at which to aim their darts. It would appear unreasonable, then, to argue against interconnection of STV operations, or against procurement and supply of programs by franchise holders with franchises in more than one city, or by equipment manufacturers, when there is no real evidence that such restrictions are essential to protect free TV or to provide safeguards against anticompetitive practices. AMST states that even if we had such restrictions they would only prevent some program siphoning but not

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all. To which we can only reply that it is not our intent to erect a complete fence about free TV. It may well benefit the public to leave at least a small opening in the enclosure. Finally, to the ACLU argument that diversity is best promoted by separating the functions of programing from other parts of STV operations, we answer that we give credence to the view that there may be a need for flexibility of approach to program procurement and supply in the early stages without which the service may not develop at all—a result that would make for even less diversity.

235. *Issue* (7).—In view of the foregoing discussion about issue (6) and the discussion of issue (12) hereafter, we are of the view that proposed section 73.642(e) concerning licensee control should be adopted with amendments befitting the situation as it appears to be. Before specifying what the amendments are, we shall refer briefly to a related topic—our chain broadcasting rules—to illustrate what we consider to be fundamental policy. That policy underlies the chain broadcasting regulations and the amendments to section 73.642(e) which we adopt today. The chain broadcasting rules, adopted for radio in 1941, were later carried over to television stations when TV came into being, and the essentials of those rules are presently in effect. The rules were designed to protect against two types of situation that the Commission deemed to be contrary to the public interest—so-called exclusivity of affiliation, and territorial exclusivity. The former consisted of an agreement between a station and a network whereby the station agreed to accept programs only from that network. The latter was the reciprocal undertaking on the part of the network whereby it agreed that it would not make its programs available to any other station within a given radius. The former was economically advantageous to the network because it gave assurance of an outlet in the community. The latter was of advantage to the station because it had a definite source of programs assured, and knew that no other station in the area could carry those programs.

236. In adopting the chain broadcasting rules, we found both types of exclusivity to be contrary to the public interest. Exclusivity of affiliation was proscribed because it hindered affiliates in the choice of their programs, since they could not broadcast those of another network even though the other network might offer some programs that were highly desirable and the broadcasting of which would be in the public interest. In addition, such exclusivity arrangements limited the chances of other networks to have their programs broadcast in that community, since the station having an exclusive affiliation with one network could not broadcast programs of another. In other words, network competition in the community was restricted, contrary to the public interest. Similarly, territorial exclusivity also restricted competition in that if an affiliate did not carry a program of its network, other stations in the market were prevented from competing to obtain and broadcast the program.

237. As explained above, and for the reasons mentioned, we are adopting rules providing that only one station licensed to a particular community may engage in STV operations. In effect, then, we have decided that under the conditions of uncertainty about the future

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development of STV, and to protect the interest of the public in having sufficient amounts of free TV programs available, there should at least at the present time be something akin to territorial exclusivity for the STV operator in each community.

238. As to the matter which is analogous to the exclusivity of affiliation which was struck down by the chain broadcasting rules, we have, as the previously stated views of the parties indicate, a conflict of thought between two of the principal proponents of STV—Zenith-Teco, and Telemeter. Zenith and Teco relate that for business and legal reasons they would be precluded from entering into arrangements with local franchise holders that would give any program supplier exclusive use of Phonevision facilities. They state that the same considerations would prevent local franchise holders from arrangements with STV stations that would require the stations to broadcast only STV programs which the franchise holder supplied. On the other hand, if we understand the position of Telemeter correctly, it is of the view that it is essential that arrangements which limit an STV station to obtaining programs from a single source be permitted or the new service will not be able to develop in its early stages. It appears that Telemeter would agree that at a later stage of development such arrangements might conceivably not be in the public interest.

239. As a general principle, we believe that the philosophy underlying the chain broadcasting rules should apply to STV, for it is in the public interest to stimulate competition and diversity. However, general principles are subject to modification if the situation indicates a public benefit may result. Such was the case with our decision to limit STV operations to one station per community. As to the present problem, in our judgment we do not know enough about STV at this time to adopt rules proscribing exclusive programing arrangements—which on their face would appear to be anticompetitive. For it may be that under the circumstances that prevail in the early phases of STV such arrangements, as Telemeter argues, will be necessary to nurture the new service into being—thereby once again modifying the general principle. Thus, on the one hand we believe, along with ABC, that there should not now be specific regulation. But on the other, we would be remiss in our duty, in setting up a new service, to write rules that are silent on a topic of great concern. For this reason, we have chosen a middle course. We adopt rules (see sec. 73.642(e) of app. D, which with modifications is the proposed sec. 73.642(e) of app. C) which provide that, generally speaking, parties will not be granted STV authorizations if they have entered into agreements that prevent or hinder them from making a free choice of programs. However, we provide that we shall examine each application on an ad hoc basis, and if it appears under the given fact situation that the rule should be waived, we shall do so.

240. Similarly, Telemeter has urged what in effect is a rule permitting optioning of a station's time for broadcasting a certain number of hours of STV programs per day or segment thereof. We have, of course, abolished option time for free TV because we found it not essential to successful conduct of TV network operations, and a restraint contrary to public interest. For reasons stated in the preceding

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paragraph, it could be that in some cases it might be in the public interest to permit this type of arrangement in the early stages of STV. Therefore, we have also incorporated in the new section 73.642(e) provisions to the effect that STV authorizations will not be granted to parties who have entered into such arrangements unless the Commission has approved them.

241. The rules which we adopt are broad enough to encompass not only equipment manufacturers, franchise holders, or others who may be engaged in program procurement and supply, but also any STV networks that may develop or other types of STV interconnections between communities. We do not foreclose STV interconnection or networks, but if arrangements related thereto restrict the freedom of choice of STV stations in procuring programs, the Commission must approve them or no STV authorization will be granted.

242. In periodic reports which we shall require those holding STV authorizations to submit, we shall obtain information in this area, and do not, of course, foreclose further rulemaking with regard to it.

243. Although, as stated in paragraph 347, we do not now decide what information will be required in applications for STV authorizations, we believe that the subject just discussed is of such importance that information on it will have to be contained in applications. For this reason, we are adopting a rule stating what material on the subject must appear in STV applications (see sec. 73.642(g) of app. D).

244. *Issue (12).*—As with issue (6) we believe that we have insufficient information at present to know what, if any, regulations may be necessary. Much, if not all, of the issue is mooted by the new rules which we adopt. Thus, for example, restricting STV operations to one per community moots the question of whether stations should be permitted to enter into contracts giving them exclusive rights to use a system in a particular community. The adopting of rules permitting multiple systems greatly dilutes the other question posed in the issue.

245. As with other aspects of the new service, we shall keep the matters covered by this issue under surveillance and may from time to time require the submission of reports and other information to keep us abreast of developments, toward the end of having an informed basis on which to take any further regulatory action that may be required in the public interest.

(8) The nature of the technical rules that should be adopted

246. Appendix C of the *Further Notice* contained a proposed section 73.644 concerning equipment and technical operating requirements. That section indicated that STV equipment must be approved in advance by the Commission's established type approval and type acceptance procedures. It further stated (as did par. 39 of the *Further Notice*) that additional rules concerning equipment and technical operating requirements would be announced at a later date. (This, of course, was contingent on the establishment of a nationwide STV service.)

247. No comments were received on whether to adopt the proposed section 73.644. After having considered that proposal, we are of the opinion that the type approval portion thereof should be deleted. Type

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acceptance is generally used throughout the radio services in the absence of an urgent need for type approval. No such urgent need appears evident here. Section 73.644 adopted herein is modified accordingly.

248. As mentioned previously, we have decided that multiple technical systems should be permitted (pars. 219–220). On July 31, 1967, we released a *Second Further Notice of Proposed Rulemaking.*[49] It invited comments on proposed rules which would permit the use of any STV technical system which meets the standards set therein in the event that STV were authorized and that multiple systems were permitted. Those rules would require adequate performance of STV systems in serving subscribers and in avoiding any increase of interference to conventional television services.

249. As that document pointed out, the Commission did not foresee a need for special technical operating requirements for STV, and stated that in the absence of such requirements the operating requirements for conventional television station operation would apply. However, it was made clear that if any parties believed that special rules on the subject were necessary, their suggestions and comments would be welcome.

250. All comments filed in response to the *Second Further Notice* are presently under study. The rules which we adopt today establishing an STV service will not become effective until 6 months hence so that ample time will be allowed for congressional and judicial review (par. 19). Before that date we intend to issue another report and order in this proceeding adopting rules establishing standards with which STV technical systems will have to comply.

(9) *Whether, and to what extent, the Commission should regulate the charges, terms and conditions pursuant to which subscription television service will be offered to the public*

251. Zenith and Teco support proposed section 73.643(b) of appendix C which would require that charges, terms, and conditions of STV service to subscribers be applied uniformly, although providing that subscribers may be divided into reasonable classifications, approved by the Commission, with different sets of terms and conditions applied to subscribers in different classifications. However, beyond that, they believe that the actual decoder installation, decoder rental, or per-program charges should not be regulated by the Commission. Trigg-Vaughn has a similar view. Among other reasons for this position, Zenith-Teco state that STV will be in competition with other forms of box office entertainment, and prices would best be controlled by competition in the marketplace. Telemeter, along the same vein, holds that STV should have the same freedom in pricing as other box office entrepreneurs enjoy.

252. Acorn states that there should be no rate regulation initially because the competition between free TV and STV should keep the STV charges reasonable. Kaiser says that it is too early to decide whether to regulate rates, and Teleglobe holds that it is premature to regulate charges, terms, and conditions because there should be as little regulation of STV as possible in the beginning. Trigg-Vaughn argues that no need for rate regulation has been shown and that regulation would

[49] 32 F.R. 11285.

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place an artificial restriction in that area. If experience shows the existence of abuses, it is argued by Zenith-Teco and others, the Commission may take appropriate action.

253. As to actual jurisdiction to regulate rates, Telemeter holds that the Commission has no such authority because STV is a broadcast service, section 3(h) of the act states that broadcasting shall not be deemed common carriage, and rate regulation has traditionally and legally been limited to common carrier and public utility fields. ABC expresses doubts that the Commission can regulate rates because STV has been determined to be broadcasting so that it comes under title III of the act; thus, it would not appear that the act would sanction STV rate regulations. It suggests that the Commission seek congressional guidance on the matter because STV is such a drastic step which changes traditional concepts of American broadcasting. Others, too, state that the Commission has no jurisdiction. For example, the views of the Joint Committee have been expressed in paragraphs 151–152 above; and, Trigg-Vaughn urges that the regulation of the economics of broadcasting is beyond the powers of the Commission. Although AMST states that it takes no position on the matter, it points out that rate and other regulation would be vast and complex, and that because of the doubtful benefits and substantial threats to the public, STV should not be authorized.

254. It is appropriate here to mention the proposal of ADA which foresees as a development of the future a system described by Dr. Joseph V. Charyk, president of the Communications Satellite Corp. The system is based on the telephone exchange principle. It is briefly described as follows:

> * * * The home or place of business would have a TV set and speaker with an auxiliary tape recorder for both picture and sound, connected to a central exchange by a single coaxial cable through a selector switch like a telephone dial or pushbutton.
>
> The cable would come from a central exchange, like a telephone exchange, which would have literally thousands of feeder connections from television and radio station studios, film and tape libraries, newspaper offices, educational classrooms and laboratories, retail stores, banks and accounting services, movies and sports centers, theaters and concert halls. Each service and individual newspaper, lecture, film, game, etc., would be individually dialed.
>
> Viewing and listening need not be live. The receiver can be turned on and off to a specific channel by a clockswitch, so the subscriber can receive and tape record programs and services for later, more convenient viewing or study: newspapers, for example, would be recorded in the early morning hours for breakfast consumption—and continually updated around the clock.

ADA states that such a system would provide a choice of all available programs and services whether paid or sponsored. All programs would be carried by the system. The producer of programs would be separate from the television station and cable carriers, and would pay them on a cost-plus-fair-return basis.

255. This is not a complete description of the views of ADA, but it serves to give the central theme of their comments—that although ADA favors STV, the Commission should withdraw its proposed rules and propose new rules under which free TV and STV stations would be separately licensed, with the latter being regulated by common car-

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rier principles under direct FCC supervision of carrier rates and terms. It expresses the fear that to adopt STV rules along the lines of those proposed in the *Further Notice* might thwart the development of the foregoing type of system, contrary to the public interest.[50]

256. In oral argument, Zenith and Teco maintain that the ADA proposal is premature. They state that eventually if it came to pass that pressures for spectrum space were so great as to make it necessary to lay cables to cover 80 to 90 percent of the population of the country, then cable would be the primary form of transmitting information into TV sets. Such cables, they say, could realize economies only by carrying many channels, e. g., 20 to 40 channels. They state that under such circumstances, probably the cable would be under single ownership and it might then be in the public interest to have a policy prohibiting the cable owner from being an entrepreneur of information that goes over the cable and requiring the owner to provide channels on a fair basis to all who order them. However, as to over-the-air STV, they aver that the situation is different, for there are not single owners of many channels, but licensees of single channels, and the duopoly rules provide protection within a community.

257. *Conclusions.*—With regard to the ADA views, we admit that the future may well bring with it the sort of development which they describe but it would appear to be years away. We do not believe that STV, which we think is in the public interest, should be required to await such a great passage of time, especially since there is nothing to lead to the conclusion that our action taken today would, as ADA fears, thwart the future. We see no reason to believe that STV, authorized as we propose, would impede the development of a telephone dial system any more than would the fact that retailing, banking, accounting, distribution of newspapers, and the like are presently cast in a mold that is highly different from that which ADA foresees. STV has already been postponed for a number of years and, with the information now before us, we believe that it should at last be given a chance to provide what lies within its power to the public. Should the situation envisaged by ADA occur, there will be time enough to switch to a common carrier type of regulation if that is then indicated.

258. It is stated that the nature of STV, like that of common carriers and public utilities, is such that rate regulation is necessary. Coupled with this are two additional arguments: That we must consider and decide whether we have such rate regulatory authority before permitting STV operations; and that lacking clear-cut authority we should go to Congress for legislation amending the act to give clear authority.

259. We cannot agree with these views. For reasons stated in the *First Report*, we have concluded that we have jurisdiction to authorize STV. Although we do not here decide whether we possess authority to regulate STV rates, we observe that the authority to authorize STV is not dependent on a concomitant one permitting such regulation. It is stated that television channels are in the public domain and that

[50] We also note here the suggestion of TVC of California, Inc., and Con-Sumers, Inc., that space satellites be used for STV. The suggestion is couched in the broadest terms, contains no details, and is, in any event, outside the scope of this proceeding.

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the STV operator will make a direct charge to the public for use of the public's property. Such a situation, we are told, requires rate regulation. The argument is without merit. Throughout this document we have used the term "free TV." However, free TV is not really free. The advertising costs which support free TV are eventually passed on to the public, and a profit is made by the licensee or others from the use of the public's channels.[51] Yet we do not regulate the rates charged by free TV stations for time over their stations which results in their profits, and it has been said that we cannot.[52]

260. The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive the operations will not succeed (see par. 200). There is nothing in the Hartford trial to indicate that rates will be exorbitant. The highest price for a feature film during the first 2 years of the trial was $1.50. The lowest was 50 cents. The most costly sports event was $3; the lowest, $1. The average prices for such programs during the second year were $1.03 and $1.37, respectively. Prices for other programing were comparably reasonable. We have already adverted to the fact that for a very popular heavyweight fight nine persons were viewing at each tuned in set for a cost of $3 whereas the same fight was shown on closed circuit TV in local theaters for a price of $5 per head. Moreover, the rules which we adopt provide that the station licensee shall have ultimate control over the maximum charges to be made for programs, and the licensee is responsible to the Commission at renewal time for the stewardship of the station in the public interest and is expected to govern his activities during the license term accordingly. Regulation of charges, terms and conditions as prescribed in section 73.642(f)(2) (app. D) which we adopt today is the extent of regulation that we deem necessary at the present time in this area. Should abuses arise, we are not barred from taking whatever steps appear to be necessary to correct them.

(10) Whether a station engaged in subscription television operations should be required to furnish subscription service to all persons within its service area who desire it.

261. Several parties are of the opinion that it would be premature to adopt rules on this subject in this stage of development of STV. In this, as in other areas, Kaiser believes that because of the uncertainty about how the new service will develop, overly narrow and detailed

[51] In oral argument, the Joint Committee questions this view that advertising costs are passed on to the public and calls attention of the Commission to a recent book, by a professor of economics, in support of the argument that "television today is indeed free because as there are more and more units of a particular commodity being sold • • • the purchase price goes down and to that extent the advertising costs are borne by the results of mass production in terms of lowering the purchase price." The Joint Committee thus has introduced into the record two conflicting positions. for app. A to its comments filed Oct. 1, 1966, in response to the *Further Notice*, consisted of a scholarly article appearing in the June 1966 issue of The Economic Journal which stated the following on its first page:

> "In 1963 American advertisers spent $1.6 billion to support the existing commercial television system. In the same year this system provided viewers in all income groups with a total of 3.4 million station hours of entertainment and news programs. The costs of this entertainment were shifted to consumers in the form of higher prices for advertised goods and services."

In any event, even if advertising costs were not passed on to the consumer, the fact would remain that we do not regulate the rates charged advertisers by licensees of public channels, and advertisers constitute a part of the public.

[52] *Pulitzer Publishing Co. v. Federal Communications Commission*, 68 U.S. App. D.C. 124, 126, 94 F. 2d 249, 251 (1937).

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restrictions might both fail to achieve their desired ends and smother the infant industry. Kaiser states:

> * * * [I]t is far too early to conclude that there is a need to impose full-blown public utility regulation upon subscription operations, with an obligation to serve everyone within some defined area and with detailed regulation of rates and earnings.

Trigg-Vaughn thinks it too early to impose a regulation requiring that everyone within the service area of a station be furnished STV service if he desires it. The reason given is that there might be a limitation on the ability of a station to do this as a result of freak interference and reception conditions or other problems for which the station would have no remedy. ABC, Telemeter, and by implication, Munn & Chase, are of the view that, generally speaking, STV service should be provided to all persons in the service area on a nondiscriminatory basis. However, the last two of those three parties qualify the position with provisos which include giving the STV operator the right to refuse or terminate service for nonpayment of STV fees, for irresponsible or unauthorized damage to or use of decoder equipment leased to the subscriber, or for other reasons. Telemeter would also like the right to provide cash decoders rather than credit-type decoders to poor credit risks. Munn & Chase observe that the right to see free TV is limited by the ability to buy a set, and if a person does not pay for his TV set, it is repossessed. They believe it would be an error to place on STV operators a requirement to serve all who wish to subscribe, and that the matter would best be left to the operator's business judgment and desire to expand.

262. As to the last-mentioned point, Trigg-Vaughn says that because of natural competitive motives the STV operator will make the broadest efforts to serve as many subscribers as possible. Zenith and Teco, of the same view, say that because of this there is no need for a rule. They also advert to the fact, like the Trigg-Vaughn view mentioned in the previous paragraph, that it is sometimes difficult to define a station's service area because there may be places of poor reception within the grades A and B contours. They believe that although a rule might give protection in such situations, they can easily be handled on an ad hoc basis. Although apparently opposing the adoption of a rule, Zenith and Teco express a view like that of Telemeter, and Munn & Chase, that the STV operator should be permitted to withhold or withdraw STV service from those who are poor credit risks or who otherwise violate the terms of subscription agreements.

263. Finally, Zenith and Teco make the following statement:

> * * * We might also note that in commencing new subscription operations in any community, it may be necessary, in order to efficiently and expeditiously handle decoder installations, to break down the so-called service area into geographic sections for purposes of orderly promotion and development. While this approach would be usually temporary, in most cases it will undoubtedly be utilized.

264. *Conclusions.*—This issue is not without difficulties. We have classified STV as broadcasting on the ground that its transmissions are intended to be received by all members of the public who wish to subscribe. This would suggest that all who wish it should receive serv-

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ice, i.e., that all should be served, but for the reason that STV is broadcasting—regardless of whether it is a public utility or not.

265. It is suggested that we not have rules on the subject, at least until more is known about the pattern of STV activities. However, although for that reason we have been willing to defer possible action in some of the areas discussed in the issues mentioned above, we believe that with regard to the instant issue the possible problems are rather clearly drawn, and that to defer action could lead to difficulties that by rule could be avoided. We know, for example, that within the normal service areas of television stations there may be poor reception at some places; that a small percentage of people are poor credit risks, that they may violate the terms of a contract with an STV operator, and that they may damage decoders installed in their homes; and that when an STV service is commencing operations in a community it may be more efficient and expeditious to install decoders on the basis of geographic sections.

266. The rule which we adopt (sec. 73.642(f), app. D) takes such matters into consideration. We believe that it will avoid problems that might arise with regard to them, that it will not hinder STV operations, or, on the other hand, do a disservice to the public by unjustly preventing them from receiving STV programs which they desire to view. With regard to the relatively tiny percentage of the public who might not pay their bills, for example, we note that even in the public utility field precautions are taken on the matter. Thus, for example, it is common for a utility like a telephone company to include in its tariff rules a provision that the company may require potential customers to supply a surety bond or cash deposit satisfactory to the company to assure payment for service. Moreover, they often provide that the company may terminate service for nonpayment of bills. The fact that the tariffs state that the company may discontinue service, i.e., leaving the matter to the discretion of the company, instead of stating that the service shall be discontinued when certain conditions of nonpayment prevail, raises certain questions about possible dissimilar treatment of customers by the utility which have not yet been solved. Be that as it may, we mention the tariffs to indicate that even in the utility field, of which the cornerstone is service to the public on demand, there are provisions of the type referred to.[53] We do not find it unreasonable, therefore, to have similar provisions for STV service, for we think that they would do no more violence to the concept of broadcasting serving all of the general public than the telephone company provisions do to the concept of a public utility.

267. However, since the service is new, we do not know under exactly what circumstances precautions or other actions should be taken by STV operators or what the precautions or actions should be. This is an area as uncertain as the "may" versus "shall" problem mentioned above. The rule which we adopt is broad enough to permit an STV operator, as Telemeter requests, to install a cash, rather than a credit decoder for poor credit risks, and to permit requirement of a reasonable deposit in advance for poor credit risks. However, we emphasize

[53] In other words, utilities must serve the public on demand—for a charge. They are not charities.

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that we do not expect such cases to arise frequently, and that we regard as fundamental the concept that STV, like other broadcasting, is for the general public. We view actions like those just mentioned as reasonable under the circumstances, and as not precluding the persons involved from becoming STV subscribers. We also regard it as reasonable to permit termination of service for nonpayment of bills, damage to decoders, or the like. It is stressed that we expect STV operators to use good judgment in this area of business operations. We shall observe carefully the operation of STV under the leeway which we here provide, and shall take appropriate action to correct any abuses that may occur or any other situations which we deem contrary to the public interest. From time to time, as with other aspects of STV operations, reports on the subject may be required of STV operators.

268. As to geographic or other reasonable patterns of installation for new STV services, the rule is drafted to permit this. Such a provision seems reasonable and likely to make for a more rapid and efficient development of the new service in any community. The rule also provides that STV service need not be furnished to those residing in pockets of poor reception within the service area of an STV station. Finally, our preliminary study of the technical systems for STV leads us to recognize that the service area of an STV operation may well be smaller than that of its free TV service that our rules will require it to provide. The rule adopted today in relation to the instant issue of whether STV service should be provided to all within the service area of a station is designed to strike what seems a reasonable requirement—namely, that STV service must be provided to all within the grade A contour of the free TV service of the station, with the exceptions mentioned above concerning nonpayment, poor reception pockets, and the like. This rule is consistent with our use of the grade A contour in limiting STV to five-station communities. No doubt many subscribers will be obtained outside that service area, but service there will not be mandatory.

(*11*) *Whether requirements should be imposed to insure that the public would not be adversely affected by obsolescence of subscription television equipment or cessation of service, e.g., should the Commission require that such equipment be leased rather than sold*

269. Kaiser states that because the industry is not yet developed, it is too early to decide whether a rule requiring STV equipment to be rented would protect subscribers from obsolescence or cessation of service, or whether it would serve primarily to prevent them from being able to obtain equipment from the sources they might prefer. Others, like Telemeter, Teleglobe, and Munn & Chase, believe that a requirement of renting would protect the viewers. Telemeter believes that it would not only protect from obsolescence and cessation of service, but that (assuming multiple systems were authorized) it would protect those who changed from the service of one STV company to another. Munn & Chase say that renting would help in the matter of maintaining equipment in proper operating condition. They analogize decoders to postal meters, saying that "the basic unit is sold

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to the customer but the meter, containing the postage printing element, is only leased, subject to regular service, with postage added only by postal authorities." ABC states that whether equipment is sold or leased, regulations should be adopted to protect against early obsolescence, or cessation of service. Trigg-Vaughn believes that, at this point, to protect the public, it would be wise as an interim measure to have a rule requiring that equipment be leased instead of sold, but with provisions for waiver thereof. Citing cases and examples, Motorola, in oral argument, states that a rule requiring leasing would be inherently anticompetitive, and urges a rule providing that subscribers have the option to lease or purchase decoding equipment.

270. Zenith and Teco believe that STV operators will rent rather than sell decoders because of practical business considerations. This is because the decoder contains the elements of secrecy of the system and the billing apparatus which the operator would want to keep under his control. They do not object to a rule requiring rental instead of sale, at least during the early years of STV, to protect the public.

271. They also point out that in paragraph 17 of the *Further Notice* the Commission, because of its doubts about the viability of STV, suggested that if nationwide STV service were authorized, it might require a showing on the part of STV applicants that they have the capacity for sustained operation just as is the policy with applications for proposed free TV stations.[54] Zenith and Teco believe that such a requirement, a showing by the applicant that it could continue operation for at least 1 year, would not be unreasonable. They stress, however, that this showing should be limited to the station applicant, and not extended to others such as the franchise holder. As an analogy, they state that if a free TV applicant proposed to use General Electric transmitting equipment it need not show the financial capabilities of that company. They admit, however, that if the franchise holder and the applicant for the station STV authorization are the same party, it might be appropriate to require a showing that the financial situation of the franchisee is such that it will not impair the ability of the station to be constructed and to operate for a specified period.

272. *Conclusions.*—At this stage of development of STV service, it appears that the best way to protect the public against obsolescence of equipment or cessation of service is to adopt a rule requiring that equipment be leased and not sold to subscribers. We recognize that at some later stage it may better serve the public interest to permit sale or lease. Should STV flourish and become a regular part of the television scene, a continued leasing requirement could mean that subscribers would pay in continued rental fees more than it would cost to buy the decoding equipment. However, for the present it would appear that a rental requirement is more in the public interest.[55]

273. Moreover, although we do not adopt a rule on the subject, we shall, as with applications for new free TV stations, follow the policy of requiring STV applicants to demonstrate financial ability to continue operations for a period of 1 year. This will apply not only to

[54] *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 Pike & Fischer, R.R. 2d 343 (1965).

[55] In addition to protecting subscribers against obsolescence or cessation of service, requiring lease of decoders could conceivably stimulate the growth of STV since selling decoders for an unfamiliar service might be more difficult than leasing.

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applicants for new stations wishing to provide STV service, but also to applicants for STV authorizations over existing stations. Besides the usual reasons for requiring such a financial showing in the case of applications for free TV stations, the requirement will here have the added function of protecting subscribers in the following way: It appears from the Hartford trial that in addition to weekly or monthly decoder rental fees, subscribers may be charged an installation fee—in the case of Hartford, $10. By assuring against early cessation of service, this investment of the subscriber is given some measure of protection. This requirement, as suggested, will run to the station applicant and not to franchise holders, although it may involve inquiry into financial status of the latter if station applicant and franchise holder are commonly owned.

(*13*) *Whether means should be provided to insure that subscription television service will be available to all eligible stations on a nondiscriminatory basis*

274. Telemeter suggests that, assuming that the Commission establishes a class of eligible stations, STV should be made available to all stations within that class, subject to the ability of the station to work out satisfactory terms with appropriate parties, such as the franchise holder. It further states, assuming that STV is permitted over more than one station in a community, that just as a network may make an exclusive affiliation arrangement with a station in a market, an STV operator should be permitted to negotiate with a station on an exclusive franchise basis if it wishes to do so.

275. ABC believes that STV should be made available to all eligible stations on a nondiscriminatory basis, but thinks that at this time a policy statement on the matter is all that is required. If for any reason discriminatory practices should occur in the future, the Commission could regulate them. Zenith and Teco state that no problem could arise in this regard until more than one station is authorized to carry on STV operations in a community. Because they believe it unlikely that in the foreseeable future there would be more than one station applying for STV authorization in the same community, they think it the better course to defer action on the matter until an occasion arises in which a second station applies for STV authorization in a community. By that time, they say, there will be more experience with STV and thus a better basis for dealing with the problem which will exist.

276. *Conclusions.*—We have already determined that all UHF and VHF television broadcast stations are eligible to conduct STV operations. However, since we today adopt rules limiting STV operations to one station in a community, possible discriminatory problems with regard to making technical equipment available to all stations in a community are moot. Of course, possible problems on a national scale are conceivable. For example, a party may be a licensee in each of two five-station communities. He may be engaged in STV operations in one of them using technical system X, and might have an agreement that the supplier of that system will not make it available to any station in the other community until such time as the viability

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of STV in the former community has been determined. If viable in the former, then the licensee might use the same equipment in the second community. If not viable, and the licensee does not wish to engage in STV operations in the second community, then the supplier of the system could make it available to another station there. Such an arrangement might hinder the development of STV, but we believe that permitting multiple systems for STV operations greatly reduces chances of adverse effect on the public interest that might occur and the possibility that arrangements of this sort might be made (also, they might be illegal restraints of trade). Similarly, we foresee no difficulties nationally with regard to other equipment arrangements. As to the Telemeter suggestion that it be permitted to negotiate with a station on an exclusive franchise basis, insofar as this pertains to programing arrangements and not to the matter of technical equipment discussed above, it has been discussed in paragraphs 231–234.

(*14*) *Whether a limitation should be placed on the type of programing which subscription television operations may broadcast, and if so, what that limitation should be and whether applicants for subscription authorizations should be required to make a showing of how their programing will differ from conventional programing or would otherwise serve the needs and interests of the community to be served, and what that showing should be* [*references to par. nos. omitted*]. *Whether placing a limitation on type of subscription programing is within the scope of the Commission's authority, taking into account sections 303*(*b*) *and 326 of the Communications Act*

277. Briefly, the principal views of parties on this issue, as expressed in the comments, are the following: There should be no program restrictions on STV because this would be contrary to the first amendment of the Constitution and section 326 of the act (ABC, ACLU, NBC, Telemeter). Only if there were an imperious need to limit STV programing might the Commission have authority to restrict (Kaiser). There is no such need because it is unlikely that there will be siphoning from free TV and thus there is no imminent threat of STV to free TV; and the very fact that there is no such threat raises serious questions about the censorship problems (Zenith-Teco).

278. Moreover, it is difficult, if not impossible, to draft a rule that would define the programs that STV could carry (ABC, Kaiser, NBC). For example, the Commission recognized the difficulty of defining box office in the *Further Notice* (ABC). Any attempted definition of a restrictive term appearing in a rule would lead to endless interpretations and reinterpretations of the rule by the Commission that could have a paralyzing effect on large areas of program procurement for STV without there being any evidence that a need exists for such a restriction (Kaiser). In addition, a restrictive rule might inhibit, channel, or otherwise bind creative activity (Trigg-Vaughn) and prevent diversity of programing (ACLU). Even if one succeeded in drafting a restrictive rule, it might not be adequate to protect against siphoning. For example, if a rule were adopted like the one suggested in the *Further Notice* which would prohibit STV from carrying

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certain types of programs common to free TV such as those in which continuing characters are presented from week to week in a series using a common setting or central program concept, it would not protect against the siphoning of all of the other types of programs which free TV carries (AMST, NBC).

279. The Hartford trial and Etobicoke have demonstrated what the programing of STV will probably be (Telemeter, Zenith-Teco). That programing shows that serious siphoning of programs or talent from free TV is unlikely (Telemeter, Zenith-Teco). Thus, there is no need to have restrictive rules to protect against siphoning (Zenith-Teco). If there were such a rule, it would probably have little influence on the actual programing anyway (Telemeter).

280. However, and without conceding that the Commission has the authority to regulate programing, it might be desirable to have a broad regulation that could serve the purpose of casting STV into the mold in which it is most likely to develop, if for no other reason than to placate the alleged fears of the opponents of STV (Telemeter). This rule or policy might provide that STV stations are expected not to duplicate free TV programing, and are expected to provide programs of the type shown at Hartford, i.e., current movies, sports events not carried on free TV, and the like, with the content thereof to be determined by the licensee or STV entrepreneur (Telemeter).

281. A rule prohibiting commercials is acceptable (Teleglobe, Trigg-Vaughn). Yet, since the impact of commercials on program diversity of STV is unknown, any rule or policy used by the Commission should be viewed as in the nature of an experiment to see how programing diversity is affected (ACLU). Possibly, prohibiting commercials on STV would violate principles of free competition (ACLU).

282. As a yardstick for the future, a rule might be adopted limiting STV to programs not presently being shown on free TV (Acorn). A possible rule would be one prohibiting STV from showing trade name programs for a period of 3 years, with the Commission reviewing the matter at the end of that time (Angel). A rule is proposed that STV not be permitted to devote more than 50 percent of its STV broadcasting time to feature films in order among other things, to promote, during the remaining portion of STV broadcasting time, a variety of programs over STV which proponents of STV have always promised that STV would furnish (Joint Committee). Still another rule is proposed that would prevent STV from carrying sports events which have been regularly carried locally on free TV within the past 5 years—for the purpose of restricting STV to the kind of sports programing which has not been available on free TV (Joint Committee).

283. Finally, as to requiring applicants for STV authorizations to make a showing that programing would be different from that of free TV, no such showing should be required because the programing of STV stations should be decided in the marketplace (Munn & Chase). Besides, since the Hartford trial has shown what programing is likely to be presented over STV, such a showing would be redundant (Zenith-Teco). Moreover, it would be impossible to give meaningful definition to the showing that would have to be made by STV appli-

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cants in order to distinguish their programing from that of free TV because the programing of the latter service is of unlimited variety (AMST).

284. *Conclusions.*—We have determined that STV can offer a beneficial supplement to free TV and that it is in the public interest that this supplement be provided. The action which we here take to prevent possible siphoning of programs from free TV is designed to protect the present television structure. At the same time that we protect that structure, we add to the diversity of voices heard by authorizing a service with a type of programing generally not found in free television. We cannot agree with those who urge that the type of programing that STV will show is known, that it is clear that it will not siphon from free TV, and that therefore no rule is necessary. The ultimate path that STV will follow is not clearly known. Although it may be that STV programing will follow the pattern of the Hartford and Etobicoke operations, and we think it well may, we would be remiss in our duties if we did not take regulatory steps to afford some assurance that free TV will continue to be available in ample quantity and quality.

285. The rules which we adopt will require that feature films shown on STV must not have been given general release in a theater [56] anywhere in the Nation more than 2 years before they are shown on STV. The purpose of this rule is to assure that the feature films shown on that service are generally of such recency that they are unlikely to appear on free TV. Thus the siphoning threat is minimized for feature films, a type of program which we are told is becoming increasingly important in the programing of free TV. Since a major part of the STV programing apparently will be feature films, the importance of this rule is especially great.

286. Under prevailing practices of the motion picture industry, films are given general release for showing in some parts of the country sooner than in others. The question thus arose as to whether the 2-year period should run from the date that the picture was first released anywhere in the Nation, or from the date that it was released in the community where the STV station is located. We have chosen the former. This will give added protection to free TV from siphoning of pictures, for using that date it is more likely that free TV would not be eligible to obtain the film. If the latter date had been chosen, it would mean that when an STV station might wish to negotiate for it, the film would be older and thus more likely to be in the category

[56] As used herein, "general release" means the first-run showing of a feature film in a theater or theaters in an area, on a nonreserved seat basis, with continuous performances. If a first-run film is given general release at more than one theater in an area, the opening will usually be on the same date. "General release" is distinguished from "road showing" of a film which means the showing of a film on an exclusive first-run basis by one theater in an area, on a reserved seat basis, with noncontinuous performances, usually at prices greater than the theater's normal admission price. The tickets sold for road show performances are colloquially called "hard tickets," to describe the rectangular tickets sold for such performances as distinguished from the regular ticket torn from a roll for general release showings. "General release," as it is used herein and in the rules which we adopt (App. D, sec. 73.643(b)(1)), does not include special situations such as the first-run showing of a picture at Radio City Music Hall in New York City on a nonreserved seat basis. We consider the general release date of such a picture for the New York City area to be the date on which the picture, after closing at Radio City, is first shown at other theaters in the immediate area on a nonreserved seat, continuous performance basis.

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reasonably available to free TV. Our decision, of course, could mean that in any particular community motion pictures shown on STV will, with regard to that community, be more current than in other communities, but we do not regard this as having any disadvantages. Attention is directed to the fact that the rule speaks of "general release." Some movies, of course, are "road showed" on a hard-ticket basis for a considerable period of time before general release. Usually, however, they are of the blockbuster variety, and although the 2-year period for such films will still be measured from the date of general release rather than of road show release, we think that protection for free TV with regard to them is still adequate because such films generally take longer to exhaust their box office possibilities before going to free TV than do ordinary films.

287. Although the 2-year restriction will assure that feature films shown on STV will generally be of such recency as to protect against siphoning from free TV, we are of the opinion that it is in the public interest that STV also be allowed to show a limited number of older films of great public appeal that might or might not be available to free TV. Films that would fall into this category are, for example, "Gone With The Wind," and "All Quiet On The Western Front." Accordingly, the rule will permit STV stations to present, during one week of each calendar month, one feature film the general release of which occurred more than 10 years previously. The film may be shown more than one time during the week selected for it.[57] Finally, the rule will permit the showing of feature films on STV that fall into neither of the above-mentioned categories, i.e., it will permit the showing of films that are from 2 to 10 years old. Such films may be broadcast, however, only upon a showing to the Commission that; (1) There has been a bona fide attempt to sell the films to free television and that they have been refused by that medium (e.g., because the film lacks wide enough audience appeal; or because its contents are of such a nature as to make it inappropriate to broadcast it indiscriminately without the restrictions as to the use imposed by a charge for viewing it), or (2) the owner of broadcast rights to the film will not permit it to be televised on free TV either because the owner has been unable to work out satisfactory arrangements concerning its editing for presentation on free TV or perhaps because the owner intends never to show it on free TV since to do so might impair its repetitive box office potential in the future (e.g., as in the case of "Bambi," or "Gone With The Wind").

288. We also believe that a rule giving a measure of protection against siphoning of sports events from free TV would be in the pub-

[57] As the table in par. 27 indicates, each feature film at Hartford was, on the average, shown 3.55 times. Sometimes all of the showings occurred in one week; sometimes, in two widely separated weeks. It may be expected that STV operators will similarly have more than one showing of both current and older films. Older films can be expected to constitute only a small percentage of all feature films shown by STV stations (see pars. 59 and 131). We believe it generally to be in the public interest to spread throughout the year the showing of older films, hence the provision that only one such film may be shown during one week during each calendar month. However, if STV operators should desire to show more than one in a single month, e.g., to show a "festival of classics" during all or part of a month, we shall give consideration to waiver of the rule.

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lic interest. The Joint Committee (par. 282) suggests a rule the core of which is as follows:

> No licensee shall broadcast any program involving sports events for which a fee is charged which was regularly televised into the market via a free television station within 5 years from the last date on which the event appeared on free television.

Its proposal also contains a requirement that STV stations notify other television stations in the area of intent to broadcast a sports event, and a provision under which such other stations could file with the Commission, within a specified time, petitions to prohibit the showing of such programs. We find the latter proposals cumbersome, unduly restrictive, and unnecessary. However, we are of the opinion that the part of the proposal quoted above contains a helpful concept for the prevention of siphoning of sports, and the rule which we adopt is basically like it.

289. Our new rule appears in section 73.643(b)(2) of appendix D. Generally speaking, it prohibits the STV broadcast of sports events regularly televised in the community via free TV during the previous 2 years. It differs from the proposal of the Joint Committee in that it uses a period of 2 years rather than five. The Joint Committee states that the 5-year period would act as a deterrent to siphoning, and would give free TV stations an adequate time in which to adjust to the loss of sports programs. We believe a period of 2 years to be a more realistic and workable figure on which to base a rule that will provide the desired deterrent effect. As to giving stations an adequate time for adjusting, we regard this as a makeweight argument, and, in any event, 2 years appears to be an adequate time for such adjustment. In addition to the foregoing modification of the proposal of the Joint Committee, other modifications, consistent with the discussion in the following paragraphs, appear in our rule.

290. The Joint Committee, in discussing its proposal, states the following:

> Such a rule, for example, in the Washington, D.C., area, would proscribe from pay-TV the World Series, the Kentucky Derby, the National Football League and American Football League games of the week, Washington Senator baseball games, Washington Redskins regular season away games, Atlantic Coast Conference basketball games, National Association basketball games, American League and National League baseball games of the week, specific golf and tennis tournaments, specific professional and college preseason and postseason football games. Sports events which could be carried would include Washington Redskins home football games, games of any professional or college team not formerly carried in Washington on a regular basis, and boxing bouts including championship boxing bouts since boxing has not been carried on a regular basis.

Although our views are essentially similar to those of the Joint Committee expressed in the foregoing statement, we believe that some refinement and elaboration is necessary as will become apparent below. Since to include in the rule all of the points covered in the following paragraphs would make it extremely cumbersome, we are in note 2 of section 73.643(b)(2), calling attention to the fact that when questions arise with regard to administering the rule they will be resolved

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in the light of the following discussion—the legislative history of the rule.

291. The principal questions raised by the proposed rule quoted in paragraph 288 have to do with the meaning of the term "sports events," and the phrase "regularly televised into the market via a free television station." It is to these questions that we now direct our attention.

292. To begin with, some may raise the question of the meaning of "sport." One dictionary defines it as a pastime or diversion involving "activity requiring more or less vigorous bodily exertion and carried on according to some traditional form or set of rules, whether outdoors, as football, hunting, golf, racing, etc., or indoors, as basketball, bowling, squash, etc." It is our belief that the term must include an element of physical agility or skill—the bodily exertion mentioned in the foregoing definition. Thus, we would not view chess or bridge as sports. On the other hand, there are activities, ballet for example, that require physical agility and skill (and that are carried on according to some traditional form or set of rules) that we would view as an art form rather than a sport. Generally, we believe that there will be no difficulty in recognizing, for purposes of the rule, what the term means.

293. As to the meaning of "events," there would appear to be two types: (1) Specific events, such as the baseball World Series, or the PGA Golf Tournament, and (2) games, or other contests, which are part of a regular series, such as football or baseball games played during a regular season (but, as indicated below, the games need not be played during a regular season).

294. The following are examples of what would be regarded as "specific events" within the meaning of the rule. The list is neither exhaustive of such specific events within any sports category (e.g., major league baseball, college football), nor does it include all sports categories in which such specific events might occur:

Major League Baseball:
- World Series
- All-Star Game

Professional Football:
- League Championship Game
- Division Championship Game
- Game Against College All Stars

College Football:
- Rose Bowl, or other Bowl Game
- East-West Game
- North-South Game
- Blue-Grey Game

Professional Basketball:
- NBA All-Star Game
- NBA Championship Game

College Basketball:
- National Invitational Tournament (NIT)
- NCAA Semifinal Games After Regular Season
- NCAA Final Games After Regular Season

Horse Racing:
- Kentucky Derby

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Preakness
Belmont Stakes
Golf:
U.S. Open
PGA
Masters
Thunderbird
USGA Amateur
Other:
Le Mans Grand Prix Auto Race
Olympic Games

295. It may be noted that some of the specific events mentioned above consist of more than one game or match. Thus, there are at least four games in the World Series, there are numerous games in the NIT, and matches in golf or tennis tournaments. If a substantial number of game or matches (or portions thereof) were shown by a free TV station, it would be considered to have broadcast the specific event within the meaning of the rules. With the World Series, there would likely be no problem, since stations usually carry all of the games and carry each game in its entirety. However, with a golf tournament, for example, not all of the matches, and possibly not all of any particular match, may be carried. If a tournament runs for 3 days, and a station broadcasts it 1 to 2 hours per day for 2 or 3 days, it would be considered to have covered the event, although it is likely in such a case that only portions of play for all 3 days would have been broadcast. For example, in the case of a golf tournament, the broadcasts might have covered the last four holes of various matches on several days, but not the complete matches, and not all of the matches. Similarly, the broadcast of an auto race that takes 24 hours, like the Grand Prix at Le Mans, need not occupy 24 hours to be considered as having covered the event for protection within the rule. In this connection, we might also point out that, conceivably, some specific events might be regularly carried on television news programs. However, it is likely that such programs would only show very small portions of events, and we would not consider such broadcasts to merit protection against siphoning. Moreover (as stated in par. 305), the rule will only provide protection for events that are televised live, and not for those broadcast on a delayed basis, and most news programs are broadcast on a delayed basis.

296. In addition to "specific events," we believe that certain other sports events should be protected against siphoning. We characterized these in paragraph 293 as games or other contests which are part of a regular series, such as football or baseball. For easy reference, we shall hereinafter refer to them as "nonspecific events." For the purpose of the rule, we shall afford protection to nonspecific events falling into well-defined categories. The following will serve to explain our meaning and intent. For some sports there is a regular season during which the sport is played, e.g., football, baseball, basketball. Games played during the regular season we view as nonspecific events. In these sports, the networks broadcast "games of the week." Examples are the NCAA games of the week for college football, games of the week in the National Football League and the American Football League, or games

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of the week for the American League or National League in baseball. Such broadcasts, for each sport, will be considered to constitute a category for purposes of the rule so that if they have been regularly broadcast by free TV in a community for a period of 2 years immediately preceding proposed STV broadcast of such programs, STV may not carry them. On the other hand, in addition to network games of the week during a regular season, other games may be televised in a community. Thus, in the case of major league baseball or professional football, games of the week might be shown in a community, but "away" games of the home team might also be televised, though the latter might not be network games of the week. Such "away" games would be considered a separate category. This means that if, for a period of 2 years, baseball games of the week were regularly broadcast by free TV in a community during the regular season, and "away" games were not, STV could then show the latter but not the former. The same would be true for professional football.

297. Another category of nonspecific events is that consisting of preseason games which do not qualify as "specific events." Before the start of the regular football season, a championship professional team plays a game against college all-stars. This game we regard as a specific event. However, professional football teams play other preseason games among themselves which we view as nonspecific events. For purposes of the rule, such preseason games will constitute a category separate from regular season games of the week or "away" games. Finally, some clarification should be given with regard to "playoff" games. It is customary in NBA professional basketball and NHL professional ice hockey to have playoffs at the end of the regular season. These games are a regular feature of the season and will be viewed as such; i.e., as nonspecific events. They may be broadcast either as games of the week or as "away" games, and dealt with accordingly under the rule. However, in professional football or major league baseball, occasionally two teams will be tied for the division or league title at the end of the regular season, and a playoff is necessary. Such playoffs are not regular features of the season, usually generate great public interest, and will be viewed as specific events rather than as nonspecific events.

298. Having discussed the meaning of "sports" and "events," we now turn to the phrase "regularly televised into the market via a free television station." As stated elsewhere, the rules which we adopt permit STV operation in communities which lie within the grade A contours of five or more operating commercial TV stations, including the contour of the STV station. Hence, in deciding whether sports events have been regularly televised in a community via free TV, we shall only consider commercial stations which place a grade A contour over the community. Moreover, stations placing such a contour over the community will be considered collectively, so that if one broadcasts major league baseball games of the week, and another major league baseball "away" games, both categories will be considered as having been furnished the community.

299. As stated previously, we shall prohibit STV from broadcasting sports events that have been regularly televised over free TV during

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the 2 years preceding the proposed STV broadcast. With regard to the meaning of "regularly televised," our standard will be somewhat different for specific events, and for nonspecific events. Our standard for specific events is best illustrated by an example using the baseball world series. If that series were televised in a community on free TV in October 1965 and October 1966, it could not be shown on STV in October 1967 by a station licensed to the community. However, if the series were on free TV in that community in either October 1965 or 1966, but not in both years, it would be viewed as not having been "regularly televised" there, and an STV station could show the series in October 1967. Moreover, the period of 2 years need not be exact. Thus, if free TV showed the series in a community starting Wednesday, October 6, 1965, and did not show it during 1966, an STV station in the same community could have shown it in 1967, even though (since it started October 4) the full 2-year period had not elapsed. In other words, for the purposes of the rule if an event is held each year, the time between occurrences need not be exactly a year.

300. The rule also provides that if the last regular occurrence of a specific event; e.g., the Olympic games, was more than 2 years before the proposed STV broadcast of the event, it may not be televised on STV in a community if the last occurrence was televised therein over free TV. Another point should also be mentioned. It is conceivable that, for some reason, an event normally occurring at regular intervals might not take place. For example, it might usually occur yearly, but skip a particular year or years. In such cases, we would prohibit the showing of such events by STV in a community if the event was carried there on free TV the last time that it occurred. Finally, as previously stated, we shall view professional football division playoffs and major league baseball playoffs as specific events. Since such playoffs do not occur on a regular basis, we shall proscribe their broadcast on STV if they were televised in the community by free TV the last time that they occurred.

301. We have indicated in paragraph 295 that a specific event will be considered to have been broadcast by free TV even if the entire event is not televised. Although with regard to nonspecific events the whole contest is usually televised, in those cases where this is not the case, the event will be considered televised on free TV if a substantial portion thereof was broadcast. As to the meaning of "regularly televising" nonspecific events, we shall view any category of such events as having been carried on a regular basis within the past 2 years before proposed STV broadcast if a substantial number of events in the category were televised over free TV in the community within each of the 2 years preceding the proposed STV broadcasting thereof. The standard will be applied on a category by category basis (e.g., major league baseball games of the week, major league baseball "away" games, professional football games of the week) as explained in paragraphs 296–297. If during 1, but not both, of the 2 years preceding proposed STV broadcast a substantial number of events in a category were not televised in the community, the category will be considered not to have been regularly televised therein, and STV may show the contests in that category.

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302. The rule would permit the showing on STV, during the regular season, of "home" games of a team that were not previously shown on free TV in the home community. Thus, to use the example of the Joint Committee, Washington Redskins professional football home games have not been broadcast on free TV in Washington, D.C., and could be shown on STV. The comments state that professional football home games of the Detroit and Chicago teams have been shown on closed circuit theater TV in those communities. This, however, would not prevent their being shown on STV since free TV did not carry them in those communities. The comments also suggest that all of the home games of the New York Yankees and of the New York Mets have hitherto been shown on free TV in New York City. Such games would therefore not be permitted on STV in that community. A problem exists in cities like Washington, D.C., where some, but not all, home baseball games of the Washington Senators have been shown on free TV. In communities where this sort of thing occurred, we would permit the showing of the home games on STV only to the extent that it would supplement what was previously shown. Thus, for example, if for a period of 2 years before STV proposed to show home games in Washington, D.C., five such games, on the average, had been shown for each of the two previous baseball seasons, STV could broadcast such games in that community, above and beyond five for a season. This means that five would be shown on free TV and any additional number could be shown on STV.

303. We would view a title boxing match—heavyweight or otherwise—as a "specific event." Other boxing matches probably would not be so viewed. As the Joint Committee suggests, it is likely that all boxing bouts including championship fights, would be available for STV since they have not been carried on a regular basis on free TV. Until recently, this would clearly have been true of heavyweight title fights which for many years were carried only on closed circuit theater TV. However, a few recent heavyweight championship bouts have been broadcast over free TV. Should a pattern of broadcasting all heavyweight title fights on free TV develop, and should all such fights within a 2-year period be broadcast over free TV in a community, they would fall within the protection of the rule. However, if some such fights are on free TV and some on closed circuit theater TV during the 2-year period, an STV station could show them (see note 30 supra).

304. With regard to developing situations, it may be necessary to construe the rule or modify it as specific problems arise. Soccer, for example, may be viewed as such a situation. Up to 1967 it was a relatively unknown sport in the United States. In the Spring of 1967, for the first time, professional games were played here in each of two professional leagues—the United Soccer Association, and the National Professional Soccer League. These groups combined to form a single North American Soccer League which played league games during the 1968 season. CBS, in that season, broadcast a soccer game of the week. Generally, if a team was not selected for showing on the game of the week it did not appear on TV, although in some cases teams made arrangements to be shown on their local station. It has now been an-

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nounced that the league has suspended league competition for at least 3 years, and that it will be represented by a single league team that will play international games. According to the press, a factor in the decision was notification from CBS that it would not televise league games in 1969. Thus, whether there will be televised soccer, and whether it will be on free TV or STV is not clear. Should special problems in this or other areas occur, we shall face them as they arise.

305. Finally, it is our belief that only sports events that are broadcast live should be afforded protection, and the rule reflects this view. It appears unlikely that STV would wish, or be able, to sell taped sports programs. To the extent that they should do so, we believe that this sort of programing should be open to competition between the two TV services. This means, then, that the showing of such a program as ABC's Wide World of Sports consisting, generally, of taped sports events would not prevent the showing of similar programs on STV.

306. In addition to the foregoing, we are adopting a rule prohibiting STV stations from devoting more than 90 percent of their STV programing hours to feature films and sports combined, the percentage, generally speaking, to be applied on the basis of annual STV hours broadcast. Once again, this is similar to the proposal of the Joint Committee. That group suggests that not more than 50 percent of the STV time be devoted to films. This, coupled with sports events, they aver, would be an equitable balance that would give STV sufficient programing on which to operate, and yet require it to mine new program sources and give the sort of diversity of programing that it has promised. We believe that the Joint Committee's concept is a good one, but that its proposed restriction is of a harshness that could spell the death knell of STV before it even began. It would appear from the Hartford and Etobicoke experiences that feature films will be a staple part of the STV programing. To reduce the amount of this to 50 percent in an STV operation would be to raise serious doubts about whether it could be viable.

307. The figure of 90 percent which we select is, as with all lines of demarcation (voting age of 21, for example), arbitrary to some extent. However, it is roughly based on the information in the table of paragraph 27 above, and appears to be a reasonable one in terms of the Hartford operation. Using the figures of that table, and the fact that 1500 hours of STV programing were broadcast each year (par. 27), it appears that the average length of a single program was about 1.7 hours, and that films and sports events occupied about 91 percent of the STV programing hours.[68]

308. This rule, of course, does not limit STV operators to showing for only 10 percent of their STV broadcast hours programs like opera, ballet, theater, and other programs of their choice exclusive of feature films and sports. They may show more if they wish. Calculating percentages on an annual basis, as we do with our AM–FM nonduplication rules, will provide flexibility. However, we wish to avoid the

[68] The table supplies us with the number of programs per year in each category, and the total number of showings for each category. Thus, in terms of number of separate programs, films constituted 72 percent of the offerings and sports, 13 percent, for a total of 85 percent for the combined categories. In terms of number of showings, films occupied 86.5 percent and sports, 4.5 percent for a combined total of 91 percent.

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possibility that some STV operators might have an overload of opera, ballet, theater, and similar programs during, say, the summer months when there might be less STV viewing, in order that they could devote more STV broadcast hours to mass-appeal feature films during other months when there might be more viewing. Therefore, in the absence of a showing of good reason for not doing so, we shall expect STV stations to devote at least 5 percent of their STV broadcast hours in any calendar month to programing other than sports and feature films.

309. Still another rule adopted to prevent siphoning is that which proscribes the showing on STV of a series type of program with interconnected plot or substantially the same cast of principal characters, heretofore mentioned (par. 278). Since this sort of program is a staple of free TV it would appear essential to afford protection in this area, consistent with our desire to assure ample free programing to the viewing public.

310. Finally, we adopt a rule prohibiting commercial announcements of any kind during STV programing hours. However, it would permit promotional announcements about STV operations, at the beginning or end of each separate program. Thus, for example, if the same feature film were shown twice in the same evening, such announcements could be broadcast between the two showings. We cannot agree with ACLU that principles of free competition should weigh in favor of permitting commercials on STV. Such operations are based on an entirely different economic concept from that of free TV—namely, that of direct financial support from paying subscribers rather than from advertisers. This fact works to permit the enhancement of the beneficial supplement which STV can offer by additional advantages mentioned elsewhere, namely, no interference with artistic continuity of a program by commercials or by cutting programs to make them fit a time schedule.

311. If, as we believe, the classifications of service we have adopted will serve the public interest, our delineation of these classifications does not conflict either with section 326 of the Communications Act, 47 U.S.C. 326, or the first amendment to the Constitution. We can agree that *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), does not specifically reach the precise situation before us. However, that decision makes amply clear that reasonable regulation of radio directed toward concern for program service in the public interest is prohibited by neither section 326 of the Communications Act nor the Constitution. On the contrary, the decision firmly supports our jurisdiction here. The circuit courts have also consistently rejected the contention that there is either censorship or some other violation of the right of free speech when the Commission takes cognizance of program categories in its licensing function. *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949); *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 216. 171 F. 2d 826 (1948); *Lafayette Radio Electronics Corp.* v. *Unitd States*, 345 F. 2d 278 (C.A. 2, 1965); *California Citizens Band Association, Inc.* v. *United States*, 375 F. 2d 43 (C.A. 9, 1967) cert. den. 389 U.S. 844. See also *Southwestern Cable Co.* v. *United States*, 392 U.S. 157, decided June 10, 1968; *Carter Mountain*

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Transmission Corp. v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963).

312. Thus, in both the broadcast and nonbroadcast fields the courts have refused to accept the contention that the classification powers conferred upon the Commission by section 303 of the Communications Act, 47 U.S.C. 303,[59] are either to be read as unrelated to program service or as violative of free speech. The contention of CBS that the *Lafayette Radio* and *Carter Mountain* cases both involve the classification of nonbroadcast stations in accordance with the purposes of their transmissions, does not persuade us that a classification of STV stations in accordance with the purposes of their transmissions is beyond our authority.

313. It must be recognized that any determination of the use to which a portion of the radio spectrum is to be put demands a resolution of conflicting purposes related to the public's needs and interests and that this resolution cannot be accomplished without classifications specified in terms of content. We believe that Congress fully intended this result and that *National Broadcasting Co.* and the other decisions cited above confirm its full compatibility with the constitutional and statutory protections of free speech.

314. Except for the proviso permitting STV stations to show feature films that are from 2 to 10 years old, the rules described above are the same as those which the Subscription Television Committee recommended for adoption. In oral argument and the congressional hearings we find that the Committee-recommended rules are a principal target of discussion. The arguments concerning them are manifold. Some are couched in general terms such as that they will not serve to prevent siphoning, that they are impractical, that they will be hard to administer and that the benefits of the rules will be far outweighed by the disadvantages, and that they will involve the Commission in detailed regulation of programing which is the sort of thing that it has avoided in the past in order to promote licensee responsibility and independent judgment.

315. Other arguments are more specific. Thus, some STV opponents say that the rule concerning feature films would check the trend to recency in the films that have been shown on free TV [60] because it would almost automatically consign the more current films to STV which has the potential economic base to pay more for product. Other opponents say that film distributors would probably delay the sale of films to free TV until they had a run on STV. (But several proponents say that STV would probably bring feature films to free TV sooner than now because their box office potential would be exhausted sooner (par. 55)). Opponents also argue that, quite likely, STV would acquire the rights to the best of the film classics over 10 years old and there seems to be little justification for the rule to permit STV to show such older films if the Commission is concerned about preventing siphoning, since very few of such pictures can command a theater box office.

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[59] Sec. 303(a) authorizes the Commission to classify radio stations and sec. 303(b) authorizes the Commission to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."

[60] See statement of NBC in par. 39 supra.

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316. ABC urges that the rule on feature films use a 1-year rather than a 2-year period. Teleglobe suggests, on the other hand, that the 2-year period should be liberalized so that the time starts to run, not from the date of general release of the film anywhere in the country, but from the date of release in the community where the STV station proposes to show it. There are those proponents who assert that the feature film and other programing restrictions would hamper the development of STV and that they unduly protect free TV, and they urge that the programing rules be relaxed or eliminated. Zenith, however, says it can live with the film and other programing rules since it would program in much the same way with or without them. (Zenith also states in the congressional hearings that it can live within the limitations of all the STV rules proposed in the Committee draft of the *Fourth Report and Order.*)

317. MPAA avers that the rule on feature films fails to define "feature films" in any manner except by age. It calls attention of the Commission to the judicial definition of "feature," citing cases.[61] MPAA also maintains that the proposed rule contravenes public policy against restraint of competition. In this regard it states:

> A motion picture distributor desiring to exhibit his pictures on STV stations will have to make certain that he arranges a playdate for the picture on STV within 2 years of the anniversary of the exhibition of the picture on general release anywhere in the nation. The mechanics of distribution will require the distributor to negotiate and conclude an agreement with the STV station well in advance of that date. He will not be in a position to delay, looking perhaps for an increase in the list of subscribers to the STV station. Free bargaining will be impaired, to his detriment. Some time before the 2-year anniversary both parties will be precluded from making an agreement because then it will be too late to arrange a playdate to take place before the expiration of the 2 years. At that time, even before the lapse of 2 years, conventional TV will become assured that the competition of the STV station is removed.

On the other hand, the manager of the Hartford station, over which the trial STV operation is being conducted, states in the congressional hearings that they normally attempt to obtain the license for a movie 2 to 3 weeks ahead of time. In addition to its view quoted above, MPAA also says that the 2-year rule does not take cognizance of the technique of the industry because distributors of motion pictures and STV operators must weigh matters such as timeliness, season of the year, and other factors in deciding when to schedule a picture for showing.

318. MPAA also criticizes the 2-year rule because it excludes from STV feature films more than 2 years old even though free TV in the area may have refused to show the film because of reasons such as sponsor dislike, station booker's judgment, or lack of mass audience appeal. One example given is the foreign "art" film. Another, is the film between 2 and 10 years old that has been shown on free TV but which STV subscribers request their STV station to show in an unedited version. CBS points out that in a recent edition of *The New*

[61] The definition and cases cited by MPAA are:
"Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 ft." *United States* v. *Paramount,* 66 F. Supp. 323, 333, fn. 1 (S.D.N.Y., 1946); *United States* v. *Paramount,* 70 F. Supp. 53, 55 (S.D.N.Y., 1946). See, also, *United States* v. *Twentieth Century-Fox Film Corp.,* 137 F. Supp. 78, 122 (S.D. Cal. C.D., 1956); *United States* v. *Columbia Pictures Corporation,* 189 F. Supp. 153, 157 (S.D.N.Y., 1960).

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Yorker magazine, in the section listing movies of more than ordinary interest in New York City, about half of the pictures were over 2 years old. (No statement is made as to how many of those were over 10 years old so that they would be permitted under the Committee-drafted rule.) MPAA also says that over a period of 10 years there would be a total of 3,500 domestic and foreign feature films generally released in the United States, and of these, those that had not been sold to STV within the 2-year period would be barred from STV until they were 10 years old.

319. Another point made by MPAA is that the 2-year rule precludes STV showing of feature films between 2 and 10 years of age which the producer does not wish shown on free TV because of commercial interruptions and editing to fit them into required time periods.[62] Laurence Olivier, we are told, has taken that position with regard to his "Henry the Fifth," and Walt Disney, it is said, refused to sell any of his feature films to free TV; hence, "Bambi" and "Snow White" have never been shown on free TV, but "Bambi" was shown at the Hartford STV trial.

320. It is said by some that the rule proscribing STV showing of series-type programs with interconnected plot or substantially the same cast of principal characters is not clear. They ask, for example, whether such programs as the "Ed Sullivan Show" and the "Bob Hope Show" are of a series type that would prevent their being siphoned to STV. Opponents urge, too, that it would be easy for STV to circumvent this rule by techniques of random scheduling and nonrepetitive titling, renaming series, and making minor adjustment in the format and cast. Various parties say that specials are a program form that has become increasingly important to free TV and an increasingly large part of free TV programing, but they are afforded no protection under the rules. Such programs as the "Miss America Pageant" and the "Academy Awards" are referred to in this connection. It is also said that not only are specials becoming more important, but series-type programs are becoming less so in prime time.

321. Numerous opponents believe that the rule on sports programing could be circumvented. Some say that the owner of the sports rights could merely keep his programs off free TV for 2 years and then realize a bonanza in STV showings thereafter. Others say that STV operators could pay the holders of sports rights to keep the events off free TV for 2 years, so that there would be no loss of revenues for the holder of the rights during that period. Still others say that if the pattern has been to show the away games of a team on free TV and not the home games, STV could make arrangements to show the home games for 2 years and the holder of the rights to the sports events could keep the away games off free TV for 2 years. Thereafter, STV could show all the games of the team—home or away. On the other hand, in the congressional hearings we find the president of Zenith testifying that they have no intention of arrogating to themselves the existing programs of networks. He states that they have no intent of taking the world series and the Rose Bowl; that they are

[62] See note 28 supra.

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not going to make any deals with baseball or other sports to the effect that if they go off free TV for 2 years STV will make it worth their while. He further states that Zenith would accept any kind of regulations that the Commission or Congress would wish to make to assure their carrying out this pledge. And the president of Teleglobe, at the same hearings, says that his company would not be averse to a tightening of the sports rule from 2 to perhaps 3 or even 5 years since it is his belief that no restrictions are really required to prevent siphoning of sports programing.

322. Several parties opposing STV argue that the rules would freeze sports and other free TV programing as it is now rather than permit it to change with changing needs and desires of the viewing public.

323. Finally, ACTS, testifying at the congressional hearings, takes the view that there should be no restrictions on STV programing and that the marketplace should determine this. It urges that, rather than having rules on the subject, STV applicants should be required to demonstrate to the Commission, as free TV applicants are presently required to do, how they propose to serve unmet programing needs. It states that the programing representations should then be made a condition of the STV license.

324. As to the foregoing arguments raised in oral argument or at the congressional hearings, we cannot agree that the programing rules proposed by the Subscription Television Committee are impractical or that they will be inordinately difficult to administer. On the contrary, we believe the rule concerning feature films is clear, definite, and easy of application. In addition, although some difficulties may occur in application of the rules on sports or series-type programs, we do not anticipate that they will be serious. Nor can we agree that the rules will be ineffective in preventing siphoning. On the contrary, it appears that they will serve to fulfill their functions of preventing undue siphoning, promoting program diversity, and preserving artistic continuity, without unduly hampering the development of the new service or impairing licensee responsibility or independent judgment.

325. *Feature films.*—We believe that the points made in paragraphs 318–319 concerning feature films between 2 and 10 years of age are generally well taken. It may be observed, however, that if STV gets underway, of 3,500 feature films generally released in theaters during its first 10 years of operation, many of those that are not shown on STV during the first 2 years after release quite possibly would be of a lesser quality, with little box office appeal; hence they might not be wanted for STV during the second through 10th years after release any more than they were during the first 2 years. Nevertheless, there is no doubt that to permit feature films 2 to 10 years old to be shown on STV if certain conditions are met would create a source of additional programing for the new service. We are modifying the committee-recommended rule governing feature films to permit the STV broadcast of films between the ages of 2 and 10 years if a convincing showing is made that they either are not salable to free TV or that the owner of the rights to the film is intent on not permitting it to be shown on free TV (par. 287). We are persuaded that this relaxation

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is in the public interest, for it broadens the quantity and variety of films available on STV without adversely affecting the free TV service.

326. It has been pointed out that the 2-year provision will mean that there are some feature films for which STV and free TV will be competing, and it has been suggested that the standard be changed from 2 years to 1, presumably to avoid such competition. As we have stated in paragraph 63, we are of the view that conventional TV, because of its cost-per-thousand economics, generally will not be able to pay enough to obtain the most current films. As Zenith and Teco have mentioned, free TV cannot pay enough to cover production costs and potential box office revenues that would be lost because of the free TV showing. (AMST, in oral argument, questions this conclusion. They state, quoting a New York Times (Aug. 2, 1967) article, that CBS has "plans to televise four or five feature length films it will produce for TV and subsequent theatrical release." The implication AMST would apparently give is that conventional TV showing does not destroy subsequent potential at theaters, so that free TV will, in the future, be able to obtain current films which may later by shown in theaters. However, it is important to note that in oral argument NAB suggests that such films would be shown abroad in European theaters. NAB is uncertain as to whether, after European showing, they would be shown in U.S. theaters.) The 2-year standard is an attempt to find a dividing line between films that would attract an STV audience and those which free TV could afford to purchase. We believe that it is a reasonable and workable standard. (See par. 133.) It can be adjusted, to some degree, at a later date if warranted, but it appears that to change to a 1-year rule would unduly restrict the product available to STV, and have a deleterious effect on its development.

327. Assuming the correctness of the NBC statement that during the past 6 years the average lapse of time between theater release of feature films and network showing on free TV has decreased about 6 months per year (par. 39), it would still appear that there is a point beyond which free TV cannot go in the purchase of recent films. We believe that any trend which may exist will not be stopped by the 2-year rule. The economics of the situation will act as a brake. As to whether any trend that might exist has begun to level off, we note that NBC has said that in the 1966–67 season more than 10 percent of films carried by the networks were less than 2 years old (par. 39). Our calculations show that during the 1967–68 season the figure was about 6 percent, and during the first 6 weeks of the 1968–69 season it was approximately 9 percent. The average age of films shown on the networks during the 1966–67 season is suggested to have been in the vicinity of 5½ years (par. 64); for the 1967–68 season (according to our calculations), the average age of films shown by the networks for the first time was about 5 years; and for the first 6 weeks of the 1968–69 season it was 3¾ years. (See par. 64 supra.)

328. For reasons stated in paragraph 286, we reject the suggestion that the 2-year period be changed to commence not on the date of general release anywhere in the Nation, but on the date of release in the community where the STV station proposes to show a film. We also

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reject the argument that STV should not be permitted to show films over 10 years of age because very few of them can command a box office. If they cannot command a box office, it appears unlikely that an STV operator would care to show them, and there would be no siphoning from free TV. If they can command a box office, we think that this is a legitimate area of competition between the two services. Such films may possibly constitute a minuscule portion of STV programming, and in any event are limited by the rule to not more than 12 per year.

329. We are grateful for the information provided by MPAA concerning the definition of the term "feature." Although we do not anticipate any difficulties in determining what a feature film is and do not write the definition into the rule, we shall feel free to fall back on the judicial definition provided if the need should arise.

330. It has been suggested by MPAA that if motion picture producers agreed among themselves not to sell to STV any films over 2 years of age it would be a violation of the antitrust law, and that for the Commission to accomplish a similar end by rule contravenes the public policy against restraint of competition. We are of the opinion that it is one thing for private parties to engage in the activities mentioned, and another for the Commission, an arm of the Government, to adopt a rule of the kind under discussion because it believes it in the public interest to do so.

331. Concerning one facet of the subject, there appears to be a conflict in the information before us. MPAA suggests that the 2-year rule is unduly restrictive because it impairs free bargaining and that the mechanics of distribution require distributors to negotiate and conclude an agreement with the STV station well in advance of the date of STV televising. On the other hand, the Hartford experience, we are informed, has been that it was normal to attempt to obtain the licensee for a movie 2 to 3 weeks before showing time. Whatever the situation may be, we see no reason why, if STV becomes a factor in the marketplace, parties to such transactions cannot adjust themselves to the 2-year rule. The same would appear to be the case with regard to other decisional factors, mentioned by MPAA, that influence motion picture scheduling decisions.

332. *Sports.*—Our sports rule, it is said, will not prevent siphoning of sports events from free TV to STV. Various methods are mentioned whereby parties could evade the intent of the rule and ultimately siphon sports to STV. To begin with, we believe that such suggested ruses would be avoided by STV and members of the sports world because they might generate great adverse publicity that could redound to their detriment. Moreover, if STV operators and owners of sports rights make arrangements that would result in keeping sports events off free TV for a period of 2 years, it is conceivable that violations of law with regard to restraint of trade might occur. In any event, we would emphasize here that it is not our intent to create new markets for owners of televising rights of sports events. We shall keep operations governed by this aspect of the rule under careful observation and if we detect any untoward trends we shall take ap-

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propriate action, which might include increasing the sports rule standard from 2 to 5 years.

333. *Specials.*—Opponents of STV maintain that specials are assuming increasing importance in free TV and that the rules give no protection against their being siphoned to STV. To this we say, as we have said before, that some competition between STV and free TV in the programing area may be beneficial to free TV and to STV as well, and we leave this type of program to competing factors in the marketplace and the performer's desire for exposure. It is not only said that the series-type program is becoming less important to free TV and that specials are becoming more important, but that, generally speaking, free TV programing is dynamic and changes to meet viewer interests and needs, and that the programing rules will freeze free TV programing into its present mold. We fail to see why this should be true. The rules place no strictures on inventiveness and ingenuity of the free medium; in fact, they may stimulate them.

334. *Series-type programs.*—We find the arguments concerning the rule on series-type programs labored. It seems clear to us, although apparently not to some opponents of STV, that the "Ed Sullivan Show" is not a series type since it has no interconnected plot or substantially the same cast of principal characters. The same is true of the "Bob Hope Show." Both could be siphoned to STV under our rules. And the methods suggested for circumventing the rule seem farfetched. As in all matters concerning our programing rules we intend to observe the operation of STV carefully in this area and are free to make changes that subsequently appear to be necessary.

335. *Talent siphoning.*—We believe the foregoing rules adequate to prevent siphoning of programs. It does not appear to us that rules to prevent siphoning of talent are necessary to achieve the end of assuring adequate quantity and quality of free TV to the public, at least at this time. However, we would view with a jaundiced eye unreasonably restrictive contracts on the part of either STV or free TV with talent that would prevent the latter from performing on or otherwise serving the other service. It is suggested by some that the danger of talent siphoning lies not in such contracts but in the fact that talent like Bob Hope and Frank Sinatra, for example, have such great demands on their time that possibly they can only be on one service or the other; and if they have to make a choice, they might choose STV over free TV because it would pay more. This area, too, will be watched closely. We shall stand ready to take any action here that may be necessary in the public interest, including the entertaining of petitions by aggrieved parties.

336. The last point on the topic of programing rules has to do with the suggestion of ACTS that there be no rules, but that applicants be required to make a showing as to how their proposed programing will serve unmet needs and then have their licenses conditioned on their representations. This is an intriguing suggestion. However, we believe that the matter of siphoning is best handled by general rule rather than by the consideration of individual applications. In addition, the rule carries with it the possibility of applying additional enforcement sanctions.

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337. The subject of requiring the STV applicant to make a showing of how he proposes to serve unmet needs, mentioned by ACTS is not unrelated to the comments mentioned in paragraph 283 above. As to the subject of a required showing by STV applicants that their proposed programing will differ from conventional programing or would otherwise serve the needs and interests of the community, we shall, of course, require such a showing, contrary to what some parties suggest, for without it we could not make a public interest finding that grant of the authorization would be in the public interest. We do not believe, as AMST suggests, that such a showing will be impossible to make. As to feature films, a vital item will be the length of time since general release. Meeting the 2-year test, a major hurdle is passed. Similarly with sports. Other programing, which we expect to comprise by far the lesser portion of programing, should present no insurmountable problems. As with free TV, we shall require that applicants provide us with narrative statements about what they have done to determine the needs of the community with regard to STV programing and the manner in which they propose to fulfill those needs.

338. Concerning the conventional programing which STV stations will be required to carry, we have already indicated our belief that such programing will provide a valuable service to the community. Applicants for STV authorizations must, in addition to a showing with regard to subscription programing, also make a showing with regard to the conventional programing which they proposed to broadcast in non-STV hours. This will have to be based on a survey of community needs with a showing of how the proposed programing is designed to meet those needs, just as with any application made by a non-STV television station. We shall not consider that the STV applicant has met the standard with regard to conventional programing if it carries entirely, or almost entirely, industrial and other available free film programing. We shall expect STV stations to develop a staff—for programing, sales, news, engineering, etc.—which will perform the same functions as the staffs of conventional TV stations.

(*15*) *Whether various sections of the act and of the Commission rules, and of Commission policies; e.g., the fairness doctrine, pertaining to broadcasting (see par. 30 above) should be modified as they affect subscription television, and if so, what the modification should be*

339. Paragraph 30 of the *Further Notice*, referred to in the issue, reads as follows:

> Since over-the-air subscription television is considered to be broadcasting, the question arises as to whether certain provisions of the Communications Act and our rules pertaining to broadcast stations should apply to subscription television operations in the same way they do to regular broadcasting. In the act, section 303(i) gives the Commission authority to make special regulations applicable to stations engaged in chain broadcasting; section 307(d) limits the term of broadcast station licenses to 3 years, and of other stations to 5 years; section 315 provides for equal use of broadcasting facilities by political candidates; section 317 provides that announcement must be made * * * [about matters] for which money or other consideration has been paid; section 325 prohibits broadcast stations from rebroadcasting programs of other stations without permission; section 605 prohibits the unau-

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thorized publication of communications, but expressly exempts "the contents of any radio communication broadcast" from its application. Most of the foregoing are the subject of Commission rules. We invite comments on whether we should recommend legislation to the Congress, and if appropriate, make changes in our rules, to modify any of these sections insofar as they affect subscription television. In addition, comments are invited on how the "fairness doctrine", which does not appear in our rules, but which is given recognition in section 315(a) of the act, should apply to subscription television.

340. Some comments favor applying present sections of the act and of the broadcast rules and policies to STV, without amendments of any kind, since STV has been determined to be broadcasting. Others state that at least some of the foregoing should not apply, or that STV experience should be gained before deciding. Illustrative of these views are the following.

341. Telemeter states that it sees no reason for adopting new rules. It believes that to the extent to which STV programing would bring present rules and policies into play, they should apply, and mentions that at Etobicoke (although it was a cable STV operation, and in Canada), candidates for public office appeared over STV without charge to them or to the subscribers in accordance with section 315 and the fairness doctrine principles. Zenith and Teco say that WHCT at Hartford reported that it experienced no dissimilarities in complying with the Commission's broadcasting rules when operating conventionally as compared to operating with STV. The station did not find it necessary to request a waiver of any of the rules except to the extent necessary to scramble its signals. These parties observe that should any problems arise in STV operations, they could be handled on an ad hoc basis. Teleglobe says that the only amendments necessary are those proposed in appendix C of the *Further Notice* as modified by the comments in this proceeding.

342. AMST, mentioning the paragraph 30 material, says that since STV has been designated as broadcasting by the Commission, the fairness doctrine and the sections of the act and of the Commission's rules which govern free TV should apply. As to section 317 of the act, it says that it should apply if sponsorship is allowed on STV, which it should not be. It stresses the fact that comments of proponents indicate that a system of one or more national organizations similar to free TV networks is contemplated. Therefore, the chain broadcasting rules (sec. 73.658 of the rules and sec. 303(i) of the act) should apply to STV. These rules, it is said, are intended to guard against dangers which the Commission assumes are inherent in network systems, and would be especially important if only one STV network were to emerge, in which case even more stringent protective measures might have to be adopted. Finally, it mentions that section 315 and the fairness doctrine should be kept within the different confines of STV and free TV operations over the same station so that a candidate appearing on STV may not be balanced against one appearing on free TV.

343. ABC states that STV, which has been designated to be broadcasting, should not be exempt from the rules and policies of the Commission such as the fairness doctrine. Although admitting that it is possible that some of these provisions may not have any real meaning

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with regard to the public interest insofar as they are related to STV, it would recommend no action on the matter at present. Specifically it says:

> At this juncture, however, ABC suggests that the Commission should not attempt to carve out exceptions to its rules and policies. If subscription television is to be authorized, the burden should be upon the proponents and applicants to show in each instance where exemption from the requirements of a rule or policy is appropriate. At this juncture, the Commission should presume that all of its rules are applicable and reserve judgment on exemptions until particular matters are raised and probably until some meaningful experience with subscription television has been realized.

Trigg-Vaughn takes the following position:

> We think that the Commission should gain actual experience with the day-to-day operations of pay television services before carrying over to pay television wholesale the limitations on program presentation which now apply to conventional broadcasting. The absolute statutory equal time obligation concerning political candidates would apply to pay television, of course, but there is a problem of significance in connection with the treatment of controversial issues. Applicants for pay television should be encouraged at the outset to set forth their plans for presenting in the course of pay television programs full opportunity for the expression of varying viewpoints on public issues. Whether the strict obligations of the fairness doctrine should apply exactly as they do in television broadcast operation is not clear at this point. If problems of significance are detected in the course of operation, it might later be appropriate to extend the fairness doctrine and similar regulations to pay television operations, but at this stage we think a less restrictive policy should apply to pay television than to television broadcasting as it presently operates.
>
> We think that the distinguishing feature of pay television—its usefulness only if the public wishes to pay for it—calls for more thought and observation before the many existing rules on regulation of programs are extended to it.

344. Munn & Chase state that since STV offers primarily box office entertainment and does not involve problems of politics and personal attack found in editorial and advertising programs over free TV, the subject of fairness does not enter. ACLU, on the other hand, maintains that it regards the fairness doctrine and section 315 of the act as essential to assure that STV will operate in the public interest, because they "help to promote the concept of balance and fairness which undergird diversity, and we see no reason why they should not be vigorously enforced."

345. *Conclusions.*—The purpose of this issue was to elicit information in recognition of the fact that STV might have different features from those of conventional TV and that therefore changes in the act or the Commission's rules might be indicated. Those of the commenting parties who say that because STV has been judged to be broadcasting all broadcasting rules should apply to it are, in effect, saying that there are no differences between the two services. We are not sure that this is correct. However, neither do we know for certain at this point what the differences are that might require different regulation through the act or our rules. We are of the view, therefore, that, for the present, the better course of action is to adopt section 73.643(e) of appendix C which proposed that, except as otherwise waived by the Commission in issuing STV authorizations, the rules applicable to free

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TV broadcast stations be applicable to STV operations.[48] (In addition, of course, all of the other STV rules adopted today are new and in addition to present TV broadcasting rules.) We have no evidence on this matter other than that provided by Zenith and Teco (see par. 341). The path we pursue is consistent with that evidence and with the recommendation of those parties, and is not fundamentally at variance with the views of all parties. The rule will provide a necessary flexibility in a relatively unknown area. At a later stage, should we find that additions, deletions, or other changes are indicated, we shall act accordingly.

Rules

346. The rules which we adopt appear in appendix D. They are based on careful consideration of all of the comments filed in this proceeding, the oral argument, and the congressional hearings. Although parties did not comment on some portions of the rules which we proposed in the *Further Notice*, we believe that they are reasonable and in the public interest and adopt them. These include the requirement that holders of STV authorizations shall complete construction of STV transmitting facilities within a period of 8 months after issuance of the authorization, and that STV authorizations will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast station. Although in some cases the adopted rules add to or otherwise modify the rules proposed in appendix C, in accordance with previous discussion in the document, in other cases the only modification is a change in paragraph number. In a few cases, amendments not discussed in the document have been made because they appear to be reasonable and in the public interest (e.g., compare proposed sec. 73.642(c) of app. C with the same section in app. D). These rules, as well as the equipment and performance rules to be adopted later, will become effective on the same date, about 6 months hence.

Applications, financial requirements, reports

347. As indicated in the note to section 73.642(b) of the rules appearing in appendix D, no applications will be accepted for filing until such time as we have adopted rules concerning equipment and system performance capability. At or before that time we shall announce the manner in which applications are to be filed and the content thereof with regard to equipment, technical operation, and other matters. We contemplate that applications will be required to contain, among other things, financial information sufficient to permit us to make a judgment about capacity for continued operation for a period of at least 1 year (see pars. 271, 273); a program showing (see pars. 337–338); information pertinent to section 73.642(g) of the new rules; and some, but not all, of the information which was required of applicants for trial operations by paragraph 32 of the *Third Report*. Information already on file with the Commission in formal application forms or ownership reports may be incorporated by reference in these applications. We also

[48] The rule which we adopt is modified to say "the rules and policies applicable to" free TV stations so as to include the fairness doctrine which, except for the subject of personal attacks (47 C.F.R. § 73.679), is embodied in no rule.

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contemplate that, at least in the early stages of the service, we shall not adopt an FCC form to be used by those wishing to apply for STV authorizations. Section 1.531 [64] of the rules will be amended to indicate that STV applications will be viewed as formal applications although no FCC form will be used for them. Public notice of the acceptance for filing of such applications, or substantial amendments thereto, will be given by the Commission, and no grants will be made earlier than 30 days following the issuance of such public notice. We intend to charge filing fees for STV applications equal to those charged for applications for authorizations to operate TV stations. Thus, for example, if an applicant simultaneously files applications for a construction permit for a new TV station and for authorization to conduct STV operations over that station, the filing fee would be $150 for the former, and $150 for the latter, for a total of $300. Section 1.1111 of the rules (schedule of fees for radio broadcast services) will be appropriately amended, prior to the time that applications are accepted, to reflect the filing fees for the new service. Finally, at the time that we announce the manner of filing and the content of STV applications, we shall make any announcements that may be necessary concerning guidelines to be followed in the granting of STV authorizations. No grants will be made until after the rules become effective.

348. We adopt no rule requiring applicants to make a showing as to their capacity to sustain operations for at least a year. This is, rather, a policy that will be followed. Similarly, although no specific rules are adopted thereon, as mentioned in various portions of the document we shall periodically require those possessing STV authorizations to submit reports and information to us for the purpose of keeping us informed about various aspects of STV operations.

Educational television

349. Throughout this proceeding, our attention has been directed at commercial television, and the thrust of our entire discussion of beneficial supplementing of programing, siphoning, audience diversion, preempting of time, and other matters has been directed at commercial free TV. The rules which we adopt today, likewise, are so oriented, and the proposals in the *Further Notice* have been clarified to indicate that only parties having or applying for authorizations to operate commercial television stations are eligible to apply for STV authorizations.

350. As for the matter of STV as related to educational television, Teleglobe, in its comments, has the following to say:

> "Subscription" is also in a position to alleviate the financial plight of educational television. It may take years before the ambitious plan of the Ford Foundation for the establishment of a "broadcasters' nonprofit service" is realized and in the meantime the financial position of many an ETV station may deteriorate even further. The part-time use of the principle of subscription for financing ETV "cultural"—as distinct from the "instructional"—activities, would make ETV self-supporting.

[64] Sec. 1.531 of the rules states (in part) the following:
"Formal application" means any request for authorization where an FCC form for such request is prescribed. "Informal application" means all other requests for authorization.

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> Is it not rather sad that channel 13, the New York educational station, which has on the whole succeeded in rising to a higher niveau of programing, is compelled for lack of finances to be off the air Saturdays and Sundays and thus leave waste a valuable natural resource? "Subscription" could help channel 13—and similarly placed ETV stations—to provide expanded services to their communities.

351. On the same subject, ACLU states:

> Although the FCC notice is silent on this question, ACLU believes it to be in the public interest to permit educational, municipal, and nonprofit stations to employ STV for portions of their broadcasting schedules. STV programing by such stations could be expected to add to the variety of services available to the public, as well as contribute to their financial self-support.

352. Except for the observations of Teleglobe and ACLU mentioned above, the relationship between educational television and STV has not generally been commented on by the filing parties, and we therefore have no basis on which to found decisions pertaining thereto at the present time. However, if parties having STV authorizations wish as part of their programing, to broadcast educational or cultural programs in conjunction with nonprofit educational organizations, such proposals will be given consideration in connection with their other proposed programing. In this regard, we point out that we are of the opinion that programing of an educational and cultural nature is certainly in the public interest. This is the main reason for our having adopted a rule requiring that at least 10 percent of STV broadcast hours be devoted to other than feature films and sports.

353. In the past, we have authorized noncommercial educational television stations, on an experimental basis, to transmit scrambled signals which could be viewed unscrambled on specially adapted equipment. An example is that of four such stations in California which have been authorized to present, in that manner, programs designed to meet the educational needs of the medical profession and not deemed suitable for the general viewing public. The programs have been broadcast to hospitals and educational institutions for viewing by physicians, hospital staffs, and others.[65]

354. One of the stations so authorized, noncommercial educational television station KCET, Los Angeles, California, on November 1, 1968, filed with the Commission a "Petition for rulemaking to permit the encoded ('scrambled') transmission of medical and police instructional programing by noncommercial educational television broadcast stations" (RM–1365). The petition states the following:

> [Petitioner] hereby respectfully petitions the Commission to institute a rulemaking proceeding and to adopt rules that will permit noncommercial educational television broadcast stations to transit limited amounts of encoded, or so-called "scrambled", programs. Such programs, which are not suitable for viewing by the general public, would be transmitted for the instruction of doctors, nurses, and law enforcement personnel.
>
> There is clear need for such programs. They are of definite benefit to the public. Based upon KCET's transmission of such programs under experi-

[65] We shall continue to authorize such operations on the same basis where application is made and it appears appropriate to do so, unless action taken with regard to the petition mentioned in paragraph 354 suggests another course.

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> mental authority during the past 4 years [footnote omitted] there is no question of technical or other feasibility. Moreover, KCET's experience demonstrates that the transmission of such programs results in no detriment to the regular broadcast services of educational television stations. Community Television believes that the Commission should therefore now adopt rules to permit such operations to be conducted by all noncommercial television licensees, so that similar benefits to the public can be provided throughout the country and on a continuing basis.

355. This petition is presently pending before us and could lead to the building of a record on which to base decisions concerning STV over educational stations.[66] In this connection, we call attention to the fact that educational STV is a part of the larger problem of educational television in general which in the past few years has been the subject of careful consideration by the Ford Foundation, the Carnegie Foundation and others.[67]

Wire or Cable Subscription Television

PRELIMINARY STATEMENT

356. As stated in paragraph 5 above, the scope of this proceeding was enlarged by the *Further Notice* to include not only over-the-air STV, its previous subject matter, but an inquiry into what the role of the Federal Government should be, if any, with regard to the establishment and manner of operation of wire or cable STV, and how that role should be effected. This was done, as the *Further Notice* mentioned, because of the change in conditions since this proceeding began in 1955. An important change has been the rapid growth of community antenna television (CATV) systems.

357. Because of the necessity to avoid frustration of our television plan and policies under sections 1 and 307(b) of the act by the existence and growth of CATV systems throughout the Nation, in 1965 (docket Nos. 14895 and 15233) we asserted jurisdiction over CATV systems served by microwave facilities and adopted rules governing those systems.[68] In 1966 (docket Nos. 14895, 15233, and 15971), for the same reason, we asserted jurisdiction over all CATV systems (whether receiving their signals by microwave or off the air). In so doing, we adopted rules governing over-the-air CATVs, and amendments to existing rules concerning microwave-served CATVs.[69] Our jurisdiction was sustained in *Southwestern Cable Co.* v. *United States* (par. 311 supra).

358. In the proceedings in which the CATV rules were adopted, some parties expressed the fear that CATV might become a vehicle for STV or combined CATV–STV operations which would siphon programs from free TV and possibly result in a transition from free TV

[66] In passing, we note that sec. 73.621 of the rules provides that educational television stations may not broadcast programs for which consideration is received. This rule, of course, was adopted in a context devoid of STV possibilities.

[67] Comments of the Ford Foundation concerning educational television were filed in the domestic satellite proceeding, docket No. 16495, which we presently have under consideration. The report of the Carnegie commission on educational television was a principal factor leading to the adoption of the public broadcasting Act of 1967 (note 25 supra). We shall follow with interest the operation of the Corporation for Public Broadcasting created under provisions of that act.

[68] 38 FCC 683, 1 FCC 2d 524 (1965).

[69] 2 FCC 2d 725, 6 FCC 2d 309 (1966).

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to STV. Because of this, we invited and received comments therein on the question of whether it would be feasible or desirable to have STV operations over CATV, whether any conditions might be necessary to protect the interest of the public in free TV, and, if so, what conditions might be appropriate.[70]

359. The *Further Notice* stated that, in addition to the comments filed in the present proceeding on the subject of wire or cable STV, we would take notice of the above-mentioned comments (in docket No. 15971) concerning the CATV–STV relationship. It further stated that besides comments on the general topic of wire or cable STV, we would welcome comments on problems that might be encountered by parties proposing to bring over-the-air STV to communities in which there were established CATV systems. These included such questions as whether (if subscribers do not have antennas because their only reception is by CATV) it would be necessary to have built-in antennas in decoders attached to sets of subscribers; whether a single decoder attached to the antenna of the CATV system which delivered an unscrambled signal along the cable would suffice, and, if so, how collection charges could be made; and whether the CATV rules on carriage of signals of local stations would apply to carriage of STV stations.

360. Having considered all of the material before us, it is discussed and conclusions thereon are set forth in the remaining paragraphs. We shall first treat the specific problems, just mentioned, related to bringing over-the-air STV signals to communities with established CATV systems. Then we shall turn to the general problem of cable STV or combined CATV–STV operations. Among other things, this will deal with the question of program origination by cable systems.

Specific Problems

Pickup of scrambled STV signals by CATV systems

361. The comments of Zenith-Teco and Telemeter inform us that it is technically feasible to attach a decoder at the CATV head end that would unscramble signals of an STV station and transmit them to sets of subscribers. However, Zenith-Teco states that it is doubtful that any STV station would permit this since it would defeat the purpose of having single subscribers pay charges on a per-program basis, and Telemeter says that any flat rate arrangement with the CATV operator would be commercially impractical since program suppliers for box office product prefer to participate in the gross receipts on the basis of percentage arrangements. Moreover, Telemeter states, such an arrangement implies a flat fee for CATV subscribers for STV service, and "the public has shown a reluctance to pay a flat fee for blocks of entertainment."

362. Both of these parties also indicate that it is technically possible to have CATV systems pick up scrambled signals, transmit them along the cables, and have them unscrambled by decoders attached to sets of STV subscribers just as if the signals had been picked up off the air. No built-in antennas would be necessary in the decoders.

[70] 1 FCC 2d 453, 473–475 (1965).

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CATV rules requiring carriage of local TV stations

363. Comments in the record contain the following views: Telemeter states that since STV stations will probably be required to broadcast conventional programing part of the time, it seems logical that the CATV rules on carriage of local stations should apply. ACLU expresses the opinion that it would be consistent with the present CATV carriage rules requiring carriage of local conventional television stations to require CATV systems to carry STV programing of local STV stations, for otherwise millions of families might be deprived of free TV programing without having the right to subscribe to STV services that replaced them. On the other hand, the Joint Committee argues that at least until such time as the Commission is prepared to evaluate the significance of CATV generally with regard to free TV, it should prohibit CATV systems from carrying STV programs broadcast by STV stations; and it should also prevent STV stations from entering into arrangements whereby STV stations would use CATV systems as outlets for STV programing.

Conclusions

364. To the extent that, under our new rules, STV stations will be required to broadcast at least the minimum number of hours of free TV programs required by section 73.651 of our rules, such stations are conventional stations and, for their nonsubscription programing, are entitled to the protection of our CATV rules, including the carriage and nonduplication provisions. As to the STV programing, we are informed that a decoder attached to the head end of a CATV system could unscramble an STV signal and transmit the decoded signal along the cable like any other TV signal. However, this is said to be commercially impractical, and we dismiss it from further consideration. It is also said that existing CATV systems could carry scrambled signals along a cable to decoders, attached to sets of subscribers, which could unscramble them just as if they had been picked up off the air. However, we shall not at this time require that CATV systems carry unscrambled signals of local STV stations.

365. Should an STV station and CATV systems within the grade B contour of the conventional service of that station wish privately to arrive at agreements whereby the CATVs will carry STV programing of the station, the public interest would be served (by having the STV signal of the station extended within its conventional TV service area). We shall therefore give consideration to proposals of STV stations wishing to make such arrangements. However, no party holding or applying for an STV authorization shall consummate such an arrangement without Commission approval thereof. It should be noted that we here speak of permitting such carriage of STV signals by CATV systems within the grade B contour of the STV station. We do not now intend to permit it outside of that contour. This will confine STV to the communities which we have selected for that service. Because of this, we see little merit to the Joint Committee argument that STV–CATV arrangements should be prohibited (see par. 363).

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366. Often the CATV operator, in installing the cable connection, disconnects the TV set from the outdoor antenna. This can make it impossible for the subscriber to receive a local TV station directly off the air. Under the provisions of section 74.1103(c) of the rules, we have provided that if a CATV system does not carry the conventional signals of a local TV station it must offer and maintain a switching device for each subscriber so that the subscriber may choose between viewing the local station off the air or viewing other stations on the cable. This need not be done if the subscriber indicates in writing that he does not desire the device. With regard to STV, it is possible that if the CATV operator has disconnected the set from the outdoor antenna, is not required to carry the scrambled signal of the local STV station (see par. 364), and has not made arrangements with the local STV station to carry its scrambled STV signals (see par. 365), the CATV subscriber might be precluded from becoming an STV subscriber. At a later date, if we were to continue not to require CATV carriage of STV signals, we might need to consider whether to adopt a rule for STV similar to section 74.1103(c), or to take other measures that would leave the TV set of the CATV subscriber accessible to STV service. (However, see par. 368 infra.)

367. The discussion in the preceding paragraph leads to a final topic. Although CATV carriage of STV signals will not presently be required, it appears that there is merit in the ACLU position that it should be. They base their argument on the belief that those who lose free TV service should have the opportunity to view the STV service which preempted the free TV time. This might be true, but the reason for requiring carriage could go deeper. For example, if STV were broadcast over a new station there would be no preempting of time, yet requiring carriage on the cable could be in the public interest because, whether the STV station is new or a previously operating station, if STV programs are not carried on the cable those residing in the service area of an STV station who are dependent on CATV for TV viewing do not receive the same consideration as those capable of receiving the STV station without the aid of CATV. The latter, if within the grade A contour of an STV station, have the right to subscribe, and if between the grade A and the grade B contours have a good chance of obtaining STV service, although not as of right. As to those dependent on CATV, some might be inhibited from receiving STV because of the frequent rooftop disconnection mentioned in the preceding paragraph. Others, who cannot receive the off-the-air signal of the STV station, even with a rooftop antenna, are foreclosed from receiving STV.

368. We have concluded that STV is broadcasting and have taken measures to assure its effective integration into the total TV system. As a part of that system, it is entitled to protection with regard to CATV, just as conventional television broadcasting is, and for the same reasons (par. 357). The present CATV rules (47 CFR §§ 74.1100–74.1109) contain carriage and nonduplication requirements concerning conventional TV stations. Not to require carriage of STV signals would, in our opinion, be inconsistent with sections 1 and 307(b) of the act and with our view that STV is broadcasting. There-

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fore we are today adopting a *Third Further Notice of Proposed Rulemaking* in this proceeding in which comments are invited on a proposal that would require CATV systems located within the grade B contours of STV stations to carry the scrambled signals of those stations according to certain priorities. We believe that CATV systems operating in the large STV markets would have the multichannel capacity to meet such a requirement. Comments are also invited on whether, and under what circumstances, CATVs located outside the grade B contours of STV stations should be permitted to carry STV signals. If as a result of the further notice rules requiring CATV carriage of STV signals are adopted, we shall not be unsympathetic to requests for continuation of any arrangements which have been made under the policy expressed in paragraph 365.

General Problems

Will CATV Become STV

369. The principal arguments in the instant proceeding as well as in docket No. 15971 on the matter of CATV–STV relationship revolve about the question of whether CATV might develop into an STV or a combined CATV–STV operation which would siphon programs from free TV. It is urged that revenues obtained from large CATV operations, in major cities, for example, would permit the CATV operators to outbid free TV for programs, and that a transition from free TV to STV might thereby occur. It is argued that this is not only unfair because CATV operations would be using free TV, which makes CATV possible, as a stepping stone to STV operations that will harm free TV, but that such undermining of free TV is contrary to the public interest. Various parties point to cases where there is already program origination by CATV systems and imply that this shows the direction that will be followed. STV would thus enter by the back door, using the financial base created and made possible by free TV. If it is to enter, it is said, it should enter by the front door after appropriate proceedings. Some suggest that the appropriate proceedings should include trial STV operations over CATV systems similar to the Hartford trial in order to develop information helpful to arriving at decisions on the subject. It is also urged that if importation of distant signals by CATV is prohibited, the systems may well have to turn to program origination to survive. Still another argument is that if copyright law is modified to require CATVs to pay fees for programs, the strength of the argument against program origination over CATV which derives its base from free TV is lessened.[71]

370. On the other hand we are told that there can be no objection to program origination by CATV systems in areas where there is no television station; that in the few cases where there is presently program origination by CATVs it is programing of a public interest

[71] On June 17, 1968, the Supreme Court of the United States held that when a CATV system picks up the off-the-air signal of a television station and transmits it by cable there is no liability under the Copyright Act to the copyright owner for the program material transmitted. *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390.

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nature such as local news, local sports, and the like; and that CATV alone or in combination with STV may well pose an economic threat to the present system of broadcasting, but that system is not central to the economic structure of this country, and what is central is whether or not the public is being served in the best possible way—CATV with multiple channel capacity can provide a wider diversity of programs to the public.

Jurisdiction

371. In their comments, several parties, without giving detailed legal arguments, express their views on the question of jurisdiction of the Commission over wire or cable STV. It should be borne in mind that the comments were filed in this proceeding on October 10, 1966, after we asserted jurisdiction over all CATV systems, but before the decision in *Southwestern Cable.*

372. On the jurisdictional issue, Telemeter says:

> Telemeter is aware, of course, of the Commission's assertion of jurisdiction over nonmicrowave serve CATV's and of the pending legislation in Congress to support that jurisdiction. In the case of the closed-circuit subscription operation by wire, however, which involves no use of frequency space whatsoever, and in the case of the CATV system, which, itself, originates subscription television programs (as distinguished from the off-the-air pickup or microwave-fed subscription programs), there should be no question that no Federal regulatory authority exists.

373. CBS is of the opinion that the Commission does not have jurisdiction over cable STV. It states that although jurisdiction was asserted over CATV, "an all important element was the fact that television stations' signals were extended by CATV systems beyond the area or zone to be served by the originating station, a factor not involved here." Teleprompter expresses a similar view. CBS goes on to say that even if the Commission had such jurisdiction it should not regulate cable STV because it does not involve scarce spectrum space. On the other hand, Taft asserts, simply, that there is no jurisdictional problem with Commission action in this area because it has established such jurisdiction over all forms of CATV.

374. ABC expresses the following view:

> ABC believes that the Commission should apply the same standards to pay-TV by wire as it applies to pay television by "broadcasting." The logic of the Commission's assertion of jurisdiction in CATV would support jurisdiction over pay-TV by wire. Although the Commission would appear to have no power to authorize pay television by wire, it should, in ABC's view, apply whatever regulatory policies it determines to be appropriate to wire television to the extent found necessary to protect the "public interest in the larger and more effective use of radio."

375. Finally, Trigg-Vaughn states:

> We think it premature to consider the question of the Commission's jurisdiction to regulate pay television systems conducted by wire. We believe that it is too early to tell how and in what way pay television by wire should be authorized. Experiments with off-the-air systems of pay television have been conducted and have produced meaningful operating data—the same cannot be said with respect to the relatively limited wire pay television systems.

Deferring action on over-the-air STV

376. Teleprompter, in oral argument, states that the Commission should not now decide to authorize over-the-air STV because it would

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be better first to determine whether STV might be more satisfactorily provided by cable. It states, however, that if the Commission should authorize over-the-air STV operations, it should make clear that in so doing it is not proposing now or later to prefer such STV over any form of wire or cable STV. It goes on to say that the Commission should also make clear that it will not seek to use its regulatory power to restrict the offering of STV over cable because it has no jurisdiction to do so.

377. Motorola believes that before a new service is permitted to use spectrum space, competing claims to the space should be considered. This, it says, would involve determinations about whether wire is a practical substitute, the relative importance of the service as compared with other uses to which the spectrum space might be put, the number of people who would probably benefit from the service, and whether there is a substantial public need for the service that would result in its viability. Zenith and Teco reply to this argument by saying that this is not an allocation proceeding, and that the proposed new STV service would use channels already allocated for the use of television broadcast stations.

Conclusions

378. We may make a threefold distinction with regard to STV over cable: (1) STV systems, like that which operated for a short period in Los Angeles and San Francisco, in which programs travel entirely by cable from studio to sets of subscribers, and which make no use of signals of television stations. See *Weaver* v. *Jordan*, 49 Cal. Reptr. 537, 411 P. 2d 289 (1966), cert. den. 385 U.S. 844. (2) CATV systems which, in addition to their traditional function of receiving and retransmitting conventional TV signals, also originate STV programs that travel by cable to sets of subscribers. (3) CATV systems which, in addition to traditional functions, transmit by cable the over-the-air STV programs which they have picked up either off the air or by microwave—and which may or may not engage in STV program origination.

379. Without deciding whether the Commission has jurisdiction over the first type of cable STV mentioned in the preceding paragraph, we believe that we clearly have jurisdiction over the second two. Pickup of over-the-air STV signals by CATVs has been previously discussed (pars. 361–368). As to program origination by CATVs, our authority to regulate programs originated by CATV systems on valid public interest grounds is discussed elsewhere and will not be repeated here. *Midwest Television, Inc., et al.*, 13 FCC 2d, 478, 503–508 (1968); *Memorandum Opinion and Order* denying reconsideration, FCC 68–1089 (Nov. 6, 1968), 15 FCC 2d ——.

380. We cannot agree with Teleprompter and Motorola that we should not authorize over-the-air STV. The channels to be used by STV have been allocated to television broadcasting and are available for such use. The argument of Motorola, if accepted and logically extended, could mean that we should grant no further authorizations for conventional television stations, a result which we cannot believe would be in the public interest.

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381. In establishing the new over-the-air STV service, we do not mean to imply that there is no place for cable STV. On the contrary, it is our view that the two kinds of service are not mutually exclusive. We believe it would be in the public interest to promote both over-the-air and cable STV, for the result could be increased diversification of service and choice of programs. Moreover, it should be noted that over-the-air STV operations could serve people living in a broad area away from the core of a community, whereas cable, at least at present, is generally restricted to the more densely populated areas of a community.

382. We have read the Report on Cable Television and Cable Telecommunications in New York City, recently prepared by the Mayor's Advisory Task Force on CATV and Telecommunications. We recognize the advantages of cable transmission, such as, for example, the fact that cable may carry many channels as compared to the single channel of a broadcast station. If the recommendations of that document are carried into practice in New York City and other urban centers, there would be a great contribution to increased program diversity. However, that would, in our opinion, not mean that over-the-air broadcast operations would not have a place in the communications picture. Finally, whether such large-scale wire operations will actually occur cannot be regarded as a settled question. We believe, therefore, that we should now promote over-the-air STV which our exhaustive studies indicate has an excellent chance of contributing to program diversity, continue our studies and encouragement of CATV originations and, in short, seek to encourage the attainment of maximum program diversification consistent with the public interest.

383. We are of the opinion that the question of CATV program origination needs thoroughgoing examination. The material submitted in the present inquiry and in docket No. 15971 has proved of some value, but more information is needed. We are aware, of course, that many CATV systems presently do engage in limited program origination consisting, e.g., of weather reports, stock reports, and some local interest programing. However, the origination of which we speak is broader.

384. In *Midwest Television*, supra, we permitted the origination of programing by CATVs, without advertiser support, for the purpose of providing some insight into its potential without at the same time having an undue adverse impact on broadcasting, especially UHF, in the San Diego area. In so doing, we stated, however, that the resolution of the issues with regard to CATV program origination and television broadcast stations was a matter of overall policy in a general rulemaking proceeding such as that in docket No. 17999 [72] or a new proceeding. Several months later, on August 28, 1968, in *Jefferson-Carolina Corporation*, 14 FCC 2d 601, we stated, in denying a request to prohibit general program origination and advertising over a CATV system, that we intended shortly to initiate a rulemaking proceeding

[72] This docket deals with the subject of permitting stations licensed in the community antenna relay service to transmit program material originated by CATV systems. In the *Notice of Proposed Rule Making* (adopted Feb. 5, 1968) instituting the proceeding (33 F.R. 3188) we stated: "[T]here is no question but that, at the least, the public interest is served by CATV acting as an additional outlet for community self-expression."

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in which we might gain data on the implications of such operations. We here today issued an order instituting such a proceeding (docket No. 18397). Accordingly, we are terminating the present inquiry, although the material submitted will continue to be appropriately considered in our evaluation of this important matter.

ORDERS

385. Authority for adoption of the rules herein is contained in sections 3(o), 4(i), 301, 303 (a), (b), (d), (e), (f), (g), (r), and 307(b) of the Communications Act of 1934, as amended.

386. Accordingly, *It is ordered*, That the rules contained in the attached appendix D *Are adopted*, effective June 12, 1969.[73]

387. *It is further ordered*, That, since we have under study the comments filed in response to the *Second Further Notice of Proposed Rulemaking* (pars. 248–250, supra) concerning proposed technical standards for over-the-air subscription television systems, and since we are today adopting a *Third Further Notice of Proposed Rulemaking*, the rulemaking proceeding herein is not terminated.

388. *It is further ordered*, That, the inquiry into subscription television as related to wire or cable *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

***Parties filing comments in response to Further Notice of Proposed Rulemaking and Notice of Inquiry** (* indicates reply comments also filed)*

American Broadcasting Cos., Inc.* (ABC)
Acorn Television Corp., et al. (Acorn)
American Civil Liberties Union (ACLU)
Americans for Democratic Action (ADA)
Angel Toll Vision (Angel)
Association of Maximum Service Telecasters, Inc.* (AMST)
Thomas A. Banning, Jr.
Colorado Translator Association
Columbia Broadcasting System, Inc. (CBS)
Communications Corp. of Indiana
Field Communications Corp.
International Telemeter Corp.* (Telemeter)
Jerrold Corp. (Jerrold)
Joint Committee Against Toll TV* (Joint Committee)
Kaiser Broadcasting Corp. (Kaiser)
John M. McLendon (McLendon)
Motorola, Inc. (Motorola)
E. Harold Munn, Jr. and James A. Chase (Munn and Chase)
National Association of Broadcasters (NAB)
National Broadcasting Co., Inc. (NBC)

[73] Thomas A. Banning, Jr., proposes a system that would permit transmission of TV programs in color to those paying a fee, and in black and white to all others for no charge. He suggests that his system could be used in all markets, regardless of the number of free TV services therein, since there would be no blackout of a channel when an STV program is being shown. Such programs do not fit our definition of an STV program (see § 73.641(b) in app. D), namely, a program intended to be received in intelligible form by members of the public only for a fee or charge. Should any applications be received for use of this system by a station in any community (regardless of the number of free TV services therein) we shall treat them on an ad hoc basis. Such applications will be subject to technical rules adopted herein. They will not be accepted until such rules are adopted, and no grants will be made until June 12, 1969.

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RKO General, Inc. and RKO Phonevision Co. (RKO)
Screen Actors Guild
Skiatron Electronics and Television Corp. (Skiatron)
Springfield Television Broadcasting Corp. (Springfield)
Taft Broadcasting Co. (Taft)
Teleglobe Pay-TV System, Inc.* (Teleglobe)
Trigg-Vaughn Stations, Inc. (Trigg-Vaughn)
TVC of California, Inc. and Com-Sumers, Inc.
WAIM-TV
WJRJ-TV
Zenith Radio Corp. and Teco, Inc.* (Zenith and Teco, or Zenith-Teco)

Parties filing technical descriptions of proposed STV systems in response to Further Notice of Proposed Rulemaking and Notice of Inquiry

Thomas A. Banning, Jr.
International Telemeter Corp.
Kahn Research Laboratories, Inc.
Skiatron Electronics and Television Corp.
Teleglobe Pay-TV System, Inc.
Zenith Radio Corp.

Parties filing written comments in connection with oral argument (indicates participation in oral argument)*

All Channel Television Society* (ACTS)
American Broadcasting Cos., Inc.* (ABC)
American Civil Liberties Union (ACLU)
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Americans for Democratic Action* (ADA)
Angel Toll Vision
Association of Maximum Service Telecasters* (AMST)
Banning, Thomas A., Jr.*
Celler, The Honorable Emanuel*
Columbia Broadcasting System, Inc.* (CBS)
Feeney, James J.
Harrington, Lin
Hollywood A.F.L. Film Council
Hubbard Broadcasting, Inc* (Hubbard)
International Telemeter Corp.* (Telemeter)
Jerrold Corp., The
Joint Committee Against Toll Television and the National Association of Theatre Owners* (Joint Committee)
Motion Picture Association of America, Inc.* (MPAA)
Motorola, Inc.*
National Broadcasting Co., Inc. (NBC)
National TV Translator Association
Nationwide Communications Inc.
Rediffusion International Ltd.
Roth, Morton A.
Screen Actors Guild
Skiatron Electronics and Television Corp.* (Skiatron)
Springfield Television Broadcasting Corp.* (Springfield)
Teleglobe Pay-TV System, Inc* (Teleglobe)
Teleprompter Corp.* (Teleprompter)
Zenith Radio Corp. and Teco, Inc.* (Zenith and Teco, or Zenith-Teco)

Parties participating in oral argument but filing no written comments

Association of Motion Picture and Television Producers (Represented by same counsel as MPAA, and identified as MPAA)
Kahn Research Laboratories, Inc. (Kahn)
National Association of Broadcasters (NAB)

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APPENDIX B

SUMMARY OF HARTFORD SUBSCRIPTION TV TRIAL AND ZENITH-TECO PROJECTIONS BASED THEREON

The information presented here, except where otherwise indicated, is based on material contained in the Zenith-Teco comments and the RKO General response to the Commission questionnaire. It is intended to provide a convenient summary of the facts and conclusions as reported by the petitioners.

PART 1.—FACTS ABOUT THE HARTFORD SUBSCRIPTION TELEVISION (STV) TRIAL—3-YEAR EXPERIENCE

1. This service was introduced by RKO's station WHCT, channel 18 in June 1962 in Hartford, Conn., which is part of the Hartford-New Haven television market. This market is served by other stations affiliated with all 3 networks. The net weekly circulation of this market is approximately 800,000 homes (ARB, 1965) which is the number of homes estimated to be tuned in at least once a week to the largest station WTIC, channel 3. The net weekly circulation of WHCT channel 18, prior to its STV experiment was 108,000 homes.

2. During the evening hours, and Saturday and Sunday afternoons, station WHCT, channel 18, transmitted a scrambled signal which could be viewed intelligibly only by those having a decoder attached to their set. The decoder was installed for a $10 installation fee and a rental fee of $3.25 per month. All service calls were made free of charge.

3. By means of a weekly program schedule (supplemented by newspaper ads and listings), each subscriber was advised of the subscription features to be shown, the time and the price, and was given a code number for each feature. For example, the movie "What Ever Happended to Baby Jane" was listed for a price of $1 and was shown Monday, July 1, 1963 (Code No. 115E), and Thursday, July 4 (Code No. 111D), at 9 p.m. Subscribers wishing to see the movie simply set the code number in the decoder and the picture became unscrambled. The code number of each feature viewed and the price of the feature was automatically printed on a tape, which the subscriber removed each month and mailed to RKO with his check for the total amount for the programs viewed plus the monthly rental charge.

4. RKO intended to commence operations after 2,000 decoders had been installed, and "looked toward installation of 10,000 decoders by the end of the first year of trial. A maximum of 50,000 subscribers is contemplated * * *"[1] Actual operations started with fewer than 200 decoders on June 29, 1962, and progressed through three years of operation, as follows:

	Installed	Disconnected	Number of subscribers at end of year
First year	3,183	422	2,761
Second year	3,394	1,386	4,769
Third year	1,752	1,670	4,851
Three year total	8,329	3,478	4,851

According to Zenith-Teco, "at the close of the second year of trial operations, RKO decided to limit the number of subscribers to 5,000 for the remaining third year of trial authorized because business prudence and fairness to subscribers did not warrant further substantial expansion without some assurances that the Commission would authorize the trial beyond the third year." The 4,851 STV subscribers at the end of the third year represented 0.6 percent of the net weekly circulation in the TV market or 4.5 percent of WHCT's net weekly circulation prior to its STV operation.

[1] FCC *Report and Decision*, Feb. 23, 1961; par. 8.

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5. Zenith-Teco disputes the contention that STV is a service which only the wealthy can afford. The following table shows the income level and program expenditures of the Hartford subscribers:

Hartford subscribers by family income level

Income levels	Proportion of total U.S. families [1]	Proportion of total subscribers	Average weekly program expenditure
	Percent	*Percent*	
0-$3,999	29.1	1.5	$0.99
$4,000-$6,999	32.5	40.8	1.25
$7,000-$9,999	21.0	43.3	1.23
$10,000 and over	17.7	14.4	1.18
Totals (rounded)	100.0	100.0	1.22

[1] Statistical Abstract of the U.S. 1964, p. 338.

6. To interest new subscribers RKO, from time to time, did extensive advertising, used door-to-door specialty salesmen, made offers of free decoder rentals, gave program discounts and used other promotions. During the first 2 years, RKO was able to obtain only a limited number of first subsequent run (neighborhood release) motion pictures and practically no first run (downtown release) movies. Most of the movies during this period were over 6 months old. In the third year, subsequent first run movies were available in greater number.

7. The turnover rate (the number of subscriber homes disconnected as a percent of the average number of subscriber homes) was 27 percent the first year, 36 percent the second year and 34 percent the third year. Turnover results from such factors as subscribers moving from the community, insufficient use to justify expenditure for decoder rental and credit delinquencies.

8. The following table summarizes the income and expense statements of the Hartford trial operation:

	($000)			
	First year	Second year	Third year	Total 3 years
Net income—Totals	134	320	436	890
Installation	30	36	20	86
Decoder rental	30	92	154	276
Program	74	192	262	528
Expenses—Total	1,487	1,687	1,254	4,428
Program product	31	75	110	216
Other program expenses	17	68	66	151
Time charges paid to WHCT [1]	698	799	482	1,979
Technical	157	146	106	409
Sales, advertising and promotion	74	112	60	246
Depreciation [2]	[3]375	308	289	972
Other general and administrative	135	179	141	455
Operating loss	(1,353)	(1,367)	(818)	(3,538)

[1] Station was paid $300 per hour. Zenith-Teco comments suggest that payment of $400,000 per year would normally be made to station in market of this size. If such $400,000 were paid in this case, 3-year loss would be $2,759,000 instead of $3,538,000.

[2] Decoders cost $125 each and, for the test were completely depreciated during the 3-year period.

[3] For this year cost of decoders purchased was reported rather than depreciation.

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9. The following table shows the extent to which reductions were made in the charges for programs and decoder rentals.

Hartford discounts

	First year	Second year	Third year	Total 3 years
Gross program income [1]	$82,028	$211,647	$285,821	$579,496
Net program income [2]	$74,163	$191,142	$262,088	$527,393
Difference	$7,865	$20,505	$23,733	$52,103
Difference as percent of gross program income	9.6	9.7	8.3	9.0
Gross decoder rental income [3]	$60,479	$151,211	$189,878	$401,568
Net decoder rental income [4]	$30,394	$92,284	$153,708	$276,386
Difference	$30,085	$58,284	$36,170	$124,539
Difference as percent of gross decoder rental income	50	39	19	31

[1] Amount that would have been charged for programs if each subscriber were required to pay for each program viewed the listed price.
[2] Amount actually charged for programs.
[3] Amount that would have been charged for decoder rentals if each subscriber were required to pay $3.25 for each month.
[4] Amount actually charged for decoder rentals.

PART 2.—ZENITH-TECO PROJECTIONS

10. In its comments, Zenith-Teco has prepared business projections illustrating the viability of STV under various assumptions. These statements show that an STV franchise would break even with 20,000 subscribers spending an average of $65 per year for programs and $39 for decoder rental. If the number of subscribers is more, or the average program expenditure is higher, the business shows profits as indicated:

Summary of business projections by Zenith-Teco

Number of subscribers and average program income	Sales ($000)	Cost of equipment ($000)	Profit before Federal taxes		
			$000	Percent of sales	Percent of cost of equipment
20,000 subscribers:					
65 dollars per year	2,120	2,711	1	0	0
75 dollars per year	2,320	2,711	119	5	4
40,000 subscribers:					
65 dollars per year	4,240	5,393	619	14	11
75 dollars per year	4,640	5,393	855	18	16
75,000 subscribers:					
65 dollars per year	7,950	10,087	1,780	22	18
75 dollars per year	8,700	10,087	2,223	26	22
100,000 subscribers:					
65 dollars per year	10,600	13,441	2,591	24	19
75 dollars per year	11,600	13,441	3,181	27	24

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*Restatement on a "per subscriber" basis of Zenith-Teco's break-even projection**

Income: *Variable data*	*Per subscriber*
Programs	$65.00
Decoder rental	39.00
Installation	2.00 [1]
Total income	106.00
Expenses:	
Program product	22.75
Sales and commissions	8.15
Franchise fee (5 percent of program and rental income)	5.20
Technical	7.93
Taxes (other than Federal.)	2.22
Supplies, truck, bad debts, other	3.10
Depreciation (almost all for decoders)	27.09
Total variable expense	76.44
Gross margin before fixed expense	29.56
Fixed expenses: [2]	
Station time	300,000
Administrative salaries	94,000
Program staff	23,000
Lines and facilities	32,000
ASCAP and BMI fees	18,000
IBM equipment rental	88,000
Rent	15,000
Legal, audit, insurance, travel, telephone, utilities, dues, maintenance	20,000
Total fixed expenses	591,100

*Prepared by Commission staff.

[1] Zenith-Teco assumes 20 percent turnover, or 4,000 per year. This gives a total of $40,000 installation income, or $2 per subscriber (20,000).

[2] Some of these expenses listed as "fixed," actually do increase slightly with increased income.

NOTE.—Break-even point: $591,100÷$29.56—20,000 Subscribers.

11. The projections were made on the basis of the following assumptions:

Assumption 1.—An STV system operating in a number of markets. Zenith-Teco state that STV franchise agreements have been entered into for the following cities with RKO: New York, Philadelphia, Washington, D.C., San Francisco. Hartford, and New Haven; with Marshall Field in Chicago and with Kaiser in Los Angeles. It is their opinion that a number of additional agreements, now in negotiation, will be concluded upon approval of nationwide STV by the Commission.

Assumption 2.—STV will obtain a 10 percent market penetration. Based on this it is concluded that STV will be viable in the top 91 TV markets. At different levels of penetration (assuming the 20,000 subscriber break-even point) the number of viable markets is as follows: 50-percent penetration, top 200 markets; 20-percent penetration, top 170 markets; 10-percent penetration, top 91 markets; 5-percent penetration, top 46 markets; 3-percent penetration, top 20 markets; and 10-percent penetration of the Hartford market would result in 74,000 subscribers.

Assumption 3.—Program product cost will average 35 percent of program income. Based on the figures shown in paragraph 8, program product cost in Hartford was 38 percent of program income during the first year, 35 percent during the second and 38 percent during the third year. Motion pictures, which are exhibited in theaters for 33⅓ to 35 percent of the gross, were made available to STV in Hartford at the same prices.

Assumption 4.—Station time will cost $300,000 for small STV systems and $400,000 for larger ones. Zenith-Teco anticipates paying $300,000 for its STV time to a TV licensee in markets which can support up to 40,000 subscribers (as-

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suming 10 percent penetration) and paying $400,000 in markets which can support 75,000 (or more) subscribers.

Assumption 5.—Decoder cost of $131.38[2] *and 5 years depreciation.* This was the actual decoder cost in Hartford. On a 20,000 subscriber system (the break-even point) the annual depreciation of decoders would amount to $525,520.

Assumption 6.—A turnover rate of 20 percent. Based on the Hartford experience and anticipated changes in operating methods and practices. Also 15–20 percent turnover experienced by telephone companies. (Turnover rate in Hartford trial averaged 32 percent, see par. 7.)

Assumption 7.—Program income will average a minimum of $65 a year and decoder rental income $39 a year per subscriber. Based on the Hartford experience adjusted to eliminate discounts and the assumption of a multimarket system resulting in more and better program product. This is also the basis for projections of program income of $70 and $75. (See par. 9 for Hartford discount experience and conclusion 3 on inherent limit on spending. According to the Bureau of Labor Statistics[3] in 1960 and 1961 urban families with incomes between $4,000 and $10,000 spent an average of $30 a year and those with incomes of over $10,000 an average of $59 a year for movies, sporting events, concerts, plays, etc.)

PART 8.—ZENITH-TECO CONCLUSIONS

Conclusion 1.—STV will make available additional program choices to the viewing public. Box office type television entertainment is not now available nor can it be available in the future on conventional TV.

Conclusion 2.—STV will have minimal impact on audience for conventional TV. In Hartford, an average of 5.5 percent of all subscribers viewed STV programs. There seems to be an inherent limit on the amount of STV viewing the public will support. The loss of audience by conventional TV would be less than 5.5 percent of TV homes because the loss is limited to those homes which subscribe to STV and which otherwise would normally have been watching conventional TV had STV not been available.

Conclusion 3.—Only one STV station in a market. WHCT in Hartford devoted an average of 30 hours per week to STV. This is expected to be typical of future STV operations due to the limited number of box office attractions and the size of the recreational budget. On this basis, in markets with three or more stations, STV could not absorb more than 10 to 15 percent of the total broadcast time. This limited time would probably result in but one STV station in the market.

Conclusion 4.—STV will not siphon talent or existing programs from conventional TV. None of the Hartford programs were available on conventional TV anywhere in the country. No one can expect the public to pay for what someone else provides free. There are too many programs of the conventional entertainment type and the public's recreational budget is too limited to permit STV to pay more than sponsors are willing to pay for such programs. Talent and writers now often work for both the motion picture industry and conventional TV. Since subscription television merely substitutes the home TV receiver for the motion picture theatre, there is no reason to believe that motion picture talent and writers would not still continue to work for conventional TV as they now do.

APPENDIX C

1. It is proposed that the following new sections be added to part 73 of Commission rules and regulations:

OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS

§ 73.641 *Definitions.*

(*a*) *Subscription television.* A system whereby subscription television broadcast programs are transmitted and received.

(*b*) *Subscription television broadcast program.* A television broadcast program intended to be received in intelligible form by members of the public only for a fee or charge.

[2] Decoder price of $125 plus $6.38 for freight and use tax.
[3] Consumer Expenditures and Income, Bureau of Labor Statistics, July 1964, p. 237.

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§ 73.642 Licensing policies.

(*a*) Subscription television service may be provided only upon specific authorization therefor by the Commission. Such authorization will be issued only to:

(1) The licensee of a television broadcast station;

(2) The holder of a construction permit for a new television broadcast station; or

(3) An applicant for a construction permit for a new television broadcast station.

(*b*) Application for such authorizations shall be made in the manner and form prescribed by the Commission. If the Commission, upon consideration of such application finds that the public interest, convenience and necessity would be served by the granting thereof, it will grant such application. In the event it is unable to make such a finding, the Commission will then formally designate the application for subscription television authorization for hearing and proceed pursuant to the provisions of section 309(e) of the Communications Act and the Commission's rules and regulations applicable thereto. The Commission may impose such conditions upon the grant as may be appropriate.

(*c*) Holders of subscription television authorizations shall complete construction of subscription television transmitting facilities within a period of 8 months after issuance of the authorization unless otherwise determined by the Commission upon proper showing in any particular case.

(*d*) A subscription television authorization will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast authorization.

(*e*) No subscription television authorization shall be granted to a television broadcast station licensee or permittee, or to an applicant for a construction permit for such a station, having any contract, arrangement or understanding, express or implied, which:

(1) Prevents it from rejecting or refusing any subscription television broadcast program which it reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest; or substituting a subscription or conventional program which in its opinion is of greater local or national importance; or

(2) Delegates to any other person the right to schedule the hours of transmission of subscription programs: *Provided, however*, That this rule shall not prevent a licensee, permittee, or applicant from entering into an agreement or arrangement whereby it agrees to schedule a specific subscription television broadcast program at a specific time; or

(3) Prevents it from making a free choice of subscription programs, whatever their source; or

(4) Deprives it of the right of ultimate decision concerning the maximum amount of any subscription program charge or fee.

§ 73.643 General operating requirements.

(*a*) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(*b*) Charges, terms, and conditions of service to subscribers shall be applied uniformly: *Provided, however*, That subscribers may be divided into reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications.

(*c*) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast, in addition to its subscription broadcasts, at least the minimum hours of programs required by section 73.651 of the rules.

(*d*) If a television broadcast station supplies the only grade A signal to a community, not more than 15 percent of its nonprime broadcast time (including subscription and nonsubscription broadcast time during that period), and not more than 50 percent of its prime broadcasting time (including subscription and nonsubscription broadcast time during that period) may be devoted to subscription broadcasting; if it supplies the second or third grade A signal, not more than 25 percent of its nonprime broadcast time, and 60 percent of its prime broadcast time; if it supplies the fourth grade A signal, not more than 50 percent of its nonprime broadcast time, and 75 percent of its prime broadcast time; and if it is

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one of five or more stations supplying a grade A signal to the community, there is no limitation on the amount of broadcast time that may be devoted to subscription broadcasting.

(*e*) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules applicable to regular television broadcast stations will be applicable to subscription television operations.

§ 73.644 *Equipment and technical operating requirements.*

(*a*) Subscription television equipment must be approved in advance by the Commission pursuant to the type approval and type acceptance procedures now established by part 2, subpart F—equipment type approval and type acceptance—of the Commission's rules and regulations.

Additional proposed rules concerning equipment and technical operating requirements will be announced at a later date.

APPENDIX D

1. Part 73 of the Commission rules and regulations is amended by adding the following new sections thereto:

Over-the-air Subscription Television Operations

§ 73.641 *Definitions.*

(*a*) *Subscription television.* A system whereby subscription television broadcast programs are transmitted and received.

(*b*) *Subscription telcvision broadcast program.* A television broadcast program intended to be received in intelligible form by members of the public only for a fee or charge.

§ 73.642 *Licensing policies.*

(*a*) Subscription television service may be provided only upon specific authorization therefor by the Commission. Such authorization will be issued only to:

(1) The licensee of a commercial television broadcast station;

(2) The holder of a construction permit for a new commercial television broadcast station; or

(3) An applicant for a construction permit for a new commercial television broadcast station: *Provided, however,* That such authorization will not be issued prior to issuance of the construction permit for the new station.

Moreover, such an authorization will be issued only for a station the principal community of which is located entirely within the grade A contours of five or more commercial television broadcast stations (including the station of the applicant), whether the principal community each station is authorized to serve is the same as that of the applicant, or is a nearby community. Only one such authorization will be granted in any community. No such authorization will be granted unless, not counting the station of the applicant, at least four of the stations which include the community of the applicant within their grade A contours are operating nonsubscription stations.

(*b*) Application for such authorizations shall be made in the manner and form prescribed by the Commission. If the Commission, upon consideration of such application finds that the public interest, convenience and necessity would be served by the granting thereof, it will grant such application. In the event it is unable to make such a finding, the Commission will then formally designate the application for subscription television authorization for hearing and proceed pursuant to the provisions of section 309(e) of the Communications Act and the Commission's rules and regulations applicable thereto. The Commission may impose such conditions upon the grant as may be appropriate.

Note.—No applications will be accepted for filing until such time as rules concerning equipment and system performance capability have been adopted in section 73.644. At that time, the manner of filing such applications, the form, and the content thereof with regard to equipment, technical, and all other matters will be announced. No grants will be made until June 12, 1969.

(*c*) Holders of subscription television authorizations shall complete construction of subscription television transmitting facilities within a period of 8 months after issuance of the authorization unless otherwise determined by

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the Commission upon proper showing in any particular case. During the process of construction of the subscription television facilities, the holder of the authorization, after notifying the Commission and the engineer in charge of the radio district in which the station is located, may, without further authority of the Commission, conduct equipment tests for the purpose of such adjustments and measurements as may be necessary to assure compliance with the terms of the authorization, the technical provisions of the application therefor, and the rules and regulations. The Commission may notify the holder of the authorization not to conduct tests if such tests appear to be contrary to the public interest, convenience, and necessity. Upon completion of the construction, the holder of the authorization shall submit a detailed showing that compliance with the terms of the authorization, the technical provisions of the application therefor, and the rules and regulations has been achieved. No subscription television operation shall commence until requirements of this paragraph have been fulfilled and operation has been specifically authorized by the Commission.

(*d*) A subscription television authorization will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast authorization. Renewals of such authorizations will usually be considered together with renewals of the regular station authorizations.

(*e*) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, express or implied, which:

(1) Prevents or hinders it from rejecting or refusing any subscription television broadcast program which it reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest; or substituting a subscription or conventional program which in its opinion is of greater local or national importance; or

(2) Delegates to any other person the right to schedule the hours of transmission of subscription programs: *Provided, however,* That this rule shall not prevent a licensee, permittee, or applicant from entering into an agreement or arrangement whereby it agrees to schedule a specific subscription television broadcast program at a specific time or to schedule a specific number of hours of subscription programs during the broadcast day (or segments thereof) or week subject to Commission approval; or

(3) Prevents or hinders it from, or penalizes it for, making a free choice of subscription programs, whatever their source: *Provided, however,* That upon making a satisfactory showing to the Commission that the public interest would be served by permitting the licensee, permittee, or applicant to enter into an agreement or arrangement whereby it agrees to obtain all or a specified portion of its programing from one or more sources, this rule may be waived; or

(4) Deprives it of the right of ultimate decision concerning the maximum amount of any subscription program charge or fee.

(*f*) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, express or implied, with other parties the provisions of which do not comply with the following policies of the Commission:

(1) Unless a satisfactory signal is unavailable at the location where service is desired, subscription television service shall be provided to all persons desiring it within the grade A contour of the nonsubscription television service provided by the station broadcasting subscription programs: *Provided, however,* That geographic or other reasonable patterns of installation for new subscription services shall be permitted: *And provided further,* That, for good cause, service may be terminated.

(2) Charges, terms and conditions of service to subscribers shall be applied uniformly: *Provided, however,* That subscribers may be divided into reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications: *And provided further,* That within such classifications deposits to assure payment may, for good cause, be required of some subscribers and not of others; and, also for good cause, if a subscription

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system generally uses a credit-type decoder, cash operated decorders may be installed for some subscribers.

(3) Subscription television decoders shall be leased, and not sold, to subscribers.

(*g*) All applications for subscription television authorization or renewal shall set forth, in such detail as the Commission may require, the terms of agreements and arrangements the applicant has or intends to have with other parties concerning the supplying of subscription television programs, including specifically any provision that such programs shall be presented at a particular time or during a certain number of hours during the day (or segments thereof) or week, any arrangement or understanding which might hinder or prevent the presentation of programs from different sources, or penalize the applicant for so doing, and, as to any arrangement or understanding with a party other than the producer of the program, any other arrangement or understanding of which the applicant has knowledge, between such other party and third parties, which prevents or hinders such other party from obtaining programs from different sources. The applicant shall use due diligence to ascertain the existence and nature of arrangements to which it is not a party.

§ *73.643. General operating requirements.*

(*a*) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(*b*) Subscription television broadcast programs shall comply with the following requirements:

(1) Feature films shall not be broadcast which have had general release in theaters anywhere in the United States more than 2 years prior to their subscription broadcast: *Provided, however,* That during 1 week of each calendar month one feature film the general release of which occurred more than 10 years previously may be broadcast, and more than a single showing of such a film may be made during that week. *Provided, further,* That feature films the general release of which occurred between 2 and 10 years before proposed subscription broadcast may be broadcast upon a convincing showing to the Commission that a bona fide attempt has been made to sell the films for conventional television broadcasting and that they have been refused, or that the owner of the broadcast rights to the films will not permit them to be televised on conventional television because he has been unable to work out satisfactory arrangements concerning editing for presentation thereon, or perhaps because he intends never to show them on conventional television since to do so might impair their repetitive box office potential in the future.

NOTE.—As used in this subparagraph, general release means the first-run showing of a feature film in a theater or theaters in an area, on a nonreserved-seat basis, with continuous performances. For first-run showings of feature films on a nonreserved-seat basis which are not considered to be general release for purposes of this subparagraph (see note 56 in the *Fourth Report and Order* in docket No. 11279, 15 FCC 2d ——).

(2) Sports events shall not be broadcast which have been televised live on a nonsubscription, regular basis in the community during the 2 years preceding their proposed subscription broadcast: *Provided, however,* That if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than 2 years before proposed showing on subscription television in a community, and the event was at that time televised on conventional television in that community, it shall not be broadcast on a subscription basis.

NOTE 1.—In determining whether a sports event has been televised in a community on a nonsubscription basis, only commercial television broadcast stations which place a grade A contour over the entire community will be considered. Such stations need not necessarily be licensed to serve that community.

NOTE 2.—The manner in which this subparagraph will be administered and in which sports, sports events, and televised live on a nonsubscription regular basis

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will be construed is explained in paragraphs 288–305 of the *Fourth Report and Order* in docket No. 11279, 15 FCC 2d ——.

(3) No series type of program with interconnected plot or substantially the same cast of principal characters shall be broadcast.

(4) Not more than 90 percent of the total subscription programing hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programing hours may not exceed 95 percent of the total subscription programing hours in any calendar month.

(*c*) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast, in addition to its subscription broadcasts, at least the minimum hours of nonsubscription programing required by section 73.651.

(*d*) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations.

§ 73.644. *Equipment and system performance requirements.*

(*a*) No subscription television authorization will be granted unless the system to be used has been type accepted in advance by the Commission pursuant to the type acceptance procedures established by part 2, subpart F—equipment type approval and type acceptance—of this chapter.

NOTE.—Additional rules concerning equipment and system performance capability for subscription television systems will be adopted after a rule making proceeding in docket No. 11279.

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D.C., *October 26, 1967.*

HON. TORBERT H. MACDONALD,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MACDONALD: When I testified before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on October 9, 1967, questions were raised concerning the authority of the Federal Communications Commission to authorize subscription television operations. At that time I agreed to supply supplemental material to bring up to date the *Memorandum of Law* (FCC 57–730) on this subject furnished to the Committee on July 3, 1957. That memorandum, a copy of which is enclosed herewith as attachment A, discusses in detail the provisions of the Communications Act of 1934 which the Commission believes constitute authority for the authorization of subscription television service.

On February 6, 1958, the House Committee on Interstate and Foreign Commerce adopted a resolution expressing the sense of the Committee that the Commission could not authorize subscription television absent amendment of the Communications Act of 1934. A second resolution, of March 24, 1959, stated the Committee's view that the earlier resolution should not preclude the grant of an authorization for trial or experimental operations, under the terms of the Commission's *Third Report* in docket No. 11279, 26 FCC 265 (1959).

On February 23, 1961, the Commission granted an application of Hartford Phonevision Co., for an authorization to conduct an experimental subscription television operation over station WHCT, Hartford, Conn., *Hartford Phonevision Co.*, 30 FCC 301. This decision was made after hearing, and upon the basis of the earlier *Third Report* in docket No. 11279. Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the Commission's action was challenged both with respect to its jurisdiction to permit any subscription television service and the particular terms of the Hartford trial. The first of these issues was defended by the Commission upon the basis of the considerations set forth in the Commission's Memorandum of Law of July 3, 1957. This authority was sustained by the court of appeals. *Connecticut Committee Against Pay TV* v. *FCC*, 301 F. 2d 835 (1962), *cert. den.*, 371 U.S. 816.

It has been suggested that the decision merely upheld authority to grant an experimental license, but I believe that analysis of the opinion demonstrates its

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approval of the general authority of the Commission to authorize subscription TV. The court itself characterized the contentions as including a broad argument that the Commission lacked statutory power to authorize any television broadcast system which required the direct payment of fees by the public. Thus, it stated (301 F. 2d at 837) that the first issue was whether "the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees to the public." On this issue, it stated (301 F. 2d at 837):

> The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations, not pertinent here, to issue a broadcasting station license to any applicant "if public convenience, interest and necessity will be served thereby." 47 U.S.C.A. sec. 307(a). Additionally, Congress specifically commanded the Commission by sec. 303(g) of the Communications Act to "study *new uses* for radio, *provide for experimental uses of frequencies*, and generally encourage the larger and more effective use of radio in the public interest." (Emphasis added). The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the Nation's communications facilities. The Supreme Court has said that "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." *United States* v. *Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S. Ct. 133, 136, 73 L. Ed. 322 (1929).

The opinion goes on to refer to the distinguishing characteristic of the authorization as the experimental nature of the grant, in response to the appellant's arguments that the grant was made with inadequate knowledge of the programing plans of WHCT and that it had not been shown that these plans would serve the public interest. And, noting its assumption that the Commission would carefully scrutinize the operation and oversee the form which programing would take under the subscription system, the Court added: "Surely its power to see that this area of the public domain is used in the public interest is not less for 'paid' television than for the existing system of so-called 'free' television." (301 F. 2d at 838.) At no point in its opinion does the court indicate that the authority found in the statute is limited to the grant of an experimental license. Thus, the Commission's position is, I believe, fully supported by the opinion of the court of appeals.

Furthermore, when certiorari by the Supreme Court was sought by the appellant, the Solicitor General, on behalf of the Federal Communications Commission, advised the Supreme Court that the court of appeals' decision was not limited to the question of authorization of an experimental operation since basic jurisdiction must be present whether the authorization be for a trial or permanent operation. A copy of the opposition to certiorari is enclosed as attachment B. (See footnote 8 therein.)

In sum, I believe that the Commission's power to authorize subscription television operations under the broad provisions of the Communications Act of 1934 has been judicially confirmed. I hope that this letter satisfactorily explains the position of the Commission.

Sincerely yours,

ROSEL H. HYDE, *Chairman.*

Attachments A and B of the foregoing letter are omitted from this appendix, but footnote 8 of attachment B reads as follows:

Petitioners aso urge (Pet. 20–21, 22) that, while the Commission found it had statutory power to authorize subscription television on a regular, permanent basis, the court of appeals did not reach this question and found such authority only to authorize a trial test. We do not believe this to be a correct evaluation of the opinion below, so far as the issue of basic authority raised by petitioners is concerned. Statutory support for the Commission's jurisdiction to authorize a system requiring the payment of fees by the public is equally necessary whether that authorization be for a trial or a permanent operation.

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Neither the Commission nor the court below (nor, indeed petitioners) made the alleged distinction. As petitioners recognize (Pet. 21, fn. 23), the court below correctly stated petitioner's contention as a broad attack on the Commission's statutory power to authorize any system requiring the direct payment of fees from the public.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent because I believe that valuable spectrum space should not be used for subscription television.

CONCURRING STATEMENT OF COMMISSIONER JAMES J. WADSWORTH

I concur in the Commission's action looking to the authorization of a commercial subscription television system because I believe that that portion of the public willing to pay should not be denied program material which, because of lack of mass appeal, might not otherwise be received through our free television system; and further because I believe that entrepreneurs who wish to provide such a service should have an opportunity to demonstrate this at their own financial risk. I believe that the restrictions which have been imposed should adequately protect the program sources of free television.

I do have some reservations with respect to the inauguration of this service: first, there has been no widespread demand for such a service shown by the public; and second, there is some doubt in my mind that operation under the restrictions which have been imposed can result in economic viability of a subscription television system.

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FCC 68–1175

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS (RADIO BROADCAST SERVICES TO PROVIDE FOR SUBSCRIPTION TELEVISION SERVICE	Docket No. 11279

THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. In a *Fourth Report and Order* adopted today in this proceeding (FCC 68–1174), we have established a nationwide, over-the-air subscription television service and, with the exception of technical standards governing subscription television systems, have adopted rules governing that service.

2. In paragraphs 361–368 of that document we discussed the question of carriage by CATV systems of the signals of stations authorized to transmit subscription television programs and announced that although we were not presently requiring such carriage, we were today issuing the instant document inviting comments on a proposal to require it.

3. In establishing over-the-air subscription TV service, we have concluded that it is a broadcasting service, and the rules adopted are designed to assure its effective integration into the total television broadcasting system. We believe that as a part of that system it is entitled to protection with regard to CATV operations, just as conventional television broadcasting is. The present CATV rules (47 C.F.R. §§ 74.1100–74.1109) contain carriage and nonduplication requirements concerning conventional TV stations. Not to require carriage of STV signals would, in our opinion, be inconsistent with sections 1 and 307(b) of the act and with our view that STV is broadcasting.

4. If CATV systems are not required to carry subscription TV signals, those residing in the service area of an STV station who are dependent on CATV for television viewing do not receive the same consideration as those capable of receiving the subscription station without the aid of CATV. Under the rules governing subscription TV service, persons falling in the latter category may, as of right, subscribe to subscription service if they reside within the grade A contour of a subscription television station. If they live within the grade

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B contour, they have a good chance of subscribing, although as of right. On the other hand, as to those dependent on CATV, some might be inhibited from receiving subscription programs because often CATV operators, in installing the cable connection, disconnect the TV set from the outdoor antenna. Others, who cannot receive the off-the-air signal of the subscription TV station, even with a rooftop antenna, are foreclosed from receiving subscription service. Requiring CATV carriage of subscription signals would remove the foregoing difference in treatment of television viewers.

5. The record in this proceeding indicates that while it is technically feasible to attach a decoder to the head end of a CATV system that would unscramble subscription TV signals and transmit them along the cable to sets of subscribers, it is doubtful that any subscription TV station would permit this because it would defeat the purpose of having single subscribers pay on a per-program basis. It supports the view that any flat rate arrangement with the CATV operator for use of the subscription programs would be commercially impractical since program suppliers for box office product prefer to participate in the gross receipts on the basis of percentage arrangements. Moreover, it suggests that this approach to carriage of subscription signals implies that those viewing subscription programs over the CATV system would pay a flat fee for the service and that the public in the past has demonstrated its reluctance to purchase blocks of entertainment in this way.

6. On the other hand, the record contains statements by knowledgeable parties saying that it is technically possible for CATVs to pick up scrambled subscription TV signals, transmit them along the cable, and have them unscrambled by decoders attached to sets of subscribers in the same way that this would be done if the subscription viewer picked up the scrambled signal off the air.

7. In view of the foregoing, we are proposing rules in the appendix hereto that would require CATV systems located within the grade B contours of television broadcast stations authorized to broadcast subscription programs to carry, in scrambled form, the subscription signals of those stations in accordance with a system of priorities. Comments are invited on the proposed rules, and on any other system of priorities that parties believe would better serve the public interest.

8. The proposal also provides that CATV systems may not extend subscription television signals beyond the grade B contours of the stations broadcasting them. This would limit subscription television service to the communities that, for reasons set forth in detail in the *Fourth Report and Order*, have been designated to be eligible to receive such service. Parties may wish to submit comments to show that it would be in the public interest to permit extension of subscription TV signals beyond the grade B contour.

9. Under the subscription television rules, stations authorized to broadcast subscription programs must, in addition, broadcast conventional free programs. It is possible that adequate subscription TV signals might not extend as far out as the conventional TV signals of the station. To avoid confusion, the attached appendix indicates that the grade B contour referred to in the proposal is that of the conventional service of the station.

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10. Since we propose to restrict CATV carriage of subscription television signals as mentioned above, it appears unlikely that any problems of duplication of programing with regard to other subscription television stations will occur. Moreover, we do not anticipate having duplication problems between subscription and free television stations in the same area. Any subscription duplication problems should be so rare that they will be handled on an ad hoc basis rather than by rule.

11. Under present section 74.1103(c) of the rules, if a CATV system does not carry the conventional signals of a local TV station, it must offer and maintain a switching device for each subscriber so that the subscriber may choose between viewing the local station off the air or viewing other stations on the cable. This need not be done if the subscriber indicates in writing that he does not desire the device. Although in the attached appendix we do not propose a modification of that section, we invite comments on whether it should be amended in any way with regard to subscription signals of a local TV station that are not carried by the CATV system.

12. Since the subscription rules adopted today restrict subscription service to communities lying within the grade A contours of five or more commercial television stations, it is likely that, under the proposals in paragraphs 7 and 8 above, CATV systems required to carry subscription signals would be systems with a large number of channels on the cable. Thus the required carriage of subscription signals would not generally be at the expense of making fewer conventional TV signals available to the CATV viewers. At the same time, the required carriage could facilitate the development of subscription television.

13. Authority for the amendments proposed herein is contained in sections 4(i), 301, 303, and 307 of the Communications Act of 1934, as amended.

14. Pursuant to the procedures set forth in section 1.415 of the rules and regulations, interested parties may file comments on or before January 24, 1969, and reply comments on or before February 14, 1969. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this notice.

15. In accordance with the provisions of section 1.419 of the rules and regulations, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents filed in this proceeding shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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APPENDIX

It is proposed to amend part 74 of the Commission rules and regulations as indicated below.

1. Sections 74.1101 (c) and (d) are proposed to be amended to read as follows:

§ 74.1101 *Definitions.*

* * * * * * *

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by section 73.685(a) of this chapter. In the case of a television station with an authorization to broadcast subscription television programs, the term refers to the contour of the conventional television service of the station.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in section 73.683(a) of this chapter. In the case of a television station with an authorization to broadcast subscription television programs, the terms refer to the contours of the conventional television service of the station.

* * * * * * *

2. Section 74.1103(a) is proposed to be amended by adding a note at the end thereof that reads as follows:

§ 74.1103 *Requirements relating to distribution of television signals by community antenna television systems.*

(a) * * *

NOTE.—In the case of a television broadcast station with authorization to broadcast subscription programs, the signals required to be carried by this paragraph include both the conventional television signals and the scrambled subscription signals of the stations. The subscription signals shall not be unscrambled at the head end of the CATV system and carried over the cable unscrambled, but shall be carried over the cable in scrambled form.

* * * * * * *

3. Section 74.1107 is proposed to be amended by adding a note at the end thereof that reads as follows:

§ 74.1107 *Requirements applicable to carriage of television broadcast signals in specified zones and in areas outside of specified zones.*

* * * * * * *

NOTE.—Regardless of the size of the television market in which a CATV system is operating, it shall not extend the subscription television signals of television stations with subscription television authorizations beyond the predicted grade B contours of such stations.

* * * * * * *

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent because I believe that valuable spectrum space should not be used for subscription television.

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FCC 68-1234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TELEPHONE AND TELEGRAPH CO. (A.T. & T.)
"Foreign Attachment" Tariff Revisions in A.T. & T. Tariff FCC Nos. 263, 260, and 259

MEMORANDUM OPINION AND ORDER

(Adopted December 24, 1968)

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN THE RESULT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. We have before us new tariffs and supporting papers filed recently by the American Telephone and Telegraph Co. (A.T. & T.) in behalf of itself and other telephone companies wherein it is proposed to effectuate significant changes in the foreign attachment provisions now appearing in certain tariffs of A.T. & T. These provisions govern the connection or attachment of customer-provided facilities to common carrier-provided facilities used in furnishing interstate or foreign communications services to the public. The particular services affected by these new tariffs are long-distance-message telecommunications service or message toll telephone service (tariff No. 263); private line service (tariff No. 260), and wide-area telecommunications service or WATS (tariff No. 259). The new tariffs are published to become effective, in part, on January 1, 1969, and, in part, on January 1, 1970. Appendix A hereof identifies the aforesaid new and revised schedules and supporting documents submitted by A.T. & T. In addition, we have before us a number of formal and informal pleadings and comments that have been submitted in response to the new tariffs. See appendix B.

2. Many of the responsive pleadings request us to reject, suspend, or investigate the new tariffs in whole or in part. Others submit comments and observations on the new tariffs without requesting any specific action by the Commission at this time. A.T. & T. urges us to permit the new tariffs to go into effect as scheduled without hearing or investigation. We believe that it will be useful to outline the salient features of the changes proposed by the new tariffs and the questions presented before stating our disposition of the matter before us.

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I. Description of Changes

A.T. & T. TARIFF FCC NO. 263

3. The pleadings and comments are addressed principally to the new tariffs as they affect A.T. & T.'s tariff FCC No. 263. This tariff applies to the message toll telephone service, which is to be renamed "long-distance-message telecommunications service" under the new tariffs.

4. The nature of the changes proposed for A.T. & T. tariff FCC No. 263 will be more easily understood by making clear at the outset the nature of the service offered by the telephone companies under this tariff. This service utilizes the nationwide switched network of more than 2,000 cooperating telephone companies extending throughout the country. The network consists of (1) the telephone set, usually located on the customer's premises; (2) the pair of wires, or loop, and its supporting structures, which connect the telephone set to the central office; (3) the switching equipment in the central office; and (4) the trunk facilities that connect central offices to each other.

5. For years the tariffs on file with this Commission governing this service offering have made it clear that this service consists of the furnishing of facilities for the public to make interstate or foreign telephone calls between telephones, that is to say the service is now and has for many years been offered only as a complete service that includes the furnishing of the telephone itself with certain exceptions hereafter noted. Thus, the presently effective Tariff 263 states that the service offered thereunder "is that of furnishing facilities for telephone communication *between telephones* in different local service areas" and that the interstate and foreign toll charges shown in the tariff "are in payment for all service furnished *between the calling and called telephones*" (2.1.1(A)). (Our italic.)

6. With respect to the revisions in the message toll tariff, several important features emerge. First, the new tariffs would delete currently effective paragraph 2.6.1 which, in pertinent part, now reads as follows:

> No equipment, apparatus circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise * * *.

Also they would delete currently effective paragraph 2.6.9 which begins with the following language:

> The provisions of paragraph 2.6.1 preceding shall not be construed or applied to bar * * *.

Second, in addition to canceling the above-cited paragraphs, the new tariffs would publish new provisions as follows:

> 2.6.1
> Customer-provided *terminal equipment* may be used with the facilities furnished by the telephone company, for long-distance-message telecommunications service, as specified in 2.6.2 through 2.6.6 following;
> 2.7.1
> Customer-provided *communications systems* may be connected with the facilities furnished by the telephone company for long-distance-message telecommunications service as specified in 2.7.2 through 2.7.10 following. (Our italic.)

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7. As indicated above, the new tariffs will permit any kind of customer-provided terminal equipment (e.g., a computer) or customer-provided communications system (e.g., a private microwave system) to be attached to or connected to the telephone company facilities subject to the specifications set forth in the new tariff. Thus, an important feature of the revisions is the new set of conditions, referred to above, that are to govern the interconnection of such terminals and systems.

8. In the case of both customer terminals and systems, it will be the general responsibility of the customer to assure that his terminal or system shall not interfere with any of the services offered by the telephone company, nor endanger the company's employees or the public, or damage or change the company's equipment or facilities (2.6.2 and 2.7.2). Also in the case of both customer terminals and systems, all network control signaling functions are to be performed by equipment that is furnished, maintained, and installed by the telephone company (2.6.3 and 2.7.3), with exceptions. These exceptions, which have been in existence for some time, apply under limited conditions to systems of power, pipeline, and railroad companies, National Aeronautics and Space Administration, U.S. Army, Navy, and Air Force, and to systems or terminals of customers located in isolated, sparsely developed, hazardous, or inaccessible locations (2.7.4, 5, 6, and 7). Network control signaling is defined in the new tariffs as the transmission of signals used in the telecommunications system which perform functions such as supervision (control, status, and charging signals), address signaling (e.g., dialing), calling and called number identification, audible tone signals (call progress signals indicating reorder or busy condition, alerting, coin denominations, coin collect and coin return tones) to control the operation of switching machines in the telecommunication systems. The ordinary telephone set as used in the message toll service is a network control signaling unit.

9. The new tariffs divide customer terminals into three categories: Data transmitting or receiving equipment (data), voice transmitting or receiving equipment (voice), and accessories.

10. At the customer's option the aforementioned data terminals may be connected to the telephone company facilities either by direct electrical connection (i.e., physical connection of electrical conductors) or indirectly (i.e., acoustic or inductive connections). If the option is for direct electrical connection, the data customer has a further choice of (*a*) using either the telephone company's dataphone set, which performs not only the network control signaling functions but also the functions of a modem (modulation and demodulation of signals), or (*b*) using an interface called a data access arrangement, furnished by the telephone company, in lieu of the dataphone. Such an interface does not perform the modem function, so that this option allows the customer to provide his own modem rather than using that of the telephone company. If the customer's option is for a direct electrical connection through a data access arrangement rather than through a dataphone, then the customer's data terminal must meet certain technical criteria that are set forth in detail in appendix C hereof.

11. If instead of a direct connection, the data customer chooses to

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connect his data terminal indirectly, he may do so by acoustic or inductive connections made externally to the telephone company's network control signaling unit. No telephone company interface is required therefore and no technical criteria are specified for such indirectly connected data terminals in the new tariffs published to be effective January 1, 1969. However, the new tariffs specify that, effective a year later, on January 1, 1970, the technical criteria for such indirectly connected data terminals shall be as shown in appendix D hereof.

12. The second, or voice, category of customer terminals may also be connected either directly or indirectly. If direct connection is used, such a terminal must use a telephone company interface called a connecting arrangement, and the terminal must meet the technical criteria set forth in appendix C hereof. If indirect connection is used, such connection must be made externally to the telephone company's network control unit. However no other interface is required and no technical criteria will apply until January 1, 1970. On and after that date the criteria shall be as shown in appendix D.

13. Accessories are customer terminal devices of a mechanical nature that do not involve electrical connection, directly or indirectly, to the telephone company facilities. These terminals are not subject to the technical criteria required for data and voice terminals, but are subject to the other requirements of the tariff applicable to all terminals.

14. Insofar as the interconnection of customer systems is concerned, the new tariffs impose the same technical criteria on these customer-provided facilities as apply to terminals. Thus, the new tariffs will permit either direct connection thereof through a connecting arrangement interface provided by the telephone company or through an indirect acoustic or inductive connection made externally to the telephone company's network control signaling unit. If a customer system is to be interconnected directly, it must meet the technical criteria set forth in appendix C. If it is to be connected indirectly by acoustic or inductive means, no technical criteria will apply until January 1, 1970, when the criteria shown on appendix D must be met.

15. A.T. & T. states that the purpose of the 1-year postponement of the technical criteria in appendix D for indirect connections is to give customers having acoustic or inductive devices that do not currently meet the new criteria additional time to accommodate themselves to these criteria.

A.T. & T. TARIFF FCC NO. 259

16. This tariff applies to wide-area telecommunications service or WATS. It is a voice grade service that is provided over the same nationwide switched network used for message toll service. The new and revised tariffs propose in substance to make the same revisions in WATS as outlined above for the message toll service.

A.T. & T. TARIFF FCC NO. 260

17. This tariff applies to private-line service. This is a separate service that does not use the switched telephone network. Changes com-

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parable to those referred to above for message toll and WATS are not being proposed at this time for the private-line service. However, the private-line-service tariff is being revised, effective January 1, 1969, to make a new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. These private-line facilities are called entrance facilities. They may not be used to connect a customer terminal or system to private-line facilities of the telephone company.

18. A.T. & T. has advised the Commission by letter dated December 6, 1968, that it expects to make further revisions in its private-line-service tariff comparable to those made in the message toll and WATS tariffs, shortly after January 1, 1969.

II. Questions Presented

19. As heretofore stated, the objections that have been filed are aimed principally at the revisions in the message toll tariff No. 263. The contention is made that these revisions do not comply with our *Carterfone* decision, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 14 FCC 2d 571. Objections are also made to the revisions in the WATS and private-line tariff for the same reason.

20. Accordingly the principal question raised by the pleadings and comments is whether the new and revised tariffs, in whole or in part, are in violation of our decision in *Carterfone*, and, if so, what action we should take with respect thereto. In addition, the question is raised as to whether, apart from compliance or noncompliance with *Carterfone*, there appear to be any other question of lawfulness that would warrant suspension, investigation, or action by the Commission at this time and, if so, the nature thereof.

III. Discussion

21. The contention is made that the new and revised message toll tariffs do not comply with our decision in *Carterfone* because the new filings bar the use of any customer-provided network control signaling units irrespective of whether they are harmful or harmless to the rest of the message toll telephone system. It is argued that such a bar is an *a priori* assumption of harm that we found in *Carterfone* to be unreasonable.

22. We believe that this particular objection is based upon a misconstruction of what we decided in *Carterfone*. We were concerned in that case with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, this telephone system includes the telephone instrument which performs the network control signaling functions for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. Our decision in *Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be

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telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company in providing message toll telephone service as that service is defined in the tariff. Our decision dealt with interconnections and not replacements of any part of the telephone system. We emphasized this in our decision where we stated that "our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operation or the telephone system's utility to others." 13 FCC 2d at page 424. In denying petitions for reconsideration we again made this clear by stating that "General has contended that the Commission has 'opened the door to customer ownership of telephone handsets.' The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on *the message toll telephone system.*" 14 FCC 2d 571 at page 572. (Our italic.)

23. Although the tariff bar against any customer providing his own network control signaling unit is not in conflict with our *Carterfone* ruling, the question remains as to whether the telephone companies should make provision in their tariffs by which subscribers may have access to the so-called switched telephone network through the use of their own provided network control signaling equipment. On the basis of the pleadings and comments before us, we are in no position to determine the extent to which any such provision may be consistent with efficient and economic telephone service and otherwise in the public interest. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required. We believe that we will be in a better position to make these determinations after we have had a reasonable opportunity to closely observe the effects of the substantial changes now being effectuated by the telephone companies in their interconnection tariffs, the extent to which such changes satisfy reasonable requirements of their subscribers for data transmission and other communication services or facilities, and the implementation by the telephone companies of their representations that they are actively engaged in devising equipment and operating procedures to meet the expressed needs of customers for flexible access to the switched network. Thus, we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs.

24. We are also instructing the chief of the Common Carrier Bureau to initiate promptly a series of informal engineering and technical conferences with the telephone industry and interested manufacturers, user groups, and Government agencies to ascertain what further changes are necessary, desirable, and technically feasible in the various tariff offerings of the telephone companies. It is our intent that these further informal proceedings shall be broad in scope and that they will provide a principal forum for the identification, examination, and, subject to Commission review, resolution of any questions presented by the tariff revisions. We are aware, for example, that there

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are a number of unresolved specific questions, which we need not delineate herein, that are raised both in the pleadings and in the separate analysis of our own staff. These may require further action by the Commission. Some of these problems can reasonably be expected to be satisfied by further tariff amendments, such as additional revisions in the private-line tariffs which are scheduled to be made early in 1969, and provisions for unattended operation of a large variety of customer-data terminals, which provisions, according to the telephone companies' commitment, will become possible by the middle of 1969 when appropriate equipment and arrangements therefor will have been developed. Other tariff changes may be necessary or desirable, both of a substantive and clarifying nature, to respond to other questions that have arisen and that are likely to arise. Accordingly, the further proceedings will include, among other things, consideration of what changes, if any, should be made in the technical criteria and other conditions for interconnection and other matters of clarity and substance raised by the pleadings and comments. The staff will submit periodic reports to the Commission, with appropriate recommendations, and the Commission will be prepared to take such further action as it deems necessary or desirable to resolve outstanding issues.

25. We are of the opinion that the further informal procedures that we are here initiating, together with the information gained from the pending computer inquiry (docket No. 16979), will greatly assist the Commission in carrying out its statutory obligations herein. Through such procedures we expect to obtain valuable technical and operational information on a current and continuing basis and from a variety of sources that will aid us in our evaluation of the public interest factors involved in the new tariffs now being put into effect, as well as any new or revised tariffs that are expected to be proposed for the future or that may otherwise be required.

26. We will also welcome the cooperation and participation in the further proceedings of the National Association of Regulatory Utility Commissioners on behalf of the State regulatory commissions which have a substantial interest in the matters yet to be determined herein.

IV. Conclusion

27. In view of the foregoing, we conclude that we should permit the new and revised tariffs to go into effect, as now scheduled, on January 1, 1969, without scheduling a formal investigation or hearing at this time. Our action is not to be construed as approval thereof and these tariffs are subject to such further action as the Commission may wish to take with respect thereto.

28. *Accordingly, it is ordered*, That the various pleadings and requests for rejection and suspension or formal investigation of the aforementioned new and revised tariffs *Are hereby dismissed* without prejudice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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APPENDIX A

Tariffs and Supporting Documents

1. A.T. & T. transmittal letter No. 10240, dated September 13, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).
2. A.T. & T. transmittal letter No. 10249, dated October 2, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).
3. A.T. & T. (unnumbered) letter to FCC, dated October 4, 1968, stating, among other things, intent to offer in future station equipment to permit unattended operation of data terminal (i.e., automatic calling and answering), and to require A.T. & T. dataphone sets to meet tariff technical criteria (relating to proposed revisions in tariff FCC No. 263).
4. A.T. & T. transmittal letter No. 10267, dated October 18, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).
5. A.T. & T. transmittal letter No. 10270, dated October 22, 1968 (relating to proposed revisions in A.T. & T. tariff FCC Nos. 263 and 260).
6. A.T. & T. (unnumbered) letter to FCC, dated October 29, 1968, stating intent to offer facilities by middle of 1969 to permit automatic connection of customer-provided PBX and intercom-type system to the long-distance telecommunication network (tariff FCC No. 263).
7. A.T. & T. transmittal letter No. 10281 to FCC, dated October 30, 1968 (relating to proposed revisions in tariff FCC Nos. 263 and 260).
8. A.T. & T. transmittal letter No. 10291, dated November 12, 1968, and revised pages to A.T. & T. tariff FCC No. 263 submitted therewith; reissuing and revising tariffs submitted under transmittal Nos. 10240, 10249, 10267, 10270, and 10281.
9. A.T. & T. letter (unnumbered) of November 15, 1968, to FCC and enclosed statement in support of provision in new and revised tariffs that connection of customer-provided terminal and systems shall be made through a network control signaling unit furnished, installed, and maintained by the telephone company.
10. A.T. & T. transmittal letter No. 10293, dated November 15, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 259 (wide-area telecommunication service).
11. A.T. & T. transmittal letter No. 10294, dated November 18, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 260 (private-line service) re entrance facilities for use in customer connection's to the switched telephone network.
12. A.T. & T. letter (unnumbered), dated December 6, 1968, advising it as to when further revisions will be made in A.T. & T. tariff FCC No. 260 (private-line service).
13. A.T. & T. letter (unnumbered), dated December 13, 1968, in reply to pleadings and comments filed in response to aforementioned new and revised tariffs.

APPENDIX B

Tel-Plan, Inc.—Comments on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 10, 1968.

Aeronautic Radio, Inc. (ARINC).—Comments on the proposed tariff revisions in tariff No. 260, filed December 6, 1968.

Charles W. Schweizer Associates, Inc.—Comments on the proposed tariff revisions in tariff No. 263, filed December 11, 1968.

The Data and Graphic Communications Section of the Electronics Industries Association petition.—Protesting and opposing proposed tariff revisions in tariff 263 and for investigation, filed December 2, 1968.

National Retail Merchants Association (NRMA).—Comments on the proposed tariff revisions in tariff No. 263, and request for acceptance of the tariff filing, filed December 2, 1968.

Bethlehem Steel Corp. et al.—Revised petition to reject certain tariff provisions in tariff No. 263, filed November 26, 1968, and supplemental petition to reject tariff filing, filed December 2, 1968.

TELCON Associates, Inc.—Comments on the proposed tariff revision in tariff No. 263, filed November 15, 1968, and a supplemental statement commenting on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 4, 1968.

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Computer Security Systems.—Petition objecting to certain revisions in tariff No. 263 and asking that they be rejected, filed December 3, 1968.

Photo Magnetic Systems, Inc.—Letter objecting to certain revisions in tariff No. 263, filed November 22, 1968, and a petition to reject certain provisions of tariff No. 263, filed December 2, 1968.

Ripley Co.—Comments on the proposed tariff revisions of tariff No. 263 and request for appropriate relief, filed December 2, 1968.

Small Business Administration.—Statement supporting the suspension and investigation of certain revisions in tariff No. 263, filed December 2, 1968.

Aerospace Industries Association of America, Inc. (AIA).—Petition for rejection of certain revisions of tariff No. 263 and for other relief, filed December 3, 1968.

United States.—Memorandum requesting investigation of a specific revision in tariff No. 263, filed December 2, 1968.

Altone Systems, Inc.—Petition for rejection of certain revisions in tariff No. 263, filed October 15, 1968, and a supplemental letter, filed December 2, 1968.

Xerox Corp.—Supplemental pleading withdrawing objection to certain revisions in tariff No. 263 and additional comments, filed November 29, 1968.

Microwave Communications, Inc. (MCI).—Petition to reject certain tariff revisions in tariff No. 263 and for other relief, filed December 3, 1968.

Thomas F. Carter, Carter Electronics Corp. and Carterfone Communications Corp.—Petition for rejection of tariff revisions or, in the alternative, for suspension, investigation, and hearing, and for other relief, filed December 2, 1968.

Plessey, Inc.—Petition for investigation of tariff Nos. 259, 260, and 263, filed December 4, 1968.

Marcom, Inc.—Supplemental petition to reject certain revisions in tariff No. 263 and comments on network control signaling, filed December 2, 1968.

Secretary of Defense (DOD).—Petition for suspension and investigation of certain tariff revision in tariff No. 263, filed December 2, 1968.

ACTION! Systems Co.—Comments on the proposed revisions in tariff No. 263, filed November 29, 1968.

National Committee for Utilities Radio (NCUR).—Supplemental petition for rejection of certain revisions in tariff No. 263, filed December 3, 1968.

International Telephone & Telegraph Corp. (ITT).—Supplemental petition for rejection in certain tariff revisions or, in the alternative, suspension, investigation, and hearing, filed November 29, 1968.

Magnavox Co.—Petition to reject certain revisions in tariff No. 263, and for other relief, filed November 27, 1968.

American Trucking Association (ATA).—Petition to reject certain proposed tariff revisions in tariff No. 263, filed November 29, 1968.

Business Equipment Manufacturers Association (BEMA).—Supplemental petition to reject certain proposed tariff revisions in tariff No. 263, filed November 27, 1968.

American Petroleum Institute.—Comments on proposed tariff revisions and requests for acceptance of the tariff filing, filed November 27, 1968.

The American Bankers Association.—Comments concerning the revisions in tariff No. 263, filed November 27, 1968.

Western Data Products, Inc.—Letter commenting on the proposed tariff revisions, filed November 22, 1968.

American Trucking Association, Inc.—Petitions to reject proposed tariff revisions to tariff Nos. 259 and 260, filed December 12, 1968.

Magnavox Co.—Petition to reject proposed revisions in tariff No. 259, filed December 17, 1968.

Business Equipment Manufacturers Association (BEMA).—Comments on the proposed revisions to tariff Nos. 259 and 260, filed December 18, 1968.

Bethlehem Steel Corp. et al.—Petitions to reject proposed revisions in tariff Nos. 259 and 260, filed December 17, 1968.

APPENDIX C

Technical Criteria for All Terminals and Systems Connected by Direct Electrical Connection, Effective January 1, 1969

i. The power of the signal at the central office shall not exceed 12 db below 1 mw when averaged over any 3-second interval.

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ii. The signal at the telephone company interface located on the customers' premises shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.
2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.
3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.
4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.
5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.
6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

APPENDIX D

TECHNICAL CRITERIA FOR ALL TERMINALS AND SYSTEMS CONNECTED BY ACOUSTIC OR INDUCTIVE MEANS, EFFECTIVE JANUARY 1, 1970

i. The power of the signal at the output of the network control signaling unit shall not exceed 9 db below 1 mw when averaged over any 3-second interval, and such signal at such output point shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.
2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.
3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.
4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.
5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.
6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

Carterfone Tariffs

(In the matter of A.T. & T. "Foreign Attachment" tariff revisions—Nos. 259, 260, 263)

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The 11-year-long saga of the *Carterfone* case involves, in general, the competitive structuring of this country's communications network. A small manufacturer, Tom Carter, sought to market an invention enabling the user to couple a telephone handset to a mobile radio transmitter. The telephone company, through its jingoist-titled "foreign attachment" tariff, opposed his efforts. For A.T. & T. has consistently held to the position that it is entitled to a monopoly not only of the Nation's switching system and communications lines, but of all consumer equipment "attached" to its system as well. (A distant analogy might be suggested if an electric power company were to insist on a monopoly of the manufacture, installation, and repair of toasters, television sets, and all other electrical appliances that could be plugged into an electric wall socket.) Yielding not an inch, A.T. & T. has consistently and successfully fought off for years the Tom Carters of the communications industry.

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But Tom Carter persisted. For 11 long years he persisted. And then, finally, earlier this year, the FCC held the foreign attachment tariffs illegal and authorized Tom Carter to go ahead with the sale of his device. *Carterfone*, 13 FCC 2d 420 (1968). The Commission's opinion was heralded as a commendable effort to open up competition in the communications business.

As experienced reformers have long since discovered, however, the political victories that are won after long struggle under the light of public scrutiny can be very quickly lost in the dark backrooms of practical implementation. The new legislation or agency decision is praised and then forgotten. And when—if ever—anyone goes back to see how it all worked out he finds the situation very little changed from before. The swamp waters have returned to their former level.

And so it was, shortly after the Commission's *Carterfone* decision, that A.T. & T. petitioned for a stay of its effectiveness and for a reconsideration of the decision. The Commission's Common Carrier Bureau did not oppose the stay, and the Commission granted it until November 1, 1968—over the dissents of Commissioner Cox and myself. *Carterfone*, 14 FCC 2d 149, 151 (1968). When the Commission affirmed its decision on reconsideration, *Carterfone*, 14 FCC 2d 571 (1968), the telephone company went to court. Subsequently, A.T. & T. asked for and was granted, another extension of the stay of the effective date of the decision from November 1, 1968, to January 1, 1969. *Carterfone*, 15 FCC 2d 31 (1968).

All these delaying tactics are well known, and fully exercised by A.T. & T. What A.T. & T. had not counted on, however, was that its first tariff proposal would be watched by small businessmen from across the country in addition to Mr. Carter—and that they would send up howls of protest when they saw what A.T. & T. was trying to do. For A.T. & T.'s first proposals were designed to be drawn very narrowly in an effort to render this landmark decision of limited practical effect.

Having been publicly caught in this untenable posture, Bell quickly shifted to its present position. It has now offered tariffs which are somewhat more liberal—but it insists that from now on all proceedings be conducted off the record.

These new tariffs raise three separate questions. First, who is to own and control the network signaling device—the dial mechanism that imparts control signals to the telephone system? Bell argues that only it can control this part of the overall telephone system. International Telephone & Telegraph sees no reason why the domestic telephone handset market should be a virtual monopoly. The Department of Justice believes the Commission should formally investigate this question. The majority concludes that a tariff bar against a customer-provided network control device is not in violation of the *Carterfone* ruling. It is my view that such a bar does violate the spirit of *Carterfone* and its reasonableness should be investigated in a formal proceeding.

Secondly, there is the question of how well these new tariff provisions are going to work, what their effect will be, and what the literal words of the tariff mean operationally. This is the arena, of course,

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in which this ballgame will ultimately be won or lost. Disagreement between the parties is most likely in view of the past history of the foreign attachment question.

Finally, a number of parties have raised specific questions about parts of the tariffs Bell has filed. Arguments are made that specific provisions are unnecessarily rigid, too tightly drawn, or exclude equipment arbitrarily. The majority is allowing these tariffs to go into effect without approving them and says that these specific questions on the tariffs will be taken up in the informal proceedings. But a tariff is an application by Bell to do business in a certain way. The majority may not be giving its legal imprimatur to the Bell tariffs, but the fact remains that Bell is now free to do business under these tariffs until it decides to make a change, or the Commission again is forced to institute formal proceedings. I would prefer to have Bell respond formally to each objection to the tariffs posed by private groups, and would hope that the Common Carrier Bureau would make its own evaluation of the public interest factors on a formal record to be presented to the Commission.

We are now confronted with a proceeding in which virtually every party—other than the telephone company and the Common Carrier Bureau—opposes part or all of these tariffs. And yet they are allowed to go into effect, with differences to be resolved in informal closed-door sessions.

I cannot agree that the validity of the telephone company's refusal to permit subscribers to provide their own telephones purchased in a free market is a question which can appropriately be determined through informal discussions. The *Carterfone* case is a testimony to the tenacity of the little fellow who won out over a procedural system which for years permitted the telephone companies to monopolize the connection of private communications systems with the telephone network. While the *Carterfone* decision does much good in permitting beneficial interconnection, the Commission's present treatment of a far more important question will result only in unnecessary delay before it can be resolved. It is tough enough for the little operator to win out in formal proceedings before this Commission and the courts. It is virtually impossible without such protections.

No one will disagree with the importance of the issue presented by the insistence of A.T. & T. and the other telephone companies that they must be the sole provider of all equipment which initiates signaling. But this issue, of such great importance to every telephone company subscriber, is now on the road to being settled through a process in which the ordinary person will have no effective voice and of which, indeed, he is likely to be totally unaware. The telephone companies will be well represented. Large corporations seeking more flexibility in the use of telephone facilities will be well represented. The ordinary person who cannot understand why he should not be permitted to buy his own telephone will not be represented at all, except indirectly by some other party or by the "referee" Commission staff.

I recognize that the entire process of reviewing telephone company tariffs is not conducive to ordinary consumer participation. This makes it all the more important that a question so vitally affecting the ordi-

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nary consumer be examined and decided under the light of day in fully public proceedings rather than in informal negotiations. It seems highly unlikely that negotiations can lead to any substantial changes in the telephone company's position on this issue. Therefore, if there is any doubt as to whether the proposed tariff provisions are unreasonable, the question must be explored in a full hearing under section 205 of the communications act, since Commission action to remedy an unreasonable tariff must be after hearing. There is no point in not instituting such a hearing at the outset, and the failure to do so can only result in unnecessary delay. Informal procedures have no advantage over the formal hearing process in this situation. This is not a negotiation among sovereigns where forcing a party to take a public position may make it more difficult for him to back off gracefully. It is a matter for decision by a public body entrusted with the duty to make a decision, and with the power to enforce it. Furthermore, the *Carterfone* proceeding furnishes ample evidence that the hearing process is an excellent means of testing technical claims.

I do not urge that the proposed tariffs must necessarily be rejected or suspended. I do urge that it is a great mistake to enter upon this new exploration to which *Carterfone* was a prelude in a semiprivate bargaining session rather than in the full hearing process in which the public may justifiably have confidence.

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FCC 68-1197

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF ANDERSON BROADCASTING SERVICE, LICENSEE OF RADIO STATION KVLH, PAULS VALLEY, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration its notice of apparent liability dated August 15, 1968, addressed to Anderson Broadcasting Service, licensee of radio station KVLH, Pauls Valley, Okla.

2. The notice of apparent liability in the amount of $200 was issued for violation of section 1.539(a) of the rules in that the licensee did not file a renewal application at least 90 days prior to the expiration date of the license. A renewal application was due on or before March 4, 1968, but it was not filed until June 3, 1968, 91 days beyond the due date.

3. The notice of apparent liability was mailed to the licensee on August 15, 1968, by certified mail—return receipt requested. Although the return receipt indicates that the licensee received the notice on August 19, 1968, the licensee failed to reply to the notice within the 30-day period prescribed by section 1.621 of the Commission's rules, and has not made reply subsequent to the expiration of the 30-day period.

4. In the absence of a response and in light of the matter set forth in the notice of apparent liability, we find that the licensee willfully and repeatedly violated section 1.539(a) of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended and section 1.621(b) of the Commission's rules,[1] *It is ordered*, That Anderson Broadcasting Service, licensee of radio station KVLH, *Forfeit* to the United States the sum of $200 for willful and repeated failure to observe section 1.539(a) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or re-

[1] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee . . . fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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mission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order.*

6. *It is further ordered,* That the Secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested, to Anderson Broadcasting Service, Pauls Valley, Okla.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

15 F.C.C. 2d

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FCC 68-1199

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF ARMAK BROADCASTERS, INC., LICENSEE OF RADIO STATION KBAM, LONGVIEW, WASH.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration its notice of apparent liability dated March 18, 1968, addressed to Armak Broadcasters, Inc., licensee of radio station KBAM, Longview, Wash.

2. The notice of apparent liability in the amount of $200 was issued for violation of section 73.114 of the rules in that the licensee failed to make entries in the program log from August 8, 1967, to September 14, 1967.

3. The notice of apparent liability was mailed to the licensee on March 18, 1968, by certified mail—return receipt requested. Although the return receipt indicates that the licensee received the notice on March 21, 1968, the licensee failed to reply to the notice within the 30-day period prescribed by section 1.621 of the Commission's rules, and has not made reply subsequent to the expiration of the 30-day period.

4. In the absence of a response and in light of the matter set forth in the notice of apparent liability, we find that the licensee willfully and repeatedly violated section 73.114 of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of the Commission's rules,[1] *It is ordered*, That Armak Broadcasters, Inc., licensee of radio station KBAM, *Forfeit* to the United States the sum of $200, for willful and repeated failure to observe section 73.114 of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order*.

[1] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee . . . fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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6. *It is further ordered*, That the Secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested, to Armak Broadcasters, Inc., licensee of radio station KBAM, Longview, Wash.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

15 F.C.C. 2d

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FCC 68-1200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF AVLIN, INC., LICENSEE OF RADIO STATION KALV, ALVA, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration its notice of apparent liability dated July 24, 1968, addressed to Avlin, Inc., licensee of radio station KALV, Alva, Okla.

2. The notice of apparent liability in the amount of $200 was issued for violation of section 73.47(b) of the rules in that at the time of inspection on October 16, 1967, the latest equipment performance measurements available were dated May 22, 1966.[1]

3. The notice of apparent liability was mailed to the licensee on July 24, 1968, by certified mail—return receipt requested. Although the return receipt indicates that the licensee received the notice on July 30, 1968, the licensee failed to reply to the notice within the 30-day period prescribed by section 1.621 of the Commission's rules and has not made reply subsequent to the expiration of the 30-day period.

4. In the absence of a response and in light of the matter set forth in the notice of apparent liability, we find that the licensee willfully and repeatedly violated section 73.47(b) of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of the Commission's rules,[2] *It is ordered*, That Avlin, Inc., licensee of radio station KALV, *Forfeit* to the United States the sum of $200 for willful and repeated failure to observe section 73.47(b) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be

[1] Sec. 73.47(b) of the rules provides as follows: "The data required by par. (a) of this section together with a description of instruments and procedure, signed by the engineer making the measurements, shall be kept on file at the transmitter and retained for a period of 2 years, and on request shall be made available during that time to any duly authorized representative of the Federal Communications Commission."

[2] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee . . . fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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filed within 30 days of the date of receipt of this *Memorandum Opinion and Order.*

6. *It is further ordered*, That the Secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested to Avlin, Inc., licensee of radio station KALV, Alva, Okla.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R-522

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BERWICK BROADCASTING CORP., BERWICK, PA.	Docket No. 17884 File No. BPH-5812
P.A.L. BROADCASTERS, INC., PITTSTON, PA. For Construction Permits	Docket No. 17885 File No. BPH-5924

MEMORANDUM OPINION AND ORDER

(Adopted December 16, 1968)

By THE REVIEW BOARD:

1. Berwick Broadcasting Corp. (Berwick), and P.A.L. Broadcasters, Inc. (PAL), are mutually exclusive applicants seeking a construction permit for an FM broadcast station in Berwick and Pittston, Pa., respectively. By *Order*, FCC 67-1289, released December 19, 1967, the Commission designated the applications for consolidated hearing on a limited financial issue against Berwick, and areas and populations and section 307(b) issues. The issues in this proceeding were subsequently enlarged by the Review Board to include a "suburban community" issue against PAL (*Memorandum Opinion and Order*, 12 FCC 2d 8, 12 R.R. 2d 665 (1968)), and a rule 1.65 issue against Berwick to determine whether Berwick possesses the requisite qualifications to be a Commission licensee (*Memorandum Opinion and Order*, 12 FCC 2d 175, 12 R.R. 2d 771 (1968)).[1] On April 26, 1968, Berwick and PAL filed their first joint petition for approval of agreement which contemplated dismissal of the Berwick application, reimbursement to Berwick in an amount not to exceed $8,981.92 for out-of-pocket expenses incurred in the preparation and prosecution of its application; favorable resolution, on the basis of submitted pleadings, of the outstanding issues in this proceeding; and a grant of the PAL application. By *Memorandum Opinion and Order*, 14 FCC 2d 132, 13 R.R. 2d 1073 (1968), the Board denied the joint petition since the reimbursement provisions of the agreement were not conditioned on favorable resolution of the outstanding character issue against Berwick; and resolution of said issues were not possible on the basis of the submitted pleadings.[2] Presently before the Review Board is a second joint petition for approval of agreement, filed September 26, 1968,

[1] In the latter order the Board provided that in the event of a grant of the Berwick application, such grant would be without prejudice to whatever action, if any, the Commission might deem appropriate as a result of various pending civil suits involving Berwick principals.

[2] Inasmuch as the rule 1.65 issues could not be resolved, questions relating to substantiation of expenses, publication and disposition of the "suburban community" issue against PAL were not reached.

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by Berwick and PAL, which incorporates by reference petitioners' first joint petition and responsive pleadings thereto.[3]

2. Although the language of the instant agreement is somewhat ambiguous, petitioners have indicated that reimbursement of the expenses, discussed hereinafter, will be conditioned on favorable resolution of the outstanding character issues against Berwick. Under these circumstances the Board will consider the merits of the instant agreement. *Miss Lou Broadcasting Corp.*, 11 FCC 2d 589, 12 R.R. 222 (1968); *Rovan Television, Inc.*, 9 FCC 2d 899, 11 R.R. 2d 108 (1967). The expenses for which reimbursement is sought have been adequately substantiated by Berwick;[4] affidavits setting forth the exact nature of the consideration involved and details of the initiation and history of the negotiations have been furnished;[5] and petitioners submit that approval of the instant agreement would be in the public interest in that it would obviate the need for an extended hearing and expedite the inauguration of a new FM service. Thus, petitioners have complied with the requirements of rule 1.525. However, as noted above, prior to approval of the reimbursement provisions of the instant agreement, the outstanding character qualifications issue specified against Berwick would have to be resolved. See *John A. Egle*, FCC 63–953, 1 R.R. 2d 344, released October 17, 1963.[6]

3. The Board is unable to make a determination that withdrawal of the Berwick application would not unduly impede the objectives of section 307(b) of the communications act. The record reveals that both applicants propose first local FM facilities for communities of substantially similar size, in which one other broadcast facility is presently operating. PAL's service area has a minimum of three and a maximum of six existing FM services available; Berwick's service area has a minimum of four and a maximum of seven existing FM services available. However, as noted by the Bureau, Berwick is not located within any urbanized area, while PAL's station location, Pittston, is within the Wilkes-Barre urbanized area. It may, therefore, be that Berwick is significantly more important to the communities within its proposed service area than is Pittston. The importance of communities to their surrounding areas has been held to be of substantial and decisive importance.[7] Absent a showing by petitioners with regard to this question, the Board is unable to find that the withdrawal of the Berwick application would not unduly impede the objectives of section

[3] Also under Board consideration are comments, filed Oct. 16, 1968, by the Broadcast Bureau, and reply, filed Nov. 8, 1968, by Berwick and PAL.

[4] Petitioners originally requested approval of reimbursable expenses of $8,981.92; the instant petition excludes a request for reimbursement of a $1,000 expense for the cost of land acquisition which the Bureau had previously challenged. Although the Bureau now contends that the instant agreement fails to reflect such a change in the reimbursement requested, the agreement provides for reimbursement of all expenses "legitimately and prudently incurred by [Berwick] in preparing, filing and advocating the grant of its application," and it is apparent that the petitioners now concur in the Bureau's contention that the subject expense, previously claimed, was unjustified.

[5] The pertinent affidavits were filed with the first joint petition and the reply to the Bureau's comments thereto.

[6] Substantial questions have been raised as to Berwick's eligibility for reimbursement in light of the proceedings in *Securities and Exchange Commission* v. *Fifth Avenue Coach Lines, Inc., Victor Muscat, Edward Krock, Thomas A. Bolan and Roy M. Cohn*, 67 Civ. 4182 (S.D.N.Y. 1968), and in light of recent press reports concerning the indictment of Roy Cohn, one of Berwick's principals. Favorable resolution of this question would also be required prior to permitting reimbursement.

[7] See *Radio Haddonfield, Inc.*, 37 FCC 168, 3 R.R. 2d 25 (1964); *Pioneer States Broadcasters, Inc.*, 34 FCC 625, 25 R.R. 221 (1963).

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307(b) of the communications act. Pursuant to rule 1.525(b), publication will, therefore, be required. In the event that no application is filed pursuant to publication and Berwick's application is dismissed, the suburban community issue previously specified will be deleted.

4. Accordingly, *It is ordered*, That action on the joint petition under section 1.525 of the Rules, filed by Berwick Broadcasting Corp. and P.A.L. Broadcasters, Inc., on September 26, 1968, *Is held in abeyance;* that further opportunity be afforded for other persons to apply for the facilities specified in the application of Berwick Broadcasting Corp.; and that Berwick Broadcasting Corp. will, therefore, comply with the provisions of section 1.525(b)(2) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1179

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF PART 91 OF THE COMMISSION'S RULES TO REQUIRE FREQUENCY COORDINATION IN THE BUSINESS RADIO SERVICE	Docket No. 18406
PETITION OF CENTRAL STATION ELECTRICAL PROTECTION ASSOCIATION, AND CONTROLLED COMPANIES, AMERICAN DISTRICT TELEGRAPH COMPANY AND BAKER INDUSTRIES, INC., TO AMEND PART 91 OF THE COMMISSION'S RULES TO ESTABLISH AN INDUSTRIAL PROTECTION RADIO SERVICE AND TO REQUIRE COORDINATION OF FREQUENCIES ALLOCATED TO THE CENTRAL STATION PROTECTION INDUSTRY	RM-1267
PETITION OF NATIONAL ASSOCIATION OF BUSINESS AND EDUCATIONAL RADIO, INC. (NABER) TO AMEND SECTION 91.8 OF THE COMMISSION'S RULES TO REQUIRE FREQUENCY COORDINATION FOR APPLICATIONS REQUESTING ASSIGNMENT OF FREQUENCIES IN THE 450-470 MHz BAND ALLOCATED FOR USE IN THE BUSINESS RADIO SERVICE	RM-1302

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the petition for rulemaking (RM-1267) filed on March 7, 1968, by the Central Station Electrical Protection Association, and the controlled companies, American District Telegraph Co. and Baker Industries, Inc. (referred to collectively herein as "CSEPA"); the petition for rulemaking (RM-1302) filed on May 3, 1968, by the National Association of Business and Educational Radio, Inc. (NABER); comments in opposition to NABER's proposals, filed on June 20, 1968, by Maximum Service Telecasters, Inc. (MST);[1] and NABER's reply to MST's comments, filed July 5, 1968.[2]

[1] MST's opposition was filed one day beyond the time period allowed for such pleadings, see section 1.405 of the rules. Since its opposition was not unduly late and there is no apparent prejudice to NABER or any other party, we are waiving the requirements of section 1.405 of the rules and will consider the MST pleading.

[2] NABER's reply is supported in general by arguments advanced by it in its rulemaking petition. These mattters, and those advanced by NABER and by MST in opposition, are disposed of consistent with our opinion and the actions taken herein.

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2. CSEPA asks the Commission, through rulemaking, to establish a separate service for the central station protection industry and reallocate to it the five frequency pairs made available for its use in the proceedings in docket No. 13847 (*Frequency Allocations—450–470 Mc/s Band*, 11 FCC 2d 648, 653 (1968)) or, alternatively, to amend section 91.8(a)(1)(vii) of the rules and require frequency coordination for applications for protection industry frequencies. (See appendix, attached.)[1] Pending consideration of these proposals, CSEPA asks the Commission to issue a public notice requiring frequency coordination for these applications.

3. Along similar, but much broader lines, NABER proposes amendment of section 91.8(a)(1)(vii) of the rules to require frequency coordination uniformly for all applications in the business radio service proposing use of frequencies in the 450–470 MHz band. (See appendix, attached.) See *Frequency Allocations—450–470 Mc/s Band*, supra, at page 657. In this connection, it asks the Commission to recognize NABER as frequency coordinator for this purpose, except as to applications for frequencies for central station protection industry and air terminal use. Coordination as to the latter frequencies would be carried out, under its proposal, by the Central Station Industry Frequency Advisory Committee and by Aeronautical Radio, Inc., respectively. Pending consideration of these proposals, like CSEPA, it asks the Commission to issue a notice "encouraging" frequency coordination by all applicants in the business radio service for use of frequencies in this band.

4. CSEPA's request that we institute rulemaking proceedings to consider the establishment of a separate service for the central station protection industry will be denied. Without detailing the arguments it has advanced in support of this proposal, we observe that the same request was considered and was denied in docket No. 13847 and again in docket No. 17891. *Frequency Allocations—450–470 Mc/s Band*, supra, at paragraphs 13–15, 35, 40–41; and *In re amendment of part 91 of the Commission's Rules, Report and Order* (FCC 68–657), docket No. 17891, adopted June 24, 1968, released June 25, 1968, 13 FCC 2d 713 (1968). In these circumstances, we believe no further consideration of this matter is warranted.

5. We will also deny CSEPA's and NABER's requests that interim measures be adopted to make mandatory or encourage frequency coordination for the protection industry and for the business radio service. Such action, in our view, would require a tentative determination that the amendments proposed would serve the public interest without the benefit of any comments that may be filed in this proceeding. Further, there does not seem to be sufficient urgency to justify such action in as much as some type of voluntary coordination is being conducted

[1] The frequencies for the central station industrial protection industry were made available in the business radio service (subpart L of pt. 91), where, except in a few special cases, frequency coordination is not now required. See sec. 91.8(a)(1)(vii) of the rules. Adoption of CSEPA's proposal to establish a separate radio service for the protection industry would bring into force the provisions of sec. 91.8(a) of the rules, which require frequency coordination of applications in other industrial radio services (pt. 91). Thus, if its suggestion for establishment of this separate service were adopted, frequency coordination for applications for industrial protection frequencies would become mandatory without any further rule amendment.

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at the local level, and both NABER and CSEPA can encourage further coordination among their members.

6. In support of its proposal for frequency coordination in the business radio service, NABER argues that prior coordination of authorizations in this service would foster improved utilization of the allocated frequencies; result in better engineered radio systems; reduce interference in many cases; and, in general, promote the more efficient use of mobile radio communications facilities authorized in the business radio service.

7. More specifically, NABER points out that the allocation of new frequencies in the 450–470 MHz band to the business radio service unencumbered by debilitating congestion affords a good opportunity for inaugurating coordination in this service. Further, NABER states, the Commission's decisions in the *Second Report and Order* (FCC 68–128) in docket No. 13847, relating to 5 MHz spacing and reallocation of frequencies, the compliance date for which is January 1, 1970, present difficult transitional problems, and urges that coordination, instituted at an early date would facilitate a more orderly readjustment in assignments and would minimize confusion and any attendant interference difficulties.

8. If recognized as a frequency advisory committee, as it asks, NABER plans to coordinate business applications for frequencies in the 450–470 MHz band, except for applicants for air terminal and central station protection industry assignments. Under its proposal, as mentioned, applications for those frequencies would be coordinated by committees within those industries.

9. As to the other business services, NABER plans to process coordination requests at its Washington headquarters and issue frequency recommendations from there, although local area coordinating committees will be advised of all requests and will be asked to submit recommendations. For this service, NABER will assess a fee, but it has not determined the amount it will charge.

10. MST, while it agreed that effective coordination of radio frequencies is a desirable goal, doubted whether meaningful and effective coordination is possible in the business radio service. Further, it opposed recognition of NABER as a coordinator. It argued that NABER is not representative of the licensees in the business radio service in that its members account for a small percentage of the total number of business licensees and could not have intimate knowledge of their communications requirements, since, in MST's words, this service is a "hodgepodge of disparate users engaged in activities that have no relation to one another." MST argues further that the NABER petition "raises a serious question as to the appropriateness of having frequency coordination functions performed by a private organization that serves purposes other than frequency coordination and has goals other than the more efficient use of existing * * * frequencies."

11. The matter of coordination of business frequencies was considered when the service was established in 1958. The Commission, however, concluded that coordination would be impractical because of the anticipated heavy sharing of the frequencies allocated to the service by a large and nonhomogeneous group of potential users. See

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First Report and Order in docket 11991, FCC 58–602, page 30. There are now well over 100,000 business licenses outstanding and applications for new and modified facilities continue to flow at a rate of over 2,000 per month.[4] Under these circumstances, we wish comments as to whether coordination is indeed practical and as to whether it could make significant improvement in the efficiency in the use of business frequencies and in the quality of communication systems authorized in that service. Further, we note that coordination is not completely lacking. Applicants, with the aid of their equipment suppliers, perform some sort of coordination locally in that they attempt to select frequencies so as to minimize interference to and from existing systems.

12. On the other hand, we recognize, as NABER points out, that new frequencies have been made available to the business radio service in the 450–470 MHz band, and coordination could result in their more orderly assignment; and that more complicated operational standards for their use have been imposed, and formalized coordination may aid existing licensees and new applicants in implementing these new standards and frequency changes during the prescribed transitional period. Finally, the Commission has always encouraged efforts on the part of its licensees to improve the usefulness of the frequency spectrum allocated.

13. In view of these considerations, we believe, the issue raised by NABER's petition is whether coordination, such as proposed by NABER, would offer sufficient advantages in terms of more efficient use of business frequencies in the 450–470 Mc/s band and improved quality of communications to warrant the added effort, expense, and delays in preparing and processing applications for both the applicants and for the Commission. In addressing themselves to this question, interested persons are asked to discuss and to give information and views on the following matters: (1) the type of information that will and should be required of applicants; (2) the type of records that will and should be kept by the coordinator; (3) the approximate number and the qualifications of personnel required to process these requests; (4) how coordination should and will be performed (i.e., the criteria for a favorable—or unfavorable—recommendation, the procedures that will be followed in arriving at "optimum" frequencies, and the disposition that is to be made of controversial requests); (5) whether each coordination request will be examined on an engineering basis, taking into account such things as the technical parameters of the proposed system and existing systems with a view to fitting each new system into the existing technical environment; (6) the processing time for each coordinating request; (7) the approximate cost to the applicants for each coordination request; and (8) other such considerations.

14. In addition, interested persons should discuss, in some detail, the expected benefit of coordination in terms of the more efficient use of business frequencies and in terms of improved quality of communi-

[4] These applications, of course, are for frequencies in all of the bands available in the business radio service and NABER proposes coordination only in the 450–470 Mc/s band. But a substantial number of these applications are for 450–470 Mc/s frequencies and it is expected that the bulk of future applications will be in that band where new frequencies have recently been made available.

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cation systems particularly in view of the fact that frequencies in the business radio service are to be shared on an intensive basis, with many licensees being expected to use a given channel in a given area.

15. From the foregoing discussion, it is clear that, it would not be appropriate now to pass on NABER's request that it be recognized as a frequency coordinator for the business radio service. It would be premature to do so, when we have not determined whether to adopt the requirement for this service. Also, this course of action has the added advantage of affording interested parties, such as MST, an opportunity to comment on the points raised as to the qualifications of NABER to perform in this role and to suggest alternative procedures. Accordingly, we also ask that the comments address themselves to this aspect of NABER's proposal.

16. Frequency coordination for the central protection and air terminal frequencies stands on a different footing. The potential licensees for the frequencies allocated for these purposes are, in each instance, a relatively small and homogeneous group. Moreover, the channels made available to the central station protection and airline industries, although included in the business radio service, were allocated on an exclusive basis in urbanized areas of 200,000 or more population; and, additionally, in the case of the protection industry, two of the five frequency pairs were made available exclusively nationwide. Further, it is expected that relatively few air terminal and central protection licensees will share these frequencies in a particular area. These characteristics are similar to those present in the services where coordination procedures have been established.

17. These features persuade us that frequency coordination for the air terminal and central protection industries will be feasible and could lead to more efficient and effective management of the available spectrum space. Therefore, we are proposing to amend the rules as suggested by CSEPA, but modified to include like frequency coordination requirements for the air terminal frequencies. (See appendix, attached.)

18. Accordingly, *It is ordered*, That, to the extent indicated in the foregoing opinion, the petitions for rulemaking filed herein on March 7, 1968, by the Central Station Electrical Protection Association, and controlled companies, American District Telegraph Co., and Baker Industries, Inc., and on May 3, 1968, by the National Association of Business and Educational Radio, Inc., *Are granted*, and in all other respects, *Denied*.

19. *Notice is hereby given* of proposed rulemaking to amend section 91.8(a) (1) (vii) as set out in the attached appendix.

20. The proposed amendment to the rules is issued pursuant to authority contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

21. Pursuant to the procedures set out in section 1.415 of the Commission's rules, interested persons may file comments on or before February 7, 1969, and reply comments on or before February 24, 1969. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission

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may also take into account other relevant information before it, in addition to the specific comments invited by this notice.

22. In accordance with the provisions of section 1.419 of the Commission's rules, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Proposal of Central Station Electrical Protection Association, the controlled companies, American District Telegraph Co., and the Baker Industries, Inc., as modified, is as follows:

"It is proposed to amend present section 91.8(a)(1)(vii) of the Commission's rules by deleting present subsection (vii) and substituting new subsection (vii) to read as follows:

> "(vii) Any application in the business raido service, where the frequency involved and both immediately adjacent frequencies are available for assignment in that service, except for the frequencies allocated for the exclusive use by persons rendering a central station commercial protection service or by persons engaged in furnishing commercial air transportation service at air terminals, in accordance with the provisions of section 91.554(b) of this chapter."

Proposal of the National Association of Business and Educational Radio, Inc., is as follows:

"It is proposed to amend present section 91.8(a)(1)(vii) of the Commission's rules by deleting present subsection (vii) and substituting new subsection (vii) to read as follows:

> "(vii) Any application in the business radio service requesting a frequency below 450 Mc/s where the frequency involved and both immediately adjacent frequencies are available for assignment in that service."

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FCC 68R-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petitions by:	
CLEAR VISION TV CO. OF BESSEMER, BESSEMER, BRIGHTON AND BROWNVILLE, ALA.	Docket No. 18064 File No. CATV 100-47
TELVUE CABLE ALABAMA, INC., UNINCORPORATED AREA OF JEFFERSON COUNTY, SOUTH OF BIRMINGHAM, ALA.	Docket No. 18065 File No. CATV 100-238
JEFFERSON CABLEVISION CORP. HOMEWOOD AND IRONDALE, ALA.	Docket No. 18066 File No. CATV 100-242
For Authority Pursuant to Section 74.1107 of the Rules To Operate CATV Systems in the Birmingham, Ala., Television Market	

MEMORANDUM OPINION AND ORDER

(Adopted September 17, 1968)

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING IN THE CERTIFICATION TO THE COMMISSION.

1. This proceeding involves the above-captioned petitions which seek authority pursuant to section 74.1107 of the Commission's rules permitting the importation of distant television signals into various communities in the Birmingham, Ala., television market, currently ranked as the Nation's 40th largest television market. By *Memorandum Opinion and Order*, FCC 68-258, 12 R.R. 2d 662, the Commission waived the provisions of section 74.1107 of the rules in order to permit the cable systems to carry the UHF television station located in Tuscaloosa, Ala.; denied similar requests with regard to the importation of other distant signals; and ordered a consolidated hearing on issues which include the following:

> (1) To determine the present and proposed penetration and extent of CATV service in the Birmingham market.
> (2) To determine the effects of current and proposed CATV service in the Birmingham market upon existing, proposed, and potential television broadcast stations in the market.

On May 1, 1968, Clear Vision TV Co. of Bessemer (Clear Vision) filed a motion to clarify with the examiner, requesting clarification of the scope of proof imposed on the cable systems under the issues indicated above. Specifically, Clear Vision requested that the issues be clarified so as to "delineate the geographic boundaries of the Birmingham market." By *Memorandum Opinion and Order*, FCC 68M-868, 13 R.R. 2d 338, the examiner denied the motion to clarify, indicating that the geographic limits of the Birmingham market would be determined

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through the evidence adduced at hearing. Presently before the Review Board is an appeal from the examiner's adverse ruling, filed June 14, 1968, by Clear Vision.[1]

2. With respect to appeals from examiner's rulings, the Review Board has governed itself by the policy stated in the note to rule 1.301: "Unless the ruling complained of is fundamental and affects the conduct of the entire case, appeals should be deferred and raised as exceptions." See, e.g., *James S. Rivers, Inc.* (*WJAZ*), FCC 63R-436, 1 R.R. 2d 199; *National Broadcasting Co., Inc.*, FCC 63R-256, 25 R.R. 457. In the Board's view, however, the ruling challenged herein is of a fundamental nature and significantly affects petitioner's burden of proof under the existing issues. For these reasons the merits of the instant pleading will be considered.

3. In support of its appeal, Clear Vision argues that in a study of a CATV proposal within a top 100 market, the area of concern should be limited to CATV systems and television stations located within the composite grade A contour of the market. While petitioner recognizes the "lack of meaningful precedent" in this area, it nonetheless contends that it is within the pertinent market's grade A contour that UHF stations can be expected to develop, and that therefore only evidence relating to this portion of the market should be considered relevant under the designated issues.[2] In opposition, Taft argues in support of the examiner's ruling and contends that there is a difference between the use of the word "market" in rule 74.1107[3] and in the designated issues. Taft submits that rule 74.1107 reflects a rebuttable presumption that new UHF stations "must at least be able to rely upon an ability to provide service within the largest grade A contour for the market"; however, Taft argues, once a hearing is ordered and issues are specified, CATV impact on UHF stations can only be determined by full consideration of the *total* audience available to these stations. The Broadcast Bureau contends that the term "market," as used in the designated issues, is essentially an economic concept. The Bureau argues that "the economic base of market stations [and presumably the area in which developing UHF stations will seek support] has not been demonstrated to be limited to its composite grade A contour."[4] Contrary to petitioner's view, the Bureau submits that the ARB area of

[1] The other pleadings before the Board are: (a) opposition, filed June 26, 1968, by Taft Broadcasting Co. (Taft), licensee of television station WBRC-TV, Birmingham, Ala., and a party to this proceeding; (b) comments, filed June 26, 1968, by the Broadcast Bureau; and (c) reply, filed July 9, 1968, by Clear Vision.

[2] Petitioner also submits that despite the fact that Tuscaloosa, Ala., is located partially within the grade A contour of one Birmingham station, evidence relating to CATV impact in this area should not be required inasmuch as Tuscaloosa is a distinct market (ARB-222d market), 40 miles from Bessemer, which has an operating, network-affiliated UHF television station and an assigned UHF channel which will probably also secure a network affiliation.

[3] Rule 74.1107 reads in pertinent part:

"No CATV system operating in a community within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area.

[4] The bureau also notes that, although petitioner seeks to have Tuscaloosa separated from a consideration of the Birmingham market, Clear Vision was permitted to carry the Tuscaloosa station "since under the rules, it must be considered a market station."

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dominant influence (ADI)[5] represents the effective economic Birmingham television market.

4. As noted by petitioner, the Commission has not, as yet, had an opportunity to definitively specify the intended scope of the CATV market impact issues. In the Board's view, this matter involves novel and important issues of law and policy which warrant consideration by the Commission; therefore, the pleadings presently before the Board will be certified to the Commission for its determination. The Board has carefully reviewed the various methods of market analysis advanced in the instant pleadings. However, because of the varying views among the Board members, as to the intent to which either the composite grade A contour or the ARB area of dominant influence (ADI) should be utilized, the matter will be certified to the Commission. As an aid to the Commission, the results of this review are presented below.

5. In the *Second Report and Order* (on CATV regulation), 2 FCC 2d 725, 6 R.R. 2d 1717 (1966), reconsideration denied 6 FCC 2d 309, 8 R.R. 2d 1677 (1967), the Commission studied the recent trends in CATV and UHF development and noted that both services "are entering the larger markets, most often in an effort to bring programing that is not now available in those markets." While no final conclusion was drawn as to the effect of CATV development on UHF broadcasting in the major market, the Commission did indicate that:

> * * * there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals.

Thus, rule 74.1107 requires an evidentiary hearing in instances where a cable system, located within the grade A contour of a major market, proposes to import "distant" signals. In the *Second Report and Order*, supra, (footnote 63), the Commission indicated the reasons for specifying the grade A contour in the rule:

> * * * we think that this is an appropriate criterion since [the grade A contour] encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration.

In the reconsideration of the *Second Report and Order*, supra, the Commission stated that the use of this contour "coupled with the procedures for waiver, insures that all proposed distant signal CATV

[5] The ADI consists of counties assigned by ARB exclusively to a particular market on the basis of the highest total share of viewing hours in the county to all stations of a market.

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operations in the area of apparent reasonable concern are brought before us for consideration. * * *"

6. Once a distant signal hearing is ordered, and the market impact issues are specified, a question arises as to the extent and scope of the major market inquiry. In its simplest terms, the question posed is "what is the major market?" Various definitions have been advanced: (*a*) the American Research Bureau (ARB) total survey area; (*b*) the ARB area of dominant influence; and (*c*) the composite grade A contour of the major market stations. The ARB total survey area usually includes television families which represent 98 percent of the net weekly circulation [6] of any market station. The ARB area of dominant influence is a relatively new method of measurement which assigns counties to a particular market on the basis of highest total share of viewing in the county of market stations. The composite grade A contour represents the predicted grade A contours of all central-city stations. With respect to the Birmingham, Ala., television market it may be noted that there are eleven cities, excluding Birmingham, within the ARB total survey area to which television channels have been allocated; nine of these cities have operating stations. Of the nine, six are exclusively UHF (including one with a pending application); seven of the nine cities are beyond the composite grade B contour; and the same seven are also beyond the ADI. Between the outer limits of the grade A and the grade B contours there is one city (Anniston) for which an applicant has received a construction permit; additional allocations have been made to two cities (Gadsden and Munford). There is also an operating station in Tuscaloosa, located within the composite grade A contour. The last four cities mentioned are also located within the Birmingham ADI. In regard to cities in the ARB Total Survey Area with existing CATV operating systems (a total of 32), 21 are beyond the composite grade B contour, and 19 outside the ADI area: nine such systems (27 percent) are between the composite grade A and B contours, and two (6 percent) are within the composite grade A contour, and 14 (42.4 percent) are within the ADI.

7. Appendix I to this opinion shows that the Birmingham total survey area extends to a maximum distance of 140 miles from the city of Birmingham. Because of the substantial distances to which this area extends (this area includes much of northern Alabama and portions of Mississippi and Tennessee), and in light of the limited circulation that the central city stations have in this area, the Board is of the view that evaluation of the total survey area would not be helpful in developing meaningful data concerning the designated impact issues.

8. In support of the use of the composite grade A contour, it could be argued that various portions of the area of dominant influence might also be considered too remote to be meaningfully relevant. Thus, while the ADI extends 110 miles from the city of Birmingham, the grade B contours of Birmingham UHF stations do not extend beyond approximately 48 miles from the city. As noted in appendix III, there is very

[6] Net weekly circulation is the estimated number of different television households viewing a particular station at least once per week, Monday through Sunday, 6 a.m. to 2 a.m., e.s.t. The 100 major market rankings are determined on the basis of net weekly circulation.

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little CATV penetration in the immediate area of Birmingham (within the composite grade A contour there are CATV systems in Tuscaloosa and Talladega); whereas beyond the grade A contour (beyond a distance of approximately 50 miles (see app. I)), there is substantial penetration—a total of 31 lying outside the grade A contour. To require a petitioning CATV system to make a showing beyond the composite grade A contour of the existing Birmingham stations may produce a record containing much data which bears little relationship to the critical question of impact. Thus, in *T–V Transmission, Inc.*, FCC 67–1000, 11 R.R. 2d 123, the Commission seemingly indicated that the composite grade A contour is the outer limits of the area with which the Commission is concerned. In that case the Commission dealt specifically with the essential area within which new UHF operations would be based and where the provisions of rule 74.1107 would apply.[7] Furthermore, the Commission requires petitioners seeking waiver of hearing requirements of rule 74.1107 to "develop the available facts concerning the cumulative effect of operation of (the subject) system together with all other systems (in operation or proposed) similarly situated in the pertinent predicted grade A area. * * *" *Central New York Cable TV, Inc.*, 11 FCC 2d 150, 11 R.R. 2d 1065 (1967).[8] If immediate importation of distant signals is permissible through a waiver of the rules, based on a grade A contour showing, it might be inconsistent to impose a more severe burden on the CATV at the commencement of a hearing seeking similar authority. It is also important to note that, under our present rules, a CATV system operating outside the grade A contours of stations in top-100 television markets is not prohibited from importing distant signals. *Vumore Video Corp. of Colorado, Inc.*, 12 FCC 2d 955, 13 R.R. 2d 569 (1968).

9. It may be argued that the above-cited references made to the grade A contour merely reflect the Commission's selection of this contour as the usual line of demarcation in determining whether a hearing

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[7] In paragraph 3, the Commission said:

"Bi-States fails to distinguish between two separate concepts—(*a*) market rank and (*b*) essential area of new UHF operations—and the fact that we have adopted a different standard to measure each, for different purposes.

"(*a*) In the Second Report and Order[3] we determined that CATV entry into major markets poses public interest questions appropriate for consideration in evidentiary hearings. The top-100 markets, based on total net weekly circulation, were selected because 'it is in these markets that UHF stations * * * are most likely to develop * * *' and because the top 100 markets include roughly 90% of the nation's television homes. Para. 144, Second Report and Order, ibid.; para. 27, Reconsideration of the Second Report and Order, FCC 67–37, 6 R.R. 2d 309 (1967).

"(*b*) It was then determined that the predicted Grade A service area was the 'essential area upon which new UHF development *in the market* would be based * * *' N. 63, Second Report and Order, supra. (Emphasis added.) The scope of the distant signal hearing policy is thus limited to the predicted Grade A service area *within* each of the top-100 markets; it was not intended to include the entire market.[5]

Thus, while the rank of an individual ARB market may include circulation from the Grade B service area of satellites as well as parent stations, such circulation figures established ARB rank only. The areas from which the circulation figures are drawn do not establish and are not co-extensive with the 'essential area' in which new UHF operations would be based and where the hearing provisions of § 74.1107 apply.

* * * * * * *

"[5] The suggestion that the scope of § 74.1107 be enlarged to include the areas within the Grade B contours (the end result of petitioner's theory) was specifically rejected upon reconsideration of the Second Report and Order."

(Footnote 2 omitted.)

[8] See also the Commission's consideration of the original waiver petitions in *General Electric Cablevision Corp.*, 7 FCC 2d 592, 9 R.R. 2d 1325 (1967).

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will be required under rule 74.1107. The grade A contour, however, does not necessarily encompass the exclusive area within which public interest questions may arise. Thus, once distant signal importation is proposed within the grade A contour, and the rule becomes operative, a full evidentiary hearing is generally required to determine whether the proposal is consistent with "the establishment and healthy maintenance of television broadcast service *in the area.*" [Emphasis added.] See pertinent text of rule 74.1107, footnote 3. It is also significant to note that neither this portion of the rule nor the designated "market impact" issues specify the grade A contour as the sole area of inquiry. As previously noted, the Commission has concluded that both CATV and UHF facilities are entering the major markets in an effort to provide essentially nonnetwork programing. See *Second Report and Order*, *supra*, pp. 1772–1774. In order to evaluate the present and projected economic base for independent service in the major market, it thus becomes essential to determine the extent of the available nonnetwork audience; neither such an audience nor the economic base of a market is necessarily located exclusively within the grade A contour of that market. Rather, the effective economic base of a major market may be more precisely reflected in the ARB area of dominant influence, for it is in these counties that a majority of the viewers watch the central-city stations, and it is from these counties that existing, proposed, and potentially more powerful UHF stations will seek viewer and economic support.[9] By adopting the ADI as its market standard, the Commission would evidence its concern for the protection of UHF development, not only within the central cities of the major markets, but also in the area which presently provides support for existing market stations.[10]

10. The ultimate policy question thus becomes—"What is the extent of the area within which the Commission is prepared to afford some form of protection to UHF broadcasting from CATV development?" While resolution of this question may be found in one of the alternatives discussed herein, it may be that the Commission will seek still another approach to the problem presented. In any event, as noted above, the Board has considered the arguments advanced by the parties in an effort to aid the Commission in its deliberations.

11. Accordingly, *It is ordered*, That the above-cited pleadings *Are hereby certified* to the Commission for its determination.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[9] It should be noted that, according to ARB, Tuscaloosa falls within the Birmingham ADI and station WCFT–TV, located in Tuscaloosa, is not dominant even in its home county.

[10] Nor, as might be inferred from the facts of the instant case, would the selection of this market definition necessarily impose upon petitioning CATV's a more difficult standard of proof or even a more extensive geographic area within which such proof would be required. Quite aside from the fact that ADI's are not in all cases geographically larger than composite grade A's, it is important to note that there are a number of major markets wherein grade A contours encompass significant areas, rural and urban, in addition to those which are included in the ADI or even the total survey area.

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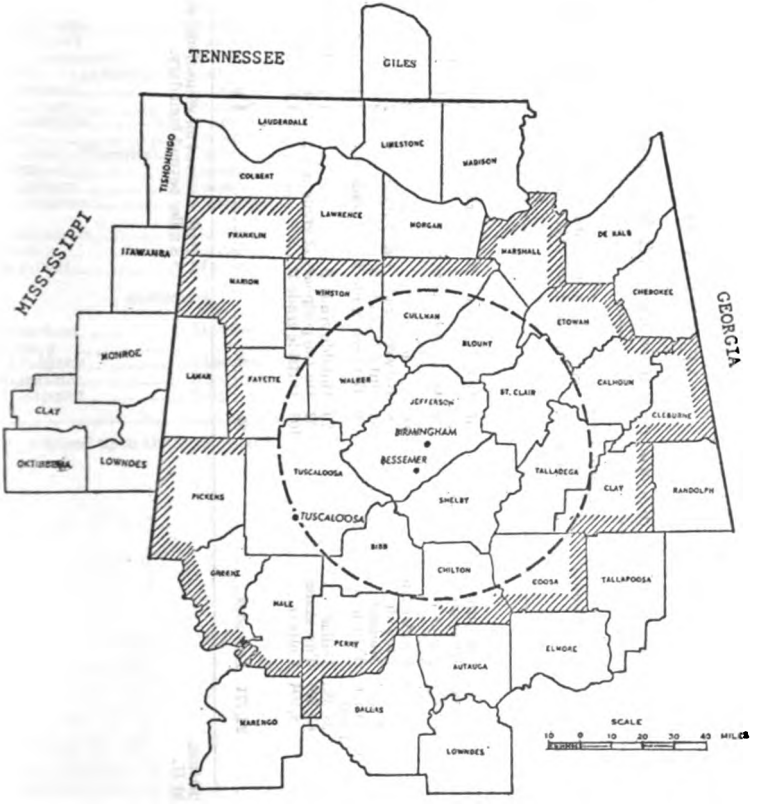
APPENDIX I

BIRMINGHAM, ALABAMA MARKET - ARB "TOTAL SURVEY AREA"

solid lines = State boundaries
shaded lines = ARB "Area of Dominant Influence"
circle = composite Grade A contour of Birmingham stations



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APPENDIX II

Cities with TV assignments within the ARB Birmingham total survey market

Cities	1960 [1] population	County	Approximate miles from Birmingham	Location as to contours of the Birmingham VHF stations	Number of channels assigned	Number of operating stations	Within ADI	CATV system in operation
ALABAMA								
Anniston	33,657	Calhoun	57	Between grade A and grade B	1 U	1 U(cp)	Yes	Yes.
Birmingham	340,887	Jefferson			3 Vs, 4 Us	3 Vs, 1 U, 1 U [2] (cp)		
Decatur	29,217	Morgan	78	Outside grade B	1 U	1 U	No	Yes.
Demopolis	7,377	Marengo	95	do	1 U	1 pending U	No [3]	Yes.
Florence	31,649	Lauderdale	106	do	3 Us	2 Us, 1 U(cp)	No	Yes.
Gadsden	58,088	Etowah	58	Between grade A and grade B	2 Us		Yes	Yes.
Huntsville	72,365	Madison	88	Outside grade B	4 Us	3, 1 pending U	No	Yes.
Munford	Less than 1,000	Talledega	50	Between grade A and grade B	1 V, 1 U [4]		Yes	
Selma	28,385	Dallas	79	Outside grade B	1 V, 1 U	1 V	No	Yes.
Tuscaloosa	63,370	Tuscaloosa	52	On the periphery of grade A	3 Us	1 U	Yes	Yes.
Tuscumbia	8,994	Colbert	103	Outside grade B	1 U		No	Yes.
MISSISSIPPI								
Columbus	24,771	Lowndes	97	do	1 V	1 V	No [5]	Yes.

[1] 1960 census of population.
[2] 3 applications for 3d U.
[3] Is on border.
[4] Both reserved for educational stations.
[5] 8 miles beyond boundary.

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APPENDIX III

CATV operations within the ARB Birmingham total survey market [1]

City	County	City population	Within ADI	Location as to Vs' contours	Approximate miles from Birmingham
ALABAMA					
Alexander	Tallapoosa	13,140	No	Between grades A and B	62
Anniston	Calhoun	33,657	Yes	do	57
Athens	Limestone	9,330	No	Beyond grade B	87
Decatur	Morgan	29,217	No	Outside grade B	78
Demopolis	Marengo	7,377	No	do	95
Fayette	Fayette	4,227	Yes	Between grades A and B	60
Florence	Lauderdale	31,649	No	Outside grade B	106
Fort Payne	De Kalb	7,029	No	Beyond grade B	88
Gadsden	Etowah	58,088	Yes	Between grades A and B	58
Guin	Marion	1,462	Yes	Outside grade B	74
Guntersville	Marshall	6,592	Yes	On edge of grade B	61
Hamilton	Marion	1,934	Yes	Outside grade B	81
Hartselle	Morgan	5,000	No	On edge of grade B	63
Huntsville	Madison	72,365	No	Outside grade B	88
Northport (Tuscaloosa).	Tuscaloosa	5,245	Yes	On the grade A contour	50
Oxford (Anniston)	Calhoun	3,603	Yes	Between grades A and B	55
Piedmont	do	4,794	Yes	Outside grade B	70
Red Bay	Franklin	1,954	Yes	do	99
Russelville	do	6,628	Yes	do	85
Selma	Dallas	28,385	No	do	79
Sheffield (Florence)	Colbert	13,491	No	do	98
Sulligent	Lamar	1,346	No	do	82
Talladega	Talladega	17,742	Yes	Inside grade A	40
Tuscaloosa	Tuscaloosa	63,370	Yes	On edge of grade A (assumed to be within)	52
Tuscumbia	Colbert	8,994	No	Outside grade B	103
Vernon	Lamar	1,492	No	do	77
Winfield	Marion	2,907	Yes	On edge of grade B (assumed to be within)	66
MISSISSIPPI					
Aberdeen	Monroe	6,450	No	Beyond grade B	100
Amory	do	6,474	No	do	100
Columbus	Lowndes	24,771	No	do	97
Starkville	Oktibbeha	9,041	No	do	115
Westpoint	Clay	8,550	No	do	105

[1] Based upon the Television Factbook No. 38 (1968).

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FCC 68-1218

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
EDWARD C. ALLMON, TR/AS COASTAL FLORIDA
RADIO BROADCASTERS, TITUSVILLE, FLA.
Requests: 1460 kc, 5 kw, DA-Day
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it (*a*) the above-captioned application; (*b*) a motion to dismiss, as supplemented, filed by WRMF, Inc., licensee of standard broadcast station WRMF, Titusville, Fla.; (*c*) a statement in support of the WRMF motion filed on behalf of Daytona Broadcasting, Inc., licensee of station WMFJ, Daytona Beach, Fla.; and (*d*) responsive pleadings.

2. The above-captioned proposal of Coastal Florida Radio Broadcasters, tendered July 19, 1968, included engineering data showing that prohibited overlap of contours would not be involved with any existing station on the basis of ground conductivity indicated by figure M-3 of the Commission's rules.

3. On September 24, 1968, WRMF, Inc. ("petitioner" or "WRMF" hereinafter), filed a motion to dismiss the subject application supported by field intensity measurement data, taken along radials from WRMF and WMFJ, indicating that mutual overlap of 0.5 mv/m contours would occur between the applicant's proposal and WMFJ in contravention of the provisions of section 73.37 of the Commission's rules.

4. In opposition to the motion, the applicant claims that the measurements are inadequate and that thus reliance on M-3 conductivities is justified. Specifically, the applicant alleges that, in the area of overlap where WRMF measured the signal strength of WMFJ, the presence of other cochannel signals casts doubt on the validity of the measurement data. Further, the applicant contends that measurements should have been made on eight radials from WMFJ to determine whether that station's radiation was distorted from nondirectional operation. In addition, the applicant notes that no mention has been made of the presence of any skywave interference, although measurements were made 1 hour before sunset; that upon examination of the maps some of the measuring points appear to be inaccessible; that the measurements made on WRMF are not valid because they were made from a site other than that proposed; and that the field strength meter employed may not have been calibrated properly.

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5. In reply to the above contentions, petitioner stated that the lowest ratio of a computed interfering signal to the WMFJ signal was approximately 1:6.5, and that the computed interfering signals were generally less than one-tenth of the field strength from WMFJ. According to petitioner, the matter of other signals in the area was considered before the fieldwork was commenced and the undesired signals present had no significant effect upon the results obtained. Concerning the allegation that measurements should have been taken on eight radials, petitioner points out that, in determining the location of contours, section 73.152 of the rules merely requires that the measurements be sufficiently complete in the pertinent direction to determine the field intensity at 1 mile.[1] Further, petitioner states that the field intensity meter used was compared with another calibrated meter on October 10, 1968, and it was established that the gain of the meter had not changed. In regard to the question raised by the applicant concerning inaccessibility of some of the points measured, WRMF points out that numerous roads have been constructed through the Merritt Island area since the latest available topographical map was prepared, and it was not necessary to walk more than 500 feet in order to reach any point shown on the point-location maps. Finally, concerning the allegation that the measurements made on WRMF did not establish conductivity and the extent of the proposed 0.5-mv/m contour, WRMF states that its site is only 1.3 miles from the Coastal Florida Radio Broadcasters site and, therefore, even if test transmitter data had been obtained from the actual site, it would show essentially the same conductivity as determined from the measurements made on WRMF.

6. Having examined all of the field intensity measurement data presented, we find that it is sufficient to establish that the applicant's proposal for a new standard broadcast station at Titusville, Fla., would involve prohibited overlap of contours with the existing operation of WMFJ, in contravention of the provisions of section 73.37 of the Commission's rules. In this regard, we find further that, even if petitioner's measurements taken from its own site were totally ignored, the measurements made to establish the extent of WFMJ's 0.5-mv/m contour together with the applicant's own M–3 calculations used to establish the location of the proposed 0.5-mv/m contour lead inescapably to the conclusion that prohibited overlap would occur.

7. Accordingly, *It is ordered*, That the motion to dismiss filed by WRMF, Inc., *Is granted* and the above-captioned application *Is returned* as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] In this instance, the inverse distance field strength at 1 mile indicated by petitioner's measurements is essentially that authorized by the Commission for WMFJ.

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FCC 68-1225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of COMMUNICATIONS ENGINEERING, INC. For Construction Permits for Six New Stations in the Domestic Public Point-to-Point Microwave Radio Service To Be Used for Communications Service Between Anchorage, Alaska, and Various Oil Drilling Platforms in Cook Inlet Near Nikishka, Alaska.	Docket No. 18410 Files Nos. 7160 through 7164-C1-P-66 2852-C1-P-67

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it the captioned microwave applications filed on May 24, 1966, and December 15, 1966, by Communications Engineering, Inc. (CEI), and the following pleadings: (*a*) informal objections to the CEI proposal filed by Alaska Communications System (ACS) (letter of May 20, 1966), North State Telephone Co., Inc. (letter of Aug. 24, 1966), and the City of Anchorage Telephone Utility (letter of Oct. 10, 1966);[1] (*b*) a petition to deny the CEI applications and a request for acceptance of late filing filed by ACS on March 8, 1968, and responsive pleadings thereto; and (*c*) a motion for summary dismissal filed by ACS on August 26, 1968, and responsive pleadings thereto. Further, associated with these applications are various requests from ACS for the use of non-Government frequencies for the purpose of permitting it to provide service to oil-drilling platforms in Cook Inlet. These requests, which were filed with the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee (IRAC)[2] by the Department of the Air Force on behalf of

[1] Aside from the original letters of opposition, which are very short, neither North State Telephone Co. or the City of Anchorage Telephone Utility have taken a further active interest in this proceeding. In fact, the city of Anchorage, in a letter dated Mar. 30, 1967, indicated that it would negotiate an interconnection agreement with CEI if it obtained the appropriate authorizations.

[2] The IRAC is under the Director of Telecommunications Management (DTM) in the executive branch. The IRAC proper deals primarily with policy matters while the principle function of the FAS is to advise on applications for frequency assignments filed by agencies of the Federal Government. The DTM has full authority to accept or reject IRAC/FAS recommendations. The DTM frequency assignment activity for Federal agencies accomplishes the same function as the FCC in assigning frequencies to all non-Government radio stations. (Sec. 303(c) of the Communications Act of 1934, as amended, sets forth the Commission's authority to assign frequencies while sec. 305 provides, inter alia, that Federal Government stations are not subject to the provisions of sec. 303 (with one exception) and that frequency assignments for such stations shall be made by the President. The President's authority was, in turn, redelegated to the DTM pursuant to Executive Order No. 10995.)

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ACS, were noted on the Commission's public notices.[3] Subsequently, CEI submitted to the Commission a petition to deny the ACS requests. Action by the IRAC on this matter is being withheld pending the receipt of the Commission's comments.[4] Such comments must necessarily await the disposition of the pending CEI applications.

2. CEI is a common carrier operating mobile radio facilities in the area of Anchorage, Alaska, pursuant to authorization by this Commission and the Alaska Public Service Commission (APSC). ACS, an agency of the U.S. Air Force, has for years operated numerous long-distance radio and wire communications facilities in Alaska, providing a common-carrier-type service to the public as well as service to Government users. Both CEI and ACS desire to provide communications service via radio to a number of oil-drilling platforms in Cook Inlet, some 60 miles southwest of Anchorage. CEI, as an intrastate carrier, is subject to the jurisdiction of the APSC for franchise authority and to the FCC for radio authority. However, ACS, as a governmental carrier operating under authority of Congress (48 U.S.C. 310), is not subject to the jurisdiction of either APSC or the FCC.

3. ACS contends that it is the policy of the Air Force to oppose all potential competitors in order to preserve its salability value[5] and that the Government's interest requires that all long-distance communications services in Alaska be provided by ACS. Among other things, ACS also alleges that CEI is not authorized by the APSC to provide the proposed service; that CEI did not comply with various provisions of part 85 of the Commission's rules; that the rates proposed by CEI are excessive; and that certain existing Government communications facilities would be duplicated. CEI, for its part, contends that non-Government common-carrier radio frequencies should not be assigned for Government use and that it is contrary to the express general policy of the Government to permit the purposeful entry of a governmental agency into competition with private enterprise. Both ACS and CEI recognize that their proposals are mutually exclusive.

4. Since the proposed service is intrastate in nature, a matter of prime importance is the status of CEI's local authorization. Section 21.15(c)(4) of the Commission's rules requires a microwave applicant to submit proof of franchise or other local authorization where such is required. When CEI filed the applications, it submitted letters dated August 11 and November 15, 1965, from the executive director of the APSC interpreting CEI's existing franchise certificate to permit the rendition of the proposed point-to-point service. However, the APSC subsequently superseded the interpretation of its executive director, setting the question of CEI's authority for hearing in a consolidated

[3] The appendix contains a compilation of the ACS frequency assignment requests which appeared on the Commission's Common Carrier Public Notices of Nov. 14, 1966, Dec. 20, 1966, Feb. 12, 1968, May 6, 1968, Aug. 19, 1968, and Aug. 26, 1968.

[4] In accordance with established frequency assignment coordination procedures, the FAS referred the ACS requests to the main Committee (IRAC) for consideration in consultation with the FCC liaison representative on that Committee. This was done because of the policy issues involved, the predominant one being the question of whether the Cook Inlet service should be provided by ACS or CEI, both proposing the use of non-Government frequencies.

[5] Public Law 90-135, enacted on Nov. 14, 1967, authorized the sale by the Government of any element of ownership in ACS, including franchise rights. Preparations are currently being made for the offer for sale of ACS facilities.

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proceeding with applications of North State Telephone Co., Inc. (North State), and Glacier State Telephone Co., Inc. (Glacier State), for authorization to serve the Cook Inlet area.[6] After hearing, the APSC issued an order on August 16, 1968, which denied the North State and Glacier State applications because the service would be duplicative of the service being rendered to the area by CEI from its Anchorage mobile base station but also found that CEI's existing certificate for mobile operations did not authorize point-to-point service.

5. Under normal circumstances, such a ruling by a State commission would be cause for dismissal or return of the microwave applications. However, the circumstances here are extraordinary. First of all, it appears that the APSC was convinced that CEI should serve the Cook Inlet area. The hearing officer found that the public interest would be served by the institution of service proposed by CEI and recommended that CEI's present certificate be amended to permit such service.[7] The Commission itself affirmed the hearing officer on the former point and said of the competing applications:

> The Commission is of the opinion that to a large extent such service would be duplicative of the MTS service [mobile telephone service] which is being provided by CEI from its Anchorage base station, * * * and it has not been shown that the service provided by CEI is so inadequate or unsatisfactory as to justify the issuance of a certificate to another utility to provide a competing service.[8]

However, the Commission reversed the Hearing Officer on the latter point, stating:

> As the Commission understands the applicable laws, it would be in error if it granted a certificate to CEI to provide point-to-point microwave service without CEI ever having submitted itself as an applicant for that service. Accordingly, the Commission must reverse the Hearing Officer in his Finding No. 6 without prejudice to the filing by CEI of such an application if it later decides to do so.[9]

6. We are advised that CEI, on October 15, 1968, filed an appeal with the Superior Court of the Third Judicial District in Alaska (case No. 68–2727) contesting that portion of the APSC decision which denied it (CEI) appropriate certification in that proceeding.

7. The second special circumstance in this case involves the fact that ACS is not a carrier subject to regulation by the APSC or this Commission. If we now return CEI's applications pending its receipt of State authorization, CEI would be eliminated from present consideration by this Commission, and we would have only the ACS requests before us. If we were to indicate to IRAC our concurrence in the ACS requests, this would appear to preclude a subsequent grant of CEI's admittedly mutually exclusive applications.

8. In summation, the APSC appears to have found that the public interest would be served by the institution of the CEI proposal and has denied other carriers the right to serve the Cook Inlet area. Under

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[6] North State and Glacier State are telephone companies providing exchange service in several Alaska communities. They proposed to split Cook Inlet with Glacier State providing service to the eastern half and North State to the western half. ACS, as an intervenor in the proceeding, protested the CEI proposal on the grounds that it (ACS) should provide all toll service.

[7] Alaska Public Service Commission, docket No. U–66–24 et al., hearing officer's decision, findings 6 and 7.

[8] Id., order issued Aug. 16, 1968, p. 9.

[9] Id., p. 11.

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these circumstances, notwithstanding the fact that CEI does not now have appropriate State authorization, it appears desirable to temporarily waive the requirements of section 21.15(c)(4) for the purpose of considering its applications in connection with the ACS requests for frequencies. We think that the public interest would be served by designating the CEI applications for hearing and joining ACS as a party, especially in view of the probable sale of ACS facilities to a carrier subject to regulation by this Commission and the APSC. Accordingly, we will designate the CEI applications for hearing to determine the merits of its proposal as compared to that of ACS. Of course, any subsequent grant to CEI arising out of this proceeding will be appropriately conditioned to preclude construction by CEI prior to receiving authorization from the APSC.

9. One other issue needing resolution at this time involves the applicability of part 85 of the rules to CEI's applications.[10] CEI has obviously not complied with several provisions of such rules requiring coordination with ACS. CEI contends that part 85 is not applicable to part 21 applications while ACS argues the converse. We agree with CEI. Part 85 applies only to services to be rendered through the use of those frequencies specified therein. Applicants for microwave facilities pursuant to part 21 are not required to comply with part 85.

10. Except for the matters placed in issue herein, CEI appears to be legally, technically, financially, and otherwise qualified to render the services it has proposed.

11. Since the questions raised in this proceeding are unusual and because we think it desirable to minimize delay in reaching a final decision, we will order that any review of the examiner's initial decision be made by the Commission.

12. Accordingly, *It is ordered*, That pursuant to sections 309(e) and 403 of the Communications Act of 1934, as amended, the captioned applications are *Designated for hearing*, at the Commission's offices in Washington, D.C., before an examiner and on a date to be hereafter specified by separate order, upon the following issues:

(*a*) To determine the nature and extent of the communications facilities, and services proposed by CEI including costs, rates, charges, practices, classifications, regulations, and personnel pertaining thereto;

(*b*) To determine, by comparison, the nature and extent of the communications facilities and services proposed by ACS including costs, rates, charges, practices, classifications, regulations, and personnel pertaining thereto;

(*c*) To determine the nature and extent of existing communications facilities and services rendered by ACS which may be duplicated by the CEI proposal including rates, charges, practices, classifications, regulations, and personnel, pertaining thereto;

(*d*) To determine, in light of the evidence adduced on the foregoing issues and any other relevant considerations, whether a grant of the CEI applications will serve the public interest, convenience, and necessity.

13. *It is further ordered*, That Communications Engineering, Inc., the Alaska Communications System, and the Chief, Common Carrier Bureau, *Are made parties* to the proceeding.

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[10] Pt. 85, entitled, "Public Fixed Stations and Stations of the Maritime Services in Alaska," is directed primarily toward providing for the shared (Government/non-Government) use of frequencies in the low (LF), medium (MF), and high (HF) frequency bands, and does not cover, to any significant extent, the use of frequencies in bands higher in the spectrum allocated exclusively to the non-Government fixed services.

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14. *It is further ordered*, That the burden of proof on issue (*a*) shall be upon CEI and that the burden of proof on issues (*b*) and (*c*) shall be upon ACS.

15. *It is further ordered*, That any review of the initial decision be made by the Commission.

16. *It is further ordered*, That if the CEI applications are granted and if prior to such grant CEI has not shown that it has received requisite operating authority from the Alaska Public Service Commission, the following condition shall be attached to the radio construction permits:

> **Construction of the facilities authorized herein shall not be commenced prior to receipt of the necessary franchise authority from the Alaska Public Service Commission.**

17. *It is further ordered*, That the ACS request for acceptance of a late filed petition to deny *Is dismssed* as moot and; That the ACS motion for summary dismissal *Is denied.*

18. *It is further ordered*, That the parties desiring to participate herein shall file their appearances in accordance with section 1.221 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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APPENDIX

Proposed ACS frequency usage in the vicinity of Cook Inlet, Alaska

From	To	Frequency (MHz)
Union Oil Grayling Site—60°50'24" N., 151°36'55" W	West Forelands Marathon Site	2121.8
West Forelands Marathon Site—60°48'56" N., 151°46'53" W	Union Oil Grayling Site	2171.8
Nikishka ACS Repeater—60°43'13" N., 151°21'51" W	Pan American Granite Point Site A.	2121.8
Pan American Granite Point Site A—60°58'38" N., 151°18'46" W.	Nikishka ACS Repeater	2171.8
Nikishka ACS Repeater—60°43'13" N., 151°21'51" W	Pan American MGS Site D	2118.2
Pan American MGS Site D—60°44'08" N., 151°30'46" W	Nikishka ACS Repeater	2168.2
Atlantic-Richfield Trading Bay NR—60°55'42" N., 151°31'52" W.	Atlantic-Richfield King Salmon Platform.	2129.0
Atlantic-Richfield King Salmon Platform—60°51'55" N., 151°36'18" W.	Atlantic-Richfield Trading Bay NR.	2179.0
Nikishka—60°43'13" N., 151°21'51" W	Soldotna	4110, 3870
Soldotna—60°31'53" N., 151°04'55" W	Nikishka	4150, 3910
Soldotna—60°31'53" N., 151°04'55" W	Nikishka	2175.4
Nikishka—60°43'38" N., 151°20'45" W	Soldotna	2125.4
	Cook Inlet	2111.0
	Cook Inlet	2118.2
Cook Inlet—60°50'00" N., 151°30'00" W	Nikishka	2161.0
Cook Inlet—60°47'45" N., 151°29'44" W	Nikishka	2168.2
Shell Oil Platform C—60°44'26" N., 151°31'00" W	Shell Oil Platform A	454.65
Shell Oil Platform A—60°47'45" N., 151°29'44" W	Shell Oil Platform C	459.65
Union Oil Trading Bay Site Oil Platform—60°53'49" N., 151°34'45" W.	Union Oil Grayling Site Oil Platform.	2164.6
Union Oil Grayling Site Oil Platform—60°50'24" N., 151°36'55" W.	Union Oil Trading Bay Site Oil Platform.	2114.6
West Forelands—60°49' N., 151°47' W	Cook Inlet	454.45
Cook Inlet—60°48' N., 151°38' W	West Forelands	459.45
West Forelands—60°48'56" N., 151°46'53" W	Dolly Varden Platform	454.45
Dolly Varden Platform—60°48'29" N., 151°37'29" W	West Forelands	459.45
Nikishka—60°43'13" N., 151°21'05" W	West Forelands	2125.4
West Forelands—60°48'56" N., 151°46'53" W	Nikishka	2175.4
Pan American Granite Point Site—60°58'38" N., 151°18'46" W.	Cook Inlet	454.45
Cook Inlet—60°59'57" N., 151°17'52" W	Pan American Granite Point Site	459.45

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FCC 68R–519

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of COSMOPOLITAN ENTERPRISES, INC., EDNA, TEX.	Docket No. 16572 File No. BP–16347
H. H. HUNTLEY, YOAKUM, TEX. For Construction Permits	Docket No. 16573 File No. BP–16570

APPEARANCES

Jerome S. Boros and *Edward L. Smith* on behalf of Cosmopolitan Enterprises, Inc.; *William J. Potts, Jr.*, on behalf of H. H. Huntley; *Harry J. Ockershausen* on behalf of International Broadcasting Corp.; and *Vergil W. Tacy* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 13, 1968)

BY THE REVIEW BOARD: BERKEMEYER, SLONE, AND PINCOCK.

1. This proceeding involves the two mutually exclusive applications of Cosmopolitan Enterprises, Inc. (Cosmopolitan), and H. H. Huntley (Huntley) for construction permits to establish new standard broadcast stations at Edna, Tex., and Yoakum, Tex., respectively. Each proposes to operate on frequency 1130 kilohertz with 10 kilowatts power during daytime hours only and with a directional antenna system. Edna and Yoakum are located in southeastern Texas and are approximately 35 miles apart. The hearing issues relate to areas and populations and availability of other services, adjustment and maintenance of directional antenna systems, and whether the proposals would provide adequate protection to station KWKH, Shreveport, La., and a section 307(b) determination.

2. In the initial decision (FCC 67D–41), released August 9, 1967, Hearing Examiner H. Gifford Irion recommended denial of both applications. The examiner concluded that the differences in the need for the applicants' respective services were not sufficiently great to award a 307(b) preference to either, and that the applicants failed to carry the burden of proof that the proposed directional antenna systems can be adjusted and maintained as proposed. The proceeding is now before the Review Board on exceptions filed by both applicants and the Broadcast Bureau. We have reviewed the initial decision in light of these exceptions, our examination of the record, and the oral arguments of the parties presented before a panel of the Review Board on September 5, 1968. In brief, we conclude that both applicants' directional antenna systems can be adjusted and maintained so as not

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to cause interference to the operation of station KWKH, which is the basis for our reaching a different result from the examiner on this point, and that the proposal of Cosmopolitan would better achieve the objectives of section 307(b) of the communications act, as amended. Except as modified and supplemented herein and in the rulings on exceptions contained in the attached appendix, the examiner's findings of facts are adopted.

Directional Antenna Systems and Protection of Station KWKH

3. KWKH, as a class I–B station, is entitled to protection from objectionable interference to its 0.1-mv/m contour from stations operating on the same channel. Although it is not disputed that applicants' 0.005-mv/m contours do not overlap KWKH's protected contour, minor variations in the operating parameters could result in radiation exceeding the maximum expected operating values (MEOV's) proposed by each station. Although Huntley could exceed its MEOV's only slightly before causing interference to KWKH, Cosmopolitan, in the critical direction of 356°, could increase radiation from its MEOV of 12.2 mv/m to 20 mv/m before causing interference to KWKH. Therefore, it is incumbent on the applicants to demonstrate that their directional antenna systems can be adjusted and maintained to provide adequate protection to station KWKH. The directional antenna systems will consist of three element in-line arrays. Cosmopolitan's towers will be spaced 150 electrical degrees apart, and Huntley's towers will be spaced 90 electrical degrees apart. The towers of both applicants will be oriented in the north-northeast to south-southwest direction. Excitation of Cosmopolitan's antenna system according to its proposed current ratios and phase parameters would produce a radiation pattern which will be a symmetrical figure eight that is not entirely closed at the center and with the main radiation lobes broadside to the line of towers. Huntley's radiation pattern will be cardioid with radiation deeply suppressed in the north-northeasterly direction. In directions toward the KWKH service area, both Cosmopolitan and Huntley have specified maximum expected operating values (MEOV's) within which they propose to limit the variation of signals from the theoretical design values.

4. The record establishes that, if Cosmopolitan's operation were to be contained within its proposed maximum expected operating values (MEOV's), the KWKH service area would be protected. If there were variations in phase of plus or minus 1 degree or in current magnitude of plus or minus 1 percent from the design values in the center tower of the directional array, the radiated fields on the eight bearings between 351° and 26° true would exceed the MEOV's specified by the applicant. On the critical bearing toward KWKH of 356° true, the radiated field would reach 16.4 mv/m, which exceeds the MEOV of 12.2 mv/m. On this same bearing, if variations in phase and current magnitude of 1 degree and 1 percent were to occur in the end towers, the radiated field would be 18.7 mv/m under the most adverse conditions. If, on the other hand, the variations were limited to one-tenth of a degree and one-tenth of 1 percent, the extreme of radiation would

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be 12.3 mv/m. Although the radiated field on the 356° radial under these operating conditions would exceed the MEOV's, the field would not reach the maximum allowable value of 20 mv/m. After construction of the station, Cosmopolitan's engineer intends to adjust the array so that the radiated values would be about 10 percent below the specified MEOV's. Under such circumstances, the radiated values would be greater than the theoretical values in all instances, except for the critical radial of 356° true where it would be 0.7 mv/m below the calculated radiation of 11.7 mv/m. With this final adjustment, the operation of Cosmopolitan's directional antenna could be maintained within the specified MEOV's if the variations in the antenna parameters do not exceed more than two-tenths of 1 percent in current magnitude and two-tenths of a degree in phase.

5. As to Huntley's proposal, an operation within its proposed MEOV's would also provide protection to the service area of station KWKH. If the antenna parameters of the center tower, or of the two end towers, were to vary not in excess of one-half of 1 percent in current and four-tenths of a degree in phase from the design values, the resultant radiated fields would not exceed the MEOV's. On the critical bearing toward KWKH of 2° true, variations of plus one-half of 1 percent in current magnitude and minus three-tenths of a degree in phase in the end towers would result in a radiated field of 12.2 mv/m which is 1 mv/m below the MEOV of 13.2 mv/m.

6. Other factors which could affect the directional antenna radiation patterns are terrain and objects located in the proximity of the transmitter sites. The Cosmopolitan site is located on flat grazing land where there appear to be no terrain problems in the immediate vicinity except for the grounding wires on nearby utility poles. There are also a number of towers at distances greater than 2 miles from the site which are potential sources of reradiation. As to Huntley, the proposed transmitter site is on a rolling terrain. There is a difference of opinion between Huntley's and KWKH's engineers as to the effect of rolling terrain. Huntley's engineer believes that such a terrain would not be likely to affect the directional antenna radiation pattern, but KWKH's engineer expects some distortion to occur. Similarly, there are a water tower and other towers with guywires located at varying distances from Huntley's site which are potential sources for reradiation of signal. However, the engineering consultants agreed that, with proper detuning procedures which the applicants have obligated themselves to undertake if needed, the reradiation problem can be reduced to a minimum.

7. For surveillance of their directional antenna systems, Cosmopolitan and Huntley both propose to use a Nems-Clarke Type 112 phase monitor, for which the manufacturer claims a resolution capability of one-half of a degree in phase and one-half of 1 percent in current magnitude. Huntley proposed to add a digital voltmeter which will increase the resolution capability of the monitor to one-tenth of a degree in phase and one-tenth of 1 percent in current magnitude. Assuming, on a conservative basis, that the resolution capability of indicating instrument should be approximately three times as great as the requirement for reading the instrument, Huntley's phase monitor-digital voltmeter combination would meet this requirement, but Cosmopolitan's

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monitoring system would not. Even if Cosmopolitan were to use a phase monitor-digital voltmeter combination, it would not provide adequate resolution for Cosmopolitan to maintain its radiation within the specified MEOV's. However, as previously indicated in paragraph 4 above, radiation values higher than Cosmopolitan's proposed MEOV's will not necessarily result in interference to KWKH. Because of the wide range between the maximum expected operating values (MEOV's) and the value at which interference would be cause to KWKH, Cosmopolitan can radiate 20 mv/m on the 356° radial without causing interference to KWKH. While we agree with the examiner that Cosmopolitan has not shown with absolute certainty that it will not exceed the foregoing upper limit, we also agree with the Broadcast Bureau that the possibility that it will exceed such limit is remote. The fact that Cosmopolitan has such a large leeway before radiation in excess of its MEOV's would cause interference to KWKH presents a unique situation which, viewed in light of the Bureau's comments and the existence of monitoring equipment having the necessary accuracy, persuades us that Cosmopolitan's inability to show that it can maintain the operation within its MEOV's should not, in the circumstances of this case, be held disqualifying. We believe that the public interest would best be served in this connection by providing that any grant to Cosmopolitan be conditioned on the applicant's installing a monitoring system that would adequately monitor the adjustment of its directional array to demonstrate that the array is maintained during day to day operation within the values specified in the authorization which will provide adequate protection to KWKH.

Section 307(b) Consideration

8. Although most of the pertinent factual information is set forth in the initial decision, a brief summary of the facts would assist in understanding our disposition of the 307(b) issue. Edna, Tex., which Cosmopolitan proposes to serve, has a population of 5,038 persons (1960 census) and is the largest city and the seat of Jackson County (population 14,040 persons). The headquarters of the Jackson County Chamber of Commerce is located in Edna. The Jackson County Courthouse contains all of the county offices and the county library. There are also located in Edna offices of four State agencies [1] and seven agencies of the Federal Government.[2] Edna, under home rule, is governed by a mayor and city council and provides the usual municipal services such as police, fire, utilities, schools, and recreation. Based on the city's water department records, Edna's population in 1966 was approximately 6,000 persons, and the city recently annexed an area with 81 homes which increased the Edna population by about 255 persons. The U.S. census reports reflect a steady growth in population for both Edna and Jackson County. Edna's population in 1950 was

[1] Highway department, welfare office, unemployment compensation office, and department of public safety.

[2] Federal Land Bank, Civil Defense, Farmer Home Administration, Agricultural Stabilization, Conservation, Social Security Administration, and county agent of the Department of Agriculture.

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3,855 persons. The Jackson County population increased from 12,916 persons in 1950 to 14,040 persons in 1960.

9. Edna's major industries consist of two meat-processing plants, one of which is located beyond the city limits, and a welding company. The estimated labor force is 4,440 persons, some of whom are employed in industries located in other communities. The major products of Jackson County are rice, beef, cotton, tomatoes, corn, and oil. Edna has one weekly newspaper, but neither Edna nor Jackson County has an AM, FM, or TV station.

10. Yoakum, which Huntley proposes to serve, has a population of 5,761 persons (1960 census) and is not a county seat. It is governed under a home-rule charter. Yoakum is located on the boundary of De Witt and Lavaca Counties (population 20,683 and 20,174 persons, respectively). Approximately 70 percent of the city is in Lavaca County and the remaining 30 percent is in De Witt County. Cuero, located 16 miles southwest of Yoakum, is the seat of De Witt County, and Hallettsville is the seat of Lavaca County. Yoakum's population in 1950 was 5,231 persons. The De Witt County population decreased from 22,973 persons in 1950 to 20,683 persons in 1960, and the Lavaca County population decreased from 22,159 persons in 1950 to 20,174 persons in 1960.

11. Yoakum is located in an agricultural area where grain and cotton are the principal products, and stock raising and large cattle feedlots are beginning to develop. There are nine manufacturing companies in Yoakum, of which four are engaged in tanning of leather and manufacturing of leather products and employ about 900 persons. There are also 123 retail establishments, 17 wholesale trade establishments, and food processing plants employing approximately 510 persons. Yoakum has a labor force of about 3,160 persons. It has its own schools, a municipal hospital, churches of various denominations, and offices of four State agencies.[3] Yoakum also provides water, sewer, and electrical facilities to its residents. The chamber of commerce and its associated organizations assist Yoakum's industry and encourage new industry in Yoakum. There is one newspaper published three times a week in Yoakum. There is no AM, FM, or TV station in Yoakum or in Lavaca County, and the only such station in De Witt County is AM station KCFH in Cuero.

12. Within its proposed 0.5-mv/m contour, Cosmopolitan would provide service to 334,702 persons residing in an area of 18,100 square miles. There are a minimum of 12 to a maximum of 29 of other services available within this area. Edna now receives service from eight existing stations. Within Cosmopolitan's proposed 2-mv/m contour, there are 10 communities with population of 2,500 or greater. Of these, Hallettsville, Palacios, and Port Lavaca now receive services from at least five stations, and Cuero, Victoria, and Yorktown receive services from at least nine stations. The remaining communities, including Yoakum, receive between six to eight services.

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[3] District Office of Texas Highway Department, State Health Department, State Employment Agency, and Soil Conservation Service.

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13. Huntley would provide service to 357,010 persons residing in an area of 20,914 square miles within its proposed 0.5-mv/m contour. There are a minimum of nine to a maximum of 24 other services available within this contour. Yoakum now receives services from eight existing stations. There are 11 communities within Huntley's 2-mv/m contour which receive a minimum of five to a maximum of nine primary services. Among these communities are Victoria, Cuero, Edna, and Port Lavaca. Although Huntley would serve Cuero, the seat of De Witt County, it would not serve Hallettsville, the seat of Lavaca County.

14. The Review Board agrees with the hearing examiner and the Broadcast Bureau that the foregoing facts raise a close and difficult 307(b) question. However, in our view, there are sufficient differences between the two proposals to permit a meaningful 307(b) choice, so that it is unnecessary to reopen the record and conduct further hearings to evaluate the comparative qualifications of the applicants. Although the communities applied for are approximately the same size, it is significant that Edna is the county seat of a county without any broadcast stations. Yoakum is not a county seat and one of the two counties in which it is located has a broadcast outlet. The Board has held, on several occasions, that the importance of communities to their surrounding areas may be of substantial and decisive significance. See, e.g., *Radio Haddonfield, Inc.*, 37 FCC 168, 3 R.R. 2d 25 (1964).[4] We have also held that the relative significance of a community includes its commercial, governmental and cultural attributes. *Five Cities Broadcasting Co., Inc.*, 35 FCC 501, 504, 1 R.R. 2d 279, 283 (1963). While we do not find an adequate basis for concluding that either of the communities here is economically or culturally more significant in the area to be served, it is clear that the political and governmental importance of Edna surpasses that of Yoakum. This preference takes on added weight when considered in light of the growth patterns of the relevant areas. Edna is growing at a faster pace than Yoakum (during the period between 1950–60, there was an increase of approximately 30 percent in the population of Edna and about 10 percent in the population of Yoakum), and Jackson County has shown a 10-percent growth in population over the past 10 years, whereas the population of De Witt and Lavaca Counties decreased by about 9 percent during the same period. Although it is service to existing population with which the Commission must be primarily concerned, these statistics cannot be disregarded since they tend to substantiate our appraisal of the relative importance of the two communities in the areas they will serve. *Cf. Holmes Broadcasting, Inc.*, 10 FCC 2d 781, 11 R.R. 2d 930 (1967). Based on the foregoing, we conclude that Edna, Tex., a growing community and seat of a county that is also growing, has a greater need than Yoakum, Tex., for a standard broadcast station.

15. Accordingly, *It is ordered*, That the application of H. H. Huntley, Yoakum, Tex. (BP–16570), *Is denied*, and that the application of Cosmopolitan Enterprises, Inc. (BP–16347), for authority

[4] *Cf. Big Basin Radio et al.*, 12 FCC 2d 182, 12 R.R. 2d 990 (1968).

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to construct a new standard broadcast station to operate on the frequency 1130 kHz, 10 kw DA, daytime only, at Edna, Tex., *Is granted*, subject to the following conditions:

(*a*) The inverse distance fields on the indicated azimuths shall not exceed the following values:

346°—17.0 mv/m	16°—15.7 mv/m	46°—15.0 mv/m
356°—16.4 mv/m	26°—20.7 mv/m	56°—20.5 mv/m
6°—12.5 mv/m	36°—17.5 mv/m	66°—19.0 mv/m

(*b*) That a study, based upon actual variations in phase and magnitude of current in the individual antenna towers after adjustment, must be submitted with the application for license to indicate clearly that the inverse distance field strength at 1 mile can be maintained within the maximum expected operating values of radiation or the inverse distance fields indicated in the authorization. Allowable deviations in phase or current determined from this study will be incorporated in the instrument of authorization.

(*c*) That to insure maintenance of the radiated fields within the required tolerance, a properly designed phase monitor shall be installed in the transmitter room, and shall be continuously available as a means of correctly indicating the relative phase and magnitude of the currents in the several elements of the directional antenna system. The accuracy, resolution, and repeatability of the monitor to be installed shall be adequate to demonstrate that the array is maintained during day-to-day operation within the maximum expected operating values of radiation or the inverse distance fields indicated in the authorization.

(*d*) Field measuring equipment shall be available at all times, and, after commencement of operation, the field intensity at each of the measuring points shall be measured at least once every 7 days and an appropriate record kept of all measurements so made.

(*e*) A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field intensity measurements must be made under similar environmental conditions.

DONALD J. BERKEMEYER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS OF COSMOPOLITAN TO THE INITIAL DECISION

Exception numbers	*Rulings*
1, 2, 3, 4, 6	Granted in substance, see paragraphs 8 and 9 of this *Decision*. Otherwise denied as not of decisional significance.
5, 9	Denied as not being of decisional significance.
7	Granted. See par. 10 of this *Decision*.
8	Granted to the extent indicated in pars. 10 and 11 of this *Decision*. Denied in all other respects as of no decisional significance.
10, 11, 12	Granted in substance, see paragraph 10 of this *Decision*.
13	Denied. The findings in paragraph 9 of the *Initial Decision* adequately reflect the evidence concerning plans to locate a dam near Yoakum.
14, 16, 17, 18	Denied. The exceptions (1) fail to point out with particularity alleged errors in the *Initial Decision* (sec. 1.277(a) of the rules); (2) request many findings which already appear in the *Initial Decision*, and (3) the findings in pars. 45, 46, 47, and 48 of the *Initial Decision* adequately reflect the pertinent evidence of record.

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RULINGS ON EXCEPTIONS OF COSMOPOLITAN TO THE INITIAL DECISION—Continued

Exception numbers	*Rulings*
15	Denied. Adequate findings based on the pertinent evidence concerning the Cosmopolitan and Huntley directional arrays appear at pars. 18–27 and 30–39 of the *Initial Decision.*
19	Denied. The exception contains no reference to the transcript page or exhibit on which it is based. An adequate finding appears at par. 22 of the *Initial Decision.*
20	Granted in substance, see par. 14 of this *Decision.*
21, 22, 23	Granted in substance, see par. 7 of this *Decision.*
24	Granted see par. 15 of this *Decision.*
25	Denied. Cosmopolitan has not shown that the examiner's action was arbitrary or capricious, or an abuse of his discretion.

RULINGS ON EXCEPTIONS OF HUNTLEY TO THE INITIAL DECISION

Exceptions to findings numbers	*Rulings*
1	Granted in substance, see par. 9 of this *Decision.*
2	Granted in substance, see par. 11 of this *Decision.*
3	Granted in substance, see par. 9 of this *Decision.*
4	Denied. Not of decisional significance.
5	Denied. The finding in pars. 38 and 39 of the *Initial Decision* as modified by par. 7 of this *Decision* adequately reflect the evidence of record.
Exceptions to conclusions numbers	
1, 2	Granted to the extent that appropriate conclusions are drawn in par. 14 of this *Decision.*
3	Denied as unsupported by the record.
4, 5, 10	Denied for the reasons stated in the Board's conclusions in this *Decision.*
6, 7, 8, 9	Granted in substance, see pars. 6 and 7 of this *Decision.*

RULINGS ON EXCEPTIONS OF BROADCAST BUREAU TO THE INITIAL DECISION

Exception numbers	*Rulings*
1	Granted, see par. 11 of this *Decision.*
2, 3, 4, 8	Denied as not being of decisional significance.
5	Granted to the extent that *Initial Decision* is amended to show that maximum number of services available within the Huntley 0.5-mv/m contour is 24. The following is added to the listing in par. 14 of *Initial Decision:* 3 stations—100 percent.
6	Granted. The phrase "within values below the MEOV" on line 9, par. 27 of the *Initial Decision* is amended to read "within the required tolerances."
7	Granted. The following sentence is added to par. 35 of the *Initial Decision:* "The maximum radiation in the major lobe is 1020 mv/m."

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RULINGS ON EXCEPTIONS OF BROADCAST BUREAU TO THE INITIAL DECISION—Con.

Exception numbers	*Rulings*
9	Denied. See ruling on Cosmopolitan Exception No. 15.
10, 11, 12	Denied. The findings in pars. 46, 47, and 48 of the *Initial Decision* adequately reflect the pertinent evidence of the record.
13	Denied. See ruling on Cosmopolitan Exception No. 19.
14	Denied. This exception, which is 14 paragraphs in length, does not meet the requirements of sec. 1.277(a) of the rules that each exception should be concise and will not be accepted if it contains argumentative matters or discussions of law.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of COSMOPOLITAN ENTERPRISES, INC., EDNA, TEX.	Docket No. 16572 File No. BP–16347
H. H. HUNTLEY, YOAKUM, TEX. For Construction Permits	Docket No. 16573 File No. BP–16570

APPEARANCES

Jerome S. Boros and *Edward L. Smith* on behalf of Cosmopolitan Enterprises, Inc.; *William J. Potts, Jr.* on behalf of H. H. Huntley; *Harry J. Ockershausen* on behalf of International Broadcasting Corp.; and *Vergil W. Tacy* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER H. GIFFORD IRION

(Issued August 7, 1967)

PRELIMINARY STATEMENT

1. These applications were designated for hearing by the Commission in an order released April 11, 1966. Cosmopolitan seeks a construction permit for a new standard broadcast station to operate on 1130 kilocycles, with 10-kilowatt power, daytime only, at Edna, Tex. Huntley likewise seeks a construction permit for a new standard broadcast station using the same facilities at Yoakum, Tex. The Commission found both applicants to be legally, financially, technically and otherwise qualified, except as to certain matters shown below in the issues, but since the two proposals would result in mutually destructive interference, they were consolidated for hearing.

2. International Broadcasting Corp., licensee of station KWKH Shreveport, La. (1130 kc, DA–N) was made a party respondent. The hearing issues were stated as follows:

> 1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.
>
> 2. To determine whether the directional antenna systems proposed by the applicants can be adjusted and maintained as proposed.
>
> 3. To determine in light of the evidence adduced under the preceding issue whether either proposal would provide adequate protection to station KWKH, Shreveport, La.
>
> 4. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
>
> 5. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

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3. Following a prehearing conference on May 4, 1966, hearings were held on various dates in July, October, and November. The record was closed on November 15, 1966 but was reopened on June 8, 1967 to receive an amendment to Huntley's application and was thereupon closed. Proposed findings of fact and conclusions were filed by all of the parties, including the respondent and the Broadcast Bureau.

FINDINGS OF FACT

Communities involved

4. Edna, Tex. with a 1960 population of 5,038 [1] is the county seat and largest city in Jackson County, Tex. Jackson County had a 1960 population of 14,040.

5. Edna is governed by a mayor and city council under a home-rule form of government and provides the usual municipal services such as police, fire, schools, and recreation. Some of these services are delivered to persons residing outside the city limits upon payment of a fee. According to Mr. Tinker, the mayor of Edna, records of the city's water department indicated that the population of Edna in 1966 was approximately 6,000. The census reports indicate a steady population growth for both Edna and Jackson County, and the school population of Edna has likewise experienced steady growth since 1962.

6. There are two meat-processing plants in Edna just beyond its city limits and also a welding company. The city has three banks and the usual civic, social, and fraternal organizations. While Edna has one weekly newspaper, neither it nor Jackson County has an AM, FM, or TV station within its boundaries. The estimated labor force of Edna is 4,400 persons.

7. Plans have been made by the U.S. Bureau of Reclamation to construct a dam and reservoir a few miles from Edna, but at the close of the hearing this proposal had only advanced to the stage of a bill being introduced into the House of Representatives.

8. Yoakum, with a 1960 population of 5,761, is located on the boundary of two Texas counties. Approximately 70 percent of the city is in Lavaca County and the remaining 30 percent is in De Witt County. It is like Edna in having home rule and in having no assignment of an AM, FM, or TV station. Yoakum is not a county seat since Cuero is the seat of De Witt County and Hallettsville is the seat of Lavaca County. Station KCFH is situated in Cuero.

9. While Yoakum is located in an agricultural area in which stock raising is an important activity, there are within the city several companies which tan leather and manufacture leather products. About 150 persons are employed in packing plants and vegetable canning. Yoakum has one newspaper which appears three times weekly. It has its own school and municipal hospital and churches of various denominations. A district office of the Texas Highway Department is located there and small offices of other State agencies are situated in Yoakum. The local authority has been working with the U.S. Bureau of Reclamation for the location of a dam approximately 15 miles from Yoakum, but the record does not indicate that any definitive steps have

[1] All population figures are taken from the 1960 U.S. census unless otherwise noted.

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been taken toward authorizing the dam. Census figures show a slight increase in population from 1940 to 1960, but there has been a population loss during the same period in both De Witt and Lavaca Counties. Yoakum has an estimated labor force of 3,160 persons and has three banks.

Proposed coverage

10. The two applicants each propose a 10-kw station on 1130 kc at Edna and Yoakum, respectively. Each station would operate daytime only and employ a directional antenna. Yoakum and Edna are 35 miles apart and are both in southeast Texas.

Cosmopolitan coverage

11. Cosmopolitan's proposed station, based on calculated radiation values specified for the directional antenna and ground conductivity values from figure M–3 of the rules, would provide primary service as shown in the following table:

Contour	Area (square miles)	Population
2.0 mv/m	7,795	166,768
0.5 mv/m	18,100	334,702

All of the area within the proposed 0.5-mv/m contour is served by three existing stations. Portions are served as follows:

5 stations	75 to 100 percent.
1 station	50 to 75 percent.
22 stations	25 to 50 percent.
44 stations	Less than 25 percent.

The minimum of existing services to any portion of the area is 12 and the maximum is 29.

12. The city of Edna, Tex., itself receives primary service from eight existing stations. There are at least five primary services (2.0 mv/m or more) to the communities of Hallettsville, Palacios, and Port Lavaca which are communities of at least 2,500 persons within the proposed 2.0-mv/m contour. Three other communities with urban populations within this contour (Cuero, Victoria, and Yorktown) now receive primary service from nine stations. Cosmopolitan would bring the first local outlet to Edna.

Huntley coverage

13. Yoakum is neither a county seat nor a part of any urbanized area. It is situated about 16 miles north of Cuero, which has one AM station and is the county seat of De Witt County. Using the calculated values of radiation specified for the proposed directional antenna and ground conductivity values from figure M–3 of the rules, the expected coverage of Huntley's station is shown in the following table:

Contour	Area (square miles)	Population
2.0 mv/m	9,480	171,217
0.5 mv/m	20,914	357,010

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14. Primary service is provided to the entire area within the proposed 0.5-mv/m contour by three existing stations. Portions are served as follows:

4 stations	75 to 100 percent.
2 stations	50 to 75 percent.
25 stations	25 to 50 percent.
35 stations	Less than 25 percent.

Portions of this area will thus receive a minimum of nine primary signals and a maximum of 25.

15. The maximum number of primary signals to the urban community of Victoria within the proposed 2.0-mv/m contour is nine. Within the same contour the urban community of Port Lavaca receives a minimum number of five primary services. Eight daytime primary services are now available to the city of Yoakum itself.

Directional antenna issue and protection to station KWKH (issues 2 and 3)

16. In the *Memorandum Opinion and Order* which designated this case for hearing, the Commission took notice that both applicants proposed to suppress radiation in the direction of KWKH to critically low values and stated that minor variations in the operating parameters of each proposal would result in exceeding the proposed MEOV of each station. Therefore the Commission felt that a substantial question existed as to whether the applicants would be able to adjust and maintain antenna systems as proposed and whether adequate protection would be afforded to KWKH.

17. Station KWKH operates on 1130 kc/s with 50 kw power, directionalized at night, in Shreveport, La. It is a class I–B station. Both Yoakum and Edna are located approximately 295 miles southwest of Shreveport. The 0.1-mv/m contour of KWKH over the pertinent arc south and southwest of Shreveport established by field strength measurements made in 1940 and 1941 lies at distances from the transmitter varying from 150 to 225 miles depending on the direction. In 1966 Cosmopolitan's consulting engineer made field strength measurements along stub radials which show some contraction of the aforementioned contour. This, however, does not occur in the area where either Cosmopolitan's or Huntley's 0.005-mv/m contour approaches most closely to the KWKH 0.1-mv/m contour. In the case of either proposal and predicated upon use of the specified MEOV and ground conductivities derived from figure M–3 of the rules, both of the proposed 0.005-mv/m contours would fail to reach the 0.1-contour of KWKH. Nevertheless, the proximity would be close in either case. At its closest approach Cosmopolitan's 0.005-mv/m contour would fall short of the KWKH 0.1-mv/m contour by about 6 miles, and the comparable contours under the Huntley proposal would be separated by no less than 3 miles.

Cosmopolitan directional antenna

18. The directional antenna system proposed by Cosmopolitan will consist of three uniform cross-section, guyed, vertical radiators spaced 363 feet (150° electrical) on a line bearing 26° true. Each tower will be base-insulated and have a height above insulator of 220 feet (91°

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electrical). The ground system will consist of 120 copper wire radials 218 feet long (approximately one-quarter wavelength) about the base of each tower. Overlapping radial wires between towers will be bonded to transverse copper straps. A 48 foot by 48 foot expanded copper ground screen at the base of each tower will minimize changes in base capacity that might result from temperature and moisture changes in the soil. Additionally, in order to eliminate any possibility of variations that might be caused by vegetation, growth in the ground screen areas will be controlled completely by chemical means and mowed in the ground system areas beyond the screens. The fences required to prevent unauthorized access to the towers will be constructed of fiberglass and will have no effect on the operation of the directional antenna system.

19. The design and construction of the antenna system contemplates the use of thin triangular cross-section towers fabricated of hot-dipped galvanized sections field welded to adjacent sections in order to prevent corrosion and minimize ohmic loss. The use of a thin tower will permit the current distribution to approach theoretical and guying the towers with Glastron fiberglass epoxy line, which is nonconducting and nonmagnetic, will not only eliminate any possibility of reradiation from the guy lines but will also avoid all chance of capacitive loading which might affect the current distribution on the towers. Electric power for tower lighting will be brought across the base insulator by means of an Austin-type transformer so as to minimize base loading and provide the most stable method of tower lighting. Tower lighting cable will be routed inside the tower to prevent any possibility of variations in current distribution or impedance. The beacon lights atop the tower will be shielded by lightning rods to protect the beacons and to minimize possible top loading variations that might result from lamp failure or conductive moisture or dirt accumulations on the glass housings.

20. Transmission lines, sampling lines, signal, and power circuits will be carried in protective Orangeburg or Transite conduits buried 12 to 18 inches beneath the soil surface. Burial of these lines will also avoid variations which might be caused by uneven or rapid temperature changes. Oversize 1⅝-inch-diameter flexible air dielectric coaxial transmission lines will be used in continuous lengths to eliminate any problems which might be encountered with intermediate joints. These transmission lines, jacketed for additional mechanical protection, will have an average power rating of 150 kw. at the proposed station's operating frequency. Use of the transmission line here proposed will minimize variations that might be caused by the power flow to each tower and will provide more permanent and trouble-free service. Sampling lines will be of equal length air-dielectric coaxial cable of the best quality.

21. Phasing and tower impedance matching components will be housed at each tower in an insulated fiberglass tuning house equipped with thermostatically controlled electric heat and air conditioning so that all inductors, capacitors, meters, etc., housed in the unit will remain at a nearly fixed temperature and thereby essentially eliminate variations that might be caused by ambient temperature changes. All phasing and power dividing components in the transmitter building

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will be maintained at room temperature by climate control facilities. The phasing, matching, and power dividing components to be used in this installation will be designed with excess ratings and for maximum stability. Variable vacuum capacitors will be utilized throughout to circumvent the need for rolling, sliding, or friction contacts associated with the usual inductive components. All interconnections will be made of semihard copper tubing to eliminate the possibility of variations that might be encountered with flexible strappings and no relays will be utilized in the radio frequency circuits.

22. Cosmopolitan's consulting engineer, like those for both Huntley and KWKH, is a man with many years of engineering experience, including the design and adjustment of directional antennas. It is his opinion that the Cosmopolitan antenna design has certain inherent favorable characteristics. For example, the rather wide spacing (0.416 wavelength) between the three quarter-wave towers results in smaller mutual coupling impedances. Base operating resistances for the several towers are high: 22.95 ohms for tower No. 1, 40.52 ohms for tower No. 2, and 58.95 ohms for tower No. 3. Small ohmic variations which might be caused by temperature changes, condensation, or changes in soil moisture were considered by him to be relatively insignificant when compared with the large operating resistances. Furthermore, these natural changes would be expected to affect all towers simultaneously creating little chance for variations between individual tower currents and phase. Also, by virtue of their inverse square root relationship, the high base operating resistances mean smaller tower feed currents, thus providing for lower power losses in the stray resistances found in antenna systems. The largest tower base current will be on the order of 12.5 amperes and the overall system losses, assuming one ohm per tower, will be less than 240 w. This low total loss (about 2.5 percent) indicates, in his view, that there will be a minimum of circulating currents, a factor that tends to enhance the system's stability.

23. The antenna current ratios and phase parameters specified for Cosmopolitan's directional antenna system are as follows:

Tower	Current ratio	Phase (degrees)
1. Northeast	0.5335	—49.1
2. Center	1.0	0
3. Southwest	.4916	—49.1

Excitation of the antenna system in accordance with the above will produce a symmetrical figure 8 radiation pattern that is not entirely closed at the center and with the main radiation lobes broadside to the line of towers. One lobe is directed to the northwest and the other to the southeast. Each of these lobes attains a maximum field of 950 mv/m. Along the line of towers to the southwest the center is expanded and reaches a value of 380 mv/m. In the northeast direction toward KWKH, the radiation pattern is deeply suppressed over an arc from 341° to 71° true. In this arc there are three small lobes and four minima. The center lobe of the three lies along the line of towers and has a maximum calculated value of 16.1 mv/m. The other two lobes are smaller and fall 30° on either side of the center lobe. These two

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smaller lobes reach their maximum calculated value of 11.7 mv/m at 356° and 56° true. The four minima of radiation are symmetrically disposed: two of the minima have values of 5.8 mv/m at 15° either side of the line of towers and the other two have values of 5.6 mv/m at 20° removed from the line of towers. Assuming an operating loss of 1 ohm per tower, the proposed array will develop an RMS of 555 mv/m for a power of 10 kw. (or 175.5 mv/m for 1 kw.).[2]

24. The following values of radiation are specified in the horizontal ground plane over the arc of suppression toward KWKH:

Azimuth (degrees)	Calculated field (mv/m)	MEOV (mv/m)	Azimuth (degrees)	Calculated field (mv/m)	MEOV (mv/m)
341	33.6	48.5	31	14.1	20.0
346	8.8	17.0	36	10.4	17.5
351	7.6	11.9	41	5.8	15.5
356	11.7	12.2	46	5.6	15.0
1	9.6	11.4	51	9.6	18.2
6	5.6	9.5	56	11.7	20.5
11	5.8	10.7	61	7.6	20.7
16	10.4	13.5	66	8.8	19.0
21	14.1	17.0	71	33.6	50.0
26	16.1	20.0			

Cosmopolitan's consulting engineer asserts that he can adjust the proposed directional antenna to or very close to the above-specified calculated field values of radiation.

25. Starting initially with the Cosmopolitan antenna system adjusted to conform to the calculated values of radiation, a variation in phase of the center reference tower by plus or minus 1° or in current magnitude by plus or minus 1 percent, would result in radiation exceeding the MEOV in the directions 351°, 356°, 1°, 6°, 11°, 16°, 21°, and 26° true. If the current magnitudes and phases of the two end towers were to vary by 1 percent and 1°, respectively, with respect to the center tower, then under the most adverse condition radiation in the critical direction of 356° true would increase from a calculated value of 11.7 mv/m to 18.7 mv/m, or 6.5 mv/m in excess of the specified MEOV of 12.2 mv/m. Since Cosmopolitan intends to hold relative parameter variations to at least 0.5 percent in field and 0.5° in phase, effects of variation within this range must be examined. Analysis of the 64 possible 0.1-percent and 0.1° combinations shows that the extreme of radiation in the critical direction of 356° true would increase from 11.7 mv/m to a value of 12.3 mv/m, or 0.1 mv/m greater than the MEOV of 12.2 mv/m in that direction.

26. The engineer for Cosmopolitan would prefer a final adjustment value of radiation that would be about 10 percent below the specified MEOV. In all instances such values would be greater than the calculated fields except on the critical bearing of 356° true where the calculated radiation is 11.7 mv/m, the MEOV is 12.2 mv/m, and the final adjustment value anticipated would be 11.0 mv/m. KWKH's engineer shows that adjustment of the radiation to 11 mv/m at 356° true can be accomplished by a change in the design current ratio from 0.5445 to 0.55319 for the No. 1 or northeast tower, and from 0.4916

[2] Sec. 73.189(b)(2) of the rules requires that the RMS of a class II station (as here proposed) be not less than 175 mv/m for 1 kw.

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to 0.4903 for the No. 3 or southwest tower. Again considering the most adverse combinations of the field and phase parameters, deviations in towers 1 and 3 of plus 0.5 percent in magnitude and minus 0.3° in phase will produce a radiation value of 13.8 mv/m; 0.3 percent in magnitude and 0.2° in phase will produce a value of 12.7 mv/m; and 0.2 percent in magnitude and 0.2° in phase will produce a field magnitude of 12.1 mv/m. Thus only by holding the variations of the antenna parameters to no more than 0.2 percent in magnitude and 0.2° in phase will the radiation never exceed the MEOV.

27. There was disagreement between the consultant for Cosmopolitan and for KWKH as to the efficiency of the Nems-Clarke type 112 phase monitor which both Cosmopolitan and Huntley propose to use for the purpose of monitoring the current and phase relationships in their respective antenna systems. According to the manufacturer of this instrument, it has a phase resolution of 0.5° and 0.5 percent in current magnitude. Resolutions of the phase and field parameters on this order, however, are not sufficiently accurate to monitor properly the operation of either proposed antenna system within values below the MEOV. Even if the type 112 monitor were used in conjunction with a suitable digital voltmeter to increase resolution to 0.1° for phase and 0.1 percent for loop current, it is the opinion of the KWKH engineer that there would still be a question as to whether this would be adequate for surveillance of the small variations to which the antenna parameters must be held if radiation is not to exceed the MEOV. In his opinion good engineering practice would require an indicating instrument capable of a resolution approximately three times as great as the requirement for reading the instrument. Since the type 112 monitor can be used only to read one loop current at a time, KWKH's engineer feels that the comparison of readings to determine current ratios is susceptible to additional error if there are any variations in power or carrier shift while reading the three tower currents. Current readings on this monitor are affected by the presence of modulation. For these reasons he is of the opinion that resolution and repeatability can be no greater than 0.2 percent for determining current ratios and that with this limitation the monitor used in conjunction with a digital voltmeter would still be inadequate to maintain Cosmopolitan's array within the 0.2 percent current limit.

Site considerations in Cosmopolitan's proposal

28. In this instance the proposed transmitter site is located about 2.6 miles north-northwest of Edna. A two-lane highway bordered by wood pole utility lines on either side runs to the east of the site. A wood pole utility line also cuts across the southern side of the site. It is in a sparsely settled area where the land is flat and used primarily for grazing. Low-level farm buildings are situated at the northeast and southwest corners but there are less than 10 residences within a half-mile radius. The consultant for Cosmopolitan who visited the site on June 10, 1966, observed that except for these residences and their associated farmsheds and the utility lines mentioned above, there are no structures within about a mile that might cause reflections or reradiation. The consultant for KWKH also visited the site and found that there were no terrain problems evidenced in the immediate

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vicinity except for the presence of vertical grounding wires on the nearby 25-foot utility poles which he felt must be electrically isolated if these elements are to be eliminated as a source of signal reradiation. He found, however, that there are a number of towers at distances greater than 2 miles from the site which in his opinion represent potential sources of significant reradiation. One of these is a 140-foot guyed tower located 2.3 miles south of the Cosmopolitan site and used in connection with a microwave system. KWKH's consultant is of the opinion that this has a theoretical potential reradiation of 11.4 mv/m. Immediately southwest of this tower is a 300-foot guyed tower with a potential reradiation of 10.1 mv/m. In the center of Edna at a distance of 3.6 miles southeast of the Cosmopolitan site is a 175-foot water tower which can reradiate as much as 11.3 mv/m. Two other guyed towers with heights of 166 and 430 feet located 4.1 and 4.9 miles, respectively, to the south of the site have potential radiation values of 6.6 mv/m and 5.6 mv/m. It was his opinion that all of these elements could pose a serious problem in connection with the ability of the applicant to adjust the antenna radiation pattern to its specified values. In calculating the values of reradiation the engineer for KWKH assumed minimum loss conditions; consequently, these figures represent maximum possible reradiation under optimum conditions. This engineer conceded that reradiation would more than likely be less than depicted and that with the application of proper techniques a competent engineer could detune the structures to eliminate reradiation.

29. In connection with proving the performance of the proposed directional antenna, Cosmopolitan's engineer would make field strength measurements along radials in the directions approximately 349°, 358°, 6°, 26°, 45°, 56°, and 66° true.[3] In addition it is proposed to meet all other requirements that may be specified in the construction permit. Cosmopolitan's engineer feels the adjustment and maintenance of the array will be facilitated by the relatively flat, open terrain. Most of the measuring locations will be considerably removed from the nearest wires and buildings. There are tree clumps, irrigation ditches, farm lanes, and fences shown on recent large-scale topographic maps which will permit accurate orientation in the field and provide for excellent repeatability of measurement at the different measurement locations including monitoring points. Two or more monitoring points will be selected in the manner required by the rules on each of the specified radials. Care will be exercised in selecting monitoring points which will permit a determination of whether changes in signal level arise from changes in ground conductivity between transmitter and monitoring point or due to antenna system instability.[4]

Huntley's directional antenna and protection to station KWKH

30. Huntley's proposed directional antenna system will consist of three base insulated vertical guyed radiators of uniform cross-section arranged on a line bearing 30° true. Towers will be spaced 218 feet

[3] It has been the practice of this engineer for some 20 years to run radials in the mulls and on the ends of the small lobes throughout the arc of suppression.
[4] In the event of a grant, Cosmopolitan will furnish KWKH a copy of the antenna proof of performance at the time application is filed for station license.

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(90° electrical) and each will have a height above base insulator of 220 feet (91° electrical). The base of each of the towers will be varied to achieve an elevation of 311 feet for each tower. The ground system at the base of each tower will consist of 120 copper wire radials, 220 feet long (approximately one-quarter wavelength), buried 6 to 8 inches and interspersed with 120 copper wire radials, 50 feet long, buried closer to the surface. Where the long copper wire radials intersect between towers, they will be terminated and bonded to a transverse copper strap. Since the site property cannot accommodate the entire ground system, the long ground wires will be shortened in a northwesterly direction about the northeast tower where approximately one-fourth of the radials would be affected and in a southeasterly and southwesterly direction about the southwest tower where some one-half of the radials would be affected. The curtailment of the wire radials would vary from a small amount to about 40 feet at the maximum. Because of the considerable ground system proposed the shortening of some of the radials wires as described is not expected to have any effect on the stability or efficiency of the proposed directional antenna system. Additional land, if required, is available from the lessor.

31. The proposed antenna pattern will be cardioid in shape, and will be adjusted as close as possible to the computed radiation values. Phase sampling lines and coaxial transmission lines feeding the tower will be of equal length to equalize variations due to changes in temperature. Power for tower lighting will be supplied across the tower base insulators by use of Austin transformers. The design of antenna units will be symmetrical so as to minimize temperature effects between the units. Phasors will be built by a commercial firm according to this engineer's specification and will include the use of vacuum capacitors where required. Tuning houses will be of nonmetallic design and located a sufficient distance from the tower bases to avoid adverse effects in wet weather. Wood fences around the towers will be located at a greater than usual distance from the tower base so as to avoid any effect on the operation of the antenna system. Power for the station will be brought into the transmitter building in underground conduit.

32. It has been the practice of the firm represented by Huntley's engineer to specify for use in directional antenna systems radio frequency ammeters of the expanded-scale type. Before being placed in service, these meters are calibrated over the entire scale by comparison with special expanded-scale mirror meters that have an accuracy checked to 0.25 percent and a scale length in excess of 5 inches. Experience of the consulting firm has shown that use of the calibrated expanded-scale radio frequency ammeter has permitted maintenance of antenna and common point currents within very close limits. Calibration charts will be provided for the radio frequency ammeters that will be utilized in the proposed array.

33. It is proposed to install a modified "Ohms law" phasor and to provide vernier phase and current ratio adjustment controls as well as vernier impedance control. Huntley's engineer has found that when a modified Ohms law phasor is employed, common point impedance

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does not change even when phase or current ratio adjustments are of a magnitude sufficient to cause gross changes in the antenna radiation pattern. Normally, no adjustment of impedance would be required for minor changes in phase or current ratio. However, if any adjustment of the common point impedance should be required, the vernier impedence controls would permit such adjustment.

34. The antenna current ratios and phase parameters specified for Huntley's directional antenna system follow:

Tower	Current ratios	Phase
		Degrees
Northeast	1.000	+102
Center	1.989	+0.92
Southwest	1.000	—102

35. Although the Huntley design is deeply suppressed toward the northeast over an arc from 340° to 81° true, the critical angle of protection towards KWKH is 17° from azimuths 355° to 12° true. In the broader arc there is a small lobe on the line of towers at 30° and there are broad minima 30° on either side of the lobe. Assuming a loss of 2 ohms per tower, it is anticipated that the array will develop an RMS of 620 mv/m for a power of 10 kw. or 196 mv/m for 1 kw. The operating base resistances for the several antenna elements are 16 ohms for the northeast tower, 36 ohms for the center tower and 57.9 ohms for the southwest tower.

36. The following values of radiation are specified in the horizontal ground plane over the arc of suppression toward KWKH:

Azimuth (degrees)	Calculated field (mv/m)	MEOV (mv/m)	Azimuth (degrees)	Calculated field (mv/m)	MEOV (mv/m)
340	30	34.5	40	10.25	14.7
350	8.35	13.4	50	8.30	12.8
0	8.75	13.2	60	8.75	13.2
10	8.30	12.8	70	8.35	13.4
20	10.25	14.7	80	30	34.5
30	11.85	16.3			

Huntley's engineer contends that he can and will adjust the radiation from the proposed directional antenna to conform with the above-specified calculated fields.

37. Assuming the directional antenna radiation pattern is adjusted to conform with the calculated field values, the center tower of the antenna system may be varied plus or minus 0.5 percent in current ratio and plus or minus 0.4° in phase before radiation would equal the MEOV in several directions and not exceed the MEOV in other directions. If similar variations were made adversely in the two end towers with respect to the center tower, the resultant radiations would not exceed the MEOV. The antenna phase parameters are proposed to be maintained within 0.1°.

38. Separate studies made by KWKH's engineer are in substantial agreement with the above calculations made by Huntley's engineer. The former also considered the effects of variations of the field and

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phase in the two end towers under the most adverse conditions for the critical azimuth bearing of 2° true. The MEOV in this direction in 13.2 mv/m and for no variation in parameters the calculated field is 8.7 mv/m. For a change in current magnitude of 1 percent and phase of 0.6°, the resultant field would reach 15.8 mv/m or 2.6 mv/m in excess of the MEOV; for a change of 0.7 percent and 0.4° in current magnitude and phase, respectively, the resultant field would reach a value of 13.4 mv/m or 0.2 mv/m greater than the MEOV. In the event variations were limited to 0.5 percent in current magnitude and 0.3° in phase, the resultant field at 2° true would attain a magnitude of 12.2 mv/m or 1 mv/m below the MEOV of 13.2 mv/m specified for this direction.

39. Huntley's consultant proposes to use a Nems-Clarke type 112 phase monitor for monitoring the field and phase parameters of the system. As noted in connection with the Cosmopolitan proposal, this instrument has a manufacturer's stated resolution of 0.5 percent in current magnitude and 0.5° in phase. Huntley, however, proposes to add a suitable digital voltmeter so that resolution can be sharpened to 0.1 percent in current and 0.1° in phase. Accuracies of this order would be adequate to facilitate maintenance of radiation to values below the MEOV. The engineer for KWKH feels that the type 112 monitor used in conjunction with a suitable digital voltmeter would help in maintaining the array within 0.3° in phase. He asserts, however, that his experience with the type 112 shows current ratios cannot be obtained with accuracy in the presence of modulation. As a result it is his opinion that resolution and repeatability can be no greater than 0.2 percent for determining current ratios. To this contention the Broadcast Bureau in its proposed findings states:

> It would appear that if the loop current readings were made during the intervals when there is no modulation present, then the current ratios could be determined with a resolution of 0.1 percent and using the "three times" standard applied by KWKH's engineer, the unit could be used to maintain the array current ratios within 0.3 percent. * * * There is no reason to believe that current ratios cannot be read directly simply by setting the meter to read unity for the reference tower.

Huntley site considerations

40. The proposed site was visited by the engineering consultants for both Huntley and KWKH. Each described the terrain as "rolling" or "gently rolling" in the area where the site is located and Huntley's engineer found no terrain feature which would be likely to distort the radiation pattern. The KWKH consultant on the other hand, said he would expect some distortion, but of greater significance than terrain, in his opinion, is the presence of certain structures in the area which would have an adverse effect on the applicant's ability to adjust and maintain the array.

41. Approximately 1 mile southwest of the site in the direction of Yoakum there is a rodeo arena with floodlights which are situated on wooden poles. The KWKH engineer estimated the height of these poles as 75 feet above the ground and estimated that they would result in reradiation in excess of the 4.5 mv/m tolerance between the Huntley computed pattern and the proposed MEOV. Huntley's engineer from

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personal inspection estimated the height of these poles at 40 feet and therefore expected lower reradiation from the down guys. In any event, if there were to be reradiation sufficient to distort the pattern, it would be relatively easy, electrically, to isolate each of the down guys by the installation of chokes. The KWKH engineer agreed that reradiation from these elements could be rendered insignificant by proper detuning procedures.

42. A large object which could become a parasitic radiator is the Yoakum water tower located about 2.16 miles southwest of the site. Its height is approximately 200 feet and it has a potential reradiation value of 24.6 mv/m according to the KWKH consultant. Nevertheless, on the basis of certain additional assumptions including a 5-ohm ground loss, the value was reduced to 13.8 mv/m. This is greater than the radiation value specified in the pattern's minima. The KWKH engineer was of the opinion that reradiation from the tower would be asymmetrical about the Huntley line of towers and would distort the directional pattern in a manner which could not be compensated by an adjustment of the array. The tower consists of a reservoir tank supported by six steel legs connected together with horizontal braces. A cylindrical pipe drops from the tank to the ground. Huntley's engineer was of the opinion that no serious problem would be encountered due to the presence of this tower, and, if trouble occurs he has been authorized by Huntley to detune or otherwise isolate this tower and any other obstruction which may cause reradiation difficulties in adjusting the antenna system. While the engineer for KWKH conceded that the water tower can be detuned, he said that in his experience no two situations of this sort have been alike and that the method of detuning would require experimentation.

43. Another object approximately 1.7 miles southwest of the site is a 150-foot guyed two-way radio tower. The KWKH engineer calculated that this has a potential reradiation value of 32 mv/m, but as a practical matter he would expect lower values of reradiation. In the opinion of Huntley's engineer there is no accurate way to calculate actual reradiation because there is a question about the quality of the electrical bonding between sections of the structure. Also the tower is supported by uninsulated guy wires. Consequently, he finds that the tower would not present any significant problem in the adjustment and maintenance of the array. But if it did, he stated that conventional choking elements could be suspended from the tower and thus isolate it and avoid serious reradiation.

44. In establishing the performance of the directional antenna system it is planned to make specific radial measurements in the directions 353°, 3°, 13°, and 30° true in addition to such others as may be subsequently specified in the instrument of authorization. Daily measurements of the field strength at the selected monitoring points will be made for a period sufficiently long to show that the array is essentially stable and that the field strengths at the monitoring points do not vary beyond the values specified in the construction permit. Huntley's engineer feels that on the basis of his many years of experience in the design, construction, and adjustment of directional antenna systems, the proposed directional antenna with construction

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features designed to enhance stability and facilitate adjustment should not present any unusual or unreasonable problems in the maintenance of radiation pattern fields that will not exceed the MEOV and thus afford adequate protection to KWKH.

Other directional antenna systems

45. The consultants who testified stated that it is virtually impossible to find any two directional antennas which are exactly alike, since they are all custom designed. Nevertheless, the record contains evidence regarding several directional antenna systems which have achieved suppression of radiation values comparable to those proposed by Cosmopolitan and Huntley. WGBS in Miami, Fla., operating on 710 kc with a power of 10 kw, formerly used a four-element inline array and obtained minimum adjustment values of radiation equivalent to 3.85 mv/m for Cosmopolitan and 4.15 mv/m for Huntley. The present antenna used by WGBS was designed by the KWKH engineer and consists of a six-element parallelogram array at a new site. It has a minimum radiation value equivalent to 5.93 mv/m for Cosmopolitan and 6.23 mv/m for Huntley.

46. KGNC at Amarillo, Tex., operating with a power of 10 kw. on 710 Kc/s and employing a five-element array suppresses radiation to an equivalent of 5.4–7.2 mv/m for Cosmopolitan and 5.97–7.95 mv/m for Huntley. A similar restriction on radiation was obtained by WDIA at Memphis, Tenn., a station operating on 1070 Kc/s with a power of 5 kw. and a six-element array: the equivalent of 7 mv/m for Cosmopolitan and 7.85 mv/m for Huntley. Somewhat larger adjustment values are obtained by KFRE in Fresno, Calif., operating on 940 Kc/s with a power of 50 kw. and using a four-element directional antenna: the equivalent of 7.57 mv/m for Cosmopolitan and 8.46 mv/m for Huntley.

47. All of the foregoing stations have directional antennas with more than three elements. In those instances where three-element arrays are employed, none shows adjustment values of radiation as low as that proposed by either applicant herein except WKBW in Buffalo, N.Y. WKBW operates on 1520 Kc/s with a power of 50 kw. In a 1941 proof-of-performance adjustment WKBW obtained radiations equivalent to 5.9 mv/m for Cosmopolitan and 6.6 mv/m for Huntley. Subsequently in 1963, reevaluation of the WKBW operation established radiations equivalent to 11.6 mv/m for Cosmopolitan and 13 mv/m for Huntley. Of the many stations employing three-element arrays listed by applicants, only the following, apart from WKBW, show equivalent adjustment values of measured radiation under 10 mv/m.

Station	Frequency (kc/s)	Power (kw)	Equivalent radiation (mv/m)	
			Cosmopolitan	Huntley
WBAL, Baltimore, Md	1090	50	8.35	9.1
KING, Seattle, Wash	1090	50	8.8	9.8
WTOP, Washington, D.C	1500	50	8.5	9.5
WWNH, Rochester, N.H	930	5	8.5	9.5
KHFI, Austin, Tenn	970	1	8.27	9.22
WICH, Norwich, Conn	1310	5	8.05	9.02
KOMA, Oklahoma City, Okla	1520	50	8.8	9.8

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The site and vicinity where each of these stations is constructed were not described in the record or compared with either the Cosmopolitan or Huntley sites. Evidence does establish that in connection with the adjustment of the WBAL array (done for the most part by KWKH's engineer) it was found necessary to detune the grounding wire on a smoke stack, a tubular steel tower used for police communication, and grounding wires on some wood utility poles.

48. Based on his experience with WBAL, the engineer for KWKH believes that Cosmopolitan's array should not be any more difficult to adjust than that of the Baltimore station and his experience would indicate that the proposed radiation pattern can be obtained if certain conditions are met. Specifically, both sites would have to be essentially comparable and he stressed the necessity of eliminating reradiation from surrounding structures. This assumes availability of competent, experienced personnel, and a sufficiency of funds. KWKH's engineer further notes that Cosmopolitan's array employs wider tower spacing which tends to give more stability to the system. The Huntley array, although not designed with tower spacing as wide as that proposed by Cosmopolitan, nevertheless is not as restricted in the critical arc toward KWKH. Assuming that reradiation from elements in the site area can be eliminated, there should not be any greater difficulty attached to the adjustment of Huntley's array than that proposed by Cosmopolitan.

CONCLUSIONS

1. In the last analysis this case hinges upon two questions. One is whether a decision can be made under section 307(b) on the question of superior need for service and the other is whether either of the applicants can construct, adjust, and maintain its proposed directional antenna system so as to provide adequate protection to radio station KWKH in Shreveport, La.

2. Inasmuch as neither Edna nor Yoakum possesses any local broadcast outlet, each has a presumption of need for its first transmission service. There being a standoff at this point it is necessary to ascertain whether either applicant should be preferred by virtue of providing a fairer, more efficient, or more equitable distribution of radio service. There is no choice with respect to size of the communities since they are approximately the same. While the record indicates that the growth of population in Edna and also in Jackson County, where it is situated, is somewhat in excess of the growth in Yoakum and the two counties in which it is situated, there is little basis here for any preference. Both principal communities receive primary service from eight existing stations. In each instance, the primary service area receives signals from a considerable number of stations. The minimum number of such signals in the Cosmopolitan service area is 12, and the minimum in the Huntley service area is nine. Within their respective 0.5 mv/m contours, Cosmopolitan would serve a population of approximately 335,000 persons and Huntley would serve approximately 357,000 persons. These differences are not sufficiently great to give either applicant a 307(b) preference.

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3. Each applicant proposes to operate on 1130 kc with 10 kw power, daytime only, using a directional antenna. As indicated by the order of designation as well as by the evidence, both of these antenna systems would be extremely tight in order to afford protection to station KWKH. In view of the critical nature of this protection, it is necessary to determine whether each applicant has borne the burden of proof that its proposed antenna system can be adjusted and maintained as proposed.

4. The evidence on this subject as shown in the *Findings of Fact* is voluminous. But, in essence it comes down to the expert opinions of three consulting engineers. The consultant for each of the applicants was of the opinion that he could so adjust and maintain the proposed array and each stated that he will be employed to do so. The consultant for respondent KWKH, however, was of the opinion that neither array could be adjusted and maintained so as to afford complete protection to his station. All three consultants are men of extensive experience in the field of designing and adjusting directional arrays. The question, however, is not simply which consultant is to be relied upon. The burden of proof is on the applicants and unless it has been shown affirmatively that either or both of the proposed antenna systems will function without the hazard of interference, the burden has not been sustained.

5. At its closest approach to the KWKH 0.1 mv/m contour the Cosmopolitan 0.005 mv/m contour would lie about 6 miles away. Under the Huntley proposal the comparable contours would be separated by not less than 3 miles. As shown in paragraph 25 of the Findings, the MEOV on certain critical azimuths would be exceeded in the Cosmopolitan proposed system by a variation in phase of plus or minus 1° in the center reference tower or in current of plus or minus 1 percent. If current and phase, respectively, of the two end towers were to vary by 1 percent or 1° with respect to the center tower, under the most adverse conditions radiation in the critical direction of 356° true would exceed the specified MEOV of 12.2 mv/m by 6.5 mv/m.

6. Cosmopolitan proposes to hold its relative parameter variations to at least 0.5 percent in current and 0.5° in phase. Yet, an analysis of 64 possible combinations of 0.1 percent and 0.1° indicates that the extreme of radiation on 356° true would exceed the MEOV on that azimuth by 0.1 mv/m. As shown in paragraph 26 of the Findings, in order to prevent radiation from ever exceeding the MEOV, variations of the antenna parameters must be held to no more than 0.2 percent in magnitude and 0.2° in phase.

7. In the case of Huntley's proposed antenna system, assuming that it is adjusted to the calculated field values, the center tower may be varied plus or minus 0.5 percent in current and plus or minus 0.4° in phase before radiation would acquire the MEOV in several directions and not exceed the MEOV in other directions. Nevertheless, on the critical azimuth of 2° true a change in current magnitude of 1 percent and phase of 0.6° would produce radiation in excess of the

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MEOV by 2.6 mv/m. (See par. 38 of Findings.) Similarly, a variation of 0.7 percent and 0.4° in current and phase respectively would result in exceeding the MEOV by 0.2 mv/m.

8. In the vicinity of each proposed antenna site there are a number of towers or other manmade obstructions which represent potential sources of reradiation. These are discussed at length in the Findings and no detailed repetition is needed here. It is sufficient to state that there was a consensus among all the consultants who testified that these towers could be effectively detuned or otherwise isolated so as not to produce reradiation. It is somewhat ambiguous, however, on the basis of the record as to how these obstructions would be detuned or at what cost. It is fair to say, however, that under ideal conditions they could be eliminated as hazards to the effective performance of either the Cosmopolitan or Huntley proposals.

9. A more critical question arises in connection with monitoring. Both Cosmopolitan and Huntley propose to use a Nems-Clarke type 112 phase monitor which, according to its manufacturer, has a resolution of 0.5° in phase and 0.5 percent in current. Huntley also has proposed to add a digital voltmeter so that this resolution can be sharpened to 0.1° in phase and 0.1 percent in current. According to the KWKH engineer, however, in neither instance would the monitoring equipment be adequate for surveillance of the small variations to which the antenna parameters must be held if the respective antenna systems are not to produce radiation in excess of the MEOV specified. (See pars. 27 and 39 of the Findings.) It was his opinion—and this was not disputed—that good engineering practice requires an instrument capable of resolution approximately three times as great as the requirement for reading the instrument. Thus, resolution and repeatability in the case of either proposal can be no greater than 0.2 percent for determining current ratios. The evidence was not conclusive that the type 112 monitor, even when used with a suitable digital voltmeter, would show current ratios with the necessary accuracy. On the basis of these factors and others set forth at length in the Findings it would appear that the question as to whether either proposed system will function with that degree of perfection required to protect KWKH from interference cannot be answered dogmatically one way or the other. In a situation where the suppression of radiation on certain bearings is as critical as shown here, it is not without significance that the applicant faces a serious risk. Assuming that he can construct and maintain his array in the manner hoped for, he is safe. But if he encounters adverse field conditions it is possible that an expensive investment may be largely lost because, in such circumstances, he may find it impossible to secure a license to cover his construction. Thus, it is not unreasonable to bear in mind the hazards to the applicants themselves.

10. Considering all of these factors the hearing examiner is forced to conclude that upon this record it is impossible to predict affirmatively the successful adjustment and maintenance of either proposed array. This is not to say that the opposite is true. In other words the examiner cannot say positively that neither array is subject to adjustment and

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maintenance. But such a conclusion is not required because the burden lay with the applicants, not with KWKH. It is thus concluded that neither Cosmopolitan nor Huntley has met its burden of proof and both must therefore be denied.

It is ordered, That unless an appeal to the Commission from this initial decision is taken by any of the parties, or the Commission reviews the initial decision on its own motion, the applications of Cosmopolitan Enterprises, Inc. (file No. BP–16347) and H. H. Huntley (file No. BP–16570) for construction permits *Are denied.*

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FCC 68-1166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of ESTATE OF PERCY B. CRAWFORD, FLOURTOWN, PA. For Transfer of Control and Assignment of License	Files Nos. BTC-5627 and BALH-1098

DECEMBER 5, 1968.

Estate of Percy B. Crawford,
Post Office Box 86,
Flourtown, Pa. 19031

GENTLEMEN: On November 26, 1968, the Commission considered your two applications (*a*) for transfer of control of WKTX, Inc., licensee of station WKTX, Atlantic Beach, Fla., from American Dielectrics Corp. to the estate of Percy B. Crawford, Ruth Crawford Porter, executrix (BTC-5627); and (*b*) for assignment of license of station WAQB-FM, Atlantic Beach, Fla., from Louac, Inc., to the estate of Percy B. Crawford, Ruth Crawford Porter, executrix (BALH-1098), and found substantial and material questions of policy and fact, as hereinafter mentioned, which necessitate designating the applications for hearing.

The policy question raised is the appropriateness of an estate acquiring broadcast licenses. While the Commission's rules provide for the interim assumption of control by the executrix of the broadcast licenses of a deceased licensee (see sec. 1.541), we believe that policy questions are raised when a long-existing estate seeks to acquire voluntarily a broadcast license for the benefit of the estate. We note that the same policy question, of course, would not be present if the beneficiaries of the estate would seek to acquire station licenses in their own right.

Secondly, there is a question as to whether the assignee's proposed programing was based upon an adequate survey of the community needs of the area to be served. In this regard, we are enclosing a copy of Public Notice, FCC 68-847, issued August 22, 1968, governing surveys.[1]

You are requested to submit comments on the matters raised within 20 days of the date of this letter. Failure to do so will result in dismissal of the above applications.

Commissioner Cox absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] Enclosure deleted.

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FCC 68-1210

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENTS OF SECTION 0.371 OF THE RULES AND REGULATIONS, DELEGATIONS OF AUTHORITY TO THE CHIEF, OFFICE OF OPINIONS AND REVIEW

ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has determined that the Chief, Office of Opinions and Review, should be authorized to act on requests for permission to file pleadings in excess of the length prescribed by the rules and regulations when such requests relate to pleadings to be filed in hearing proceedings pending before the Commission en banc. The delegation of this function to the Chief, Office of Opinions and Review, will contribute to the proper functioning of the Commission and the prompt and orderly conduct of its business.

2. Authority for this amendment is contained in sections 4 (i) and (j), 5(d), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j), 155(d), and 303(r). Because the amendment relates to matters of procedure and internal organization, the procedural and effective date provisions of section 4 of the Administrative Procedure Act, 5 U.S.C. 553, are inapplicable.

3. In view of the foregoing, *It is ordered*, effective December 30, 1968, That section 0.371 of the rules and regulations is amended.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R-518

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GEORGIA RADIO, INC., ROCKMART, GA.	Docket No. 18314 File No. BPH-5992
FAULKNER RADIO, INC., ROCKMART, GA. For Construction Permits	Docket No. 18315 File No. BPH-6224

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1968)

BY THE REVIEW BOARD:

1. The above-captioned applications were designated for hearing by Commission order, FCC 68-905, released September 11, 1968, 33 F.R. 14084. In that order the Commission specified a number of issues including a standard comparative issue. However, the Commission made no reference whatsoever to Georgia Radio, Inc.'s (Georgia's), proposal to duplicate part of the programing of its standard broadcast station in Rockmart on the FM facility. Faulkner Radio, Inc. (Faulkner), has now petitioned the Commission to enlarge the issues [1] to permit a showing concerning the benefits to be derived from the proposed duplication of programing of standard broadcast station WPLK, Rockmart, Ga., by Georgia's proposed FM station.

2. The petitioner points out that in response to question 21 of section IV-A, Georgia has stated that its FM station will duplicate the programing of station WPLK to the extent that it will carry all news, public affairs, and religious programing during the daylight hours and a 1-hour program from 2 to 3 local time, called "The Voice of Dallas." However, Faulkner notes, Georgia has neglected to specify the number of hours each day which will be duplicated. Petitioner undertakes to calculate the number of hours involved and suggests that approximately 37.2 percent of the FM broadcast day would be devoted to duplicating AM programs.[2] Faulkner observes that since the Commission did not note these circumstances in the designation order, it is precluded from making a threshold showing concerning this matter before the hearing examiner. It argues, however, that since the Commission in *Jones T. Sudbury*, 8 FCC 2d 360, 10 R.R. 2d 114 (1967), was very careful to point out that in situations where one applicant proposes substantial duplication of its AM programing and

[1] The Review Board also has before it for consideration an opposition by Georgia Radio, Inc., and Broadcast Bureau's comments, both filed Oct. 23, 1968, and a reply by Faulkner Radio, Inc., filed Nov. 4, 1968.

[2] The petitioner's calculation is based upon a program breakdown in sec. IV-A of Georgia's application. Since the AM station is daytime only, petitioner's figure may be somewhat high, but Georgia in its opposition failed to challenge this calculation or to supply a specific figure. We will, therefore, proceed on the assumption that approximately 37 percent of Georgia's FM broadcast day will be devoted to duplication of its AM programing.

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the other does not, this difference in the proposals may properly be considered under the standard comparative issue in the context of efficiency of frequency use. In *Sudbury*, petitioner argues, the Commission noted particularly that, since it is less efficient to use two frequencies to deliver a single program to a receiver location than it is to use two frequencies to deliver two programs to the receiver location, the applicant proposing duplication would be given an opportunity to show that its proposal is, nevertheless, in the public interest.

3. In its opposition, Georgia contends that since Faulkner has presented no facts which were not available to the Commission at the time of designation, any modification of the hearing order with respect to this matter would result in an unauthorized review of the Commission's decision by the Review Board. Georgia does not question the fact that a substantial percentage of its FM broadcast day would consist of duplication of its AM programing. However, it does submit an affidavit of its principal stockholder to the effect that the programs which would be duplicated are of such nature that the public interest would be served thereby. It also argues that in view of the Commission's declaration in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901, to the effect that comparative programing would not be considered in the absence of a specific issue, to require inquiry into the duplication matter would be improper.

4. The Bureau, in its comments, expresses the view that an application which proposes duplication for 37 percent of the operating day comes within the scope of the Commission's pronouncement in the *Sudbury* case, supra, and that, therefore, the examiner should afford Georgia an opportunity to "* * * demonstrate that there are benefits offsetting the disadvantages of its duplicated programing in order to avoid a demerit in the comparative evaluation of the applications."

5. The Review Board agrees with Faulkner and the Bureau that the duplication proposed by Georgia is substantial [3] and that this case falls within the Commission's pronouncement in *Sudbury*, supra. The examiner will, therefore, be authorized to permit Georgia to demonstrate that there are public benefits offsetting any disadvantages which may flow from its duplicated programing. With respect to Georgia's argument that Review Board consideration of this matter is precluded because the facts which petitioner relies upon were available to the Commission at the time of designation, we note that in *Atlantic Broadcasting*, 5 FCC 2d 717, 721, 8 R.R. 2d 991 (1966), the Commission instructed the Review Board to consider such matters as might be raised by the parties unless those matters were specifically considered in the designation order. Since the question of Georgia's duplicated programing was not so considered, Review Board consideration of that matter here is entirely proper.

6. *It is ordered*, That the petition to enlarge issues, filed October 2, 1968, by Faulkner Radio, Inc., *Is granted*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[3] See *Kieth L. Reising*, 1 FCC 2d 1082 (1965), and *Hubbard Broadcasting, Inc.*, FCC 68-11, 33 F.R. 551 (1968).

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FCC 68-1196

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF HASTINGS BROADCASTING, INC., LICENSEE OF RADIO STATIONS KICS AND KICS (FM) HASTINGS, NEBR.
For Forfeitures

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration two notices of apparent liability, each dated August 15, 1968, addressed to Hastings Broadcasting, Inc., licensee of radio stations KICS and KICS (FM), Hastings, Nebr.

2. The notices of apparent liability each in the amount of $25 were issued for violation of section 1.539(a) of the rules in that the licensee did not file renewal applications for KICS and KICS (FM) at least 90 days prior to the expiration dates of the licenses. Renewal applications were due to be filed for each station on or before March 4, 1968, but they were not filed until March 14, 1968, 10 days beyond the due date.

3. The notices of apparent liability were mailed to the licensee on August 15, 1968, by certified mail—return receipt requested. Although the return receipts indicate that the licensee received the notices on August 19, 1968, the licensee failed to reply to the notices within the 30-day period prescribed by section 1.621 of the Commission's rules, and has not made reply subsequent to the expiration of the 30-day period.

4. In the absence of responses and in the light of the matter set forth in the notices of apparent liability, we find that the licensee willfully and repeatedly violated section 1.539(a) of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of the Commission's rules,[1] *It is ordered* that Hastings Broadcasting, Inc., licensee of radio stations KICS and KICS (FM), *Forfeit* to the United States the sum of $25 for each station (a total of $50) for willful and repeated failure to observe section 1.539(a) of the Commission's rules. Payment of the forfeitures may be made by mailing to the Commission

[1] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order*.

6. *It is further ordered*, That the Secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested, to Hastings Broadcasting, Inc., licensee of radio stations KICS and KICS (FM), Hastings, Nebr.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R–517

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
JOHN P. HILMES, GEOFFREY B. KNUTSON AND TOM E. BEAL, D.B.A. H–B–K ENTERPRISES, GRANDVIEW, MO.	Docket No. 18183 File No. BP–13823
BROADCASTING, INC., KANSAS CITY, MO.	Docket No. 18184
For Construction Permits	File No. BP–14486

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER DISSENTING WITH STATEMENTS.

1. This proceeding involves the mutually-exclusive applications of H–B–K Enterprises (H–B–K) and Broadcasting, Inc. (Broadcasting), seeking authority to construct new standard broadcast stations in Grandview, Mo., and Kansas City, Mo., respectively. By *Memorandum Opinion and Order* (FCC 68–521, released May 15, 1968), the applications were designated for hearing under a coverage issue, a nighttime city coverage issue relating to Broadcasting, a suburban community issue as to H–B–K, a 307(b) issue and a contingent comparative issue. By *Memorandum Opinion and Order* (FCC 68R–326, 14 FCC 2d 241, released August 7, 1968), the hearing issues were enlarged to include a daytime city coverage issue against Broadcasting.[1] Now before the Review Board is a joint petition filed by the applicants on August 20, 1968, looking toward dismissal of H–B–K's application in return for reimbursement of the expenses incurred by it in the preparation and prosecution of its application and a grant of Broadcasting's application.[2] The petition raises questions as to whether (*a*) all of the claimed expenses may be reimbursed pursuant to section 311(c) of the communications act, (*b*) publication is required pursuant to rule 1.525(b), and (assuming that (*a*) and (*b*) are resolved favorably to petitioners) (*c*) whether the remaining coverage issue against Broadcasting may be resolved without hearing. The questions will be considered seriatim.

2. Under the terms of the agreement, H–B–K would dismiss its application and would be reimbursed in an amount not exceeding $16,731.54 for legitimate and prudent expenses incurred in the preparation, filing, and prosecution of its application. The Broadcast

[1] On Sept. 12, 1968, the Review Board released a *Memorandum Opinion and Order*, FCC 68R–374, 14 FCC 2d 597, adding an issue to determine whether the H–B–K proposal is consistent with a particular bilateral agreement between the United States and Mexico.

[2] Also before the Review Board are Broadcast Bureau's opposition, filed Sept. 18, 1968, and joint reply of H–B–K and Broadcasting, filed Oct. 21, 1968.

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Bureau, in its opposition, contends that insufficient information has been supplied as to certain claimed items of expenses including mileage and transportation costs, educational material and office expenses, land lease expenses, surveying and related fees, and, under miscellaneous items, expenditures related to a NAB convention and expenses and payments related to the dismissal of a third applicant. In an affidavit appended to the joint reply, applicants give detailed explanations of the nature of the expenditures. Of the $16,731.54 in expenditures, H–B–K expended $88 for subscriptions to Broadcasting Magazine and Yearbook, $50 for a film shown to Grandview Chamber of Commerce, a payment of $1.10 to Electronic Industries which is unexplained, $50 for membership dues in Grandview Chamber of Commerce, $138.38 for attendence to NAB convention, and $1,506 for payment for, and acquiring information leading to, dismissal of one of the competitive applications, for a total amount of $1,833.48. These items were not incurred in connection with the "preparing, filing, and advocating the granting" of the H–B–K application and, under section 311(c)(3) of the act, must be disallowed. See *e.g.*, *Charlottesville Broadcasting Corporation* (*WINA*), 3 FCC 2d 117, 7 R.R. 2d 657 (1966), and *South Jersey Radio, Inc.*, 12 FCC 2d 457, 12 R.R. 2d 787 (1968). The reimbursement of the expenses will thus be limited to $14,898.06. Otherwise the petitioners have complied in all respects with the requirements of section 1.525(a) of the Commission's rules. The joint petition is adequately supported by facts relevant to the nature of the consideration involved; details as to the initiation and history of the negotiations between the parties have been furnished; and the expenses for which reimbursement is sought have been adequately substantiated. Aside from section 307(b) considerations, approval of the agreement would be in the public interest since it would expedite the inauguration of the new service proposed by Broadcasting.

3. Petitioners urge that publication of a notice of withdrawal pursuant to section 1.525(b) of the rules is not required in this case. Petitioners note that a suburban community issue was designated against H–B–K because it had failed to overcome the presumption that it realistically proposed to serve Kansas City, Mo., rather than nearby Grandview. They contend that for purposes of determining the publication question the H–B–K application must be considered as one for Kansas City, Mo.; and that *Logan Broadcasting Co.*, 10 FCC 2d 166, 11 R.R. 2d 258 (1967), is controlling. There, the Review Board held that, where a suburban community issue has been designated against the dismissing applicant, the application will be considered as one for the larger community and the publication question will be resolved on that basis. Petitioners conclude that the withdrawal of the H–B–K application would not unduly impede the objectives of the section 307(b) of the communications act. In addition, the petitioners submit information showing that Broadcasting's 0.5-mv/m contour would encompass the H–B–K's 0.5-mv/m contour and would provide service to 331,073 more persons that the H–B–K proposal. As to daytime 2-mv/m signal, Broadcasting's proposal would include 1,109,874 persons in an area of 2,760 square miles, while H–B–K's proposal would include 857,744 persons in an area of 800 square miles. At night, Broad-

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casting would provide interference-free service to 245,889 more persons than would H–B–K.

4. In opposition, the Broadcast Bureau contends that *Logan* is distinguishable because a grant to Broadcasting would represent the sixth station in Kansas City although Grandview would remain without a station, whereas in *Logan* the surviving applicant brought a first local transmission service to a community of 6,417, served a white area of 624, and provided another service to areas having only four services. The Bureau argues that merely because H–B–K was not found to have rebutted the presumption that it would realistically serve Kansas City does not necessarily mean that another application, specifying Grandview with more local characteristics, would likewise fail to rebut the presumption. It argues that the 307(b) rights of Grandview should not be forsaken because this particular applicant in hearing has failed to rebut the presumption, and that to dispense with publication would have the effect of converting the rebuttable presumption found in the Commission's suburban community policy statement to a conclusive rule. In reply, the petitioners contend that failure to adhere to *Logan* would undermine a basic objective set forth in the suburban community policy statement, by making a nullity of the presumption intended to be rebuttable only after the conclusion of an evidentiary hearing.

5. The factual distinctions between the instant case and *Logan*, supra, do not warrant a departure from the holding therein that, where a suburban community question has been specified, the suburban community presumption will be given effect in determining the publication question under rule 1.525(b). The application of the suburban community presumption here does not, in our view, derogate from the "307(b) rights" of Grandview, since H–B–K's application must be considered as a Kansas City proposal until such time as H–B–K establishes at an evidentiary hearing that it, in fact, will provide a realistic transmission service for Grandview. Moreover, refusal to follow *Logan* would result in a paradoxical situation in which the presumption would be applicable for purposes of a hearing in this proceeding but would not apply when an applicant seeks to withdraw. Since the presumption is based upon objective factual conditions, we perceive no valid reason why its applicability should depend upon the posture of the proceeding. We therefore treat the H–B–K application as being for Kansas City. Accordingly, both applications are, in effect, for the same city and, as the above undisputed information indicates, Broadcasting would provide service to larger numbers of people than would the H–B–K proposed operation. Therefore, the dismissal of the H–B–K application would not unduly impede the achievement of a fair, efficient, and equitable distribution of radio service, and publication pursuant to section 1.525(b) of the rules is not required.

6. There remains the issue regarding Broadcasting's coverage of Kansas City, Mo., with a 5-mv/m signal as required by section 73.188 of the rules. According to the undisputed facts, Broadcasting's daytime 5-mv/m contour would encompass 514,553 persons residing in an area of 282 square miles, which represents 99.5 percent and 89.3 percent of the Kansas City population and area, respectively. At night, the

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5-mv/m contour would encompass 471,761 persons and 121 square miles, representing 91.2 and 38.3 percent of the Kansas City population and area, respectively. The petitioners contend that, if the coverage determination were made on the basis of 1960 city boundaries when Broadcasting's application was filed, prior to the annexation of land by the city in 1961, 1962, and 1963, Broadcasting's 5-mv/m signal would be provided to the entire city during daytime hours and 447,604 persons in an area of 96 square miles or 94.1 and 73.9 percent of the 1960 Kansas City population and area, respectively, at night. Petitioners claim that the land annexed since 1960 is rural in nature.[3] Petitioners further argue that, the Commission has held that the purpose of 5-mv/m coverage requirement of rule 73.188(b)(2) is to insure that all or greater part of a particular urban group would be served; that the term "most distant residential section" as used in section 73.188(b)(2) refers to an urbanized residential area and not to essentially rural area which might exist within a city's political boundaries; and that proposals falling short of absolute compliance can be granted without a waiver of the rules where substantial compliance would be achieved, citing *Manchester Broadcasting Co.*, 24 FCC 199, 14 R.R. 219 (1958); *Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691 (1968); *KDEF Broadcasting Co.*, 30 FCC 635, 20 R.R. 684 (1961). The petitioners further contend (supported by an affidavit from Broadcasting's consulting engineer), that there is no point in or near Kansas City which, if used as a transmitter site, would permit the Broadcasting 5-mv/m contour to encompass the entire present political boundaries of the city and still provide a 25-mv/m signal over the main business district of Kansas City; that in view of the protection requirements imposed by a new Canadian station and class I–B station WOWO, Fort Wayne, Ind., and other design problems posed by cochannel stations, the Broadcasting site is optimum in terms of rendering the most efficient service to the Kansas City area, and there is no alternate site from which a full time station on 1190 kHz could provide comparable benefits to the public. Finally, petitioners point out that Broadcasting originally proposed to operate at 1000-w power at night, but was required, because of the establishment of a new Canadian station, to reduce its proposed power to 250 w.

7. The Broadcast Bureau in its opposition contends that, although during daytime there would be substantial compliance with the requirements of section 73.188(b)(2) of the rules, the nighttime coverage of 38.3 percent of the city falls considerably short of compliance; that the two cases cited do not compare with the 38.3 percent figure proposed by Broadcasting and are not suitable precedents; and that *South Norfolk Broadcasting Co.*, 1 FCC 2d 621 (1965), where the proposed station enclosed 32.5 percent of the land area and 91.5 percent of the population of the principal city, is not an adequate precedent and distinguishable from the instant case. Bureau further contends that Broadcasting's inability to obtain an alternate site is largely due

[3] To support this claim, petitioners note that the population density of the area which will not receive a 5-mv/m signal is 232 persons per square mile, as opposed to 3,660 for the remainder of Kansas City, and submit various photographs of the area attempting to depict its rural nature.

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to the restricted 25-mv/m coverage caused by power limitations on the channel, and that the portion of Kansas City located outside the proposed 5-mv/m contour and characterized by petitioners as rural is really a mixture of farmland and built-up areas. The petitioners in their reply contend that the Broadcast Bureau overlooks the fact that Broadcasting proposes to serve a larger percentage of the population of the city involved here with a nighttime contour than was served in either of the earlier cases in which applications were found to be in substantial compliance with rule 73.188(b)(2); that one of the grounds for the decision in *KDEF*, supra, was that the applicant would provide a sixth nighttime service to a community of 100,000 persons or less than one-fifth the size of Kansas City; that in *Norman O. Protsman*, 26 FCC 466, 18 R.R. 372d (1959), a grant provided a community of 20,000 persons a fourth local outlet whereas Broadcasting proposes to provide fifth fulltime service to a city with a population of nearly half a million; and that the Bureau, in alleging that Broadcasting would not serve white or gray areas, fails to note that no white or gray areas were served by the applicants in *KDEF*, *Norman O. Protsman*, and *South Norfolk*.

8. The Review Board agrees with the Broadcast Bureau that the section 73.188 issue cannot be resolved on the basis of the pleadings. Broadcasting's 5-mv/m nighttime contour would encompass 91.2 percent of the population and 38.3 percent of the areas of Kansas City. While the Commission has held, as petitioners point out, that the coverage rules were intended to apply to an urbanized residential area and not to essentially rural area which may exist within a city's political boundaries, petitioners have not adequately shown that Broadcasting's proposed 5-mv/m nighttime contour does encompass the most distant urbanized residential sections within the city.[4] In the only case relied on by the petitioners where the area coverage was as low as that proposed here, *South Norfolk Broadcasting Co.*, supra, the examiner found that the area within the city, but beyond the applicant's 5-mv/m contour, had a population density of 26.2 persons per square mile, and that a substantial portion of that area was a swamp. Here the average population density is 232 persons per square mile, and the photographs submitted by the petitioners are confined to the northern portion of the annexed land. Thus, as noted by the Bureau, the area could be a mixture of rural and urban areas, and the details as to the extent of the rural and urban areas, and the population density therein, remain unknown. We therefore believe that an evidentiary hearing under the issue is required, and Broadcasting's application will be retained in hearing status. Moreover, where a major urban community such as Kansas City is involved, it is appropriate to take account of an additional related factor which bears on the coverage issue. In recent years, the populations of large urban areas in the United States have been growing at a rapid rate, and if this trend exists in the recently annexed areas of Kansas City, it could be a matter of only a few years

[4] Cf. *Andy Valley Broadcasting System, Inc.*, supra, where the Commission found that "by means of demographic and topological maps and aerial photographs, Andy Valley has shown *conclusively* that the areas outside its proposed 5-mv/m contour are sparsely populated rural areas, readily distinguishable from the urbanized residential environs of Auburn." [Emphasis added.]

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before applicant's station, because of its limited area coverage, serves a substantially smaller portion of the population in the community and becomes one more of a growing number of substandard big city stations. In this connection, the Commission has shown increasing concern about such substandard stations. See *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190. With the limited number of standard broadcast assignments available, a failure to take urban population growth into account in cases such as this involving limited coverage could preclude these developing areas from enjoying the local broadcast services which they would receive if the coverage rules are complied with.

9. Accordingly, *It is ordered*, That the joint petition for approval of agreement and for other relief, filed August 20, 1968, by John P. Hilmes, Geoffrey B. Knutson, and Tom E. Beal, doing business as H–B–K Enterprises, and Broadcasting, Inc., *Is granted* to the extent indicated herein; that the agreement submitted herewith *Is approved;* that the application of H–B–K Enterprises (BP–13823) *Is dismissed* with prejudice; and that the application of Broadcasting, Inc. (BP–14486), *Is retained* in hearing status.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

The majority opinion has denied reimbursement to H–B–K Enterprises of $1,500 which H–B–K had paid in 1966 to Radiorama, Inc., a former mutually exclusive applicant, notwithstanding the fact that said payment of out-of-pocket expenses had been found by the Commission en banc to be in the public interest. *Radiorama, Inc.*, FCC 66–363, BP–14344, released April 26, 1966. I dissent. Since the background information relating to said expenditure is not contained in the majority opinion, it is summarized below.

H–B–K's application was filed on January 15, 1960, and has been prosecuted vigorously by its principals since that date. On March 14, 1966, H–B–K and Radiorama filed a joint motion for approval of agreement for dismissal of Radiorama, Inc., application. In approving partial reimbursement of $1,500 to Radiorama, the Commission found that a grant of the joint request would be in the public interest because it would permit a more expeditious determination regarding H–B–K and other proposals for the use of the 1190 kc frequency.

Section 311(c)(3) of the communications act authorizes the Commission to permit reimbursement on a public interest finding that such payment is for moneys legitimately and prudently expended by the dismissing applicant in connection with preparing, filing, and advocating the granting of his application. Advocating or prosecuting an application by a party may take the form of upgrading his own application or downgrading or seeking dismissal of a competing application. Such dismissal may be sought on the basis of procedural or substantive defects respecting the competing application, or on the basis of reimbursement of expenditures and voluntary dismissal. In

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all of said situations, the moving party is primarily and basically advocating the granting of his application.

Since there do not appear to be any Commission or Board precedents holding that reimbursement should be denied in the factual circumstances pertaining herein, the majority's refusal to permit reimbursement would appear to be based on an assumed extension of existing policy. True, it is existing policy not to allow reimbursement of legal fees, for example, incurred in preparing a petition for reimbursement and dismissal; however, in such cases, the dismissing applicant seeking reimbursement is engaging in actions antithetical to advocacy supporting the grant of an application. Thus, it is clear that Commission policy with respect to the latter situations cannot be extended to the facts at bar. On the other hand, if new policy is involved, the question should be certified to the Commission.

In my view, the expenditure of $1,500 by H–B–K comes squarely within the wording of section 311(c)(3) of the communications act. Surely, if Radiorama, Inc., was an existing applicant, no objection would be raised to its reimbursement of the $1,500 by Broadcasting. Accordingly, I fail to see why the two-step reimbursement is objectionable to the majority when the one-step reimbursement would have been deemed proper. Since the public interest aspect of that expenditure has already been determined favorably by the Commission en banc, H–B–K is entitled to reimbursement. Further, I agree with Board member Kessler that a showing has been made warranting a waiver of section 73.188(b)(2) of the rules.

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

As to the adequacy of nighttime service, I believe that a waiver of rule 73.188(b)(2) is warranted. Here 91.2 percent of the population will be covered, and the proposal substantially satisfies the purpose of the rule which is designed to assure adequate service to the urban population within applicant's community. Accordingly, I would grant the application of Broadcasting, Inc. It is my view that Broadcasting has adequately established that the area outside the nighttime 5-mv/m coverage is predominantly rural, and that much of that area was acquired by Kansas City through annexation subsequent to the filing of Broadcasting's application. It is not disputed that Broadcasting is unable to obtain an alternate antenna site which would enable it to place a 5-mv/m signal over the entire city and still place a 25-mv/m signal over the main business district as required by rule 73.188(b)(1), and that this limitation is necessitated by protection which must be accorded to Canadian and class I–B stations. Hence, strict compliance with the rule is impossible, and it is not reasonable to demand such compliance in this case. I also believe that the showing made by Broadcasting is consistent with the principles of the cases relied upon by the majority, and that under this circumstance a hearing on issue No. 2 would serve no useful purpose.

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FCC 68-1183

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SEABORN RUDOLPH HUBBARD, VERO BEACH, FLA. Requests: 93.5 megacycles, No. 228; 3 kilowatts; 137 feet	Docket No. 18399 File No. BPH-6287
TROPICS, INC., VERO BEACH, FLA. Requests: 93.5 megacycles, No. 228; 3 kilowatts; 213 feet For Construction Permits	Docket No. 18400 File No. BPH-6341

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration (*a*) the above-captioned and described applications which are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference, (*b*) petition for modification of interim policy and designation for hearing, filed by Seaborn Rudolph Hubbard (Hubbard), (*c*) response of Tropics, Inc. (Tropics), to Hubbard's petition, and (*d*) Hubbard's reply comments.

2. On March 27, 1968, the Commission issued a notice of proposed rulemaking (33 F.R. 5315, FCC 68-332) inviting comments on proposed rules which would preclude common ownership of more than one full-time broadcast station in a single market. This notice indicated that applications then on file would be processed in accordance with the existing rules but that action on later-filed applications in conflict with the proposed rules would not be taken until the rulemaking proceeding was concluded so as to avoid further proliferation of commonly owned stations in individual markets during the pendency of the proceeding. Various parties sought reconsideration of this interim policy, and the Commission, by *Memorandum Opinion and Order* of May 15, 1968 (12 FCC 2d 912, 13 R.R. 2d 1526), denied these petitions. In so doing, it clarified various aspects of the interim policy, including the reasoning behind the decision not to designate mutually exclusive applications for hearing if one or more were in conflict with the proposed rules. As the document indicated, this policy, in great measure, was premised on the Commission's determination to conclude the proceeding with dispatch. Thus, the Commission concluded, the advantage of a small saving of time was more than outweighed by the matter of involving applicants in the substantial costs of possibly unnecessary hearings. Now, however, the

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picture has changed markedly and it is clear that at a minimum, a number of additional months will be required before the rulemaking proceeding can be concluded. Even now the processing of a number of groups of mutually exclusive applications has had to be halted because of the interim policy. Inevitably, continuation of the interim policy would cause this number to grow significantly in the coming months. This development has convinced us that a change in the interim policy is required to avoid the creation of such a backlog. Therefore, we are modifying the interim policy to permit the designation for hearing of mutually exclusive applications even if one or more conflict with the proposed rules. Under the new policy, if an application not in conflict with the proposed rules is preferred, it will be granted in the usual manner. If, on the other hand, an application in conflict with the proposed rules is preferred, it and all other applications then remaining in the proceeding will be retained in hearing until resolution of the rulemaking proceeding. Appropriate action would then be taken in light of the disposition of the rulemaking proceeding.

3. Hubbard filed a petition requesting modification of the interim policy to permit designation of his application for hearing. Tropics supported this request but insisted that both applications be considered without regard to the proposed rules. As we indicated in our discussion about the interim policy, supra, the public interest requires that certain changes be made across the board, not just in individual cases. Since this action on the Commission's own motion in effect grants the relief requested by Hubbard, no further consideration of his petition is required. As to Tropics' argument that the hearing should be governed exclusively by the existing rules, we continue to adhere to the views expressed in the *Memorandum Opinion and Order* referred to above, viz that the importance of promoting the diversity of viewpoints and program sources in individual markets requires continuation of the interim policy (as modified). Accordingly, we cannot accept the argument that the hearing should be held without regard to the pendency of the rulemaking proceeding, as Tropics in effect requests.

4. One final matter discussed in the pleadings warrants consideration. Tropics contends that Hubbard failed to meet the local notice requirements of section 1.580(c) of our rules in that he published his notice in a Fort Pierce daily newspaper rather than Vero Beach's weekly newspaper. Hubbard disputed the preferability of the Vero Beach weekly, arguing that the Fort Pierce daily, as conceded by Tropics, is circulated in Vero Beach, and as a result, that it is the preferred medium. Tropics apparently seeks no action from us on this matter, but such action, however, is required because Hubbard has misconstrued our rules. The order of preferences specified by our rules is a follows: (1) a local daily, (2) a local weekly and (3) a non-local daily circulated in the specified locality—see sections 1.580(c), 1.580(c)(1), and 1.580(c)(2). Thus, in the absence of a local daily, Hubbard should have utilized the local weekly. While Hubbard's action failed to meet the strict terms of the rules, it does not appear to have been intentionally violative of those requirements. Nor does

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the matter assume serious proportions, since there appears to be no dispute that the Fort Pierce daily is circulated in Vero Beach. Under these circumstances we believe that waiver of the strict terms of the requirements of section 1.580(c)(1) is warranted. All applicants are cautioned, however, that it will not be our intention to regularly countenance such deviations from required procedures. In the future, there should be no confusion in this regard and all applicants will be expected to use the appropriate medium as specified in our rules.

5. According to its application, Tropics would require $28,373 to construct and operate for 1 year without revenue. This includes only $6,180 to cover first-year operational costs, an amount which appears inordinately low. Nevertheless, if the total amount of funds relied upon by Tropics ($38,900) were available, there would be a cushion of approximately $10,000 to cover additional operational costs. Such availability is not clear at this time for Tropics has not indicated that personal endorsements for the $15,000 bank loan would be provided by its corporate officers as required by the bank. Accordingly, an issue will be specified to determine the availability of this bank loan.

6. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, for the purposes of comparison, the areas and populations within the 1-mv/m contour together with the availability of other FM services of 1 mv/m or greater intensity in such areas will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to either of the applicants.

7. Except as indicated below, the applicants are qualified to construct and operate as proposed. However, because of their mutual exclusivity, the Commission is unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing on the issues set forth below.

8. *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine whether the $15,000 bank loan relied upon by Tropics is available to it and as a result whether Tropics has demonstrated its financial qualifications.
2. To determine which of the proposals would better serve the public interest.
3. To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications for construction permit should be granted.

9. *It is further ordered*, That, if the application of Hubbard is preferred it shall be granted in the normal manner, but if the Tropics application is preferred, it (and the Hubbard application if it then remains in the hearing) shall be retained in hearing pending conclusion of the rulemaking proceeding in docket No. 18110.

10. *It is further ordered*, That the relief requested in Hubbard's petition *Is granted*.

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11. *It is further ordered*, That to avail themselves of the opportunity to be heard, the applicants, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney shall, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

12. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68–1227

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC. Application Under Section 214 of the Communications Act of 1934 for Authority To Acquire a 48-kHz Circuit From the Communications Satellite Corp. In the Matter of RCA GLOBAL COMMUNICATIONS, INC. Application Under Section 214 of the Communications Act of 1934 for Temporary Authority To Acquire a 48-kHz Circuit From the Communications Satellite Corp.	File No. T–C–2202
In the Matter of ITT WORLD COMMUNICATIONS, INC. Revisions to Tariff FCC No. 43, Offering a 48-kHz Leased Channel Service With Customer Subdivision In the Matter of RCA GLOBAL COMMUNICATIONS, INC. Revisions to Tariff FCC No. 67, Offering a 48-kHz Leased Channel Service With Customer Subdivision In the Matter of COMMUNICATIONS SATELLITE CORP. Revisions to Tariff FCC No. 1, Offering a 48-kHz Channel With Ultimate Customer Subdivision	Docket No. 18411

MEMORANDUM OPINION, ORDER, AND AUTHORIZATIONS

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. We have before us revisions separately filed to their respective tariffs by ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA), and Communications Satellite Corp. (Comsat), which raise related questions regarding the appropriate charges, practices, classifications, and regulations for a new leased channel service in the overseas field—the offer of a 48-kHz, broadband data channel which may alternately be subdivided by the customer into voice channels.

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2. More specifically, the tariff revisions under consideration are:

(*a*) Proposed revisions to tariff FCC No. 43 (i.e., fifth revised page 19A and sixth revised page 27A), filed on July 11, 1968, with accompanying Transmittal Letter No. 1273, by ITT, now to become effective on December 20, 1968,[1] offering leased 48-kHz channels via cable or satellite facilities between Washington, D.C., and the theoretical midpoint between the United States and Spain;

(*b*) Proposed revisions to tariff FCC No. 67 (i.e., original page 4AA and second revised page 11E), filed by RCA on November 20, 1968, with accompanying Transmittal Letter No. 3370, to become effective on December 21, 1968, offering 48-kHz leased channels between San Francisco, Calif., and Honolulu, Hawaii; and

(*c*) Revisions to tariff FCC No. 1 (i.e., second revised page 9; original page 17; original page 18; original page 19; and original page 20), filed by Comsat on December 9, 1968, pursuant to special permission No. 5428,[2] effective December 11, 1968, offering broadband channels to authorized common carriers between the earth station at Andover, Maine, and a satellite, for use with a similar channel to Spain, and between the earth stations at Brewster Flat, Wash., or Jamesburg, Calif., and the earth station at Paumalu, Hawaii.

3. The ITT and RCA revisions would offer a 48-kHz channel to the customer which may be used either as a single data channel or to derive voice bandwidth channels. RCA specifically limits the customer to the derivation of 12 voice channels, the maximum number available from a 48-kHz bandwidth under the channel derivation system which has been adopted for satellite communications. ITT's tariff, which would offer cable, as well as satellite, 48-kHz channels, would permit the customer to derive voice-grade channels to the extent permitted by the spectrum capability. While both tariffs contemplate derivation of such voice channels by use of customer-provided equipment,[3] we understand that the carriers, at least with respect to their initial customers, will themselves provide (at separate tariff charges) to the customers the equipment and services for voice channel derivation and conditioning. RCA has already filed such charges, and ITT states that, as soon as the channel conditioning requirements of its customers are known, it will make such filing.

4. Comsat's tariff revisions offer to furnish wideband channels to authorized common carriers to be used in providing 48-kHz leased channel service to the public. A wideband channel is defined in the tariff as a single channel, equivalent to approximately 12 individual voice-grade channels, with a maximum equivalent carrier spectrum of 48 kHz. The tariff prohibits carriers from creating additional channels from such wideband channels except as may be necessary to meet specific requirements of the customer to whom the carrier furnishes 48-kHz service pursuant to a tariff.

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[1] Authority was granted to defer the original effective date of Dec. 1.

[2] This action was taken in conjunction with the grant of temporary authority to RCA to acquire from Comsat, for test and lineup, a 48-kHz channel so that it could commence service by the date requested by its customer. RCA was given such authority, for a limited period, pending further action on its application described herein at par. 8. Subsequent to the grant of the Comsat application, an opposition thereto was received from the Hawaiian Telephone Co. (Hawaiian). While Hawaiian's opposition was untimely filed for its intended purpose, we will herein consider the allegations and views contained therein as they relate to the lawfulness of the tariff revisions before us.

[3] Although RCA's proposed tariff would not appear to allow the customer to obtain channel derivation equipment, etc., from other than RCA, that carrier states, in its letter of Dec. 11, 1968, that this is not its intent and offers to file tariff amendments to clarify this point.

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5. The proposed offerings of ITT and RCA are dependent on our grant of a presently pending application filed by each under section 214 of the Communications Act of 1934 for authority to acquire from Comsat, and to operate in the manner proposed, a 48-kHz channel, respectively, between the United States and Spain and between the U.S. mainland and Hawaii.

6. ITT filed on September 9, 1968, a formal application, which, as amended, requests authority to lease one 48-kHz satellite circuit between an appropriate earth station in North America (Andover, Maine, or Etam, W. Va.) and the theoretical midpoint of an appropriate Atlantic communications satellite system between the United States and Spain, and one 48-kHz landline circuit connecting its operating center in Washington, D.C., with the earth station. It would use these facilities to provide, with its correspondent in Spain, Compania Telefonica Nacional de Espana (CTNE) a 48-kHz leased channel service between the United States and Spain for a customer unnamed in the application, which other sources indicate as being the National Aeronautics and Space Administration (NASA). The customer would be permitted to use the circuit as a single channel utilizing the maximum spectrum of 48 kHz or alternatively, by use of equipment provided by the customer or leased by ITT pursuant to an applicable tariff, to derive voice-grade channels to the extent permitted by the spectrum capability.

7. Notice of the filing of the ITT application was given in the Commission's September 23, 1968, public notice of applications accepted for filing. Copies thereof, together with notices extending the opportunity to file comments were mailed to the Secretary of Defense, Director of Telecommunications Policy of the Department of Defense, Defense Communications Agency, National Security Agency, American Telephone & Telegraph Co., Communications Satellite Corp., Governor of West Virginia, Commissioner (Mayor) Walter E. Washington of the District of Columbia, RCA Global Communications, Inc., and Western Union International, Inc. The only comments received were from RCA, which are discussed below.

8. The RCA application consists of a telegraphic request, filed November 20, 1968, and amended on December 3 and 5, 1968. RCA requests temporary authority starting December 6, pending action on a regular application to be filed, to acquire from Comsat, and to operate, a 48-kHz satellite circuit between an appropriate earth station on the west coast of mainland United States and an appropriate satellite over the Pacific, a 48-kHz satellite circuit between such satellite and an appropriate earth station in Hawaii, and necessary landline facilities in mainland United States and in Hawaii, and to use such facilities to provide voice/record leased channel service to the Department of Defense (DOD) between points in or reached via mainland United States and Hawaii commencing December 21.[4]

9. In such telegraphic request, RCA represents that it has received a firm order from DOD for a 48-kHz satellite circuit to be used to provide voice/record service between a location on mainland United States

[4] RCA was authorized on Dec. 9 to acquire and operate such circuit, until further order but not beyond Dec. 20, for testing and lineup purposes only.

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and a location in the State of Hawaii. RCA also proposes to lease a 48-k Hz landline circuit from the American Telephone & Telegraph Co. (A.T. & T.) between RCA's San Francisco office and the Jamesburg, Calif., earth station, and a 48-kHz circuit from the Hawaiian Telephone Co. (HTC) between the Paumalu, Hawaii, earth station and the carriers' control center at Wahiawa, Hawaii.

DISCUSSION

10. Since the offerings proposed to be made by ITT and RCA are dependent on a grant of their section 214 applications, we shall first consider these applications.

11. The only comments received on ITT's application were filed by RCA, opposing a grant. RCA's opposition is based upon its allegations, denied by ITT, that the manner in which ITT obtained a NASA award for the service was unfair to other bidders. Although RCA has brought these matters to the attention of NASA, it believes the Commission should refuse to issue a section 214 authorization to ITT by reason of such alleged irregularities in the bidding. We do not, however, believe that we should review the bidding process in this matter, leaving it to NASA to protect the integrity of its own procurement regulations. RCA does not give any other reasons to show that a grant of ITT's application would not be in accord with the public interest,[6] although endorsing the offering, as such, of a new 48-kHz leased channel service via satellite communications to NASA.

12. RCA has finally submitted its regular application for the requested authority on December 13, 1968. It will be put on public notice, pursuant to our regular procedure, and then considered in light of any comments that may be filed.

13. While we do not have before us sufficient information to determine the extent of public demand for the 48-kHz service, or the extent to which NASA and DOD will require such service in the future, as opposed to voice-grade channels, it appears that at the present there is an ever increasing demand for ever larger quantums of capacity. We note, in this respect, that the offer of a 48 kHz, whether leased channel or otherwise, has been imminent for some time as a result of technological advances in the high speed data and computer fields. In fact, the principal problems involved in the proposed service relate to the terms and conditions, under which it will be provided, rather than to the basic offer of a 48-kHz channel capable of customer subdivision. Under these circumstances, we will make a temporary grant of the authority requested pending the outcome of the proceeding we are instituting herein into the proposed tariff provisions for the lease of 48-kHz bandwidths. Insofar as the RCA application is concerned, our grant shall be for a relatively short period, with further consideration to be given when an application for regular authorization and any comments thereon are before us.

14. We now turn to the tariff revisions before us. Each of the carriers, in such revisions, would offer 48-kHz leased channels at sub-

[6] A previous challenge by RCA to the effect that the service would be provided below cost by ITT has apparently been abandoned.

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stantially lower charges than that which they would make for a total of 12 voice-grade channels taken individually. ITT would charge $54,000 per month for a 48-kHz channel to midpoint between the United States and Spain, and, in a letter filed August 29, states that it intends to charge between $4,665 to $6,465 per month for voice channel derivation and conditioning. The total cost to the customer thus would be between $58,665 and $60,465 per month. However, it would charge $72,000 (at its present single-channel rate of $6,000 per month) for 12 voice-grade channels taken individually between the same points.[6]

15. Similarly, RCA's tariff revisions set forth total charges to the customer of $80,400 per month, consisting of $78,200 per month for a through 48-kHz channel between San Francisco and Honolulu, $500 per month for terminal control arrangements to provide for derivation of 12 individual through channels of voice bandwidth, and $1,700 per month for S–3 conditioning of the derived voice channels. It now charges $100,800 (at its present single-channel rate of $8,400) for a total of 12 voice channels between the mainland United States and Hawaii. And Comsat's revisions offer 48-kHz satellite broadband channels at $41,000 per month for a half circuit between the United States and Spain, and at $29,100 per month for each half circuit between the mainland United States and Hawaii. This is about 10 percent less than it charges for 12 individual voice channels.

16. Comsat has submitted no data on its cost of providing the 48-kHz channels as offered by its tariff revisions. ITT's and RCA's cost submissions are insufficient in that they not only fail to give the carrier's total costs for provision of such channels via satellite facilities, but do not reflect a composite of the cost of providing the service by both cable and satellite facilities.[7]

17. Our concern is with both the level of the proposed charges and their relationship to existing charges for leased voice bandwidth channels. The provision of a 48-kHz circuit, especially when voice channel derivation is permitted, appears to require substantially the same satellite capacity and other facilities and equipment as are required to provide 12 individual voice-grade channels. None of the carriers has shown that there are significant cost savings in providing 48-kHz chan-

[6] ITT points out that our *Memorandum Opinion, Order, and Authorization* of May 22, 1968, in A.T. & T. et al., 13 FCC 2d 235 (file Nos. P–C–7022, S–C–L–40) directs the carriers to file reduced charges for voice-grade leased channel service to Spain, among other points, at the time the TAT–5 submarine cable is placed in service (expected in March 1970). This reduction, ITT states, would substantially eliminate the disparity between the proposed charges for 48-kHz channel service and for voice-grade channel service. However, as ITT does not propose to institute the required voice-grade reductions effective with its 48-kHz offering, we think that further exploration is needed as to the interim rate relationship.

[7] ITT's proposed tariff revisions would offer the new service by either satellite or cable. We note in this connection that no sec. 214 application has been filed by ITT for authorization to provide 48-kHz, leased-channel service via cable facilities. Presumably, it intends to do so at some future date as customer requirements arise. In the meantime, we shall require that it appropriately amend its tariff to delete its offer of cable service for which it has no authorization. See *Press Wireless, Inc.*, 25 FCC 1466 (1958) and *RCA Communications, Inc.*, 34 FCC 171 (1963). However, since ITT apparently intends that future offerings of cable service take the charge set out in its revisions, we feel that inquiry into this aspect of its charge is appropriate at this time. RCA claims that only satellite costs are relevant to this service, since at present all submarine cables are filled and the service, therefore, must be provided via satellite facilities for the foreseeable future. This seems to be at odds with the ITT approach, which indicates in its tariff that there is a possibility that cables may be used for this service. This matter, as well as the application of the composite rate approach to the charge for a 48-kHz channel, are matters which merit further exploration on the record.

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nels to justify the proposed level of charges.[8] Further, it appears that 48-kHz channels may be used by the customers predominantly as 12 individual voice channels. As a matter of fact, RCA states that its customer, DOD, while having a requirement at some time in the future for broadband data transmission, has no present need for it. RCA will, therefore, initially, align the facilities for DOD in a manner permitting the use of the channel as only 12 separate although contiguous voice-grade channels. In this connection, Hawaiian, in its opposition to the Comsat tariff, has alleged, that DOD will not use the 48-kHz bandwidth facility as a wideband service, but will use it to provide individual voice-grade channels in connection with its Autovon service. Hawaiian states that it has been advised by DOD, following the award to RCA of an order for the 48-kHz channel, that it intends to discontinue existing leases on 12 individual voice circuits between the mainland and Hawaii. Comsat's broadband offer (and, inferentially, that of RCA, also) is characterized by Hawaiian as being merely a disguised rate reduction for 12 voice-grade circuits.

18. Related questions under the communications act and the Communications Satellite Act are presented by Comsat's tariff revision, which prohibits the derivation of additional channels from the broadband channel furnished by it, except to meet the requirements of the customer taking service under a terrestrial carrier's 48-kHz, leased-channel tariff. Comsat may thus preclude terrestrial carriers from benefiting from any potential savings granted by Comsat's broadband channel offering in so far as other services to the public are concerned.

19. ITT and Comsat attempt to justify their 48-kHz channel charges as promotional rates established to encourage and stimulate broadband use. While under appropriate conditions and with proper economic justification promotional rates may be acceptable, it does not appear to us that the material submitted in support of the tariffs meet these standards.

20. RCA has submitted no justification for the basic broadband channel charges in its tariff revisions except to state that they are within the rate patterns for 48-kHz leased service currently established or being considered by various foreign administrations and that the proposed service would be similar to the domestic series 8000 private line offering of the American Telephone & Telegraph Co. In this regard, we are aware that the telecommunications administrations of several countries are considering appropriate tariff conditions for 48-kHz, leased-channel service. However, we of course must make our independent decision on the basis of data and considerations before us. The investigation which we are instituting herein should provide a vehicle by which we may determine, pursuant to the communications act, the charges and conditions under which such a service should be offered by U.S. carriers. Nor do we think that RCA can rely on A.T. & T.'s series 8000 service as a precedent for the lawfulness of its proposed charges, since the series 8000 charges are currently under investigation along with A.T. & T.'s other private-line charges in docket No. 18128.

[8] Although RCA alleges that there are significant and substantial cost differences, the only item of savings which it documents as to amount is the 10-percent reduction in satellite channel costs offered by Comsat's tariff revisions presently before us.

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Moreover, even assuming the validity of the series 8000 charges in the domestic field, we do not believe that a similar rate relationship would automatically be valid under different operating and market conditions prevailing in the overseas field.

21. Furthermore, we are unable to determine, on the basis of the information submitted by RCA, that the separately stated charges contained in its tariff for channel derivation and voice channel conditioning will be lawful. Without further justification, RCA states that its proposed charges for the terminal control arrangement for channel derivation are the same as those applied in A.T. & T.'s series 8000 offering. For the reasons stated in paragraph 20 above, we do not accept A.T. & T.'s charge as a necessarily valid precedent. RCA has submitted summary cost data in support of its charges for voice channel conditioning. Such data, however, appear to indicate a return on investment which is larger than that allowed to overseas record carriers in the past. The cost presentation also appears to fail to take into consideration that channel conditioning in Hawaii will be provided under contract to RCA by Hawaiian rather than by the company's own employees and equipment. We therefore believe that further explanation by RCA of the basis for this charge, also, is required.

22. In summary, upon examination of the tariff filings of ITT, RCA, and Comsat offering overseas 48-kHz, leased-channel service, and after consideration of the information and arguments submitted by these carriers in support of their tariff offerings, we are unable to determine that the charges, classifications, regulations, and practices contained in such tariff offerings are or will be lawful within the meaning of sections 201(b) and 202(a) of the communications act, or of sections 201(c) (2) and (5) of the Communications Satellite Act. An investigation will, therefore, be instituted into the lawfulness of such tariff revisions. However, in view of the apparent early requirements of NASA and DOD for service, we shall grant temporary authority to ITT and RCA to commence service to these agencies and permit the subject tariff revisions to become effective without suspension.

23. One additional item is before us, i.e., ITT's application No. 549, filed September 19 and amended on September 30, 1968, for special permission to amend its proposed tariff revision under consideration herein. Aside from that part of the application seeking acceleration of the effective date of the tariff to October 10, 1968, which is now moot, ITT asks permission to amend its proposed revisions to provide for their expiration on December 31, 1969, and to change the text description of the service offering. In view of our action instituting an investigation, and granting only temporary section 214 authority to provide the service, we do not believe that December 31, 1969, would be an appropriate expiration date for ITT's revision. Rather, we believe that ITT revisions, as well as RCA's revisions, should be amended to indicate an effective period which is coterminous with the temporary authorizations granted to them. ITT would also revise the text description of the manner in which channel derivation is to be accomplished by changing the phrase "by use of customer-provided equipment" to the phrase "by use of customer-owned or company-provided equipment." The proposed amendment would appear to limit a customer,

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who does not choose to purchase channel derivation equipment, to the lease of equipment only from ITT. No reasons are advanced why a customer should be so restricted and, we will, therefore, deny ITT's application for special permission. Rather, with respect to these matters, we shall condition the temporary authorizations to ITT and RCA upon the filing of amendments providing for the expiration of their tariff revisions coterminous with the expiration of the temporary authority granted to them, and RCA shall be further required as a condition to its section 214 authorization to file tariff amendments making it explicit that voice channel derivation may be by use of customer- or company-provided equipment.

ORDER AND AUTHORIZATIONS

Accordingly, *It is ordered*, That the application filed by ITT World Communications, Inc. (ITT) on September 12, 1968, assigned file No. T–C–2202, *Is granted in part*, and it *Is authorized* to (*a*) acquire by lease from the Communication Satellite Corp. (Comsat) and to operate a two-way, 48-kHz satellite circuit between an appropriate satellite earth station on the east coast of the United States and an appropriate satellite over the Atlantic to be interconnected with a like satellite circuit between such satellite and an earth station in Spain; (*b*) acquire by lease and operate necessary connecting landline facilities between its Washington, D.C., operating center and an appropriate satellite earth station as authorized in (*a*) above; and (*c*) use the authorized facilities to furnish the National Aeronautics and Space Administration with leased 48-kHz data channel service between the United States and Spain with alternate use of the channel by the customer as alternate voice record circuits created by the customer.

It is further ordered, That the authority *Granted* to ITT in the preceding ordering paragraph shall extend until further order of the Commission, but in no event beyond 6 months from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, or until the conclusion of the rate investigation instituted by the succeeding ordering paragraphs hereof, whichever occurs first;

It is further ordered, That this authorization is without commitment as to the action the Commission may take with respect to the remaining authority requested by ITT's application, and further, is conditioned on the filing, within 5 days from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, of amendments to the tariff provisions placed under investigation herein which provide for an expiration date of 6 months from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, and which delete from such revisions the offer of 48-kHz, leased-channel service via cable facilities.

It is further ordered, That the requested authority contained in the aforementioned telegram filed by RCA Global Communications, Inc. (RCA), on November 20, 1968, *Is granted* and it *Is authorized* to (*a*) acquire by lease from the Communications Satellite Corp. (Comsat) and to operate a two-way, 48-kHz circuit between an appropriate earth station on the west coast of mainland United States and an ap-

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propriate Pacific satellite and between such satellite and an appropriate earth station in Hawaii; (*b*) acquire by lease and operate necessary connecting landline facilities in mainland United States and in Hawaii; and (*c*) to use the authorized facilities to furnish the U.S. Department of Defense with leased 48-kHz data channel service between mainland United States and Hawaii with alternate use of the channel by the customer as alternate voice record circuits created by the customer.

It is further ordered, That the authority *Granted* to RCA in the preceding ordering paragraph shall extend until further order of the Commission, but in no event beyond 2 months from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, or until the conclusion of the rate investigation instituted by the succeeding ordering paragraphs hereof, whichever occurs first;

It is further ordered, That this authorization is without commitment as to the action the Commission may take with respect to the application RCA has undertaken to file to acquire and operate these facilities involved on a regular basis, and further, is conditioned on the filing, within 5 days from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, of amendments to the tariff provisions placed under investigation herein which provide for an expiration date of 2 months from the date of the release of this *Memorandum Opinion, Order, and Authorizations*, and which make explicit that voice channel derivation may be by use of either customer- or company-provided equipment;

It is further ordered, That ITT and RCA are hereby granted special permission to make the above tariff amendments effective on not less than 1 day's notice to the Commission and to the public;

It is further ordered, That pursuant to sections 4(i), 201, 202 204, 205, and 403 of the communications act, and sections 201(c) (2) and (5) of the Communications Satellite Act, an investigation is hereby instituted into the lawfulness of the new matter contained in tariff revisions (described in par. 2 hereinabove) filed by ITT, RCA, and Comsat, offering 48-kHz, leased-channel service, and that during the pendancy of the investigation no changes shall be made in such revisions except as authorized or directed by the Commission;

It is furthered ordered, That, without in any way limiting the scope of the proceeding, it shall include inquiry into the following issues, and into such specific issues as the Commission will set out by further order;

1. Whether any of the charges, classifications, regulations, and practices contained in such tariff revisions are or will be unjust or unreasonable within the meaning of section 201(b) of the communications act;

2. Whether such revisions will make an unjust or unreasonable discrimination or will subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or will give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of section 202(a) of the communications act;

3. Whether such revisions appropriately reflect any economies made possible by satellite communications in the rates for public communications services within the meaning of section 201(c)(5) of the Communications Satellite Act;

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4. Whether Comsat's tariff revisions provide authorized common carriers with nondiscriminatory use of the communications satellite system under just and reasonable charges, classifications, practices, regulations, and other conditions within the meaning of section 201(c)(2) of the Communications Satellite Act;

5. Whether the Commission should prescribe just and reasonable charges, classifications, regulations, and practices to be hereafter followed with respect to the service governed by such tariff revisions and, if so, the charges, classifications, regulations, and practices that should be prescribed.

It is further ordered, That a hearing be held in the proceeding at the Commission's offices in Washington, D.C., at a time to be specified in a subsequent order and that the hearing examiner designated to preside at the hearing shall certify the record to the Commission for decision without preparing either an initial decision or a recommended decision, and that the Chief, Common Carrier Bureau, shall prepare and issue a recommended decision, which shall be subject to the submittal of exceptions and requests for oral argument as provided in sections 1.276 and 1.277 of the Commission rules (47 CFR secs. 1.276 and 1.277), after which the Commission shall issue its decision as provided in section 1.282 of the Commission's rules (47 CFR 1.282);

It is further ordered, That ITT, RCA, and Comsat are hereby made parties respondent to the proceeding;

It is further ordered, That ITT's application No. 549 for special tariff permission is hereby denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68–1214

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
KAFY, INC. (KAFY),
BAKERSFIELD, CALIF.
Has: 550 kc, 1 kw, DA-N, U, class III
Requests: 500 kc, 1 kw, 5 kw-LS, DA–2, U, class III
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration the above captioned application and a request for waiver of section 73.37 of the rules.

2. The existing operation of KAFY involves mutual cochannel overlap of 0.5- and 0.025-mv/m contours with station KOY, Phoenix, Ariz. (550 kc, 1 kw, 5 kw-LS, U). The proposed KAFY 5 kw daytime operation would utilize a directional antenna to suppress the radiation towards KOY. According to the applicant's data, the present KAFY 1 kw operation causes an overlap area of 2,320 square miles to KOY and under the proposed operation the overlap area would be 201.5 square miles. The applicant's data also indicates that the present operation of KAFY receives overlap from KOY in an area of 3,000 square miles and under the proposed operation the received overlap area would be 3,650 square miles. It is the applicant's contention that the proposed operation complies with note 2 to section 73.37 [1] of the Commission's rules because under the proposed operation the sum of the overlap areas received by KAFY and KOY is smaller than exists under the present KAFY operation. The applicant requests a waiver of section 73.37 if it is concluded that his interpretation of section 73.37 is incorrect.

3. The applicant's interpretation of section 73.37 of our rules was a matter of consideration in the Commission's *Memorandum Opinion and Order* of March 10, 1965, in adopting notes 2 and 3 to said section (FCC 65–195, 4 R.R. 2d 1567, pars. 8, 9, and 10). The Commission concluded that areas of overlap caused and areas of overlap received must

[1] Note 2 to sec. 73.37 reads as follows:
"In the case of applications for changes (other than frequency) in the facilities of standard broadcast stations covered by this section, an application therefor will be accepted even though overlap of signal strength contours as mentioned in this section would occur with another station in an area where such overlap does not already exist, if: (1) the total area of overlap with that station would not be increased; (2) there would be no net increase in the area of overlap with any other station; and (3) there would be created no area of overlap with any station with which overlap does not now exist."

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be considered separately. Thus, an applicant may not offset one against the other and meet the rule by showing a net decrease in the combined total. Accordingly, an increase in either the overlap received or caused renders a proposal unacceptable, and the applicant's interpretation of section 73.37(a) of the rules must be rejected.

4. We have fully considered all comments submitted both in support of the applicant's interpretation of section 73.37 of our rules and for waiver of the provisions of this section, but we find the proposal in contravention of this section and that the circumstances presented are not sufficient to warrant favorable consideration of the request for waiver. We note that the present operation of KAFY adequately serves the city of Bakersfield, and essentially all the additional area that would be served already receives other services. Since the applicant has failed to set forth sufficient reasons, if true, to justify waiver, there is no need to conduct a hearing and the application will be returned. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Oregon Radio, Inc.*, 14 R.R. 742 (1956).

5. Accordingly, *It is ordered*, That the request of KAFY, Inc., for a waiver of section 73.37 *Is denied* and the application *Is returned* as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1215

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of K & R BROADCASTING CORP., RED SPRINGS, N.C. Requests: 1510 kc, 1 kw, 500 w (CH), Day For Construction Permit	File No. BP-17849

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration the above-captioned application and a joint request seeking approval of an agreement between K & R Broadcasting Corp. and J. M. Farlow and Deane F. Bell, doing business as Randolph County Radio (hereinafter "Randolph County") formerly an applicant for a new station at Asheboro, N.C., on 710 kc. Randolph County's successor in interest is RCR, Ltd., which likewise proposes a new station at Asheboro on 710 kc.

2. As originally filed, the K & R application proposed operation on 710 kc. Consequently, it was mutually exclusive with Randolph County's proposal due to prohibited overlap of contours. Under the terms of the agreement K & R was to change frequency to 1510 kc in order to remove this conflict. In return, Randolph County was to incorporate with K & R's two principals each given the right to become 12.5-percent stockholders in the new applicant, RCR, Ltd. K & R's principals were obliged to pay for their stock and share the burden of financing the construction and operation of the station on a pro rata basis in the event RCR, Ltd., should be favored in the forthcoming comparative hearing with a group of other applicants for 710 kc. Under the agreement, K & R was not to be reimbursed for expenses incurred in connection with either its original or amended proposal.

3. Filed concurrently with the joint request for approval of the agreement was an amendment by K & R changing its proposed frequency from 710 to 1510 kc, thus eliminating the conflict between the two proposals. Subsequently, on March 13, 1968, the Asheboro applicant amended to reflect a change to corporate form listing K & R's principals, Keith and Rogers, as officers and 12.5-percent stockholders of the new entity, RCR, Ltd.

4. By letter dated October 7, 1968, we recited the above facts noting that apparently the agreement had been consummated without prior Commission approval. We then requested the parties to supplement their joint petition and set forth reasons why the Commission should sanction the agreement nunc pro tunc.

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5. On November 20, 1968, the applicants filed a supplement to their joint petition stating that, although they were aware of the requirements of section 311(c) of the Communications Act and section 1.525 of the Commission's rules, they were uncertain of the procedures to be followed in cases such as the present one. The applicants asserted that the present circumstances are "unlike those situations where prior approval is explicitly required, in that, since no application was dismissed, the Commission was not deprived of any choice among applicants nor of any choice between communities under section 307(b) of the act." According to the applicants, precedents are clear that prior approval of the Commission is required once the applications are in hearing status, but the present case, involving as it does an amendment to avoid hearing, is "sui generis and without controlling precedent."

6. We find the above arguments to be invalid and self-contradictory. Section 1.525(a) contains no language limiting its application to proposals involving a choice under section 307(b) of the act. Although section 1.525(b) does provide machinery for inviting other applicants in the event that a dismissal would unduly impede 307(b) objections, section 1.525(a) contains no mention of 307(b). We believe it is clear, furthermore, from the first sentence of section 1.525(a)[1] that the rule applies in every instance where a conflict is removed—whether "by withdrawal *or amendment*." [Italics supplied.] Furthermore, the last sentence of section 1.525(a)[2] is all-encompassing and contains no exemption for agreements made by applicants at the prehearing stage. Finally, the precedents are clear. There have been in recent years alone a dozen or more instances [3] where the Commission ruled on prehearing agreements, a number of which involved amendments rather than outright withdrawal of applications.

7. Except for the fact that the agreement has been consummated without prior Commission approval, the applicants have complied with the provisions of section 1.525(a) of the rules in that a joint petition has been filed together with a copy of the agreement and affidavits by the parties. In this material all relevant facts concerning the exact nature of the agreement, the consideration involved and the history of the negotiations have been spelled out. Although the parties did effectuate their agreement in contravention of our rules, no attempt to conceal the fact was made. This circumstance, coupled with the more persuasive fact that it would simplify the forthcoming hearing without reducing the Commission's choices under section 307(b), lead us to conclude that on a net basis approval of the agreement would serve the public interest. Similarly, we have examined the

[1] That sentence provides:
"Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the Commission by withdrawal or amendment of an application or by its dismissal pursuant to sec. 1.568, all parties thereto shall, within 5 days after entering into the agreement, file with the Commission a joint request for approval of such agreement."

[2] Which reads as follows:
"No such agreement between applicants shall become effective or be carried out unless and until the Commission has approved it, or until the time for Commission review of the agreement has expired."

[3] E.g., *B–K Broadcasting Co.*, 11 FCC 173, 12 R.R. 2d 55 (1968); *Burbach Broadcasting Co.*, 12 FCC 2d 103, 12 R.R. 2d 806 (1968); *Autauga Broadcasting Inc.*, FCC 68–769, 13 R.R. 2d 1102 (1968); *Burlington Broadcasting Co.*, 7 FCC 2d 501, 9 R.R. 2d 1119 (1967); *Heath-Reasoner Broadcasters*, FCC 66–761; *J. F. Parker, Jr.*, 5 FCC 2d 799, 8 R.R. 2d 570 (1966).

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K & R application and find that the applicant is qualified to construct and operate as proposed and that the construction of Red Springs' first station would serve the public interest.

8. Accordingly, *It is ordered*, That the joint request for approval of agreement *Is granted* nunc pro tunc March 13, 1968, and that the above-captioned application of K & R Broadcasting Corp. *Is granted*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of: KBLI, INC. (KTLE), POCATELLO, IDAHO For Renewal of Broadcast License	Docket No. 18401 File No. BRCT-485
EASTERN IDAHO TELEVISION CORP., POCATELLO, IDAHO For Construction Permit for New Television Broadcast Station	Docket No. 18402 File No. BPCT-4156

ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it for consideration the above-captioned applications, one requesting a renewal of its license to operate on channel 6, Pocatello, Idaho, and the other requesting a construction permit for a new television broadcast station to operate on channel 6, Pocatello, Idaho.

2. With respect to the issues set forth below the following considerations are pertinent:

(a) Based on the information contained in the application of Eastern Idaho Television Corp., cash in the amount of $630,988 will be needed for the construction and first-year operation of the proposed station, consisting of downpayment on equipment—$105,883; first-year payments on equipment including interest—$93,706; buildings—$40,000; first-year interest payments on loans from stockholders—$36,820; other items—$54,579; first-year cost of operation—$300,000. To meet these cash requirements, the applicant relies upon the availability of $2,500 in paid-in capital, $13,500 in stock subscriptions and loans from James U. Lavenstein and Marilyn Lavenstein, $324,300 in stock subscriptions and loans from M. Walker Wallace and Constance Wallace, and $324,300 in stock subscriptions and loans from Daniel T. O'Shea, for a total of $664,600. The applicant has demonstrated the availability of $2,500 in paid-in capital and it has also shown that Daniel T. O'Shea has available sufficient liquid and current assets in excess of current liabilities to meet his $324,300 commitment. While the applicant has shown that a total of $326,800 will be available to finance the construction and first-year operation of the station, the applicant has failed to demonstrate how James U. Lavenstein, Marilyn Lavenstein, M. Walker Wallace, and Constance Wallace will obtain liquid and current assets (as defined in sec. III, par. 4(d), FCC Form 301) in excess of current liabilities in sufficient amounts to meet their respective commitments to the applicant.[1] Accordingly, financial issues have been specified.

[1] The determination concerning the ability of the principals of Eastern Idaho Television Corp. to meet their financial commitments for the construction of the proposed Pocatello television station takes into consideration the commitments of these principals in connection with their application (BPCT-4112), which has been designated for comparative hearing, (docket No. 18380), for a construction permit for a new television broadcast station to operate on channel 6, Nampa, Idaho. Thus, while Daniel T. O'Shea has demonstrated his ability to meet his $336,775 commitment in Nampa and his $324,300 commitment in Pocatello, James U. Lavenstein and Marilyn Lavenstein have failed to show their ability to meet their $13,500 commitment in Nampa and their $13,500 commitment in Pocatello. While M. Walker Wallace and Constance Wallace have demonstrated their ability to meet their $336,775 commitment in Nampa, they have failed to demonstrate their ability to meet their $324,300 commitment in Pocatello.

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(*b*) A review of the consolidated balance sheet as of June 30, 1968, which was filed as an exhibit to KBLI, Inc.'s, renewal application indicates that current liabilities of $46,683 exceed current assets by $34,851, with a bank overdraft of $517 and an operating deficit of $462,160. Under these circumstances, the Commission believes that a financial issue should be specified. *The Kent-Sussex Broadcasting Co.* (WKSB), docket No. 15995, FCC 65–370 (1965).

3. In *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968), and the Commission's *Public Notice* of August 22, 1968 (FCC 68–847), the Commission indicated that applicants were expected to provide full information to show their awareness of and responsiveness to local programing needs and interests. Since KBLI, Inc., has failed to indicate that it made a survey of community leaders, and since the application does not contain the significant suggestions as to community needs received through the consultations with community leaders and the programing service proposed to meet the needs, as evaluated, we are unable at this time to determine whether KBLI, Inc., is aware of and responsive to the needs of the area. Accordingly, a *Suburban* issue is required.

4. Except as indicated by the issues set forth below, KBLI, Inc., is qualified to own and operate and Eastern Idaho Television Corp. is qualified to construct, own, and operate the proposed television broadcast station. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore unable to make the statutory finding that a grant of the applications would serve the public interest, convenience, and necessity, and is of the opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below.

It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of KBLI, Inc., and Eastern Idaho Television Corp. *Are designated for hearing in a consolidated proceeding* at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine with respect to the application of KBLI, Inc.:
   (*a*) Whether the applicant possesses the requisite financial qualifications.
   (*b*) The efforts made by the applicant to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
2. To determine with respect to the application of Eastern Idaho Television Corp.:
   (*a*) Whether M. Walker Wallace, Constance Wallace, James U. Lavenstein, and Marilyn Lavenstein have available liquid and current assets (as defined in sec. III, par. 4(d), FCC Form 301) in excess of current liabilities in sufficient amount to meet their respective commitments to the applicant.
   (*b*) Whether, in the light of the evidence adduced pursuant to the foregoing, Eastern Idaho Television Corp. is financially qualified.
3. To determine which of the proposals would better serve the public interest.
4. To determine in the light of the evidence adduced pursuant to the foregoing issues, which, if either of the applications should be granted.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants herein pursuant to section 1.221(c) of the

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Commission's rules, in person or by attorney, shall, within 20 days of the mailing of the *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

It is further ordered, That, the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1198

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KEAN RADIO CORP., LICENSEE OF RADIO STATIONS KEAN AND KFRN (FM), BROWNWOOD, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration two notices of apparent liability each dated September 12, 1968, addressed to KEAN Radio Corp., licensee of radio stations KEAN and KFRN (FM), Brownwood Tex.

2. The notices of apparent liability, each in the amount of $200 were issued for violations of section 1.539(a) of the rules in that the licensee did not file renewal applications for KEAN and KFRN (FM) at least 90 days prior to the expiration dates of the licenses. Renewal applications were due on or before May 3, 1968, but they were not filed until July 31, 1968, 89 days beyond the due date.

3. The notices of apparent liability were mailed to the licensee on September 12, 1968, by certified mail—return receipt requested. Although the return receipts indicate that the licensee received the notices on September 16, 1968, the licensee failed to reply to the notices within the 30-day period prescribed by section 1.621 of the Commission's rules, and has not made reply subsequent to the expiration of the 30-day period.

4. In the absence of responses and in light of the matter set forth in the notices of apparent liability, we find that the licensee willfully and repeatedly violated section 1.539(a) of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of the Commission's rules,[1] *It is ordered* That KEAN Radio Corp., licensee of radio stations KEAN and KFRN (FM), *Forfeit* to the United States the sum of $200 for each station (a total of $400) for willful and repeated failure to observe section 1.539(a) of the Commission's rules. Payment of the forfeitures may be made by mailing to the Commission a check or a similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the

[1] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order.*

6. *It is further ordered,* That the secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested, to KEAN Radio Corp., licensee of radio stations KEAN and KFRN (FM), Brownwood, Tex.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KOKE, INC., LICENSEE OF STATION KOKE, AUSTIN, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated May 15, 1968, addressed to KOKE, Inc., licensee of station KOKE, Austin, Tex., and (2) licensee's response to the notice of apparent liability dated June 10, 1968, filed June 12, 1968.

2. The notice of apparent liability in this proceeding was issued after an inspection of KOKE on June 23, 1967, revealed that the station's transmitter was operated on June 1–3, 5–9, 12–14, 17, 19–21, and 26–30, 1967, from 6 a.m. to 10 a.m. by an unlicensed operator, David Byer, in violation of section 73.93(b) of the Commission's rules. The notice provided that, pursuant to section 503(b) of the Communications Act of 1934, as amended, licensee had incurred an apparent forfeiture liability in the amount of $500 for its apparent willful or repeated violation of the recited provision of the Commission's rules.

3. In its response to the notice of apparent liability, licensee does not deny the violations as cited but requests the Commission to relieve it of liability asserting that Byer was employed upon his representation that he was properly licensed by the Commission, although he stated that he had lost his license and had written the Commission for a replacement. The licensee states that it had no intent to violate the rules and was not grossly negligent, and that Byer, while employed, acted under the supervision of the station's chief engineer. Licensee also states that "immediately after discovering that Mr. Byer was mistaken about the type of license issued him * * * management disengaged him as a meter reader * * * "

4. We have considered licensee's response and the circumstances surrounding the violations in this matter, but we are not persuaded either to remit or to reduce the amount of licensee's apparent forfeiture liability. Section 73.93(b) of the rules requires the holder of at least a radiotelephone third-class operator's permit with broadcast endorsement to be on duty and in actual charge of a station's transmitter. It is evident that such an operator was not in charge of KOKE's transmitting apparatus during most of the month of June 1967 between 6 a.m. and 10 a.m., in repeated violation of section 73.93(b). It is also evident

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that this violation resulted from the management's failure to require the operator to post the required permit or otherwise to prove that he possessed such a permit. As we have consistently held in the past, corrective action after citation will not excuse prior violations. *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967). In view of the statutory alternative provided in section 503(b)(1)(B) of the Communications Act of 1934, as amended, we need not make a finding concerning willfulness in this matter since the violations were repeated.

5. In view of the foregoing, *It is ordered*, That KOKE, Inc., licensee of station KOKE, Austin, Tex., *Forfeit* to the United States the sum of $500 for repeated failure to observe the provisions of section 73.93(b) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for remission or mitigation of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order*.

6. *It is further ordered*, That the Secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail—return receipt requested, to KOKE, Inc., licensee of station KOKE, Austin, Tex.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68R-528

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LIBERTY TELEVISION, A JOINT VENTURE COMPRISED OF LIBERTY TELEVISION, INC. AND SISKIYOU BROADCASTERS, INC., MEDFORD, OREG.	Docket No. 17681 File No. BPCT-3858
MEDFORD PRINTING CO., MEDFORD, OREG. For Construction Permit for New Television Broadcast Station	Docket No. 17682 File No. BPCT-3859

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1968)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The hearing record in the above-captioned proceeding was closed September 26, 1968. On October 25, 1968, Medford Printing Co. an applicant in the proceeding, and Oregon Broadcasting Co., an intervenor, filed a petition to enlarge the issues and reopen the hearing.[1]

2. Pursuant to cross-examination concerning the financial qualifications of Liberty Television, a joint venture comprised of Liberty Television, Inc., and Siskiyou Broadcasters, Inc., it became apparent that Liberty Television, Inc., had certain CATV franchises in Oregon cities which had not been disclosed in the Joint Venture application for a new TV station in Medford, Oreg., or in its financial exhibits. The examiner refused to permit cross-examination concerning these interests as not within the scope of issue No. 2(a).[2] This ruling was appealed and the Review Board in a *Memorandum Opinion and Order*, FCC 68R-329, 14 FCC 2d 245, 247 (1968), held:

> * * * We do not agree with the examiner's ruling barring an inquiry into the CATV interests of Liberty Television, Inc. In our view, whatever obligations that joint venturer has incurred are relevant to the question of whether it will be able to meet its commitment to Liberty. However, in view of the unexcused delay in filing the appeal, and certain information contained in

[1] The Board also has before it Broadcast Bureau's comments, filed Nov. 6, 1968; an opposition, filed by Liberty Television; a joint venture comprised of Liberty Television, Inc., and Siskiyou Broadcasters, Inc. (Joint Venture), filed Nov. 7, 1968; and a reply, filed Nov. 21, 1968, by Medford Printing Co. and Oregon Broadcasting Co. On Dec. 9, 1968, Joint Venture filed a petition for leave to file affidavit. The affidavit submitted therewith relates to the chronology of filing of the amendment here in dispute (see par. 2, infra), and is responsive to certain allegations raised for the first time in petitioners' reply pleading. The petition for leave to file affidavit will therefore be granted.

[2] "2(a) To determine whether Liberty Television, Inc., has current and liquid assets (as defined in sec. III, par. 4(d), FCC form 301) in excess of current liabilities and in excess of any funds which may be required in connection with its participation as a joint venturer in the application (BPCT-3672) of Northwest Television & Broadcasting Co., now in comparative hearing in docket Nos. 16924-16926 for a construction permit for a new television broadcast station to operate on channel 35, Yakima, Wash., to enable it to provide approximately $203,000 to the applicant."

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an affidavit filed by Liberty with its oposition pleading,[8] we find no compelling reason to explore this matter further and we will not disturb that ruling.

On September 25, 1968, one day prior to the closing of the record in this proceeding, Joint Venture submitted an amendment to its application, advising the Commission that Liberty Television, Inc., would proceed with the construction of its proposed CATV system in Junction City, Oreg.; that it would cost approximately $95,000; and that it would be financed by a loan from the First National Bank of Oregon in that amount, a loan commitment was submitted with the amendment. By order released October 10, 1968, the examiner granted the petition and accepted the amendment. The petitioners contend that in view of the Board's earlier ruling, Joint Venture's plans to construct the Junction City CATV system is now relevent to Joint Venture's financial qualifications, and that its current petition is timely filed in view of the examiner's acceptance of the amendment.

3. The Review Board's position with respect to the scope of issue No. 2(a) was made clear in its *Memorandum Opinion and Order*, supra. Accordingly, no purpose would be served by enlargement of the issues as requested by the petitioners. Where, as here, a petition to reopen the record is filed while the proceeding is pending before the examiner, the Commission's rules and orderly disposition of the Commission's business required that such petition be considered by the examiner in the first instance. In these circumstances, the petition filed by Medford Printing Co. and Oregon Broadcasting Co. will be dismissed.

4. *It is ordered*, That the petition for leave to file affidavit, filed by Liberty Television, a joint venture comprised of Liberty Television, Inc., and Siskiyou Broadcasters, Inc., December 9, 1968, *Is granted.*

5. *It is further ordered*, That the petition to enlarge issues and reopen hearing, filed by Oregon Broadcasting Co. and Medford Printing Co., October 25, 1968, *Is dismissed.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[8] One of the principals of Liberty Television, Inc., in the affidavit, states that there is no commitment for 2 of 3 CATV systems, and although the 3d does involve a $40,000 commitment, it is an extension of an existing, operating system, and the investment should be returned within 2 years.

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FCC 68-1191

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Request of:
LOOK TELEVISION CORP. (WJJY-TV), JACKSONVILLE, ILL.
For Waiver of Section 73.652(a) of the Rules

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING; COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it informal objections filed June 18, 1968, by Lee Enterprises, Inc. (Lee), objecting to a grant of a waiver of section 73.652(a) of the Commission's rules to permit television broadcast station WJJY-TV, channel 14, Jacksonville, Ill., which already has dual-city identification as a Jacksonville-Springfield station to identify itself as a Jacksonville-Springfield-Quincy, Ill., station, and a response to the informal objections filed by Look Television Corp. (Look) on October 22, 1968.

2. The request for waiver of section 73.652(a) of the Commission's rules by Look was filed on March 21, 1968, and the Broadcast Bureau, pursuant to delegated authority, granted the request on April 2, 1968. No public notice of the filing or granting of the request was made by the Commission. Lee, licensee of television broadcast station KHQA, Hannibal, Mo., with authority to identify with Quincy, Ill., filed an informal objection to the above-referred-to request pursuant to section 1.587 of the Commission's rules on June 18, 1968.

3. Section 1.587 of the Commission's rules requires that informal objections be filed before the Commission acts on any request. The Commission granted the request by Look on April 2, 1968, and since the informal objections were filed by Lee on June 18, 1968, they were not timely filed. However, we shall consider the informal objections of Lee as a petition for reconsideration, because there was no public notice of the filing or granting of the waiver request by Look.

4. Lee alleges that tricity identification should be denied because there is no common identity between Quincy and the two cities (Springfield and Jacksonville) with which the permittee already has authority to identify. Lee alleges further that Quincy, being 63 miles from Jacksonville and 90 miles from Springfield, is not in the same trading area as Quincy.

5. Look submitted an engineering study showing that station WJJY-TV is able to place a principal city contour over the entire cities of Jacksonville, Springfield, and Quincy. The Broadcast Bureau

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found that station WJJY–TV is able to place a predicted principal city contour over the cities as alleged.

6. Look also asserted that tricity identification would aid them in obtaining network affiliation with the American Broadcasting Co. In its response to the allegations by Lee, Look indicates that on July 31, 1968, a network contract was entered into between WJJY–TV and ABC. Look also disputes Lee's allegations that Quincy is not in the same trading area as Jacksonville and Springfield.

7. The Commission in *In the Matter of Part 3 of the Rules and Regulations Governing Main Studio and Station Identification of Television Broadcast Stations*, 15 R.R. 1613, at page 1616, stated that in considering requests for multicity identification that:

> We will review any such requests in the light of all the relevant local circumstances, including the provision of a minimum city signal throughout the cities concerned, the applicants proposals for the provision of studio facilities, the programing services to the cities concerned, other available television services, if any, the hardships, if any, which may be unjustifiably imposed by the present rules, and all other circumstances bearing on a decision as to whether the authorization would be justifiable in the individual case as an exception to the general rule.

The Commission went on to say at page 1615 that "* * * the concept of a community of interests is too broad and indefinable to permit its use as a criterion for the purposes of establishing a demarcation line between cases where multiple-city identification might be justifiable and those where it would not be justified."

8. Although it is disputed that Quincy, Ill., is in the Jacksonville and Springfield, Ill., trading area, this factor is not determinative in reaching our decision. The waiver permitting tricity identification was made in part because of Look's representations that the waiver would enable it to receive an ABC network affiliation thus enhancing the opportunity for economic success for a new UHF station. Station WJJY–TV has, in fact, entered into a network contract subsequent to the waiver and is presently affiliated with the American Broadcasting Co. Lee's station KHQA, Hannibal, Mo., has primary CBS affiliation.

9. Lee has not alleged nor has it shown that the waiver permitting tricity identification would result in any injury to station KHQA or the public interest. The waiver will help put station WJJY–TV on the air and aid its economic viability once on the air, and this is clearly in the public interest.

10. In view of the foregoing, we affirm the original finding by the Broadcast Bureau that the waiver of section 73.652(a) of the rules to permit tricity identification is in the public interest, convenience, and necessity.

Accordingly, *It is ordered*, That Lee's request for reconsideration of the waiver of section 73.652(a) of the rules granted by the Broadcast Bureau, permitting station WJJY–TV to identify itself as a Jacksonville-Springfield-Quincy, Ill., station, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68–1230

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: MIDWESTERN BROADCASTING CO., INC., TOLEDO, OHIO For a Construction Permit	File No. BPCT–4081

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING; COMMISSIONER COX ABSENT.

1. The Commission has under consideration the application (BPCT–4081) filed February 2, 1968, by Midwestern Broadcasting Co., Inc. (Midwestern); a petition to deny, filed October 22, 1968, by D. H. Overmyer Telecasting Co., Inc. (Overmyer), licensee of television broadcast station WDHO–TV, channel 24, Toledo, Ohio, opposing the application; and a supplement to petition to deny, filed November 19, 1968, by Overmyer.

2. Since the proposed new station will compete for audiences and advertising revenues, Overmyer falls within the class that would have standing in a Commission proceeding as a party in interest under section 309(d) of the Communications Act of 1934, as amended. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 R.R. 2008 (1940). However, Overmyer did not seasonably assert its rights, since its petition was filed well beyond the 30-day period after the application was accepted for filing, as prescribed by section 1.580(h)(i) of the Commission's rules. Overmyer asserts that two recent amendments to the application, dated August 23 and October 1, 1968, raise questions as to Midwestern's financial qualifications. Therefore, Overmyer concludes that its petition is timely. We disagree. The application did not meet our financial requirements as originally filed. The time to raise financial questions was within the 30-day period following the date upon which the application was accepted for filing. Since the applicant did not meet our financial requirements initially, we do not believe that subsequent financial amendments should serve to make timely petitions that question specific aspects of the financial plan. Our rules require this position. Section 1.580(i) is applicable to certain enumerated types of applications, including Midwestern's, and major amendments to them, under section 1.580(a). The filing of an amendment containing additional financial information does not qualify as a major amendment, under section 1.572(b). We conclude that Overmyer's petition was not seasonably filed. Overmyer has alternatively requested a waiver of section 1.580(i). One of the functions of that section is to encourage those who may

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have objections in regard to pending applications to promptly bring those objections to our attention. Such encouragement would be lacking if the rule were easily waived. The assertion that there are substantial changes is not enough. Accordingly, we will deny Overmyer's waiver request, and dismiss the petition as being unseasonably filed. We shall, however, consider the merits of the questions raised by Overmyer as informal objections under section 1.587 of the rules.

3. Based on information contained in Midwestern's application, we find that funds in the amount of $499,823 will be needed to construct and operate the proposed station for 1 year, consisting of downpayment on equipment ($119,600), payments on equipment ($112,723), buildings ($25,000), interest on loan ($17,500), first-year operating expenses ($175,000), and miscellaneous expenses ($50,000). To meet this requirement Midwestern has established the availability of a $250,000 loan from the Ohio Citizens Trust Co., a $50,000 loan from Midwestern's president, Lewis W. Dickey, existing capital of $138,585, and profits from the operation of station WOHO (AM) of at least $76,000, for a total of $514,585. Thus, Midwestern has a surplus of $14,762.

4. Overmyer contests both the amount of funds required and the availability of sufficient funds to meet that requirement. As to the funds required, Overmyer asserts that by omitting payments to the equipment supplier, Midwestern has underestimated its first-year operating expenses by some $120,000. Since it is our practice to include these payments as a cost of construction, and since the payments have been included in our computations, we find that Midwestern has not underestimated its operating expenses in this respect. Overmyer also contends that 14, rather than 12, payments on equipment will be required. This contention is based on the assumption that there will be a 90-day period between the date the equipment is shipped and the date upon which the station begins operation. Since the terms of the contract with the equipment supplier specify that payments will begin 30 days after shipment, Overmyer concludes that two additional payments will be required before the first year of operation begins. In support of this position, Overmyer cites *Brown Broadcasting Co., Inc.*, 12 FCC 2d 189, 12 R.R. 2d 826 (1968). That case assumes that there will be a 60-day period between the date equipment is shipped and the date the station commences operation. Overmyer has given no reason for its assumption that a different period, 90 days, should be used here. We therefore follow the *Brown* decision. Accordingly, we have included 13 payments on equipment in determining the total required for equipment payments.

5. In *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965), we stated our basic financial standard that an applicant for a broadcast facility must demonstrate the availability of sufficient funds to construct and operate the proposed station for 1 year. It should be noted that the *Ultravision* decision requires only that there is a reasonable assurance that sufficient funds to meet this standard will be available. For the reasons set forth below, we believe that Midwestern's application, as amended, provides such a reasonable assurance. Overmyer first questions the availability of the existing capital.

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The criteria for establishing the availability of these funds are stated in paragraph 4(d), section III, FCC Form 301.[1] That paragraph permits Midwestern to demonstrate the availability of funds, as shown by a current balance sheet, to the extent that current and liquid assets exceed current liabilities. Midwestern's balance sheet, dated September 30, 1968, shows cash and liquid assets of at least $138,585, accounts receivable (less bad debt reserve) of $149,595, and current liabilities of $122,783.[2] Under the terms of paragraph 4(d), as we have interpreted it, the current liabilities may be offset by accounts receivable. Accordingly, we find that Midwestern has established the availability of $138,585 in current and liquid assets.

6. Overmyer next questions the availability of the profits from existing operations. Midwestern has claimed $100,000 from the operation of station WOHO (AM) in Toledo, which it has committed to the financial needs of the proposed television station. The form 324 submitted by Midwestern for 1967 establishes that profits in excess of that amount were realized that year. Overmyer contends that for the first 7 months of 1968 Midwestern earned $44,362. Projecting this figure over a 12-month period, Overmyer concludes that 1968 profits will approximate $76,000. Since Overmyer has not specified the source of its information, we accord its figures little weight. We would ordinarily rely on the history of earnings as reflected in form 324. However, in view of the fact that almost a year has passed since the last form 324 was submitted for station WOHO (AM), and in view of the fact that Midwestern has not submitted any pleadings to aid us in reaching a determination, we will assume for the sake of argument that the proposed television station will have available $76,000 from the operation of the AM station. Overmyer next contends that this amount will be further reduced due to the 25-percent profit recapture provision that is contained in the bank loan. In this regard, Overmyer has overlooked one of the realities of television broadcasting; new television stations, especially UHF stations, do not operate profitably during the first year. In all likelihood, no funds will be subject to the recapture provision. If there were funds subject to recapture, the necessary conclusion would be that the television station is generating revenues in sufficient amount to keep Midwestern in the black. Specifically, the proposed television station has an operating budget of $175,000. The television station

[1] Par. 4(d) states in part:
"For each person (except financial institutions) who has agreed to furnish funds or purchase stock, but who has not already done so, submit a balance sheet or, in lieu thereof, a financial statement showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities (including amounts payable during the next year on long-term liabilities) and, in addition, to indicate financial ability to comply with the terms of the agreement. The balance sheets submitted should segregate receivables and payables to show the amounts due within 1 year and those due after 1 year. The term current and liquid assets refers to items such as cash, or loan value of insurance, Government bonds, stocks listed on major exchanges, etc., or other assets which may be readily used or converted to provide funds to meet the proposed commitments. Assets such as accounts receivable, which result from normal operation of a business, stocks of close corporations, timberland, building lots, etc., are not considered as a readily available source of funds to meet proposed commitments. * * *"

[2] Midwestern lists its current liabilities as $91,068. In addition, there is an account labeled "Net Liability on Trade Deals" of $31,715. This account is not identified as either a current or long-term liability, so that we must, as Overmyer correctly notes, consider it to be a current liability. Therefore, current liabilities are $122,783.

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would have to generate at least $99,000 in revenues ($175,000 less $76,000 profits from AM operations) before the recapture provision has any effect. Thus, we must conclude that either the full $76,000 will be available, or that the television station will generate revenues in excess of that amount. We have used $76,000 in our computations.

7. A question is also raised as to the availability of the bank loan. Overmyer points to a clause of the bank loan, that was subsequently deleted, which states that the total cost of setting up the television station will be approximately $525,000. Apparently assuming that the phrase "setting up" includes the total cost of equipment without consideration of deferred payments, remodeling of buildings, and miscellaneous expenses, Overmyer states that setting up will cost $553,000. Overmyer concludes that in light of this obvious mistake of fact, the bank loan will not be available to Midwestern. We must disagree. Since the clause in question was deleted from the agreement, we conclude that the parties do not intend to be bound by its contents. We therefore believe that Midwestern has established the availability of the loan.

8. The next question raised by Overmyer is whether the station can be operated on the proposed budget. It is alleged that Midwestern has omitted many essential expenditures, and has underestimated salary and film expenses. As to the list of essential expenditures, the extent that some of the items will contribute to operating expenses, such as charitable contributions and entertainment, appears speculative. In addition, Midwestern will locate its television studio at the existing radio studios, and expenses will be shared with the operation of the radio station. While it is expected that the expenses will increase due to the operation of the television station, we have no basis for assuming that the increases will not be covered by the $31,800 allocated to miscellaneous operating expenses. In this regard, we accord considerable weight to Midwestern's position as an experience broadcaster in Toledo, familiar with the incidental costs of operation of a broadcast station.

9. Thirty-four of Midwestern's employees who currently devote 100 percent of their time to station WOHO (AM) will devote part of their time to television operations. In addition, six full-time employees will be hired. Midwestern has set out its staffing plans in detail and it is clear that the proposed joint operation will result in substantial economies in the operating costs of the proposed station. By way of illustration, the salaries of 22 of the part-time employees will be paid from funds generated by the radio station. It is also clear that the station will not be understaffed.[3] As to the adequacy of the salaries, using those who will work for the television station full time, and average salary of $9,200 is obtained. Since Overmyer alleges that an average salary of $8,500 is required to be competitive in the

[3] The 6 full-time employees include 2 salesmen, 1 news director, 1 production manager, and 2 engineers. The radio station employees, and the approximate percentage of the time that each will devote to the television station, are as follows: president (50 percent), general manager (80 percent), business manager (25 percent), 7 salesmen (unspecified), assistant news director (75 percent), 4 reporter-announcers (10 percent), 2 cameramen (90 percent), 7 announcers (10 percent), 2 backup engineers (as required), writer (20 percent), continuity (20 percent), traffic (20 percent), promotion (50 percent), switchboard (35 percent), reception (35 percent), general secretary (40 percent), and janitor (50 percent).

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Toledo labor market. Midwestern has more than met Overmyer's standard. It should be noted that we have never specified a minimum average salary that must be met in a given market. We have only raised the question of adequacy of salaries where they appear to be patently low. This is not the case here. We conclude that Midwestern has shown that the station will be adequately staffed and that it has not underestimated its salary expenses for the proposed station.

10. Midwestern indicates that it will carry 31¼ hours of recorded programing in a normal broadcast week, and has allocated $52,000 to purchase this programing. Overmyer asserts that this figure is too low, noting that the average amount spent for film by UHF stations in 1966 was $70,761, and that its own expenditures for film for 35 hours per week were $90,789 in 1967. We do not believe that the differences are significant. Comparisons with Overmyer's operation are not determinative; some film packages cost more than others. Nor is an average figure determinative. An average assumes that some stations will pay more and some less for their films. Midwestern's proposal is not so far below the average to conclude that it can not program as proposed with the allocated funds. Even if we were to assume that Midwestern had underestimated its programing costs, we again note the surplus available to Midwestern that could be applied to the purchase of programing.

11. Overmyer also urges that processing of Midwestern's application should be withheld pending the outcome of the rulemaking proceeding in docket 18110 concerning amendment of the multiple ownership rules. One of the rules proposed in that proceeding states that no license will be issued to a party if, "such party directly or indirectly owns, operates, or controls an unlimited time standard broadcast station or an FM station in the market applied for." Midwestern, as licensee of station WOHO (AM), a full-time station, would fall within the terms of the proposed rule. However, the *Notice of Proposed Rulemaking*, FCC 68–332, 33 R.R. 5315, released March 28, 1968, stated, "Applications now on file with the Commission will continue to be processed in accordance with existing rules and precedents." This interim policy was clarified in a subsequent *Memorandum Opinion and Order*, 12 FCC 2d 912, 13 R.R. 2d 1526, released May 17, 1968. We stated there:

> **We have decided that the purposes of this proceeding would be adequately served by using the date of publication in the Federal Register (Apr. 3, 1968) as the cutoff date. Thus, all applications which would fall within the scope of the proposed rules, which were tendered for filing up to and including April 3, 1968, and which were thereafter accepted for filing, will be processed in accordance with existing rules and precedents and will not be subject to the interim policy.**

Since Midwestern's application was accepted for filing on January 24, 1968, the quoted statements make it clear that the interim policy is inapplicable here. It is equally clear that a grant of Midwestern's application would not be barred by existing rules and precedents as to concentration of control of mass media. We note in this connection that Toledo is served by four AM stations other than station WOHO

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(AM), four FM stations, one educational and three commercial television stations, and two commonly owned newspapers.[4]

12. We turn last to Overmyer's statements that the operation proposed by Midwestern, with submarginal facilities and a skeleton staff, would reflect adversely on Overmyer's television station in Toledo, WDHO–TV, and on UHF operation generally. Midwestern proposes to operate with 589-kw visual effective radiated power at an antenna height above average terrain of 370 feet, which is within the normal range for UHF stations. We have discussed the adequacy of the staffing proposal above. The broadcast week of 40 hours is not at all unusual for new television stations. In fact, our rules permit operation for as few as 12 hours per week during the first 18 months of operation. See section 73.651(a) of the rules. Accordingly, we do not consider the proposed to be marginal in any way. We fail to see how the proposed operation will adversely reflect on station WDHO–TV or UHF television generally.

13. Midwestern proposes to locate its main television studio at the proposed transmitter site, which is the existing transmitter-studio site of station WOHO (AM). That site is about 4 miles from downtown Toledo and 1 mile from the nearest city limits. The applicant states that the proposed site is readily accessible and that economies of operation will result from the combined studio-transmitter site. We believe that good cause has been shown for locating the studio outside the principal community and that operating from that site would not be inconsistent with the public interest. Therefore, our consent to the studio location will be granted, pursuant to section 73.613(b) of the rules.

14. In view of the above, we find that the petition to deny does not raise any substantial or material questions of fact.[5] We also find that Midwestern is legally, financially, technically, and otherwise qualified to construct and operate the proposed station, and that a grant of the application would serve the public interest, convenience, and necessity.

15. Accordingly, *It is ordered*, That the petition to deny, filed by

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[4] The 2 newspapers are the Toledo Blade and the Toledo Times, which have daily circulations of 172,008 and 29,554, respectively. The newspapers have no broadcast interests in the Toledo area. Toledo is served by standard broadcast stations WCWA, WTTO, WSPD, WTOD, and WOHO. Except for WTOD, these stations are full time. FM stations in Toledo are WCWA–FM, WMHE, WSPD–FM and WKLR–FM. Television service is provided by WTOL–TV, channel 11; WSPD–TV, channel 13; WDHO–TV, channel 24; WGTE–TV, channel 30. A construction permit has been issued to Toledo Telecasting Corp. for station WDKS–TV, channel 54. Additional television service is provided by 3 Detroit, Mich., stations that place predicted grade B signals over Toledo: WJBK–TV, channel 2; WWJ–TV, channel 4; and WXYZ–TV, channel 7.

[5] On December 17, 1968, Overmyer submitted yet another pleading, entitled "Further Supplement to Petition to Deny." We do not believe that this pleading alleges any facts that would alter our decision. A few comments are appropriate, however. Rather than file responsive pleadings, Midwestern has chosen to amend its application, as is its right, to correct any deficiencies that it thinks have been raised by Overmyer's pleadings. These amendments, when carefully read, have supplied us with the information we need to make our determination. We are still of the view that Midwestern has established its financial qualifications to construct and operate as proposed. Midwestern's proposed operating expenses, when considered with the economies of operation due to the combined radio and television operation, are reasonable, and for that reason, comparisons with Overmyer's operation in Toledo shed little light on the problem. Overmyer also alleges that Midwestern made alterations in a bank letter that constitute misrepresentations to the Commission. If the bank letter had been submitted without alteration, there might have been a misrepresentation. Midwestern's deletion removed that problem. The bank has acquiesced to the change. We therefore see no reason for raising a qualifications question against Midwestern.

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D. H. Overmyer Telecasting Co., Inc., *Is dismissed*, and when considered as an informal objection, *Is denied*, and the request for waiver of section 1.580(i) *Is denied*.

16. *It is further ordered*, That the application (BPCT–4081) of Midwestern Broadcasting Co., Inc., *Is granted*, in accordance with specifications to be issued, and the Commission's consent to locating the main studio outside the principal community *Is granted*.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary*.

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FCC 68R-531

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH AMERICAN BROADCASTING CO., INC., BOYNTON BEACH, FLA.	Docket No. 18310 File No. BP-17843
RADIO BOYNTON BEACH, INC., BOYNTON BEACH, FLA.	Docket No. 18311 File No. BP-17999
BOYNTON BEACH COMMUNITY SERVICES, INC., BOYNTON BEACH, FLA.	Docket No. 18312 File No. BP-18000
RADIO VOICE OF NAPLES, NAPLES, FLA.	Docket No. 18313 File No. BP-17991
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1968)

BY THE REVIEW BOARD:

1. This proceeding involves the above-captioned mutually-exclusive applications for construction permits to establish new standard broadcast stations in Boynton Beach and Naples, Fla. By *Memorandum Opinion and Order*, FCC 68-904, 14 FCC 2d 617, adopted September 5, 1968, the applications were designated for hearing on various issues, including, inter alia, a *Suburban* issue as to each of the applicants.[1] Presently before the Review Board is a petition to delete issues or other relief, filed October 2, 1968, by Boynton Beach Community Services, Inc. (Community).[2] Community requests the Board to delete the *Suburban* issue or, in the alternative, to permit each applicant to amend its application to satisfy the requirements set forth in the *Minshall* case.[3]

2. In support, Community contends that section IV-A of its application, filed December 4, 1967, reflects the result of its extensive community survey to ascertain the needs and interests of the Boynton Beach area as required by FCC rules and policies, and that the applicant has met and satisfied the requirements of part I, paragraphs 1-A, 1-B, and 1-C of section IV-A. It further contends that, by public notice, released August 22, 1968 (FCC 68-847), the Commission for the first time delineated the four elements purportedly now required of applicants in meeting community servey requirements; that this public notice adopted the general standards delineated in *Minshall Broadcasting Co., Inc.*, supra, when for the first time the Commission directed applicants to furnish the specific suggestions articulated by those interviewed as to how the proposed station could help meet area needs; that

[1] *Suburban Broadcasters*, 30 FCC 1021, 20 R.R. 951 (1961).
[2] Also before the Review Board is Broadcast Bureau's comments, filed Oct. 16, 1968.
[3] *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796 (1968).

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the public notice failed to state that this new standard would be applied retroactively to pending applications which had demonstrated at least substantial compliance with the *Minshall* requirements; that no communications were received calling attention to such new policy; and that it became aware of this requirement only when the hearing order was issued.

3. The Review Board agrees with the Broadcast Bureau that the subject petition should be denied. The Board has consistently held that it will not delete issues in the absence of unusual extenuating circumstances, such as failure to take into account amendments filed prior to the date of designation for hearing. See, e.g., *Orange Nine, Inc.*, 8 FCC 2d 637, 10 R.R. 2d 489 (1967). Here, the Board finds no extenuating circumstances which might warrant the requested relief. Thus, the *Minshall* case, supra, was adopted more than 6 months before the petitioner's application was designated for hearing, and we find no valid basis for excluding the petitioner from meeting the requirements set forth therein; there is no indication that the Commission specified the *Suburban* issues under any misapprehension of the facts; and petitioner's contention that it has substantially complied with the *Minshall* standard is unsupported and cannot be accepted. We also agree with the Bureau's contention that any ruling by the Review Board regarding the propriety of amendments designed to meet the *Suburban* issues would be premature at this time. The hearing examiner has initial jurisdiction over petitions for leave to amend, and therefore the proper procedure would be to file such petitions, including the showing required under section 1.522 of the rules, with the examiner in the first instance.

Accordingly, *It is ordered*, That the petition to delete issues or other relief, filed October 2, 1968, by Boynton Beach Community Services, Inc., *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1223

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF O'FALLON-O'CONNOR BROADCASTING CO., INC., LICENSEE OF STATION KFML, DENVER, COLO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated January 10, 1968, addressed to O'Fallon-O'Connor Broadcasting Co., Inc., licensee of station KFML, Denver, Colo., and (2) licensee's response to the notice of apparent liability dated January 23, 1968, filed January 30, 1968.

2. On January 18 and 19, 1967, station KFML was inspected and subsequently cited in an official notice of violation dated January 25, 1967, for seven infractions of the Commission's rules, including section 73.93(b), in that an operator with a third-class radiotelephone license not endorsed for broadcast station operation was on duty and in actual charge of the station's transmitting apparatus on January 1, 3–8, 10–14, 17, and 19, 1967, and section 73.47 (a) and (b), in that the station's equipment performance measurements were not available as required, the last set of such measurements being dated December 30, 1965. Thereafter, the Commission, on January 10, 1968, issued to the licensee of KFML, pursuant to section 503(b) of the Communications Act of 1934, as amended, a notice of apparent liability in the amount of $500 for its apparent willful or repeated violation of the recited provisions of the Commission's rules.

3. In a response to the notice of apparent liability dated January 23, 1968, licensee asserts that the Commission's "* * * charges are without foundation and cannot, as they stand, be substantiated." Concerning the violation of section 73.93(b) the licensee avers that the operator in question was "* * * on the board less than 2 weeks with an invalid license" and that "[t]he matter was immediately corrected." Licensee asserts that the alleged violation was a singular act and was not willful or repeated. Concerning its apparent violation of section 73.47 (a) and (b), licensee asserts that the "* * * alleged violation goes back to December 1965 to the previous ownership * * * of KFML" and therefore that "* * * if there is liability here * * * that liability rests with the previous ownership of * * *" the station. Licensee also notes that the station's equipment performance measure-

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ments were being conducted at the time of inspection and were completed within 3 weeks thereafter.

4. We have considered licensee's reply and the circumstances surrounding the violations in this matter, but we find no reason to either remit or reduce the amount of licensee's apparent forfeiture liability. It is evident that the licensee's violation of section 73.93(b) was repeated in that an improperly licensed operator was on duty and in actual charge of KFML's transmitting apparatus on at least 14 days in January 1967. See *Friendly Broadcasting Co.*, 23 R.R. 893 (1962). Furthermore, in view of licensee's response to the official notice of violation issued in this matter, it appears that the repeated violation of section 73.93(b) resulted from licensee's failure to examine the license of the operator at the time he was employed in order to insure that it was properly endorsed for broadcast station operation. It is also evident that KFML's equipment performance measurements were not made at yearly intervals and, consequently, that data concerning such measurements were not available for Commission examination as required. In this respect, it is observed that the last set of equipment performance measurements conducted for station KFML was dated December 30, 1965, and that the licensee acquired the station by assignment on February 25, 1966. Under former section 73.47(a), therefore, licensee was required to conduct new equipment performance measurements on or before December 30, 1966. However, such measurements were not completed and made available for Commission examination until February 6, 1967. Thus, it is clear that the violations of sections 73.47 (a) and (b) were repeated and, as we have consistently held in the past, corrective action after citation does not excuse prior violations. See *Mt. Sterling Broadcasting Co.*, 12 FCC 2d 571 (1968), *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967). In view of the statutory alternative provided in section 503(b)(1)(B) of the Communications Act of 1934, as amended, we need not make a finding concerning willfulness in this matter since the violations were repeated.

5. In view of the foregoing, *It is ordered*, That O'Fallon-O'Connor Broadcasting Co., Inc., licensee of station KFML, Denver Colo., *Forfeit* to the United States the sum of $500 for repeated failure to observe the provisions of sections 73.93(b) and 73.47 (a) and (b) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order*.

6. *It is further ordered*, That the secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail-return receipt requested, to O'Fallon-O'Connor Broadcasting Co., Inc., licensee of station KFML, Denver, Colo.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1195

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF JACK LEE PAYNE, LICENSEE OF
RADIO STATION WJPW, ROCKFORD, MICH.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration its notice of apparent liability dated February 1, 1968, addressed to Jack Lee Payne, licensee of radio station WJPW, Rockford, Mich.

2. The notice of apparent liability in the amount of $200 was issued for violation of section 1.539(a) of the rules in that the licensee did not file a renewal application at least 90 days prior to the expiration date of the license. A renewal application was due on or before July 3, 1967, but it was not filed until October 3, 1967, 92 days beyond the due date.

3. The notice of apparent liability was mailed to the licensee on February 1, 1968, by certified mail-return receipt requested, and the return receipt indicates that the licensee received the notice on February 5, 1968. Thereafter, although not responding to the case on its merits, the licensee requested and was granted until May 1, 1968, to reply. The licensee failed to reply by May 1, 1968, and to date no reply has been received.

4. In the absence of a response and in light of the matter set forth in the notice of apparent liability, we find that the licensee willfully and repeatedly violated section 1.539(a) of the rules.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of the Commission's rules,[1] *It is ordered*, That Jack Lee Payne, licensee of radio station WJPW, *Forfeit* to the United States the sum of $200 for willful and repeated failure to observe section 1.539(a) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this *Memorandum Opinion and Order.*

[1] Sec. 1.621 of the Commission's rules provides, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the notice of apparent liability."

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6. *It is further ordered*, That the secretary of the Commission send a copy of this *Memorandum Opinion and Order* by certified mail-return receipt requested, to Jack Lee Payne, licensee of radio station WJPW, Rockford, Mich.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: PRESCOTT TV BOOSTER CLUB, INC., PRESCOTT, ARIZ. For Construction Permit for New VHF Television Translator Station	File No. BPTTV-3306

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration the above-captioned application of Prescott TV Booster Club, Inc., requesting a construction permit for a new 1-w VHF television broadcast translator station to serve an estimated 17,000 persons in Prescott, Ariz., by rebroadcasting television broadcast station KAET, channel *8, Phoenix, Ariz. (ETV), on output channel 2; a petition to deny, filed January 22, 1968, by H. & B. Communications Corp., operator of a community antenna television (CATV) system in Prescott, and various pleadings filed in connection therewith.[1]

2. Petitioner claims standing in this proceeding as a "party in interest" within the meaning of section 309(d) of the Communications Act of 1934, as amended, on the grounds that the CATV system and the translator will operate in the same community and will compete for viewers, causing the CATV system economic injury. We find that petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 R.R. 2008.

3. The only question raised by petitioner is that the translator would cause interference to reception by the CATV system's subscribers on cable channel 2 and that it will also cause adjacent channel interference to the system's reception of the off-the-air signals of television broadcast station KTVK–TV, channel 3, Phoenix, Ariz. Petitioner operates a five-channel system which carries the signals of five Phoenix, Ariz., television broadcast stations to approximately 2,000 subscribers. The following signals are carried:

KTAR–TV (NBC), channel 12 on cable channel 2,
KTVK–TV (ABC), channel 3 on cable channel 3,
KOOL–TV (CBS), channel 10 on cable channel 4,
KPHO–TV (Ind), channel 5 on cable channel 5,
KAET (ETV), channel *8 on cable channel 6.

[1] The Commission also has before it for consideration an opposition to the petition to deny, filed June 27, 1968, by Prescott TV Booster, and a reply thereto, filed July 18, 1968, by H. & B. Prescott's responsive pleading was filed nearly 4 months beyond the time limit set by sec. 1.45 of the Commission's rules. Because of the importance of this matter, we will, upon our own motion, waive sec. 1.45 of the rules, accept the late-filed pleading, and judge this matter on its merits.

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Prescott TV Booster is licensed to operate four VHF translators in Prescott and the present application represents its efforts to obtain a fifth translator which would bring to Prescott the same services off the air as are provided by cable by H. & B. It is apparent that there is no VHF channel available which the translator can use without causing some type of interference to the cable system.

4. Petitioner alleges that the translators which are in operation presently cause interference to the cable system's subscribers' reception and the system has attempted to minimize this interference by various techniques, including transformers installed in individual home receivers and adjacent channel traps installed into the system's off-the-air antennas. The results, petitioner states, are less than satisfactory and the translator's operation on output channel 2 would aggravate the situation.

5. There appears to be no other VHF channel available for the applicant's use which would not meet with similar objections from petitioner. In effect, petitioner's position is that there are no channels available for the applicant's use which will not cause some type of interference to the CATV system's operation and, therefore, the translator cannot be authorized. We disagree. The problem of interference by an off-the-air television service to reception by CATV subscribers on their cable is not a new one. We have held that, under these circumstances, the CATV system is not entitled to protection against such interference under our rules. *Whitesburg Television Translator, Inc.*, 11 FCC 2d 275, 11 R.R. 2d 1262. There are techniques available to the CATV system to enable it to cope with this type of problem and we believe that it is incumbent upon the system to employ these techniques to the extent necessary to protect itself.

6. The applicant is a nonprofit community organization seeking to bring to Prescott the off-the-air service of a noncommercial educational television broadcast station. We recognize that CATV systems provide a valuable and desired service to members of the public in many areas, but their service is limited to subscribers who are willing and able to pay a fee, and usually is not available even at a fee to members of the community in outlying areas. Thus, the cable system serves approximately 2,000 homes; the translator would serve approximately 5,000 homes.

7. We are not unmindful of the problems which the CATV system may encounter as the result of the activation of this new translator, but unlike viewers, the system has remedies available to it and a certain flexibility which enable it to protect itself against interference at its head end. It may, for example, relocate its head end or it may use microwave relay stations to bring the signals of the Phoenix stations to Prescott. The cable system has operated, apparently successfully, in spite of the interference which it states exists because of the translators.

8. We find that the applicant is qualified to construct, own and operate the proposed new television broadcast translator station. We further find that no material or substantial questions of fact have been raised by the pleadings and that a grant of the application would serve the public interest, convenience and necessity.

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Accordingly, *It is ordered*, That the petition to deny filed herein by H. & B. Communications Corp. *Is denied*.

It is further ordered, That, upon the Commission's own motion, section 1.45 of the Commission's rules *Is waived* and the late-filed reply pleading of Prescott TV Booster Club, Inc., *Is accepted*.

It is further ordered, That the above-captioned application of Prescott TV Booster Club, Inc., *Is granted* in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of STATE MUTUAL BROADCASTING CORP., WORCESTER, MASS. For Construction Permit for a New Television Broadcast Station	File No. BPCT–4109

(Adopted December 5, 1968)

The Commission, by Commissioners Hyde, chairman; Bartley, Robert E. Lee, Wadsworth, Johnson, and H. Rex Lee, with Commissioner Johnson dissenting and issuing a statement, granted the application of State Mutual Broadcasting Corp. for a construction permit for a new television broadcast station to operate on channel 27, Worcester, Mass., subject to the following conditions:

1. If, as a result of subsequent Commission action, Bernard E. Waterman reacquires his interest in station WAAB and station WAAB–FM, Worcester, Mass., he shall sell his stock and debentures and terminate his relationship as general manager of the television station.
2. If, as a result of subsequent Commission action, Waterman Broadcasting Corp. reacquires its interest in station WAAB and station WAAB–FM, Worcester State Mutual Life Assurance Co. of America shall not exercise its option to purchase the stock of Waterman Broadcasting Corp.
3. During the time that Richard C. Steele and Robert W. Stoddard retain their interest in station WTAG, Worcester, Mass., they shall not participate in any of the activities of State Mutual Life Assurance Co. of America with respect to the control and operation of the television station.
4. Grant of the application shall be without prejudice to whatever action the Commission may deem appropriate as a result of the pending proceeding in docket No. 18110.
5. Operation with effective radiated power in excess of 1,000 kw after September 1, 1970, is subject to a further extension of consent by Canada.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This grant of a construction permit for channel 27 in Worcester, Mass., to the State Mutual Broadcasting Corp. adds yet another document to the growing pile of evidence of this Commission's insensivity to the problems of broadcast media control in America.

The corporation has asked for the permit. It has been granted. But for the overwhelming vote of approval by a majority of this Commission, I would have assumed that a mere description of the applicant's media position would have been eloquent argument enough to insure its disapproval. Apparently not. Nevertheless, in order to keep everyone posted on the current state of affairs at the FCC—reformer and practitioner alike—I think it may be useful to set forth the facts of this case.

1. There is to be no licensee—in the sense of an owner to whom this Commission can look for responsibility for the station's operation.

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The State Mutual Broadcasting Corp. is no more than a piece of paper on file in the State of Massachusetts. All of its voting stock is held by another corporation—the State Mutual Life Assurance Co. of America. State Mutual Life, in turn, has no capital stock; it is owned by its policyholders. It is, thus, perhaps an extreme illustration of the trend to institutional ownership of broadcast media—ownership by banks, trust funds, estates, universities' endowments, unions' pension funds, mutual funds, brokerage houses, and so forth. "Who's in charge here?" is an increasingly serious, frustrating, and disturbing question that echoes throughout our industrialized and institutionalized society. It has special significance, however, when it comes to assessing responsibility for the information and opinion fed into the mainstream of a people dedicated to self-government by informed citizens.

2. The problems of conglomerate corporate ownership are also raised by this grant. That is, the risk that a mass-media subsidiary may be used to serve the public information, advertising, or public relations interests of its parent—rather than as an independent source of information and opinion. This issue was explored by the Commission in the ITT–ABC proposed merger (ABC–ITT, 7 FCC 2d 245, 278, and ABC–ITT merger, 9 FCC 2d 546, 581), and was involved in the recent *RCA-Huntley* case (National Broadcasting Co., 14 FCC 2d 713, 718, 741 (1968) (dissenting opinion)). State Mutual Life is, of course, an insurance company. The insurance industry is a multi-billion-dollar industry in this country that is not immune from politics and economic involvement in serious public policy issues: medicare and health insurance, the relation of auto insurance to this country's automotive subgovernment, the investment practices of insurance companies, the income tax treatment accorded insurance companies and the policyholders of various plans (State Mutual Life's property taxes are involved in this very case), and the State and Federal regulation of the industry generally—to name a few. But, as with most insurance companies, that is but the beginning. State Mutual Life has stock and bond holdings in a wide range of interests totaling some $500 million. To the extent State Mutual Life is to be thought of as personified in its officers and directors, their interests are almost equally broad. There are 120 corporate officers. Just to list the interests of the 18 principal officers and directors takes 11 pages in an FCC form. Each officer is in a position to, however subtly, influence the programing of the media subsidiary in ways that reflect the economic interests of the other corporations with which he has relationships—as well as his own personal economic interests. (See, for example, the recent extreme case in which one of broadcasting's largest and most powerful conglomerates (RCA) saw nothing wrong in one of broadcasting's best known newscasters (Chet Huntley) using the media outlet (the NBC radio network) to attempt to shape the views of tens of millions of Americans to a position on the Wholesome Meat Act that tended to serve his own interests in the cattle and meat business, and those of his business associates, cited above.)

3. The grant of this permit will create a concentration of control of media in Worcester, Mass., that, at a minimum, is inconsistent with recent actions of the U.S. Department of Justice. Two of the

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of STATE MUTUAL BROADCASTING CORP., WORCESTER, MASS. For Construction Permit for a New Television Broadcast Station	File No. BPCT–4109

(Adopted December 5, 1968)

The Commission, by Commissioners Hyde, chairman; Bartley, Robert E. Lee, Wadsworth, Johnson, and H. Rex Lee, with Commissioner Johnson dissenting and issuing a statement, granted the application of State Mutual Broadcasting Corp. for a construction permit for a new television broadcast station to operate on channel 27, Worcester, Mass., subject to the following conditions:

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3. During the time that Richard C. Steele and Robert W. Stoddard retain their interest in station WTAG, Worcester, Mass., they shall not participate in any of the activities of State Mutual Life Assurance Co. of America with respect to the control and operation of the television station.
4. Grant of the application shall be without prejudice to whatever action the Commission may deem appropriate as a result of the pending proceeding in docket No. 18110.
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DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

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The corporation has asked for the permit. It has been granted. But for the overwhelming vote of approval by a majority of this Commission, I would have assumed that a mere description of the applicant's media position would have been eloquent argument enough to insure its disapproval. Apparently not. Nevertheless, in order to keep everyone posted on the current state of affairs at the FCC—reformer and practitioner alike—I think it may be useful to set forth the facts of this case.

1. There is to be no licensee—in the sense of an owner to whom this Commission can look for responsibility for the station's operation.

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The State Mutual Broadcasting Corp. is no more than a piece of paper on file in the State of Massachusetts. All of its voting stock is held by another corporation—the State Mutual Life Assurance Co. of America. State Mutual Life, in turn, has no capital stock; it is owned by its policyholders. It is, thus, perhaps an extreme illustration of the trend to institutional ownership of broadcast media—ownership by banks, trust funds, estates, universities' endowments, unions' pension funds, mutual funds, brokerage houses, and so forth. "Who's in charge here?" is an increasingly serious, frustrating, and disturbing question that echoes throughout our industrialized and institutionalized society. It has special significance, however, when it comes to assessing responsibility for the information and opinion fed into the mainstream of a people dedicated to self-government by informed citizens.

2. The problems of conglomerate corporate ownership are also raised by this grant. That is, the risk that a mass-media subsidiary may be used to serve the public information, advertising, or public relations interests of its parent—rather than as an independent source of information and opinion. This issue was explored by the Commission in the ITT–ABC proposed merger (ABC–ITT, 7 FCC 2d 245, 278, and ABC–ITT merger, 9 FCC 2d 546, 581), and was involved in the recent *RCA-Huntley* case (National Broadcasting Co., 14 FCC 2d 713, 718, 741 (1968) (dissenting opinion)). State Mutual Life is, of course, an insurance company. The insurance industry is a multi-billion-dollar industry in this country that is not immune from politics and economic involvement in serious public policy issues: medicare and health insurance, the relation of auto insurance to this country's automotive subgovernment, the investment practices of insurance companies, the income tax treatment accorded insurance companies and the policyholders of various plans (State Mutual Life's property taxes are involved in this very case), and the State and Federal regulation of the industry generally—to name a few. But, as with most insurance companies, that is but the beginning. State Mutual Life has stock and bond holdings in a wide range of interests totaling some $500 million. To the extent State Mutual Life is to be thought of as personified in its officers and directors, their interests are almost equally broad. There are 120 corporate officers. Just to list the interests of the 18 principal officers and directors takes 11 pages in an FCC form. Each officer is in a position to, however subtly, influence the programing of the media subsidiary in ways that reflect the economic interests of the other corporations with which he has relationships—as well as his own personal economic interests. (See, for example, the recent extreme case in which one of broadcasting's largest and most powerful conglomerates (RCA) saw nothing wrong in one of broadcasting's best known newscasters (Chet Huntley) using the media outlet (the NBC radio network) to attempt to shape the views of tens of millions of Americans to a position on the Wholesome Meat Act that tended to serve his own interests in the cattle and meat business, and those of his business associates, cited above.)

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directors of State Mutual Life have substantial interests in the Worcester Telegram & Gazette—a company which publishes Worcester's only two daily newspapers with a combined daily circulation of 157,000. Robert W. Stoddard is chairman of the board and a 5-percent stockholder of the corporation. Richard C. Steele is the president and a director of the corporation, and the publisher of the paper. We may take official notice of the fact that men occupying such positions are in a position, between them, to select the personnel and set the editorial policies of the paper. On May 8, 1968, the Justice Department filed before this Commission an opposition to a transfer application in a case involving the acquisition of a television station in Beaumont, Tex., by individuals who controlled the local papers. Subsequently, on August 1, 1968, the Department filed with this Commission a brief in our inquiry regarding a proposal to limit the number of full-time stations a single individual could acquire in the same market—docket No. 18110, FCC 68–332, March 28, 1968. The Justice Department urged that the proposed rule was too soft: That it should also consider divestiture, and that it should also take account of joint newspaper-broadcast ownership in the same community. Finally, only last week, we were informed that the Gannett newspaper chain had sold station WREX–TV in Rockford, Ill., for over $3 million profit, in accordance with a threatened Department of Justice suit because of their common ownership of two newspapers in that city. To approve an application like the one before us without a hearing—in which directors of the parent corporation of a television station control the only newspapers in the same town—seemingly flaunting the responsibly conceived and tendered positions of the U.S. Government's expert agency on the subject, is a discourteous and reckless act inconsistent with simple principles of comity and decency between agencies of the same government.

4. This acquisition will be an undesirable addition to the present media holdings of State Mutual Life. The company already has a 3.1-percent interest in the Sonderling Broadcasting Corp. (a chain of white-owned, Negro-oriented stations). It has options to purchase 50,000 more shares, which would give it a 7.5-percent interest. Sonderling owns six AM stations, four FM stations, and two television stations located in such politically significant centers as Washington, D.C. (the Nation's capital), New York and Los Angeles (the Nation's two largest markets), Albany (the State capital of New York), and so forth. State Mutual Life also holds warrants to purchase up to 10 percent of the Waterman Broadcasting Corp., which owns Waterman Broadcasting Corp. of Tex., which owns KTSA and KTSA–FM, San Antonio, Tex., and which, in turn, is owned by Mr. and Mrs. Bernard Waterman. He is a director of the State Mutual Broadcasting Corp., and channel 27's proposed general manager. (Waterman also owned stations in Worcester itself—in ambiguous status at the present time—that raise separate, numerous, and serious issues discussed later.) Another director of State Mutual Life, Mr. Julian B. Bondurant, is president of the Memphis Community Television Foundation, the licensee of WKNO–TV, channel 10, Memphis, Tenn. (a noncommercial educational station). (State Mutual Life, through Sonderling,

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it should be noted, has an interest in WDIA and WTCV (AM and FM) in Memphis.) State Mutual Life at one time held stock in CBS, although it claims now to have sold it all.

5. The grant of the application is in direct violation of this Commission's own interim policy, announced on March 28, 1968, that action will be withheld on all applications filed after April 3, 1968, where a grant would result in common ownership, operation or control of more than one unlimited-time broadcast station in a market. This application was filed on April 11, 1968. It would result in the common ownership referred to. The common ownership comes about because of State Mutual Life's relationship to the Worcester Telegram & Gazette, Inc., referred to earlier. (State Farm Mutual's directors, Richard C. Steele and Robert W. Stoddard, are president and chairman of the board, respectively, of the Worcester Telegram & Gazette.) For, as has come to be increasingly common in this country, we find that the Worcester Telegram & Gazette, owner of the only daily papers in town, also owns one of the four AM radio stations in the same city. The Commission has quite willingly and gratuitously gone through some convoluted, imaginative legalisms to fixup this defect for its applicant. The fact remains that the application, as presented, does violate the Commission's recently declared policy. It is also true that, even after the condition, it still violates the spirit (and, in my view, the letter) of the policy. But for the willing assistance of this Commission—an assistance that stands in stark contrast to the rigid resistance accorded such representatives of the broader public interest as the United Church of Christ (renewal of WLBT), John Banzhaf (failure to enforce the cigarette fairness ruling), the Ford Foundation (failure to act meaningfully upon its, or any other, proposal for funding public broadcasting or free interconnection), and Mrs. Stephanie A. Riopel in this very case—see item 7 below—the application would, of course, have been refused. What is the condition?

> During the time that Richard C. Steele and Robert W. Stoddard retain their interest in station WTAG, Worcester, Mass., they shall not participate in any of the activities of State Mutual Life Assurance Co. of America with respect to the control and operation of the television station.

It's scarely worth the Government paper it's printed on. What does "participate" mean? Are they going to stop participating in the affairs of State Mutual Life? No. Are they going to stop associating with the directors and managers of the new television station? No. Are they going to stop running their media oligopoly—newspaper and AM station—in Worcester? Probably not. Is there going to be any doubt whatsoever of the policies they would like to see the television station espouse? Of course not. Is there any reasonable probability that the television station will make any significant new offering into the marketplace of ideas that exist in Worcester? No. The public interest that the communications act holds up as our guiding star offers little light, but it is enough for me to see the path that we should follow through this jungle. That the grant of the application also requires us to violate express policies of the U.S. Department of Justice and this very Commission is simply frosting on what should already be a very obvious cake.

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6. The saga of Bernard E. Waterman, and the ambiguous status of his ownership of broadcast properties in Worcester, raise questions as to his suitability to be the general manager of the State Mutual Life television station, and requires the Commission to impose additional conditions that render the whole transaction ludicrous. Bernard E. Waterman may own, in addition to the San Antonio stations, two stations in Worcester itself. These are WAAB and WAAB–FM—resulting in three of the six AM and FM stations in Worcester being under the control of major officers and directors of State Mutual Life. One must say that Bernard E. Waterman may own these stations because of the following series of events. Waterman wished to transfer the stations to a corporation called WAAB, Inc.—the ownership of which is in question. The applications for assignment of license were approved by this Commission on March 27, 1968. *Waterman Broadcasting Corp.*, 12 FCC 2d 295 (1968). Subsequently, the ownership of another Worcester station, WORC, Inc., filed a notice of appeal to the U.S. Court of Appeals. *WORC, Inc.* v. *Federal Communications Commission*, D.C. Cir., case No. 21, 795. Before the court could act on the case, the Commission asked for it back—a remand. This was granted on October 25, 1968. WORC had charged that there had been a misrepresentation as to the interests of Atlantic Recording Corp. (one of the major producers of the principal programing heard on American radio stations today) in WAAB, Inc. The matter is now before the Commission. It is at least possible that we might rescind the assignment and order Bernard E. Waterman to reacquire his interests in WAAB and WAAB–FM in Worcester. Waterman is one of the few real people to own an interest in State Mutual Life Broadcasting (nonvoting stock and debentures only; all voting stock is held by State Mutual Life). In the event he reacquires WAAB and WAAB–FM he will, of course, be in clear violation of our March 28, 1968, rule. Moreover, because State Mutual Life holds options on 10 percent of Waterman Broadcasting Corp., it too would clearly violate the rule. Once again the Commission skirts these problems with some ingenious conditions to its approval. If Waterman gets his stations back he has to sell his channel 27 interests, and cannot be its general manager. (And just who, then, does this Commission believe is going to run the station? Or doesn't it really care at all? Needless to say, no alternate has been selected.) Moreover, State Mutual Life has to promise not to exercise its option to acquire 10 percent of Waterman Broadcasting. As in the case of Steele and Stoddard, of course, there is no reason whatsoever to believe that Waterman would not continue to carry great influence, in fact, in the operations of channel 27.

7. Finally, as if all this were not enough, this Commission is brushing off a citizen complaint regarding State Mutual Life without even publicly acknowledging its existence. Stephanie A. Riopel, a resident of Worcester, filed an objection to a grant of this application. She charges that State Mutual Life's property in Worcester is only assessed at 25 percent of its value and as a consequence the company allegedly does not pay a fair share of the taxes in Worcester—an issue about which the people of Worcester will receive very little information, one can assume, from channel 27, WAAB, WAAB–FM,

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WTAG, and the Worcester Telegram & Gazette. She also alleges that the radio station and newspaper in Worcester are under the monopolistic control of Robert W. Stoddard, whom she identifies as a director of the John Birch Society. We are advised by our staff that, "the Broadcast Bureau does not believe that the letter raises any substantial question about the qualifications of the applicant. * * *" The majority obviously agrees. I do not. I believe it is not only insulting, but irresponsible, for us to ignore such a complaint.

CONCLUSION

This is not represented to be a thorough review of the application before us. It is based on my most cursory examination of the file and reports from the FCC staff. I have no way of knowing what objections to this application might be raised by an investigation and hearing. But it is a sufficient review, I believe, to give a little insight into the present level of concern at this Commission about media ownership.

Media ownership and control in Worcester may very well warrant some action from this Commission. I am confident, however, that the cure is not to be found in turning over channel 27 to the State Mutual Life Broadcasting Corp. I dissent.

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FCC 68R-530

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SUNBURY BROADCASTING CORP. (WKOK), SUNBURY, PA.	Docket No. 18291 File No. BP-16936
HERBERT P. MICHELS, STIRLING, N.J.	Docket No. 18292 File No. BP-17004
KEL BROADCASTING CO., INC., WATCHUNG, N.J.	Docket No. 18293
For Construction Permits	File No. BP-17405

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Herbert P. Michels (Michels) and Kel Broadcasting Co., Inc. (Kel), seeking construction permits for new standard broadcast stations at Stirling and Watchung, N.J., respectively; and the application of Sunbury Broadcasting Corp. (WKOK) (Sunbury), licensee of standard broadcast station WKOK, Sunbury, Pa., to modify its existing broadcast facility.[1] By *Memorandum Opinion and Order*, FCC 68-835, released August 22, 1968, the Commission designated these applications for consolidated hearing on air hazard, transmitter site, *Suburban* and financial issues against Kel; financial and *Suburban* issues against Michels; and areas and populations, section 307(b), and contingent camparative issues. Presently before the Review Board are: (*a*) A petition to enlarge issues, filed September 11, 1968, by Sunbury, requesting the addition of suburban community and principal city coverage issues against Kel: (*b*) a joint petition for approval of agreement, filed September 25, 1968, by Kel and Michels, contemplating a merger of their respective interests; (*c*) a joint petition for leave to amend, filed October 22, 1968, by Kel and Michels, requesting the substitution of the application of K & M Broadcasters, Inc. for Michels' application and the dismissal of Kel's application:[2] and (*d*) a request for severance and grant, filed October 31, 1968, by Sunbury, requesting a severance and grant of its application simultaneously with any Board action resulting in the dismissal of the mutually exclusive Kel application.[3]

[1] Sunbury presently operates on 1070 kHz, 1 kw, 10 kw-LS, DA-2, U and requests 1070 kHz, 1 kw, 10 kw-LS, DA-N, U. The Sunbury application and the Kel application (1070 kHz, 500 w, DA-D), are mutually exclusive; there is no conflict between the Sunbury application and the Michels application (1070 kHz, 250 w, Day).

[2] The joint petition for leave to amend was certified to the Board by the examiner. *Order*, FCC 68M-1449, released Oct. 25, 1968.

[3] On Oct. 31, 1968, the Broadcast Bureau filed a request for extension of time which, with the passage of time, has become moot. The other pleadings presently before the Board are listed in the appendix.

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2. The agreement contemplates a merger of the interests of Kel and Michels into a new corporate applicant, K & M Broadcasters, Inc. (K. & M.),[4] which would be substituted for the Michels application. The agreement provides that Michels will purchase 50 percent of the shares of the new corporation and Kel Broadcasting Co., Inc., will purchase the remaining 50-percent interest; each will pay $5,000 for their stock interest. In addition, Kel has agreed to lend K & M up to $75,000 for use in constructing and operating the proposed station. The loan will be secured by a pledge of Michels' 50 percent of the corporate stock, will be payable in equal annual installments of principal and interest over a 7-year period (the first of said payments to be made 1 year after the station commences operation), and will bear an interest of 6 percent per annum on the unpaid declining balance. The agreement indicates that the corporate bylaws will provide that both Kel and Michels will be authorized to elect one-half of the board of directors of the new corporation.

3. The Broadcast Bureau argues that the instant petition and agreement present a myriad of problems and contradictions and should be summarily dismissed with prejudice. The Bureau submits that the applicants have failed to provide for the dismissal of the Kel application (which must be effectuated before Kel could prosecute the new application as a 50-percent owner);[5] that the agreement does not specify the existence or duration of any rights which may be exercised in the stock pledged as security for Kel's loan;[6] and that no showing has been made as to Kel's ability to effectuate this loan. The Bureau further contends that the agreement does not provide for the purchase of stock in the new corporation until after a construction permit is granted; and that, therefore, the new corporate applicant would be without principals to whose qualifications the Commission could look. Finally, the Bureau argues that publication should be required pursuant to rule 1.525(b) inasmuch as both applicants propose a first local transmission facility; Kel's proposal would provide service to approximately 40 percent more area than would Michels'; and that since the petitioners have submitted no information regarding the existence of other services in the affected area, no public interest determination can be made.

4. The joint petition and attached affidavits set forth the exact nature of the consideration involved,[7] and details of the initiation and history of the negotiations. Aside from section 307(b) considerations, approval of the agreement would be in the public interest in that it would simplify this proceeding by eliminating various issues, thereby expediting the inauguration of service, and mooting a pending

[4] As noted by the Bureau, the merger agreement provides that within 20 days after the date of the agreement (the agreement is dated Sept. 20, 1968), the new corporation will be organized; and that within 5 days after execution of the agreement a request to amend the Michels application would be submitted. Although the amendment and evidence of the formulation of the new corporation were not submitted until Oct. 22, 1968, the explained delay will not prejudice consideration of the instant requests. There is no provision in the agreement that time is of the essence. In addition, there has been no indication by the applicants that its failure to conform with these provisions of the agreement has in any manner rendered the agreement inoperative.

[5] A request to dismiss the Kel application is contained in the joint petition for leave to amend, filed Oct. 22, 1968.

[6] The specific provisions with regard to these stock rights and their duration were subsequently specified by petitioners in the supplement to joint petition for leave to amend.

[7] No reimbursement of expenses is contemplated under the agreement.

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request for additional issues.[8] With respect to the section 307(b) question, petitioner's engineering affidavit discloses that although the Michels and Kel proposals would serve the same general area, the Kel proposal would provide service to a larger population in a greater area (within the 2- and 0.5-mv/m contours of the respective proposals).[9] The affected area and population lie within the New York-Northeastern New Jersey urbanized area, and all or a major portion of this area is presently served by a minimum of 20 standard broadcast stations. Since a plethora of reception services are presently available to the affected area, the Board finds that the withdrawal of the Watchung proposal would not, in this regard, frustrate the service distribution objectives of section 307(b) of the communications act nor constitute an undue impediment to the objectives of section 307(b) of the communications act.[10] Cf. *Big Basin Radio*, 12 FCC 2d 182, 12 R.R. 2d 990 (1968). In addition, immediate approval of the instant agreement would expedite the inauguration of a first local transmission facility for Stirling, if the new applicant receives a grant, and permit an immediate grant of the Sunbury application (see par. 6, infra). The Board is of the view that the public interest would best be served by providing these services at the earliest possible time. Cf. *Lawrence County Broadcasting Corp.*, 10 FCC 2d 681, 11 R.R. 2d 863 (1967). The merger agreement will therefore be approved and the petition for leave to amend will be granted.

5. Substantial questions have been raised with respect to the financial qualifications of the new applicant—K & M Broadcasters, Inc. (K. & M.). Petitioner indicates that a cash outlay of $46,741 will be required for construction and first-year operation of the station. K & M relies on $10,000 in stock subscriptions[11] and a $37,000 loan from Kel. While Michels' ability to effectuate his $5,000 subscription pledge has been demonstrated[12] the Board is unable to determine whether Kel will be able to furnish the necessary remaining funds. The only evidence submitted relating to Kel's financial competence is the August 1966, balance sheets of John Kelly, Sr., and John Kelly, Jr. Although the Bureau specifically noted Kel's failure to offer additional financial information, none was submitted. An issue will therefore be

[8] As previously noted, before the Board is a petition to enlarge issues filed by Sunbury, which seeks the addition of suburban community and rule 73.188 issues against Kel. Inasmuch as the instant merger plan contemplates the dismissal of the Kel proposal, a request for such issues would be moot.

[9] Areas and populations as follows:

	Population		Area (square miles)	
	2 mv/m	0.5 mv/m	2 mv/m	0.5 mv/m
Stirling	635,877	785,282	381	1359
Watchung	1,382,291	1,655,247	590	1660

[10] Although not determinative, the transmitter site contemplated by the new proposal is only 0.8 mile from the site which would have been utilized by the dismissing applicant and it is the expressed intention of the principals of the new applicant to serve the programing needs of both Stirling and Watchung.

[11] Although these subscriptions will not be exercised prior to a grant of a construction permit, the principals of the new corporation are clearly identifiable and appear in the submitted amendment.

[12] A satisfactory bank letter evidencing the availability of a $5,000 loan to Michels is submitted with the supplement to joint petition for leave to amend.

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specified in order to determine whether Kel has sufficient funds presently available in order to meet its commitments to K & M.

6. On October 31, 1968, Sunbury filed a request for severance and grant, correctly contending that its proposal, to change from a directional to nondirectional operation daytime, is not mutually exclusive with the K & M application. It appears that a grant of Sunbury's proposal would result in substantial daytime gains in the areas and populations to be served by station WKOK,[13] and no white or gray areas will thereby be created. The Board will therefore sever and grant the Sunbury application.

7. *Accordingly, It is ordered,* That the petition to enlarge issues, filed September 11, 1968, by Sunbury Broadcasting Corp. (WKOK) *Is dismissed;* that the request for extension of time, filed October 31, 1968, by the Broadcast Bureau, *Is dismissed;* and

8. *It is further ordered,* That the joint petition for approval of agreement, filed September 25, 1968, and the joint petition for leave to amend, filed October 22, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels, *Are granted;* that the agreement *Is approved;* that the amendment *Is accepted;* that the application of Kel Broadcasting Co., Inc. (BP-17405), *Is dismissed* with prejudice; and the issues in this proceeding *Are enlarged* by the addition of the following issues:

> (*a*) To determine, with respect to the application of K & M Broadcasters, Inc., whether Kel Broadcasting, Inc., has liquid and current assets (as defined in sec. III, par. 4(d), FCC Form 301) in excess of current liabilities in sufficient amounts to meet its $42,000 commitment to this applicant.
>
> (*b*) To determine, in light of the evidence adduced under the foregoing issue, whether K & M Broadcasters, Inc., is financially qualified.

9. *It is further ordered,* That existing issue 5, *Is amended* to read as follows:

> To determine the efforts made by K & M Broadcasters, Inc., to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests; and

10. *It is further ordered,* That the burden of proceeding with the introduction of evidence and burden of proof under the issues specified herein will be on K & M Broadcasters, Inc.; and

11. *It is further ordered,* That the request for severance and grant, filed October 31, 1968, by Sunbury Broadcasting Corp. (WKOK), *Is granted;* and that the application of Sunbury Broadcasting Corp. (WKOK) (BP-16936) *Is severed* from this proceeding and *Is granted,* subject to the following conditions:

> Permittee shall submit new common point impedance measurements and sufficient field intensity measurement data to clearly show that the nighttime radiation pattern remains adjusted within authorized limits.

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[13] Sunbury has submitted the following areas and populations data:

Daytime contour (mv/m)	Population			Area (square miles)		
	Present	Proposed	Gain	Present	Proposed	Gain
5.0	81,866	91,232	9,366	491	537	46
2.0	131,519	166,424	34,905	1,064	1,211	147
0.5	277,871	335,134	57,263	3,617	4,060	443

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Before program tests are authorized, permittee shall submit sufficient field intensity measurements to show that the horizontal inverse distance field intensity at one mile has been reduced to essentially 178.5 as proposed.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Pleadings Before the Review Board

I	(1) Petition to enlarge issues, filed September 11, 1968, by Sunbury Broadcasting Corp.
	(2) Opposition, filed September 30, 1968, by Kel Broadcasting Co., Inc.
II	(1) Joint petition for approval of agreement, filed September 25, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels.
	(2) Supplement to joint petition for approval of agreement, filed October 4, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels.
	(3) Comments, filed October 17, 1968, by the Broadcast Bureau.
	(4) Reply, filed October 18, 1968, by Kel Broadcasting Co., Inc.
	(5) Memorandum of law, filed October 28, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels.
III	(1) Joint petition for leave to amend, filed October 22, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels.
	(2) Supplement to joint petition for leave to amend, filed October 30, 1968, by Kel Broadcasting Co., Inc., and Herbert P. Michels.
	(3) Comments and request for severance and grant, filed October 31, 1968, by Sunbury Broadcasting Corp. (WKOK).
	(4) Request for extension of time, filed October 31, 1968, by the Broadcast Bureau.
	(5) Comments, filed November 12, 1968, by the Broadcast Bureau.
	(6) Reply, filed November 19, 1968, by Kel Broadcasting Co., Inc.
	(7) Supplement to joint petition for leave to amend, filed December 4, 1968, by petitioners Kel and Michels.

DISSENTING STATEMENT OF BOARD MEMBER BERKEMEYER

I would require publication. The reasons which led the Commission in *Nebraska Rural Radio Association*, 11 R.R. 2d 436, and the Board in *Lawrence County*, supra, to not require publication are absent here. Moreover, the very large differences in coverage make it impossible for me to agree that the 307(b) issue can be so easily resolved in this manner.

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FCC 68R-511

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LOUIS VANDER PLATE, FRANKLIN, N.J., ET AL. For Construction Permits	Dockets Nos. 18251, (File No. BP-16837), 18252, 18253, 18254, 18255, 18256, 18257

MEMORANDUM OPINION AND ORDER

(Adopted December 9, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT. BOARD MEMBER NELSON NOT PARTICIPATING.

1. This proceeding involves, inter alia, the applications of Mid-State Broadcasting Co. (Mid-State) and Lake-River Broadcasting Corp. (Lake-River),[1] each seeking an authorization to construct a new standard broadcast station at Lakewood, N.J. These applications, together with five other proposals,[2] were designated for consolidated hearing by *Memorandum Opinion and Order*, FCC 68-731, released July 22, 1968, on various issues including section 307(b) and contingent comparative issues. Now before the Review Board is a motion to enlarge issues, filed August 9, 1968, by Mid-State, requesting nine disqualifying issues against Lake-River and a comparative coverage issue concerning the Mid-State and Lake-River proposals.[3]

2. A brief chronology of the events concerning the filing and prosecution of the Lake-River application will facilitate an understanding of our disposition. Lake-River's application was originally filed on October 26, 1966, shortly before the cutoff date on the Mid-State application. In its application, Radio New Jersey (predecessor to Lake-River Broadcasting Corp.) specified a two-tower directional antenna system on a site designated as the Heterbrugge site. On November 18, 1966, Lake-River advised the Commission that the site it had orginially proposed was no longer available but that "an appropriate amendment will be filed within the next 30 days." On May 12, 1967, an amendment was filed specifying the new site and the applicant's intention to construct a four-element directional antenna system. The amendment did not specify a change in the required costs of the proposal, nor was there any

[1] Lake-River is the successor to Radio New Jersey, the corporate entity which originally filed the Lakewood application.

[2] The other applications are: Louis Vander Plate, Franklin, N.J.; Radio New Jersey, Hackettstown, N.J.; Arthur S. Steloff, Toms River, N.J.; Seashore Broadcasting Co., Inc., Orleans, Mass.; Somerset Valley Broadcasting Co., Somerville, N.J.

[3] The other pleadings before the Board are: (*a*) Errata to petition to enlarge issues, filed Aug. 12, 1968, by Mid-State; (*b*) opposition, filed Sept. 3, 1968, by Lake-River; (*c*) addendum to opposition to petition to enlarge, filed Sept. 3, 1968, by Lake-River; (*d*) comment, filed Sept. 3, 1968, by the Broadcast Bureau; and (*e*) reply, filed Sept. 10, 1968, by Mid-State.

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indication that the site would not be available on a leased basis as had previously been the case. On January 9, 1968, the applicant filed a further amendment indicating that Radio New Jersey would be replaced by a new corporate entity, Lake-River Broadcasting Corp. Included within the new corporate structure were two new principals—Paul Larson and Donald Towbin—each of whom was shown as an officer, director, and owner of 19 percent of the issued stock in Lake-River. By letter, dated December 1967, filed with the amendment, Towbin indicated his willingness to extend a loan to the corporate applicant in an amount of $100,000. Terms for the repayment of this loan, the computation of interest and security, were unspecified. Robert Boughrum and Lawrence J. Tighe, Jr., who were parties to the original Radio New Jersey filing, remained principals in Lake-River. Said principals retained a sufficient interest in the new corporate applicant so that the assignment of a new file number, under section 1.571(j)(2) of the Commission's rules, was not necessary.

3. In its January 9, 1968 amendment, Lake-River also made another change in its specified site; the plan for a four-tower directional antenna array was retained and the applicant indicated its intent to locate its transmitter and studio building at the new site. The amendment also reflected a change in proposed construction costs, the inclusion of costs for acquiring and remodeling buildings, and an intention to use the land on a leased basis.

4. Mid-State first seeks the addition of various rule 1.65 issues against Lake-River relating to the applicant's conduct with regard to the filing of the May 1967 and January 1968 amendments. Petitioner alleges that Mid-State failed to inform the Commission of its efforts to obtain a new site after November 1966, and of its intention to alter its petitioner alleges that Lake-River has violated rule 1.65 failing to advise the Commission prior to its January 1968 amendment, of its intention to change to a corporate entity, alter its financial proposal, and introduce new principals. Lake-River alleges that, although the applicant stated that it would amend its application to specify a new site "within 30 days," almost 5 months elapsed before the filing of such amendment. In addition, petitioner submits the affidavit of a real estate agent which indicates that the owner of the new site (specified in the May 1967 amendment) stated that he was not interested in "selling his property * * * and wished to hold it as an investment for the future." Petitioner also avers that the site specified in the May 1967 amendment could not accommodate the antenna proposal of the applicant and that, in fact, the antenna would cross various public thoroughfares and adjacent property.[4] With regard to the change in the corporate identity of the applicant, petitioner alleges that the applicant contemplated a change to include the two new principals as early as September and October of 1967, but that the amendment reflecting such a change was not filed until January 1968; during this period, petitioners allege, the applicant chose to permit the Commission to process its application

[4] On the basis of these latter allegations and affidavits, petitioner requests two additional issues to (*a*) determine whether Lake-River had reasonable assurance of the availability of the site proposed in its May 1967 amendment; and (*b*) whether Lake-River was candid in its representation that the site proposed would accommodate the transmitter and studio construction proposed thereon.

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without knowledge of a change in the principals shown in the May 1967 amendment.

5. In opposition, Lake-River argues that petitioner's allegations are reckless and without regard for the true facts. The applicant alleges first that it informed the Commission of the site changes as soon as reasonable assurance was secured that a new site would be available. In addition, Lake-River contends that it promptly amended its application to show a change from a two-tower to a four-tower proposal. However, inasmuch as exact cost figures for the new four-tower array were not immediately furnished to Lake-River's counsel, that exact estimates could not be reflected in the May 1967 amendment. Although such figures were not immediately supplied, the applicant submits that "anyone knowledgeable in matters of radio broadcasting should have been readily able to ascertain that four towers would cost more than two towers."[5] With respect to the addition of the new principals, Towbin and Larson, Lake-River avers that they did not become principals in the corporate applicant until December of 1967 and that the amendment reflecting the change was promptly filed in January 1968. In its comments, the Broadcast Bureau suggests that the issues relating to rule 1.65 violations with respect to the filing of the May 1967 and January 1968 amendments are inappropriate. The Bureau submits that the real question presented by petitioners' request is whether Lake-River's behavior evidences a serious lack of candor in its dealings with the Commission. The Bureau therefore recommends that the following issues be added in lieu of petitioners' requests above:

> **To determine all the facts and circumstances surrounding the filing of amendments to BP–17485 dated May 12, 1967, and January 9, 1968, and in light of the evidence adduced thereunder, whether Lake-River possesses the requisite and/or comparative qualifications to receive a grant of its application.**

6. The Review Board is persuaded that substantial questions have been raised by petitioner with regard to the filing of the May 1967 and January 1968 amendments.[6] While the change of site specified in the May 1967 amendment does not constitute a violation of rule 1.65,[7] substantial questions have been raised as to whether the site selected by the applicant was inadequate to accommodate the antenna proposal, and was, in fact, available for leasing purposes. In addition, the amendment reflecting Lake-River's incorporation fails to indicate the details of such matters as the nature of Lake-River's acquisition of Radio New Jersey's interest in the application; the time at which the new principals acquired their interest; and the precise time at

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[5] With regard to the requested issues concerning the availability and suitability of the site proposed in the May 1967 amendment, Lake-River argues that the site specified was reasonably available and that the affidavit submitted by petitioners merely indicates that the owner of the land was not interested in selling the property; however, Lake-River contends, there is no indication that a leasing arrangement was unacceptable. Lake-River submits that the affidavit of one of its principals, attached to the opposition, indicates that a lease was specifically negotiated and that the applicant had reasonable assurance that a lease could be executed. With regard to the suitability of the site, Lake-River submits, through an affidavit of the president of Radio New Jersey, that the site was of a sufficient size to accommodate the antenna system and the transmitting plant.

[6] Issues inquiring into the availability of the original site proposed by Lake-River and the circumstances surrounding the efforts to secure that site were specified in the designation order.

[7] We agree with Lake-River's contention that after it informed the Commission that its original site was no longer available, it had no duty to amend its application until such time as it obtained reasonable assurance of securing a different site.

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which the new principals were elected officers and directors in the applicant. It should also be noted that the corrected cost figures for antenna construction on the second site were never, in fact, submitted to the Commission, although this site was proposed by Lake-River for a period of 8 months following the submission of this amendment.[8] While these omissions may have technically constituted violation of section 1.65 of the rules, we agree with the Broadcast Bureau that, under the circumstances here, the real question raised is whether Lake-River has evinced a pattern of conduct in dealing with the Commission which may be something less than the requisite candor expected of applicants for broadcast facilities. The issues in this proceeding will therefore be enlarged to include an issue similar to that recommended by the Bureau in its comments.

7. Petitioners next request the addition of an issue to determine the nature and extent of the interest held by Donald Towbin in Lake-River due to his stock ownership and loan commitment; and in light of the facts adduced thereunder, whether Towbin has de facto control of Lake-River; and to determine whether the proposal of Lake-River to retail a 52-percent interest in the applicant by the former Radio New Jersey principals, Boughrum and Tighe, constitutes a planned subterfuge to avoid the return of the application to the processing line and the assignment of a new file number. Petitioners allege that, unlike its original proposal, Lake-River principals Boughrum and Tighe have now reduced their individual commitments from $10,000 to $2,600 and that Towbin is committed to furnish more than $100,000 to the corporate applicant. Petitioner questions whether, by virtue of this loan and Towbin's position as treasurer and director of the company, he is not, in fact, the controlling principal of the applicant. The Broadcast Bureau argues in support of the addition of this requested issue.

8. In opposition, Lake-River argues that the funds to be loaned by Towbin will be placed in a corporate bank account to be drawn on by the corporate officers, that Towbin will have no further control on the purse strings of the corporation; and that he will only exercise the corporate control attributable to his 19-percent stock interest and corporate position. Submitted with the opposition is an affidavit by Towbin indicating that he will have no de facto control over the corporation and that Lake-River will repay the loan.

9. It is clear that had Lake-River specified Towbin as a majority stockholder, a new file number would have been required. The imposition of a new file number for Lake-River would have prevented its proposal from being considered with the proposal of Mid-State, since the cutoff date for the Mid-State application was October 27, 1966. While it has not been demonstrated that Towbin will in fact exercise a degree of control over the corporate applicant disproportionate with his stock interest, the circumstances relative to the potential assignment of a new file number, together with the fact that Lake-River has not set forth the details of its loan arrangement with

[8] In its comments, the Broadcast Bureau indicates that the apparent motive for the applicants' failure to indicate increased cost estimates is that Radio New Jersey, which is prosecuting both the Lakewood and Hackettstown proposals, has had serious financial problems from the outset and that to show an increase in construction costs for the Lakewood proposal "would only have made their lack of financing more apparent."

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Towbin, i.e., security, terms of repayment, etc., raise a question as to the real interest that Towbin possesses in the Lake-River application; an issue will therefore be specified to inquire into the circumstances relating to the corporate reorganization.[9]

10. As previously noted, in January 1968, Lake-River filed an amendment to again change its specified site. Petitioners allege, through the affidavits of a principal of Mid-State and its consulting engineer, that the site now proposed is a lake and swamp area; and that two of the towers and their associated ground system will have to be in an area which is subject to frequent flooding. In addition, the affidavits note that there is no land readily available as a studio location with road access. Mid-State therefore requests the addition of an issue to determine the feasibility of the proposed site as a transmitter and studio location; to determine the costs of construction of the antenna system buildings and roads; and to determine the financial and technical qualifications of Lake-River to construct and operate its proposed station.

11. In opposition, the applicant contends that the site can be readily drained and that the present landowner is "prepared to cooperate with Lake-River to remove the water so that the antenna system may be erected." The affidavit of one of Lake-River's principals indicates that the site is fully feasible and that once the land is drained, no access road would have to be constructed. In reply, Mid-State argues that Lake-River has failed to submit the affidavit of the landowner indicating his intention to cooperate in the drainage and that, even if the land were drained, it has not been shown that an access road would not have to be built. In its comments, the Broadcast Bureau suggests that the existing financial issue against Lake-River should be expanded to include an inquiry as to the additional expenditures estimated by the applicant for site construction. However, the Bureau recommends that the requested issue as to site feasibility can be included within the issue designated by the Commission concerning the applicant's present site proposal.[10]

12. Lake-River has failed to adequately resolve the questions raised by petitioners' allegations with respect to site feasibility. Although Lake-River indicates that the site is not only available but that the present owner has agreed to cooperate in the drainage required, the option to lease agreement detailing such arrangements, contrary to Lake-River's assertion, is not submitted with the opposition. The applicant has chosen to rely instead upon the affidavit of its principal, Boughrum, which merely contains generalized, unsupported assertions that the site can and will be suitable for the Lake-River proposal; Boughrum's technical qualifications with regard to a judgment of this kind are unstated. An appropriate inquiry will therefore be required. In this regard, while existing issue No. 3 was designated by the Com-

[9] By *Order*, FCC 68M–1559, released on Nov. 23, 1968, the hearing examiner accepted an amendment to Lake-River's application, to reflect a new $100,000 bank loan commitment. However, there is no indication that the proposed loan from Towbin has been deleted, and therefore the questions raised herein have not been resolved.

[10] Issue 3 specified by the Commission is as follows:

"To determine whether the transmitter sites proposed by the Mid-State Broadcasting Co. and the Lake-River Broadcasting Corp. are satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation patterns."

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mission primarily to determine whether conditions exist in the vicinity of the Lake-River antenna system which would distort the proposed antenna radiation patterns, the Board agrees with the Bureau that this issue is sufficiently broad to accommodate an inquiry into the questions of site feasibility raised herein. However, due to the present condition of Lake-River's proposed site, an additional inquiry will be required as to this applicant's cost estimates with respect to the construction of its proposed antenna system. Lake-River has failed to rebut the allegations raised by Mid-State's consulting engineer that the costs of construction of such an antenna system would exceed the amount which Lake-River has allocated for this purpose. Therefore, the present financial inquiry (issue No. 9) will be expanded to include a determination of the basis of Lake-River's construction costs and an evaluation of whether these estimates are reasonable.[11]

13. Finally, Mid-State requests authorization to adduce evidence as to the comparative coverage contemplated by its proposal and that of Lake-River. In this regard, Mid-State avers that its proposal would serve 62,585 persons and 111.5 square miles more than would Lake-River. In light of the engineering data submitted by Mid-State, it appears that an inquiry is justified. The hearing examiner is therefore authorized to adduce evidence of comparative coverage under the standard comparative issue. See *Harriscope, Inc.*, FCC 65–1165, 2 FCC 2d 123.

14. Accordingly, *It is ordered*, That the petition to enlarge issues, filed August 9, 1968, by Mid-State Broadcasting Co., *Is granted* to the extent herein indicated, and *Is denied* in all other respects; and

15. *It is further ordered*, That the issues in this proceeding *Are enlarged* by the addition of the following issues:

> 14. To determine all the facts and circumstances surrounding the filing of amendments to BP–17485 dated May 12, 1967, and January 9, 1968, and in the light of the evidence adduced thereunder, whether Lake-River Broadcasting Co. possesses the requisite and/or comparative qualifications to receive a grant of its application.
>
> 15. To determine the nature and extent of the interest held by Donald Towbin in Lake-River Broadcasting Co. in the light of his stock ownership and loan commitment; and in the light of the facts adduced thereunder, whether he has de facto control of Lake-River Broadcasting Co.; and

16. *It is further ordered*, That existing issue No. 9 *Is amended* to read as follows:

> (*a*) The basis of the applicant's estimates of construction costs and whether the estimates are reasonable;
>
> (*b*) Whether the proceeds from the sale of capital stock are available in whole or in part for the purposes intended;
>
> (*c*) To determine the source of additional funds required to meet the commitment of Donald Towbin to lend funds to the applicant, and the terms of repayment including interest and security for the loan;
>
> (*d*) To determine whether the applicant has available sufficient funds to meet its costs of construction and first year's operation;
>
> (*e*) In light of the evidence adduced pursuant to the foregoing (*a*, *b*, *c*, and *d*), whether the Lake-River Broadcasting Corp. is financially qualified;

[11] In light of Lake-River's amendment (see note 9, supra) and the possibility that the applicant will need more funds than it previously claimed were available, we will also add an issue to determine the amount of funds it has available.

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17. *It is further ordered*, That the burden of proceeding with the introduction of evidence on the issues added herein will be on Mid-State Broadcasting Co. and the burden of proof will be on Lake-River Broadcasting Co.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

15 F.C.C. 2d

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FCC 68R-521

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of STEPHEN A. WICHROWSKI, JR., 370 CONVERSE STREET, LONGMEADOW, MASS. Suspension of Radiotelephone First-Class Operator License	Docket No. 17831

MEMORANDUM OPINION AND ORDER

(Adopted December 16, 1968)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. Before us now is a petition for reconsideration of our *Decision* (14 FCC 2d 863) suspending, for 3 months, the first-class radiotelephone operator's license of Stephen A. Wichrowski, Jr.[1] The original supsension order (mimeo No. 6951, released Sept. 28, 1967) charged Wichrowski with a violation of 47 U.S.C. 303(m)(1) and rule 13.69,[2] and ordered the suspension of his license. Following a hearing duly requested by Wichrowski, the examiner, in an *Initial Decision* (FCC 68D-24, 14 FCC 2d 867), concluded that Wichrowski, while on duty as an engineer at station WEHW (Windsor, Conn.), had made unauthorized use of the station's facilities to broadcast a private dispute and had wrongfully taken the station off the air prior to the end of its broadcast day; the examiner concluded that the public interest would be best served by making the suspension order final. Wichrowski filed exceptions to the initial decision, and after oral argument before a panel of the Review Board, a decision was issued adopting the initial decision except as modified in the rulings on exceptions appended thereto. In the decision, the Board held that Wichrowski's use of the station's facilities to broadcast his private dispute, thereby disrupting a regularly scheduled broadcast, was, of itself, sufficient to warrant an affirmance of the ultimate conclusion reached by the hearing examiner.

2. In support of the petition for reconsideration, petitioner asserts that the case presents a question of first impression and that the Review Board decision rests upon an unauthorized and sua sponte enlargement of the definition of interference as used in rule 13.69. In *Roald W. Didriksen*, 21 FCC 268, 13 R.R. 425 (1956), reconsideration denied 22 FCC 1151, 13 R.R. 441 (1957); affirmed 254 F. 2d 354 (1958), argues Wichrowski, the Commission held that the term "interference" as used in rule 13.69 means only (1) electrical interference or (2) acts of

[1] The petition was filed Nov. 1, 1968; the Field Engineering Bureau filed an opposition on Nov. 12, 1968. No reply has been filed by Wichrowski, and the time therefor has passed, rule 1.106(h).

[2] The rule, promulgated pursuant to 47 U.S.C. 303(m)(1), provides: "No licensed operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal."

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disability to equipment. Wichrowski therefore claims that the definition does not include the oral statements involved here; that the Review Board is without power and authority to expand rule 13.69 to cover the instant situation; and that such expansion represents an ex post facto imposition of punitive sanctions. Arguing that in *Howard A. Chamberlin*, 21 FCC 231, 14 R.R. 135 (1956), the Commission held that turning off a transmitter did not constitute interference within the meaning of rule 13.69, petitioner asserts that both Didriksen and Chamberlin are distinguishable from the instant case because both involved acts of physical disablement to equipment, whereas only oral statements are here involved. Petitioner also notes that there is no assertion that such statements were obscene or otherwise violative of Commission rules. Wichrowski concludes that because license suspensions are punitive in nature, the statute and rules relating thereto must be strictly construed; that the license suspension is essentially confiscatory; and that, because rule 13.69 has not previously been applied to the type of conduct here involved, the sanction imposed in our decisions should be rescinded. Petitioner requests oral argument.[3]

3. The Review Board has previously considered and rejected Wichrowski's contentions and has specifically rejected the argument that interference as used in rule 13.69 constitutes only electrical interference or disability to equipment (see rulings on exception 8 and 13 to the *Initial Decision*, 14 FCC 2d 863, at 865). Wichrowski, in his petition for reconsideration, has presented no argument or precedent which persuaded us to alter our original determination.[4] The applicability of rule 13.69 is clear on its face; the purpose of the rule, as stated by the court in *Didriksen*, supra, is "to keep open and available at all times means of communication." (254 F. 2d 354, at 356.) Contrary to petitioner's assertion, the decisions in *Didriksen* and *Chamberlin* do not confine the applicability of rule 13.69 to instances of electrical interference or disablement. Rather, in *Didriksen* the Commission made it clear that the term "interference" was to be used in its normal or plain sense (21 FCC 268, at 281); and, in *Chamberlin*, the Commission stated that the rule applied to conduct "reasonably calculated to interfere with the normal transmission" (21 FCC 231, at 233) of radio signals.[5] As the Bureau correctly notes, the physical existence of Wichrowski's remarks constituted interference with normal transmissions as much as would the deliberate generation of electrical interference or jamming of the facilities.[6] Nor can it be denied that the use of the

[3] In view of the nature of the contentions raised in the petition and the fact that oral argument was held prior to our decision herein, we do not think that any useful purpose would be served by re-argument of the case. The request for oral argument will therefore be denied; see *Ottawa Broadcasting Corp.*, FCC 64R-382, 3 R.R. 2d 575.

[4] Neither the Commission nor the Review Board has previously passed upon the precise factual situation involved here, but we are not therefore deprived of jurisdiction over the matter. As this document indicates, the question presented involves neither policy formulation nor rulemaking, but the application of statute and rule along clear-cut guidelines established by the rule itself, and Commission and court decisions; see *Charles County Broadcasting, Inc., et al.*, 25 R.R. 903, 907 (1963). Nor does the fact that the precise question has not been previously considered mitigate the seriousness of the infraction; see *Didriksen*, supra, at 282.

[5] Had the Commission intended to confine the applicability of the rule to instances of electrical interference and physical disability, it would not have indicated, as it did in *Chamberlin*, that, in some circumstances, preventing access to a transmitter would constitute a violation.

[6] Irrelevant is the contention that the remarks were not obscene. Here, as in the original decision, we are concerned not with the substance of the remarks but the fact that they were made and the consequent disruption of radio communication.

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station's facilities disrupted the regularly scheduled programing. We are satisfied therefore that, even under the most literal and strict interpretation of rule 13.69, Wichrowski's unauthorized use of the radio facilities and disruption of the regular program falls within the scope of that rule, and is the type of conduct which the rule was formulated to prevent.

4. Accordingly, *It is ordered*, That the petition for reconsideration in a case of first impression, filed November 1, 1968, by Stephen A. Wichrowski, Jr., and the request for oral argument contained therein, *Are denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: WLVA, INC., LYNCHBURG, VA. For Construction Permit	Docket No. 18405 File No. BPCT-3880

MEMORANDUM OPINION AND ORDER

(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has under consideration: (*a*) The application (BPCT-3880) and the request for waiver of section 73.610(b)(1) of the Commission's rules, filed November 4, 1966, by WLVA, Inc. (WLVA), licensee of television broadcast station WLVA-TV, channel 13, Lynchburg, Va.; (*b*) a petition to deny application, filed January 3, 1967, by Charlottesville Broadcasting Corp. (WINA), licensee of broadcast stations WINA (AM) and WINA-FM, and permittee of television broadcast station WINA-TV, channel 29, Charlottesville, Va., directed against (*a*), above; (*c*) a petition to deny, filed January 4, 1967, by W.C.T.V., Inc. (WVIR), permittee of television broadcast station WVIR, channel 64, Charlottesville, Va., directed against (*a*), above; (*d*) a petition to dismiss or deny, filed January 4, 1967, by Roanoke Telecasting Corp. (WRFT), licensee of television broadcast station WRFT-TV, channel 27, Roanoke, Va., directed against (*a*), above; (*e*) an opposition to request for waiver and objections to application, filed January 11, 1967, by the Association of Maximum Service Telecasters, Inc. (AMST), directed against (*a*), above; and (*f*) related pleadings.[1]

2. Petitioners WRFT, WINA, and WVIR allege that WLVA will compete for audiences and advertising revenues in their respective communities, which fall within the proposed service contours of station WLVA-TV. We therefore find that the petitioners, as licensees or permittees in Roanoke or Charlottesville, have standing as parties in interest within the meaning of section 309(d) of the Communications Act of 1934, as amended. AMST does not claim standing, but has filed informal objections under section 1.587 of the Commission's rules. We shall consider AMST's objection on the merits.

3. In the communities with which we are concerned here, we note that Lynchburg, with a population of 54,790, has been allocated tele-

[1] The related pleadings are: Further objections of Association of Maximum Service Telecasters, Inc., filed Mar. 22, 1967, by AMST; supplement to petition to dismiss or deny, filed Mar. 28, 1967, by WRFT; opposition to objections and petitions to deny, filed Mar. 29, 1967, by WLVA; reply to opposition of WLVA-TV to objections and further objections of MST, filed May 19, 1967, by AMST; reply to opposition to objections and petitions to deny, filed May 19, 1967, by WINA; and reply of WRFT-TV to opposition to objections and petitions to dismiss or deny, filed May 19, 1967, by WRFT.

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vision broadcast channels 13, 21, and *33. Channel 13 is occupied by station WLVA–TV, the present applicant, while channels 21 and *33 are vacant. Roanoke, with a population of 97,110, has been allocated channels 7, 10, *15, and 27. Channels 7, 10, and 27 are licensed to television broadcast stations WDBJ–TV, WSLS–TV, and WRFT–TV, respectively. Educational station WBRA–TV operates on reserved channel *15. Charlottesville, with a population of 29,427, has been allocated channels 29, *41, and 64. Channel *41 is vacant, while construction permits have been issued for channels 29 and 64 to stations WINA–TV and WVIR–TV, respectively. Lynchburg and Roanoke are about 44.5 miles apart, while Lynchburg and Charlottesville are approximately 57 miles apart.

4. WLVA presently operates with an effective radiated visual power of 316 kw, with an antenna height above average terrain of 1,100 feet from a site 17.5 miles south of Lynchburg on Johnson Mountain, approximately 34 miles from Roanoke. This site is 8.4 miles short-spaced to the transmitter site of television broadcast station WVEC–TV, operating on cochannel 13, Hampton, Va.[2] WLVA is now proposing an operation with an effective radiated visual power of 240 kw at 150°, with an antenna height above average terrain of 2,350 feet [3] from a site about 2.8 miles south-southwest of Thaxton, Va., on Flat Top Mountain. This site is approximately 27.9 miles from Lynchburg and 17.4 miles from Roanoke. If WLVA's application is granted, the existing short-spacing to station WVEC–TV will be eliminated, but a 7.1-mile cochannel shortage to the transmitter site of television broadcast station WHTN–TV, channel 13, Huntington, W. Va., will be created.

5. In support of its application and waiver request, WLVA claims that the substitution of the 7.1-mile short-spacing to station WHTN–TV for the 8.4-mile shortage to station WVEC–TV will result in significant allocation advantages by decreasing the short-spacing by 1.3 miles. In regard to the new shortage, WLVA proposes to use a directional antenna that will suppress radiation in the direction of station WHTN–TV so that, in WLVA's view, equivalent protection will be afforded to station WHTN–TV in excess of the standards set forth in docket No. 13340, FCC 61–994, 21 R.R. 1695 (1961). WLVA has also agreed to use precise frequency control equipment to lessen the predicted interference with station WHTN–TV. WLVA further states that the terrain between Lynchburg and Hampton is relatively flat, while the terrain between Lynchburg and Huntington is mountainous, with some peaks reaching 3,000 feet. WLVA's position is that the terrain will further lessen the predicted interference between stations WLVA–TV and WHTN–TV to a point below that which currently exists between stations WLVA–TV and WVEC–TV.

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[2] Section 73.610 of the Commission's rules provides that the transmitters of cochannel stations in zone II shall be 170 miles apart. Stations WVEC–TV and WLVA–TV have transmitter sites that are approximately 161.6 miles apart. This short-spacing was created when the Commission waived section 73.610(b) of the rules and granted the application (BPCT–3279) of Peninsula Broadcasting Corp. for a construction permit to make changes in the facilities of station WVEC–TV. *Peninsula Broadcasting Corp.*, FCC 64–763, 3 R.R. 2d 243 (1964).

[3] Under fig. 4, sec. 73.699 of the rules, the maximum effective radiated power is a function of the antenna height above average terrain where that height exceeds 2,000 feet. WLVA's proposal utilizes the maximum effective radiated power at the height specified in the application.

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6. WLVA contends that operating from the present site, 70 percent of Lynchburg receives a shadowed signal. Roanoke, while well within the predicted principal-community contour of station WLVA–TV, actually receives a signal that is of grade A or grade B quality due to terrain obstructions, according to WLVA's measurements. WLVA states that the proposed site affords a relatively unobstructed line of sight to Lynchburg so that the shadowed areas in Lynchburg will be reduced from 70 to 25 percent and there will be an increase of 2 dbu in signal strength over Lynchburg. It is also claimed that the principal-community signal to Roanoke will be significantly improved. WLVA expects that individual receiving antennas in the area will be reoriented so that the Lynchburg and Roanoke VHF stations will all be better received by the area's viewers. WLVA's proposed facilities would utilize the maximum power permitted in zone II for stations operating at the proposed height. WLVA takes the position that a grant of its application would be in keeping with the Commission's policy to encourage the most efficient utilization of the allocated channel by using maximum facilities, citing *South Bend Tribune*, FCC 66–753, 8 R.R. 2d 416 (1966). WLVA states that operating with the proposed facilities would not result in the loss of any area presently served by the authorized facilities, and would result in an increase of grade B coverage to 451,718 persons residing in 6,622 square miles.

7. The American Research Bureau (ARB) and WLVA consider the Lynchburg-Roanoke area to be a single television market. In this market, WLVA claims that the two Roanoke VHF stations, WDBJ–TV and WSLS–TV, are operating at the maximum permissible height and power combinations. On the other hand, station WLVA–TV operates at maximum power but at less than maximum permissible height at a site from which station WLVA–TV encounters considerable shadowing problems. WLVA alleges that these circumstances place it at a competitive disadvantage. WLVA cites as evidence of this disadvantage an ARB survey of the Roanoke-Lynchburg market that showed station WLVA–TV to have approximately one-half of the net base hourly rate and net weekly circulation of the two Roanoke VHF stations. WLVA states that it has sustained an operating loss of $148,408 during 1966, with a cash-flow loss of $17,271. WLVA believes that its proposed operation with increased coverage and improved signal to Roanoke and Lynchburg will place station WLVA–TV on a competitive parity with the two Roanoke VFH stations.

8. Petitioners WINA and WVIR, permittees of UHF television stations in Charlottesville, allege that a grant of WLVA's application would have an adverse impact on the development of UHF television broadcasting in the Charlottesville area. They note that while numerous VHF stations have predicted grade B contours that approach Charlottesville, only station WSVA–TV, channel 3, Harrisonburg, Va., actually encompasses Charlottesville with a predicted grade B contour.[4] Thus, WINA and WVIR allege that a favorable climate

[4] Assuming the accuracy of fig. 26 of WLVA's opposition, Charlottesville is approached by the predicted grade B contours of television broadcast stations WMAL–TV (48 miles), WTOP–TV (46 miles), WRC–TV (40 miles), and WTTG–TV (36 miles), Washington, D.C.; WTVR–TV (covers part of Charlottesville) and WRVA–TV (5 miles), Richmond, Va.; WXEX–TV (16 miles), Petersburg, Va.; WSLS–TV (24 miles) and WDBJ–TV (24 miles), Roanoke, Va.; and WLVA–TV (6 miles), Lynchburg, Va.

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exists for the initiation of UHF service in Charlottesville, and that the addition of a second grade B VHF service, as proposed by WLVA, may change this climate and foreclose the opportunity for a UHF station to develop a viable operation.[5] WINA has also alleged that a grant of WLVA's application would prejudice its attempts to obtain a network affiliation. *VHF Drop-In in Staunton-Waynesboro, Va.*, FCC 64–1165, 3 R.R. 2d 1677 (1964), is cited as an example of the Commission's concern for UHF development in the area in question.[6] In that decision, the Commission denied a request to assign VHF channel 11 to Staunton-Waynesboro due, in part, to the belief that the proposed assignment would be at cross-purposes to the Commission's policy of fostering expanded use of the UHF channels.

9. Petitioner WRFT has also raised the question of UHF impact, but is primarily concerned with the impact on its own operation of station WRFT–TV, channel 27, Roanoke. WRFT alleges that although Roanoke is well within the predicted principal-community contour of station WLVA–TV, an ABC affiliate, the actual measured signal is considerably less than that level. For this reason, WRFT has been able to obtain an ABC network affiliation and a network hourly base rate of $75. One of WLVA's grounds for filing the present application is to improve service to Roanoke. WRFT readily concedes that WLVA's proposed operation will have that effect. WRFT's engineering affidavit estimates an increase in station WLVA–TV's signal strength in Roanoke of almost 20 dbu, to 97.8 dbu, would result if WLVA's application is granted. In view of the marked increase of WLVA–TV's signal strength and a possible reduction of shadowing in Roanoke, WRFT alleges that network advertisers would be reluctant to pay for advertising carried on station WRFT–TV since the area would be adequately covered by station WLVA–TV. WRFT claims that this would result in a loss of some or all of WRFT's network revenues and/or programing. This in turn would allegedly be a severe injury to WRFT in its attempt to establish a viable UHF station serving as a local outlet in Roanoke.

10. The petitioners also note that the proposed transmitter site will be substantially closer to Roanoke than to Lynchburg. Thus, they allege that the move proposed by WLVA may constitute a de facto reallocation of channel 13 from Lynchburg to Roanoke without a rulemaking proceeding. They cite *Louisiana Television Broadcasting Corp.* v. *Federal Communications Commission*, 347 F. 2d 808, 5 R.R. 2d 2025 (U.S.C.A., D.C. Cir. 1965), in support of their position.

11. WRFT states that WLVA's proposal would violate section 73.685(b) of the Commission's rules and that no wavier has been requested. That rule states in part that the transmitting antenna "should be so chosen that line of sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path." WRFT alleges that there is such

[5] Fig. 26 of WLVA's opposition, also indicates its proposed facilities will extend its grade B contour approximately 12 miles in a northeasterly direction, encompassing Charlottesville for the first time.

[6] Waynesboro is about 19 miles west of Charlottesville, and Staunton is about 31 miles to the west.

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an obstruction resulting in shadowing over 30 percent of Lynchburg, and concludes that the application should be dismissed on this ground. WRFT and AMST have also alleged that there are sites available that would not contravene the requirements of section 73.685 or 73.610(b) pertaining to spacing requirements.

12. In regard to the creation of the short-spacing to station WHTN–TV, the petitioners assert that the public interest would not be served by a waiver of the rules. They claim that the trade off of the 8.4-mile short-spacing to station WVEC–TV for a 7.1-mile short-spacing to station WHTN–TV is de minimis. The 2-dbu increase of signal strength over Lynchburg and a possible receiving antenna reorientation are also accorded little weight. In regard to the competitive advantages to WLVA, the petitioners state that any station can become more competitive by increasing height and/or power, so that this rationale cannot serve as a basis for waiver of the spacing requirements. The petitioners contest the extent to which there will be coverage gains, and state that any gain areas are trifling. They also claim that such gains as there may be involve areas where UHF stations can be expected to develop. The petitioners allege that WLVA has made no showing as to the unavailability of sites complying with the Commission's spacing requirements or why the antenna height cannot be increased at the present location. AMST, relying on WLVA's statements and engineering affidavits, contends that it is possible to increase the antenna height at the present site by at least 147 feet. And, as previously noted, AMST has submitted possible alternate sites from which it claims that WLVA can improve its service to Lynchburg without increasing the existing short-spacing or creating a new shortage. AMST also notes that equivalent protection, without more, is not a basis for waiver of the Commission's spacing requirements.

13. WRFT alleges that WLVA has not stated what programing needs were found to exist in the communities it surveyed in the gain areas, and that no showing has been made as to how the station will serve those needs, other than by expanded news coverage. Accordingly, WRFT questions whether WLVA's program plans will fulfill the needs and interests of its service area.

14. WLVA's response to these arguments is as follows. As to any alleged UHF impact in the Charlottesville area, WLVA states that WINA and WVIR have not set forth specific factual allegations as to how the extension of the service contours of station WLVA–TV will have any adverse UHF impact. WLVA argues that reliance on *VHF Drop-In in Staunton-Waynesboro*, above, is unjustifiable, since that decision rested largely on considerations relating to the national radio quiet zone. As to the Roanoke area, WLVA notes that the city is within its predicted principal-community contour so that the presence of a UHF station in Roanoke should not serve as a bar to improvements in VHF stations serving that city, citing *Coral Television Corporation (WCIX–TV)*, 6 FCC 2d 749, 9 R.R. 2d 405 (1967). WLVA contends that when the Commission has raised the UHF impact question in hearings, the cases involved the introduction of a new VHF service into an area where there were UHF licensees or permittees.

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WLVA's service to Roanoke cannot, of course, be considered new. WLVA also states that a grant of its application would have no effect on WRFT's ABC network contract.

15. As to the alleged defactor reallocation of the channel from Lynchburg to Roanoke, WLVA states that it has no desire to change its city of assignment, and that it will continue to meet the needs of Lynchburg. WLVA contends that the case cited by petitioners, *Louisiana Television*, above, is inapposite, since it involved a change of sites of an unconstructed station. In regard to WRFT's claim that operation from the proposed site would violate section 73.685(b) of the rules, WLVA alleges that due to terrain considerations shadowing cannot be avoided in this area; that shadowing exists in 70 percent of Lynchburg from the present site, so that the 25 percent shadowed area from the proposed site would be a marked improvement; and that the rule specifically states that population and demography "may make the choice of transmitter location difficult."

16. Concerning the proposed short-spaced site, WLVA states that it cannot increase antenna height at the present location and that the hypothetical sites proposed by AMST would not be approved by the FAA, and are inadequate solutions to station WLVA–TV's coverage problems, especially in Roanoke. WLVA notes that the Commission created the existing short-spacing to station WVEC–TV without a hearing to correct a competitive imbalance in station WVEC–TV's market. *Peninsula Broadcasting Corp.*, FCC 64–763, 3 R.R. 2d 243 (1964). WLVA seeks the same treatment here. It is further noted that the present application proposes the substitution of one short-spaced site for another where the chances of actual interference are greatly reduced. In view of the alleged improved coverage, the lack of other adequate sites, and the improvement of its competitive position in relation to the two Roanoke VHF stations WLVA concludes that a waiver of the spacing requirements would serve the public interest.

17. In regard to WRFT's allegations that WLVA will not serve the needs and interests of its service area, WLVA notes that the gain areas are contiguous to its present service area and few changes are deemed necessary. Nonetheless WLVA made programing contacts and will broaden its coverage of news and special events, and will supplement its programing directed towards its rural audience.

18. WLVA is correct in stating that we have a general policy of encouraging the use of maximum facilities to make the most efficient utilization of radio frequencies, and another policy of encouraging competitive facilities among stations in a community, where possible. However, these policies are not absolutes to be followed without reference to other public interest considerations. In this case, there is an apparent conflict as to which policy, or policies, should prevail. We believe that the choice between them, based on the allegations before us, must rest on the full record afforded by a hearing. One policy that must be considered in this proceeding is that of encouraging the development of UHF broadcasting. In the Charlottesville area, a second VHF signal may well discourage the construction of UHF facilities. Even WLVA points out that the principal situation where the UHF impact question is raised involves the introduction of a new VHF

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service to an area with existing or potential UHF service. The situation in Roanoke is not typical, since that city is already within the predicted principal-community contour of station WLVA–TV. We do not, however, limit our concern for the development of UHF broadcasting to the typical situation. Here, WRFT has alleged that the measured signal of station WLVA–TV is considerably less than the predicted signal due to terrain obstructions; that WRFT has been able to obtain ABC programing and revenues only because station WLVA–TV does not provide an adequate signal to all parts of Roanoke; and that a grant of WLVA's application would improve its signal strength in Roanoke by almost 20 dbu, and thereby jeopardize WRFT's operation. In the case cited by WLVA, *Coral Television*, above, we did say that UHF stations that are opposing proposed changes in VHF stations in the same community [7] must make specific allegations to show that such changes would not be in the public interest. We do not now change that requirement. However, we believe that WRFT's allegations are sufficiently specific to raise a UHF impact question in regard to the Roanoke area. Accordingly, an appropriate issue will be specified. The burden of proceeding with the introduction of evidence and the burden of proof with respect to the UHF impact issue will be placed on the petitioners and AMST.

19. The petitioners have alleged that WLVA's proposed move may constitute a de facto reallocation of channel 13, from Lynchburg to Roanoke. It appears that the proposed transmitter site will be only 17.4 miles from Roanoke and 27.9 miles from Lynchburg (center of city). We believe that a sufficient showing has been made to require a determination of the de facto reallocation question at a hearing, and an appropriate issue has been specified.

20. Turning to the alleged violation of section 73.685(b) of the rules, the petitioners appear to have erroneously assumed that the presence of shadowing establishes, prima facie, that a major obstruction exists. A careful consideration of the extensive data submitted in conjunction with the application and the pleadings discloses that there will be line of sight from the transmitter to a majority of the area within the city limits of Lynchburg. We cannot conclude, therefore, that a major obstruction exists, as we use that phrase. Consequently, no issue will be specified in this regard.

21. WLVA has not submitted any suggestions received in its consultations with community leaders in the gain areas that will be served by WLVA if its application is granted. Consequently, WLVA has not complied with the *Suburban* doctrine and the criteria set forth in the Commission's public notice of August 22, 1968, concerning the ascertainment of the needs and interests of the gain area. The fact that the gain area is contiguous to the present service area is not determinative. Accordingly, a *Suburban* issue has been specified.

22. We believe that sufficient allegations have been raised so as to require an issue on the question of whether a waiver of our spacing requirements, as set forth in section 73.610(b) of the rules, would serve

[7] In *Coral Television*, the applicant was proposing, among other things, a change of city of license from South Miami to Miami, the city limits of which are less than 4 miles apart. Here, WLVA appears to apply the phrase "same community" to cities that are 44.5 miles apart. We do not stretch that phrase so far.

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the public interest. This determination is, of course, related to the findings under the other issues. It should be noted that when an applicant proposes a short-spaced site our consideration is usually limited to the specific site proposed; we do not ordinarily consider the availability of hypothetical alternate sites that comply with the rules. However, in this case, AMST has submitted more than a bare allegation that suitable alternate sites area available. AMST has suggested sites that, allegedly, would enable station WLVA–TV to place a principal-community contour over all of Lynchburg; that are not short-spaced to station WHTN–TV and do not increase the existing short-spacing to station WVEC–TV; that are accessible; where land is available; that would either lessen or cause no increase in the existing shadowing; that have a reasonable probability of obtaining FAA approval; and that would avoid or minimize any receiving antenna orientation problems in Lynchburg and Roanoke. WLVA has controverted these allegations, but under the circumstances, we believe that an issue as to the availability of alternate sites is warranted. In view of AMST's allegations that an increase in height of 147 feet can be accomplished at the present antenna location, based on WLVA's data, we have also included an issue as to the extent, if any, that tower height can be increased at the present site. The burden of proceeding with the introduction of evidence and the burden of proof in regard to alternate sites and increasing antenna height at the present location will be placed on the petitioners and AMST.

23. Although not raised by the petitioners, we question the financial qualifications of the applicant. Cash in the amount of $846,955 will be needed to construct the proposed facilities. To meet the cash requirements, WLVA claims the availability of a loan of $850,000 from its parent corporation, the Evening Star Broadcasting Co. The balance sheet submitted by the parent does not disclose sufficient current and liquid assets, as defined by section III, paragraph 4(d), FCC Form 301, to enable it to meet this commitment. Accordingly, a financial issue has been specified.

24. Except as indicated below, the applicant is legally, technically, financially and otherwise qualified to construct as proposed.

25. Accordingly, *It is ordered*, That to the extent indicated above, the petitions filed by Charlottesville Broadcasting Corp., WCTV Inc., and Roanoke Telecasting Corp., *Are granted*, in all other respects *Are denied*, and the application (BPCT–3880) of WLVA, Inc., *Is designated for hearing*, at a time and place specified in a subsequent order, on the following issues:

(1) To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

(2) To determine whether a grant of the application would constitute a de facto reallocation of channel 13 from Lynchburg to Roanoke.

(3) To determine whether circumstances exist which would warrant a waiver of section 73.610(b) of the Commission's rules, and, if so, to determine the necessary conditions to be met in order to assure that equivalent protection will be provided to station WHTN–TV, Huntington, W. Va.

(4) To determine whether there is an area within which the applicant could locate its transmitter in conformity with all the requirements of the

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Commission's rules and provide service to the public equivalent to that proposed in the application.

(5) To determine whether the applicant can obtain an increase in tower height as its present transmitter location and, if so, the extent of such increase and whether service could be provided to the public from that height equivalent to that proposed in the application.

(6) To determine whether the Evening Star Broadcasting Co. has available sufficient current and liquid assets in excess of current liabilities, or has other sources of funds, to enable it to meet its commitment to WLVA, Inc.

(7) To determine, in light of the evidence adduced under the preceding issue, whether WLVA, Inc., is financially qualified.

(8) To determine the efforts made by WLVA, Inc., to ascertain the community needs and interest of the gain areas to be served and the means by which the applicant proposes to meet those needs and interest.

(9) To determine, in light of the evidence adduced under the above issues, whether a grant of the application would serve the public interest, convenience, and necessity.

26. *It is further ordered*, That Charlottesville Broadcasting Corp., WCTV Inc., Roanoke Telecasting Corp., and the Association of Maximum Service Telecasters Inc., *Are made parties respondent* to this proceeding.

27. *It is further ordered*, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues 1, 4, and 5 is placed upon the parties respondent, and the burden of proceeding with the introduction of evidence and the burden of proof with respect to the remaining issues remain upon the applicant.

28. *It is further ordered*, That to avail themselves of the opportunity to be heard, WLVA, Inc., and the parties respondent, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

29. *It is further ordered*, That, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, WLVA, Inc., shall give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of the notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LESTER H. ALLEN, OCEAN CITY, N.J.	Docket No. 18408
Requests: 106.3 mcs, No. 292; 3 kw; 300 feet	File No. BPH-6374
SALT-TEE RADIO, INC., OCEAN CITY, N. J.	Docket No. 18409
Requests: 106.3 mcs, No. 292; 3 kw; 300 feet	File No. BPH-6457
For Construction Permits	

ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has under consideration the above captioned and described applications which are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference.

2. Data submitted by the applicants indicate that there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, for the purposes of comparison, the areas and populations within the 1-mv/m contours together with the availability of other FM services of 1 mv/m or greater intensity in such areas will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to either of the applicants.

3. Salt-Tee Radio, Inc., proposes duplicated programing seasonally varying from 21.43 to 28.57 percent while Lester Allen proposes independent programing. Therefore, evidence regarding program duplication will be admissible under the standard comparative issue. When duplicated programing is proposed, the showing permitted under the standard comparative issue will be limited to evidence concerning the benefits to be derived from the proposed duplication, and a full comparison of the applicants' program proposals will not be permitted in the absence of a specific programing inquiry—*Jones T. Sudbury*, 8 FCC 2d 360, FCC 67-614 (1967).

4. Neither applicant will be able to provide a 3.16-mv/m signal to the entire city of Ocean City, N.J., as required by section 73.315(a) of the Commission's rules. This situation is traceable to the shape of the community and the need to select a site some distance from it to meet the required spacings. The proposed sites approximate the best possible coverage under these circumstances. Accordingly, we have determined that waiver of this provision is appropriate.

5. Except as indicated below, the applicants are qualified to con-

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struct and operate as proposed. However, because of their mutual exclusivity, the Commission is unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing on the issues set forth below.

6. *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine which of the proposals would better serve the public interest.
2. To determine in the light of the evidence adduced pursuant to the foregoing issue, which of the applications for construction permit should be granted.

7. *It is further ordered*, That the provisions of section 73.315(a) of the Commission's rules are waived to permit a signal level of less than 3.16-mv/m over the entire city of Ocean City, N.J.

8. *It is further ordered*, That to avail themselves of the opportunity to be heard, the applicants, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney shall, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

9. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1209

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
RADIO STATION KCRC, ENID, OKLA.
Concerning Location of Abandoned
Tower of B&W Truck Service

DECEMBER 18, 1968.

Mr. KENNETH H. BURCHARDT,
d.b.a. B&W Truck Service,
P.O. Box 243
Enid, Okla. 73701.

DEAR Mr. BURCHARDT: This will refer to the long-standing reradiation complaint by radio station KCRC, Enid, Okla., directed against your special industrial radio operation in the same community (KEN-393). This has been the subject of numerous, but unproductive, conferences and exchanges of correspondence between the Commission's staff and representatives of both KCRC and yourself.

A summary of events pertinent to our consideration of the KCRC complaint is as follows: Radio station KCRC (1390 kc/s, 1 kw, DA-1) has operated a full-time standard broadcast service at Enid since the early 1920's. Since August 1967, it has been operating with parameters at variance from licensed values because of pattern distortion caused by a communications tower you erected approximately 1,000 feet southeast of the KCRC directional array. This tower was built in the wrong place; we had originally issued a construction permit specifying geographic coordinates approximately 1 mile from the KCRC facility. You thereafter relocated your base station at another site, abandoning the original tower in the process. It is emphasized that we did not grant an authorization to erect a tower at the location initially chosen, nor was KCRC notified of that choice or afforded an opportunity to be heard in opposition thereto.

The presence of the abandoned tower continues to produce severe distortion of KCRC's authorized directional pattern, which is characterized by a serious reduction in signal strength over the city of Enid and other portions of the station's primary service area. Moreover, the resulting displacement of nulls and lobes in the measured pattern is a possible source of objectionable interference to other stations assigned to the same channel. As a result, we have been compelled to defer action on the KCRC license renewal application.

In view of your continuing refusal to cooperate in resolving the problem created by your unauthorized construction, you *Are ordered* either to dismantle the abandoned tower or, after consultation with KCRC, to eliminate the reradiation by detuning the tower. Failure to do so will make it necessary for us to initiate appropriate proceedings

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looking toward examination of your qualifications to be a licensee in the Special Industrial Radio Service.

You *Are further ordered* to submit a written report within 30 days from the date of this letter, describing the corrective measures taken or contemplated by you.

Commissioner Cox was absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of MILI ACQUISTAPACE, HELEN L. PEDOTTI, BURNS RICK, AND MARION A. SMITH, D.B.A. CENTRAL COAST TELEVISION (KCOY-TV), SANTA MARIA, CALIF. For Construction Permit	Docket No. 16430 File No. BPCT-3580

ORDER

(Adopted January 2, 1969)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. The Review Board having before it for consideration a petition for leave to amend, filed November 21, 1968, by Central Coast Television (KCOY-TV);[1]

2. *It appearing*, That the proposed amendment is necessary to reflect an assignment of the license of KCOY-TV from Central Coast Television, a partnership, to Central Coast Broadcasters, Inc., a corporation; and

3. *It further appearing*, That the proposed amendment is not opposed by the other parties to this proceeding and would not result in the addition of new or changed issues, or prejudice to any of the existing parties;[2]

4. *It is ordered*, That the petition for leave to amend, filed November 21, 1968, by Mili Acquistapace, Helen L. Pedotti, Burns Rick, and Marion A. Smith, doing business as Central Coast Television (KCOY-TV), *Is granted*, and the amendment *Is accepted*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] Key Television, Inc. (Key), an intervenor herein, filed comments on KCOY-TV's petition on Nov. 25, 1968. Although Key does not oppose acceptance of the amendment, it requests that the Board indicate that the amendment can afford no basis for any decision in this proceeding. The Board agrees that the amendment can form no basis for the enlargement of the hearing record.

[2] In its decision denying KCOY-TV's application, the Board took official notice of the assignment application, and held that there was no necessity to consider any substantive problems raised by the new ownership in view of the determination pursuant to the existing issues, that the public interest would not be served by a grant of the application (14 FCC 2d 985, 1008, 14 R.R. 2d 575, 606 (1968)).

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FCC 68R-536

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of R. EDWARD CERIES, ALBUQUERQUE, N. MEX.	Docket No. 18213 File No. BPH-6001
JACK C. HUGHES, ALBUQUERQUE, N. MEX. For Construction Permits	Docket No. 18214 File No. BPH-6041

MEMORANDUM OPINION AND ORDER

(Adopted December 23, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. R. Edward Ceries (Ceries) and Jack C. Hughes (Hughes) are mutually exclusive applicants seeking authority to construct a new FM broadcast station at Albuquerque, N. Mex., on channel 262. By order, FCC 68-613, released June 18, 1968, the applications were designated for hearing on issues which include an inquiry into the financial qualifications of Ceries. On October 23, 1968, the applicants filed with the Commission a joint petition,[1] which contemplates approval of an agreement of October 9, 1968, between Ceries and Hughes, compensated dismissal of the Hughes application, resolution of the outstanding financial issue, and grant of the Ceries application.[2]

2. The joint petition includes the affidavit of both parties to the agreement setting forth the exact nature of the consideration involved, the details of the initiation and history of the negotiations, and the reasons why the agreement is considered to be in the public interest. The agreement states that Hughes would be reimbursed for expenditures in an amount not to exceed $5,000. Hughes has submitted an affidavit enumerating expenses incurred in connection with the present application. While Hughes itemizes expenses of $4,920.30, he has not, as pointed out by the Broadcast Bureau in its comments, demonstrated that $4,420.30 of this amount represents legitimate and prudent outlays expended in preparing, filing, and advocating a grant of the Hughes application. The sum of $1,800 is claimed as legal expenses. Since no affidavit has been submitted which states that this sum was incurred in the prosecution of the present application and there is

[1] The joint petition (in accordance with sec. 1.525(a)) should have been filed no later than Oct. 16, 1968. Petitioners request waiver of the 5-day filing period, stating that additional time was needed in order to assemble documents regarding the financial issue. The Board finds petitioners' explanation adequate, and will, therefore, waive the 5-day requirement.

[2] Other related pleadings before the Board for consideration are: (*a*) Broadcast Bureau's opposition, filed Nov. 6, 1968; (*b*) reply, filed Nov. 22, 1968, by Ceries; (*c*) petition for leave to file supplement to reply, filed Dec. 3, 1968, by Ceries; and (*d*) supplement to reply, filed Dec. 3, 1968, by Ceries. The supplement contains an increased loan commitment to Ceries, which was the subject of an amendment accepted by the examiner in an order, FCC 68M-1656, released Dec. 13, 1968. The petition for leave to file supplement will be granted.

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no indication that Hughes retained counsel during the period of time this cost was incurred, this amount must be disallowed absent a statement from counsel substantiating this expense. Hughes seeks reimbursement of $634.10 for "Market Survey, Application Preparation, [and] Printing." The Bureau is correct in pointing out that these expenses may have been performed by Hughes or employees of his engineering consulting firm. Absent a showing that these services were outside the scope of normal employment, the identification of the persons who performed the services, and the respective cost of each item of service, the entire sum must also be disallowed. *Western Broadcasting Co.*, FCC 67R-409, 10 FCC 2d 180 (1967). Hughes combined expenses for travel, long-distance telephone calls, exhibit preparation and site survey, and absent a further breakdown and more detailed explanation, reimbursement for this entire sum cannot be permitted. *Western Broadcasting Co.*, *supra*, and *Miss Lou Broadcasting Corp.*, FCC 68R-30, 11 FCC 2d 589 (1968). Hughes requests $1,500 reimbursement for engineering expenses. In the absence of an affidavit showing that the claimed engineering expense is reasonable and is related to the prosecution of the application, this amount must also be disallowed. *Robert J. Martin*, FCC 65R-77, 4 R.R. 2d 647 (1965). Since the bulk of the expenses for which reimbursement is sought has not been adequately substantiated, and deficiencies were pointed out by the Bureau but not corrected, the joint petition will be denied. See *Hartford County Broadcasting Corp.*, 10 FCC 2d 46, 11 R.R. 2d 244 (1968).

3. *Accordingly, it is ordered*, That the petition for leave to file supplement to reply, filed by R. Edward Ceries on December 3, 1968, *Is granted*, and that the joint petition for approval of agreement, filed October 23, 1968, by R. Edward Ceries and Jack C. Hughes, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
COMMUNICATIONS SATELLITE CORP., WASHINGTON, D.C.
For Authority Relating to Spacecraft and System Performance Tests

DECEMBER 12, 1968.

COMMUNICATIONS SATELLITE CORP.
950 L'Enfant Plaza South SW.
Washington, D.C. 20024

Attention Siegfried H. Reiger, vice president, technical.

Re Intelsat III (F-2) launch and test operations.

GENTLEMEN: This is in reply to your letter of December 2, 1968, requesting certain authority relating to spacecraft and system performance tests during launch, positioning and precommercial operation of the Intelsat III (F-2) satellite.

You advise that in-plant acceptance tests of the F-2 satellite conform to the specifications contained in the Commission's order and authorization of June 23, 1966 (file No. 5-CSS-P-66), as amended by the Commission's letter of April 24, 1967. You also advise that the F-2 spacecraft is scheduled for launch on December 18, 1968, or as soon thereafter as feasible, into a synchronous orbit over the Atlantic Ocean at a longitude of approximately 31° west.

In conducting the proposed test program, you request authority on behalf of Comsat, American Telephone & Telegraph Co., All America Cables & Radio, Inc., ITT World Communications, Inc., RCA Global Communications, Inc., and Western Union International, Inc.. to operate the Etam, W. Va., and the Cayey, P.R., earth stations in conjunction with the Intelsat III (F-2) satellite.

Pursuant to the provisions of section 201(b)(1) of the Communications Satellite Act of 1962, the advice of the National Aeronautics and Space Administration has been solicited and we have been informed by that agency of its concurrence in the launch date and that the technical performance evaluation of the satellite is satisfactory.

Upon review of the subject correspondence and associated data and information, the Commission concludes that Comsat should be, and is hereby, authorized to participate in the proposed launch and testing of the second flight model of the Intelsat III series of satellites, and the public interest would be served by authorizing the proposed program and operation of the specified earth stations by the respective joint licensees thereof, subject to the following terms and conditions:

1. This authorization is limited to the described program for the operation of the Etam, W. Va., and the Cayey, P.R., earth stations in conjunction with the

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Intelsat III (F-2) satellite, and for the operation of the Andover, Maine, and the Paumalu, Hawaii, transportable earth stations to provide TT&C functions in conjunction with the Intelsat III (F-2) satellite;

2. The operation of the Etam, W. Va., and the Cayey, P.R., earth stations shall be within the technical specifications as set forth in the respective construction permits, files Nos. 42-CSG-P-67 and 37-CSG-P-67;

3. Comsat shall provide the Commission with summary weekly reports concerning progress of the program and upon request shall make the detailed test data available. The Commission may, at its discretion, require additional tests to be conducted;

4. Comsat shall not furnish channels of communication for commercial service via the Intelsat III (F-2) satellite facilities authorized to be tested herein until specific authorization therefor shall have been granted by the Commission upon appropriate application accompanied by detailed supporting engineering data, together with a detailed report concerning test results;

5. Conduct of the program authorized herein shall be without interruption of commercial satellite service now authorized in the Atlantic and Pacific Ocean areas;

6. Neither the authorization nor any right granted herein shall be assigned or otherwise transferred without approval of this Commission;

7. This authorization shall not vest in permittees any right to operate the facilities described herein nor any right in the use of the frequencies designated except as herein authorized;

8. This authorization incorporates paragraphs 9-13, inclusive (except as previously modified), of the Commission's order of June 23, 1966 (file No. 5-CSS-P-66);

9. Unless extended or modified for good cause shown, this authorization shall terminate January 31, 1969, or such earlier date as commercial operation may be authorized.

Commissioner Robert E. Lee was absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

106-520—69——2

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FCC 68R-542

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COMMUNICATIONS TECHNICAL SALES, INC.	Docket No. 18333
For Consent to Assignment of License of Station KIY585 in the Domestic Public Land Mobile Radio Service at Columbia, S.C., to L. Marion Evans, d.b.a. Telephone Answering Service.	File No. 558-C2-AL-67
For renewal of Licenses of Stations KIY585 and KIY589 in the Domestic Public Land Mobile Radio Service at Columbia and Sumter, S.C.	Docket No. 18334 Files Nos. 7546-C2-R-66, 51-C2-R-66
For Modification of License of Station KIY585 in the Domestic Public Land Mobile Radio Service at Columbia, S.C.	Docket No. 18335 File No. 388-C2-ML-66
For Consent to Assignment of License of Station KIY589 in the Domestic Public Land Mobile Radio Service at Sumter, S.C., to Abraham Thomy, d.b.a. A-Ble Answering Service.	Docket No. 18336 File No. 5290-C2-AL-66
L. MARION EVANS, D.B.A. TELEPHONE ANSWERING SERVICE.	Docket No. 18337
For Renewal of License of Station KIY760 in the Domestic Public Land Mobile Radio Service at Columbia, S.C.	File No. 2868-C2-R-66

MEMORANDUM OPINION AND ORDER

(Adopted December 27, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. This proceeding involves applications for renewal of the licenses of station KIY585, Columbia, S.C., and KIY589, Sumter, S.C., in the Domestic Public Land Mobile Radio Service, both presently licensed to Communications Technical Sales, Inc. (CTSI). Also sought is approval of the transfer of KIY585 to L. Marion Evans, doing business as Telephone Answering Service (TAS), and the transfer of KIY589 to Abraham Thomy, doing business as A-Ble Answering Service (Thomy). By order, FCC 68-979, released October 10, 1968, the Commission designated the applications for hearing on issues inquiring into the efficiency of use of KIY585, unauthorized assignment of license transfer and ultimate relinquishment of control of such station, and the character qualifications of TAS and CTSI. Columbia Answering Service, Inc., licensee of KFL947, Columbia, S.C., was

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made a party to the proceeding in the designation order. Now before the Review Board is a petition to enlarge issues, filed October 30, 1968, by Columbia Telephone Answering Service, Inc. (petitioner)[1] seeking the addition of the following issues:

(1) To determine the ownership of CTSI, and whether there has been an unlawful transfer of control of CTSI;
(2) To determine whether the license of KIY589 has been transferred to Thomy without prior Commission consent; and
(3) To determine whether CTSI has made efficient utilization of station KIY589 and has rendered satisfactory service to its existing customers.

2. In support of its first requested issue, petitioner asserts that, in the original application for KIY589, CTSI recited that the only shareholders having at least a 10-percent interest were R. Paul Bryant, 28 percent, J. J. Brenegar, 12 percent, and Walter J. Powell, 12 percent; and that the Commission has never been advised of the other shareholders or of CTSI's officers and directors, other than R. Paul Bryant, president, who has acted on the company's behalf, or of any changes in the composition of the shareholders and officers of such company. Petitioner further notes that a contract between Thomy and CTSI relating to the transfer of the assets of KIY589 has been filed as a part of the transfer application; such contract recites that the consideration for such transfer is the repayment of a personal note of Bryant to a Sumter bank.[2] Petitioner asserts, therefore, that although Bryant apparently owns only 28 percent of CTSI stock, he has transferred the assets of station KIY589 in consideration of the discharge of his personal debt; that this suggests that Bryant is now either the sole or controlling stockholder; and that, thus, there is a substantial question of whether control of CTSI has been transferred in violation of section 310(b). In support of the second requested issue, petitioner asserts that the contract relating to the transfer of KIY589 was entered into on December 21, 1965; that the request for approval of such contract was not filed with the Commission until April 11, 1966; but that the consideration (the repayment of Bryant's note by Thomy) had been paid on March 15, 1966. Petitioner further notes that, by amendment to the request for aproval, CTSI filed an agreement under which Thomy was designated as agent to operate the station; that in such amendment it is represented that Bryant, a resident of Columbia, devotes 8 to 10 hours per month to station affairs, whereas Thomy, a resident of Sumter, where the station is located, spends 4 to 6 hours per day in regard to stations affairs, and owns and is in physical possession of the station equipment; and that CTSI does not have a listing in the Sumter telephone directory, the address recited in the renewal application being that of Thomy's answering service. In connection with its third requested issue, petitioner notes that CTSI's 1964 Form L (financial report filed pursuant to rule 1.785) showed four operating mobile stations of which two were controlled by CTSI, and the station was being operated by two persons on a part-time basis;

[1] Also before the Board are: (*a*) Opposition, filed Nov. 14, 1968, by CTSI; and (*b*) reply, filed Nov. 22, 1968, by petitioner.
[2] Petitioner notes that a letter from the bank, filed with the request for approval, recites that Bryant's note, on which Thomy was guarantor, was repaid by Thomy.

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that CTSI's 1965 Form L shows two operating units, one of which was controlled by CTSI, and one part-time operator; and that no Form L's were filed for 1966 or 1967. According to petitioner, an amendment to the renewal application, filed October 19, 1966, shows eight subscribers. Contrasting the number of subscribers actually served with CTSI's representation in the original application that it would use the 50 mobile units authorized strongly suggests, according to the petitioner, that the station is not operating efficiently and that any improvement in the quality of service is due to the transfer of control to Thomy.

3. In opposition, CTSI asserts that the Commission had before it all of the records referred to in the petition at the time of the designation order and saw no basis for the additional issues; that the absence of a CTSI listing in the Sumter telephone directory is irrelevant because such listing is not required by Commission rules; that the records on file with the Commission show that there has been no transfer of control of CTSI or KIY589.[3] CTSI contends that its agency agreement with Thomy is a standard type and expressly reserves full control of KIY589 to CTSI. Finally, CTSI contends that the facility is being efficiently used as evidenced by the gradual increase in subscribers.

4. The Review Board is of the view that substantial questions have been raised and that the additional issues are warranted.[4] CTSI offers no explanation as to why the consideration for the transfer of KIY589 ran to Bryant rather than to CTSI, which is putatively the owner of the equipment; nor is there any explanation of the happenstance that Thomy was the guarantor on the note which was repaid. Absent such explanations, we can only question whether Bryant or perhaps Thomy has become the sole stockholder or otherwise the individual responsible for and entitled to the benefits from CTSI, and whether control of CTSI has been transferred without Commission approval. Similarly, the unexplained circumstances surrounding the transfer of KIY589 raise a substantial question as to whether it has been transferred to Thomy in violation of section 310(b). The consideration for the transfer, paid on March 15, 1966, was not made contingent upon Commission approval of the transfer and the agreement does not contemplate that possibility;[5] the prospective transferee is in actual possession of the equipment and runs the station under the agency agreement. While the agency agreement gives CTSI full control, there is no showing that such control has in fact been exercised, a particularly troublesome problem because Bryant concededly does not reside in Sumter but Thomy does, and because the only telephone listing for the station is Thomy's.[6] Finally, disregarding entirely the original estimate of mobile units which would be employed, there is nonetheless a serious

[3] CTSI also asserts that petitioner's station is located in Columbia and that it has no interest in or proper concern with KIY589, in Sumter.

[4] Without significance is CTSI's contention that the official records from which the questions derive were before the Commission at the time of the designation order; the matters rased herein were not specifically considered by the Commission. *Atlantic Broadcasting Co.*, FCC 66-1053, 5 FCC 2d 717 (1966). In addition, petitioner, having been made a party to the proceeding without limitation, has standing to raise the issues set forth in its petition.

[5] Petitioner erroneously suggests that the request for approval of the transfer of KIY589 was filed on April 11, 1966; it was, in fact, filed on March 11, 1966, 4 days prior to the payment of the consideration.

[6] We note that, given CTSI silence on the allegations set forth in the petition, the questions concerning the transfer of control of CTSI and of KIY589 appear interrelated.

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question as to whether efficient use of KIY589 is being made. The number of subscribers actually declined in 1965–66; the number of persons operating the station was reduced to an absolute minimum; and, other than vague assurances, we are given no showing that CTSI made serious efforts to increase its subscribers and improve its service. The issues will therefore be added. In addition, consistent with long-established precedent, we will, of our own motion, add an issue to determine whether, in light of the evidence adduced with respect to the control of CTSI and the transfer of KIY589, Thomy and/or CTSI is qualified to be a Commission licensee.

5. *Accordingly, it is ordered*, That the petition to enlarge issues, filed October 30, 1968, by Columbia Telephone Answering Service, Inc., *Is granted;* and that the issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine the ownership and control of Communications Technical Sales, Inc., and whether there has been a transfer of control of such company without prior Commission approval;

(2) To determine whether Communications Technical Sales, Inc., has transferred the license of station KIY589, Sumter, S.C., to Abraham Thomy, doing business as A–Ble Telephone Answering Service without prior Commission approval;

(3) To determine whether the licensee has made efficient utilization of station KIY589 and has rendered satisfactory service to its existing customers;

(4) To determine whether, in light of the evidence adduced under issues (1) and (2) above, Communications Technical Sales, Inc., and/or Abraham Thomy and A–Ble Telephone Answering Service, through their respective personnel, possess the requisite character qualifications to be Commission licensees.

6. *It is further ordered*, That the burden of proof as to issues (1) and (2) shall be upon Columbia Telephone Answering Service, Inc., and that the burden of proof as to issues (3) and (4) shall be upon the respective applicants.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68-1229

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FAULKNER RADIO, INC., SLIDELL, LA. Requests: 1190 kc, 1 kw, Day BAY BROADCASTING CORP., BAY ST. LOUIS, MISS. Requests: 1190 kc, 5 kw, Day For Construction Permits	Docket No. 18412 File No. BP-17057 Docket No. 18413 File No. BP-17244

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER COX ABSENT.

1. The Commission has before it the above-captioned applications which are mutually exclusive in that simultaneous operation of the stations proposed would result in prohibited overlap of contours as defined by section 73.37 of the Commission's rules. Also before the Commission are: (*a*) A petition to deny the application of Bay Broadcasting Corp. (hereinafter, Bay), filed by Faulkner Radio, Inc. (hereinafter, Faulkner); (*b*) a petition to strike the Faulkner objections filed by Bay; (*c*) Faulkner's opposition to the petition to strike; and (*d*) Bay's reply to opposition.[1]

2. In its petition to deny Faulkner asserts that certain alleged misrepresentations contained in Bay's application warrant either the dismissal of its proposal or the addition of issues to determine whether Bay has the requisite character qualifications to be a licensee of the Commission. According to Faulkner, its investigations reveal that Mr. Joel Bluestone, secretary-treasurer and principal shareholder (80 percent) of Bay, has twice been involved in bankruptcy proceedings, and that his wife, Mary Nance Bluestone, vice president of Bay, has once filed for bankruptcy. In completing paragraphs 10(f) and 10(h) of section II of form 301, however, Bay failed to make any mention of these bankruptcies, indicating instead that none of its principals had ever been declared bankrupt. As its response to section IV-A, paragraph 1-A of the application form, which requests that the applicant state the methods used to ascertain the needs and interests of the public to be served by the proposed station, Bay submitted its exhibit No. 5.

[1] On Nov. 19, 1968, Bay filed an additional pleading entitled "Petition to Designate for Hearing on Stated Issues," which raised questions not previously mentioned by either applicant. Faulkner, in turn, filed an opposition on Dec. 10, 1968. These pleadings are, however, both untimely and unauthorized pursuant to secs. 1.45(c) and 1.580(i) of the rules. Simultaneously with its opposition pleading, Faulkner amended its application in an apparent effort to obviate the objections raised by Bay. Prior to the receipt of all these submissions, however, we had on our own motion considered the matters raised therein, and these belated filings do not persuade us to alter our present conclusions (see par. 14, infra).

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Therein, the applicant stated that its president and general manager, Donald R. Moore, had, inter alia, conducted a personal survey of 23 community leaders in Bay St. Louis and the immediate vicinity.[2] According to Faulkner, however, 14 of these persons have never been contacted by any representative of Bay concerning any radio station or radio program. Affidavits to this effect have been submitted from each of the 14 persons in question: Furthermore, in light of these alleged misrepresentations, Faulkner asserts that the reliability of Bay's entire programing survey is thrown into question. Therefore, it is requested that an issue also be added to determine whether Bay has adequately investigated the programing needs of the Bay St. Louis area.

3. Bay's response to these allegations takes the form of a petition to strike. Attention is drawn to the fact that over 4 months had elapsed beyond the cutoff date of Bay's application before the Faulkner petition was submitted.[3] In addition to this procedural defect, Bay argues throughout that Faulkner has sought, by reckless and unsupported allegations, to malign the character qualifications of its principals. While admitting that he and his wife were involved in bankruptcy proceedings several years ago, Joel Bluestone states by affidavit that he did not deliberately fail to supply this information. Noting that Donald Moore supervised preparation of the application form, Bluestone affirms that any nondisclosure of the bankruptcies was merely an oversight on his own part in examining form 301 prior to its submission. With regard to Bay's program survey, Donald Moore reaffirms that he personally telephoned the 23 community leaders listed in the application, and that he noted their responses on questionnaire forms which were consulted during the conversations. In appraising the affidavits Faulkner obtained from the 14 persons in question, Bay stresses that, either by design or otherwise, each affidavit is couched in identical terms; that any reference to Moore by name is omitted; and that the affiants state only that they have not been contacted by any representative or representatives of Bay Broadcasting Co., Inc. [sic]. Moore claims, however, that all of his programing contacts were made prior to the formation of Bay as a corporation, and, therefore, he referred to himself merely as Don Moore, rather than as the representative of any corporate applicant. Thus it is contended that at most the affidavits establish only what they state, which is in itself inconclusive. Bay has also submitted affidavits from various local residents affirming that a survey of the area was, in fact, made. These include statements from J. Ruble Griffin, a Bay St. Louis attorney, who states he furnished Bluestone and Moore with a list of local civic and business leaders, and Mrs. Maurice J. Artigues, who affirms, inter alia, that she conducted an extensive telephone survey for the applicant, filling out a questionnaire for each person interviewed.

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[2] The persons that Moore allegedly contacted include such local leaders as mayor, school superintendent, rotary club and chamber of commerce presidents, and several members of the clergy. In addition, Bay states that it conducted a random telephone survey of the general public, using a prepared questionnaire to determine their needs and interests.

[3] Bay's application was cut off on Dec. 20, 1966, and Faulkner's petition to deny was not filed until May 8, 1967. Bay also argues that the dates of Faulkner's supporting affidavits (Jan. 1, 1967, to May 2, 1967) suggest that Faulkner did not even intitiate preparation of its petition until after the Bay cutoff date had run.

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4. In opposition to Bay's petition to strike, Faulkner admits that its initial pleading was untimely. It states that the matters in question came to its attention during the course of its preparation for the hearing that will be necessitated in this case because of the mutually exclusive nature of the two applications. Rather than withholding its information until the hearing, Faulkner argues that it sought to expedite matters so that the Commission might consider its allegations at the prehearing stage. So far as the merits of Bay's arguments are concerned, Faulkner notes that none of Bay's supporting affidavits actually state the names of the persons contacted. According to Faulkner, if Moore did call the persons in question, he should be able to support his contentions with sufficient records of the conversations. The argument that Moore was not mentioned by name in Faulkner's affidavits, and, therefore, that they are invalid, is dismissed as without merit. Faulkner contends that Moore is now, in fact, a representative of Bay, and that the affiants involved, being persons of responsibility and stature within the community, would not be taken in by such subtleties as Bay suggests may have taken place. In addition, Faulkner has submitted affidavits from its local agents, who assert that at the time the 14 affiants were questioned, all but one of these persons, was informed that Moore and Bluestone were the principals of Bay. With regard to the bankruptcy omissions, Faulkner reiterates that Bay is responsible for the accuracy of its application. Faulkner argues that Bluestone, as an 80-percent shareholder and officer of the corporation, cannot avoid his responsibility by claiming that someone else prepared the application.

5. In reply, Bay again attacks Faulkner's initial supporting affidavits as misleading and invalid. It is noted that Faulkner's use of the word "contact" in its form affidavit may have persuaded the 14 affiants to believe that a contact meant a face-to-face meeting rather than the telephone call they allegedly received from Moore. Citing the decision in *Jones T. Sudbury*, 67R–164, 9 R.R. 2d 1329 (1967), Bay raises the possibility that the affiants may have forgotten telephone interviews which it maintains occurred approximately 1 year prior to Faulkner's inquiry.[4] In addition, Bay has submitted a questionnaire said to have been filled out during the telephone conversation with M. Haas, one of the aforementioned 14 affiants. Counsel for Bay also states that it has the remaining questionnaires in its possession, but thus far these have not been submitted for Commission perusal.

6. Despite its belated filing, the Commission will, pursuant to section 1.587 of the rules, treat Faulkner's petition to deny on its merits as an informal objection. As Faulkner has noted, consideration of its objections at this time will serve to expedite matters, since Faulkner, in any event, could petition to enlarge issues after designation of the applications for hearing. Moreover, upon review of the various affidavits and contradictory pleadings now before us, the Commission finds that Faulkner has raised substantial and material questions of fact, both as to the authenticity of Bay's representations on its survey of com-

[4] According to Moore, he made most of the telephone interviews in January 1966. The 14 affidavits initially obtained by Faulkner are dated Jan. 1, 1967, to Mar. 4, 1967, inclusive.

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munity programing needs and as to Bay's failure to disclose prior bankruptcy proceedings involving its controlling shareholder.

7. As to Bay's contention that Faulkner's allegations constitute a reckless and unwarranted attempt to malign the character of Bay's shareholders, we find, on the contrary, that Faulkner has adequately supported its contentions with appropriate affidavits both from its own agents and from presumably disinterested members of Bay St. Louis and its environs. As for Bay's attempt to refute the allegations of misrepresentation in its programing survey, while its counsel maintains that copies of questionnaires reflecting Moore's conversations with each of the 14 affiants in question are available, these questionnaires, with the exception of the one allegedly pertaining to Moore's interview with M. Haas, have not been submitted for Commission examination.[5] Thus, it would appear that, while Bay may have the best evidence available to refute Faulkner's allegations, it has itself chosen not to present the questionnaires at this time. *Cf. Jones T. Sudbury, supra.* Instead, Bay has relied upon affidavits from Moore himself and from other Bay St. Louis residents who do not profess to know specifically which persons Moore contacted. Aside from indicating that some survey was taken, the latter affidavits fail to refute Faulkner's basic allegation that 14 of the 23 community leaders supposedly surveyed were never, in fact, contacted. Likewise, Bay's preoccupation with the semantics of Faulkner's supporting affidavits fails to convince us either that Faulkner has managed to deceive the 14 affiants, or that its allegations of misrepresentation are unfounded. In addition, Bay's supposition that the affiants may simply have forgotten their respective telephone conversations with Moore is not persuasive. Accordingly, we find that an issue is warranted to determine whether Bay's programing survey contains misrepresentations concerning the number and identity of the community leaders actually interviewed. *Cf. Lebanon Broadcasting Co.*, FCC 67–1305, 10 FCC 2d 936 (1968).

8. Regarding the Bluestones' unreported bankruptcies, Joel Bluestone's affidavit affirms in substance the allegations made in the petition to deny. As Faulkner has pointed out, an applicant cannot avoid the responsibility for accurate and full disclosure in its application simply by noting that only one of its principals prepared the proposal. This is especially the case where, as here, the nondisclosure involves the applicant's controlling shareholder. Bluestone argues that since no findings of culpability were involved in the bankruptcies, he had no motive for failing to disclose their occurrence. However, since the nondisclosure is admitted, it will be necessary for the hearing examiner to take evidence for the purpose of determining what effect, if any, the failure to disclose past bankruptcies has upon Bay's requisite and comparative qualifications to receive a grant.

9. Based on the questions raised concerning Bay's survey of community leaders, Faulkner has also requested imposition of an issue to determine whether the applicant has sufficiently investigated the pro-

[5] The questionnaire that Bay did submit has the name and title "M. Haas—Pres. Jc's" written across the top. Presumably this refers to Michael D. Haas, past president of the Bay St. Louis Jaycees, who is one of the 14 affiants under debate herein. The sheet contains brief answers to eight questions of a general programing nature. It is not dated, however, nor is it designed in any way to be signed by the interviewee.

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graming needs of the Bay St. Louis area. *Suburban Broadcasters*, 30 FCC 1021, 20 R.R. 951 (1961). Even assuming, however, that the questions pertaining to its survey are resolved in Bay's favor, we find that the applicant's ascertainment of community needs fails to meet the criteria recently reaffirmed by the Commission in *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968), and the Commission's public notice of August 22, 1968, FCC 68-847. Accepting, arguendo, that Bay's survey took place substantially as professed in exhibit No. 5 of its application, it would appear that a cross section of the listening public and a sampling of informed opinion in the community has been contacted. "Report and Statement of Policy Re: Commission En Banc Programming Inquiry," FCC 60-970, released July 29, 1960, 20 R.R. 1902. However, aside from a brief statement that the community is much interested in the national space program, due to the establishment of a testing facility nearby, and that a need exists for local news and announcements, Bay, despite its reference to use of a planned questionnaire, says very little about the actual program suggestions as to community needs it received or how its program format will reflect the area's needs as evaluated. In view of the nature of community leadership allegedly interviewed and the absence of alternative local AM service in Bay St. Louis, this lack of informative response requires further explanation. Therefore, in the event Bay demonstrates to the satisfaction of the hearing examiner that its survey took place as alleged, it will be necessary for the applicant to fully demonstrate its efforts to ascertain the community needs and interests of the Bay St. Louis area and the manner in which it proposes to meet those needs and interests.

10. On the basis of its original application and amendments, Bay will require approximately $76,280 to construct and operate the proposed station for 1 year without revenue. The alleged cash requirements are as follows: Downpayment on equipment, $6,500; first-year payments on equipment, including interest, $7,280; land, $12,500; building, $10,000; miscellaneous, $4,000; and working capital for 1 year, $36,000. To meet these financial requirements, the applicant relies upon paid-in capital of $10,000 and a loan commitment from the Hancock Bank of Bay St. Louis for $30,000. The bank's letter, submitted as evidence of its commitment, fails, however, to state the terms of repayment or if any collateral is involved. See section III, paragraph 4(h) of form 301. Consequently, we are unable to include the $30,000 loan in the computation of Bay's available funds. Thus, it appears that only $10,000 is currently available to meet anticipated first-year expenses of $76,280. Accordingly, a financial issue will be included to determine the applicant's financial ability to construct and operate the proposed station for 1 year without revenues.

11. Examination of the engineering portion of the Faulkner application, as amended on June 27, 1968, indicates that its proposed 5-mv/m contour will penetrate the city limits of New Orleans. Slidell's population according to the 1960 U.S. census is 6,356, while New Orleans has a population of 627,525. In view of these circumstances, a presumption is raised that the applicant is realistically proposing an additional transmission service for the larger city rather than its desig-

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nated community of Slidell. "Policy Statement of Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities," 2 FCC 2d 190, 6 R.R. 2d 1901 (1965). Since Faulkner has made no attempt to rebut the aforementioned presumption, an appropriate issue will be added to explore the matter further. If, in the course of this proceeding, Faulkner fails to rebut the presumption that it is realistically proposing to serve New Orleans rather than Slidell, and fails to show, pursuant to issue 8 below, that its proposal meets all of the technical provisions of the Commission's rules for a station assigned to New Orleans, its application will be denied. If, however, its proposal qualifies as one for New Orleans under such issue, we will then consider whether its application should be allowed to remain in hearing.

12. In response to paragraph 1–A of section IV–A, regarding its ascertainment of local programing needs and interests, Faulkner has made rather vague reference to contacts with an indeterminate number of community leaders and other residents of Slidell. Based on Faulkner's brief summation of its survey efforts, however, we are unable to conclude that a fair cross section of informed opinion and group interest in the Slidell community has been adequately canvassed. *Cf. Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691 (1968). Although the applicant proposes to devote time on a weekly basis to a community affairs program, Faulkner has not sufficiently indicated what suggestions of community programing needs it has received, nor does the proposed programing reflect an attempt to meet those needs as evaluated. Accordingly, in keeping with the *Minshall* decision, supra, a *Suburban* programing issue will be included so that Faulkner may fully demonstrate its effort to ascertain the community needs and interests of the Slidell area and the manner in which it proposes to meet those needs and interests.

13. Analysis of Faulkner's financial requirements indicates that $92,309 will be needed for construction and first-year operation of the proposed station. Anticipated expenses consist of downpayment on equipment, $10,297; first-year payments on equipment including interest, $11,532; buildings, $6,000; loan curtailments, $20,000; loan interest, $480; miscellaneous, $4,000; and first-year working capital, $40,000. The applicant proposes to meet these expenses by relying upon existing cash of $3,000 and two bank loan commitments of $40,000 each. Examination of Faulkner's balance sheet, however, reveals current liabilities in excess of current assets, and thus the cash on hand of $3,000 cannot be assumed to be available for the instant proposal. In addition, the Baldwin National Bank of Robertsdale, Ala., has made its loan of $40,000 contingent upon the personal guarantee of James H. Faulkner, Sr., controlling shareholder of the applicant corporation. To date, Mr. Faulkner has not signified his willingness to accept this personal liability, and thus the loan cannot be credited toward the applicant's financial requirements. We note, however, that even if the full amount of $80,000 in loans were adequately shown to be available, Faulkner's financial resources would still be short of the $92,309 total required. Therefore, a financial issue will be specified to determine whether the applicant has sufficient funds available to construct and

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operate as proposed for 1 year without reliance upon prospective revenues.

14. As originally filed Faulkner's application did not contain section II of form 301, which refers to the legal qualifications and other ownership interests of the applicant. Instead, the Commission was requested to consult its ownership reports (form 323) for the required information. These reveal that Faulkner is licensee of several southeastern radio stations.[6] Thereafter, on May 20, 1968, Faulkner notified the Commission that it had assumed control of station WGAA, Cedartown, Ga., and that on March 18, 1968, it had filed an application for a new FM station in Rockmart, Ga. (BPH-6224). Nowhere, however, has the applicant made mention of its currently pending application (BPH-5493) for a new FM station to be located in Slidell.[7] While no apparent motive for concealment suggests itself, in light of our abiding interest in concentration of control and local diversification, Faulkner's failure to note the pendency of an application for an additional Slidell facility assumes considerable significance. Therefore, an issue will be specified to determine what effect, if any, the applicant's failure to keep the Commission informed, as required by section 1.65 of the rules, of the filing of its proposal for an FM station at Slidell has upon its requisite and comparative qualifications to receive a grant of its instant application. *Cf. Vernon Broadcasting Company*, 12 FCC 2d 946, 13 R.R. 2d 245 (1968); *Romac Baton Rouge Corp.*, 7 FCC 2d 564, 9 R.R. 2d 1029 (1967).

15. Examination of the Commission's records discloses that the W. D. Alexander Co. of Atlanta, Ga., distributors of General Electric products, has filed a complaint alleging fraudulent billing practices with regard to WBTR-FM, licensed to Faukner Radio, Inc., at Carrollton, Ga.[8] The distributor furnished to the Commission copies of original affidavits received from WBTR-FM for the first 4 months of 1968 and revised affidavits submitted at a later date covering the same months. The revised affidavits were submitted after the G.E. distributor had checked the station's logs and found that log entries did not correspond to the spot announcements billed. These latter affidavits show a considerably lesser number of announcements broadcast by the station in 3 of the 4 months. Thus, it is apparent that the billing practices of WBTR-FM involve questions of serious misconduct on the part of a Commission licensee. Accordingly, an issue will be added to determine what effect, if any, Faulkner's conduct of its Carrollton FM operation has upon its requisite and comparative qualifications to receive a grant of its Slidell application.

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[6] Commission ownership reports indicate that Faulkner Radio, Inc., is licensee of the following stations: WBCA and WWSM-FM, Bay Minette, Ala.; WLBB and WBTR-FM, Carrollton, Ga.; WAOA, Opelika, Ala.; and WFRI-FM, Auburn, Ala.

[7] In its decision in *Bill Garrett Broadcasting Corporation*, FCC 68R-214, released May 23, 1968, 13 R.R. 2d 163, the Review Board granted Faulkner's application for an FM construction permit to operate on channel 287 at Slidell. The competing application of Bill Garrett Broadcasting Corp. (BPH-5482) for the same authorization was denied. However, the Commission, on its own motion, has decided, pursuant to sec. 1.117 of the rules, to review the Board's decision. FCC 68-702, released July 5, 1968. Oral argument was held before the Commission, en banc, on Nov. 14, 1968.

[8] During 3 days in February 1968, tire copy rather than General Electric copy was used on Faulkner's Carrollton AM station, WLBB, although the affidavit indicated the announcements were for General Electric products. However, the distributor has indicated belief that this was an honest mistake on the part of the station's bookkeeper, as contrasted to the FM billing, which was termed deliberate.

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16. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications *Are designated for hearing in a consolidated proceeding*, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.

2. To determine whether Bay Broadcasting Corp., or any of its principals, failed to disclose prior bankruptcy proceedings involving Joel Bluestone and Mary Nance Bluestone.

3. To determine in connection with the community survey allegedly conducted by Bay Broadcasting Corp., whether the applicant or any of its principals misrepresented facts to the Commission or have in any manner attempted to deceive or mislead the Commission.

4. To determine the effect of the facts adduced pursuant to issues 2 and 3, above, on the requisite and comparative qualifications of Bay Broadcasting Corp. to receive a grant of its application.

5. To determine with regard to the application of Bay Broadcasting Corp.:

(*a*) Whether the $30,000 loan commitment from the Hancock Bank of Bay St. Louis is available to the applicant, and, if so, the terms of its repayment and collateral required, if any;

(*b*) The source of additional funds necessary to meet the costs of construction and operation of the station during the first year; and

(*c*) In light of the evidence adduced pursuant to (*a*) and (*b*) above, whether the applicant is financially qualified.

6. To determine the efforts made by the applicants to ascertain the community needs and interests of their respective service areas and the manner in which the applicants propose to meet such needs and interests.

7. To determine whether the proposal of Faulkner Radio, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(*c*) The extent to which the applicant's program proposal will meet the specific unsatisfied programing needs of its specified station location; and

(*d*) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

8. To determine, in the event that it is concluded pursuant to the foregoing issue that the proposal will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the rules for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely, New Orleans, La.

9. To determine with regard to the application of Faulkner Radio, Inc.:

(*a*) Whether the $40,000 loan commitment from the Baldwin National Bank of Robertsdale, Ala., is available to the applicant, and, if so, whether Mr. James H. Faulkner, Sr., is willing to guarantee the repayment of such loan in his individual capacity;

(*b*) The source of additional funds necessary to meet the costs of construction and operation of the station during the first year; and

(*c*) In light of the evidence adduced pursuant to (*a*) and (*b*) above, whether the applicant is financially qualified.

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10. To determine whether Faulkner Radio, Inc., has continued to keep the Commission informed of substantial changes of decisional significance as required by section 1.65 of the Commission's rules.

11. To determine whether Faulkner Radio, Inc., has engaged in fraudulent billing practices in the operation of its station WBTR-FM, Carrollton, Ga.

12. To determine the effect of the facts adduced pursuant to issues 10 and 11 above, on the requisite and comparative qualifications of Faulkner Radio, Inc., to receive a grant of its application.

13. To determine in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

14. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

15. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

18. *It is further ordered*, That the petition to deny filed by Faulkner Radio, Inc., and the "Petition to Designate for Hearing on Stated Issues" filed by Bay Broadcasting Corp., *Are denied.*

19. *It is further ordered*, That the petition to strike filed by Bay Broadcasting Corp. *Is granted* to the extent indicated and *Is denied* in all other respects.

20. *It is further ordered*, That in the event of a grant of the application of Bay Broadcasting Corp., the construction permit shall contain the following condition:

In the event of a grant of the application filed by Michael D. Haas for a new standard broadcast station on 1140 kc, 250 w, DA-Day, at Bay St. Louis, Miss. (file No. BP-18154), permittee herein shall share the responsibility of eliminating any problems of cross-modulation, reradiation or spurious emissions which may occur.

21. *It is further ordered*, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

22. *It is further ordered*, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R-533

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GEORGIA RADIO, INC., ROCKMART, GA.	Docket No. 18314 File No. BPH-5992
FAULKNER RADIO, INC., ROCKMART, GA. For Construction Permits	Docket No. 18315 File No. BPH-6224

MEMORANDUM OPINION AND ORDER

(Approved December 23, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. This proceeding involves the mutually exclusive applications of Georgia Radio, Inc. (Georgia Radio), and Faulkner Radio, Inc. (Faulkner) for construction permits to establish new class A FM stations at Rockmart, Ga. By order, FCC 68-905, 14 FCC 2d 591, the Commission designated the applications for hearing on various issues. Presently before the Review Board is a petition to enlarge issues, filed October 2, 1968, by Georgia Radio.[1] The requested issue would inquire whether Faulkner's proposal would violate section 73.211(b) of the rules.

2. Supported by an engineering affidavit, Georgia Radio contends that Faulkner's computation of its antenna height above average terrain is based on terrain profiles obtained from old topographic maps; and that profile studies, based on more recent maps, indicate that Faulkner's proposal would exceed the maximum antenna height of 300 feet above average terrain for a class A FM station proposing to operate with a maximum effective radiated power of 3 kw, as provided by section 73.211(b) of the rules. It further contends that Faulkner's proposed 1-mv/m contour would encompass 58,969 persons within an area of 685.8 square miles, but, if Faulkner were to comply with section 73.211(b) of the rules, the population encompassed would be 46,585 persons within an area of 644 square miles, and that this would constitute a drop in population of about 21 percent and in area of about 6 percent. The Broadcast Bureau supports the petition.

3. In opposition, Faulkner submits an engineering affidavit and contends that since its engineer used the only available map and an altimeter in comparison to Georgia Radio, which relied on maps not officially released and incomplete, its study is based upon a more reliable data; that although there are differences in the method of averaging large numbers of elevations, Georgia Radio does not establish the inaccuracy of Faulkner's engineering study or that its application does not comply with the Commission's rules; and that,

[1] Also before the Review Board are: (*a*) Opposition of Faulkner Radio, Inc., filed Oct. 18, 1968; (*b*) Broadcast Bureau's comments, filed Oct. 23, 1968; and (*c*) reply of Georgia Radio, Inc., filed Nov. 4, 1968.

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assuming that Georgia Radio's allegations are correct, Faulkner's computations show that area and population affected would not be as large as that urged by the petitioner. Georgia Radio, in reply, alleges that the current maps were available in 1966 before the preparation of Faulkner's engineering statement in February 1968, and good engineering practice requires that such studies be made on the basis of the most up-to-date maps available; that although Faulkner claims that an altimeter was used in the preparation of its application, no reference was made to an altimeter in the application, and that, in determining coverage, Faulkner is relying on a technique which is not nearly so precise or accurate as that employed by Georgia Radio.

4. Georgia Radio's petition for enlargement of issues will be granted. It appears that the difference in the antenna height above average terrain results from the type of maps used and the methods employed for determining the terrain elevations and computing the average terrain elevations. The Review Board is of the view that the pleading raises a substantial and material question as to whether there would be a violation of section 73.211(b) of the rules, and that the most appropriate means of resolving that question is in an evidentiary hearing before the hearing examiner. Therefore, an issue inquiring into this matter will be added to the proceeding.

5. Accordingly, *It is ordered*, That the petition to enlarge issues, filed October 2, 1968, by Georgia Radio, Inc., *Is granted*, and that the issues in this proceeding *Are enlarged* by the addition of the following issue:

To determine whether the proposal of Faulkner Radio, Inc., would violate the provisions of section 73.211(b) of the Commission's rules.

6. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden of proof under the issue added herein will be on Faulkner Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of GEORGIA RADIO, INC. (WPLK), ROCKMART, GA. For Construction Permit	Docket No. 17537 File No. BP-16698

MEMORANDUM OPINION AND ORDER

(Adopted January 6, 1969)

BY THE REVIEW BOARD:

1. This proceeding involves an application of Georgia Radio, Inc. (WPLK), for authority to change the frequency and increase the power of its existing standard broadcast station. The application was designated for hearing by Commission order (FCC 67-748, released June 27, 1967). An initial decision, proposing to deny the application, was released on February 8, 1968 (FCC 68D-9). By Commission order (FCC 68-824, released Aug. 15, 1968), WPLK obtained special permission due to extraordinary circumstances, to file exceptions to the initial decision even though the time for such filing had expired. Exceptions were filed on September 16, 1968, and the Bureau filed a reply on September 26, 1968. Before us now is a petition to reopen the record, filed November 15, 1968, by WPLK.[1]

2. In its petition, WPLK requests the Board to reopen the record for the limited purpose of receiving into evidence a supplemental engineering statement attached to the petition. In support of the request, petitioner asserts that the supplemental engineering statement sought to be introduced consists of a breakdown of area and population previously shown on the record and referred to in the initial decision. The Broadcast Bureau opposes the petition, asserting that the information sought to be put on the record is of no decisional significance and has been available to WPLK since the inception of the proceeding. The Bureau does not, however, dispute the accuracy of the tendered engineering statement, or contend that its acceptance would necessitate further hearing. Under the circumstances of this case, and in order to insure a full and complete record, the petition will be granted.

3. Accordingly, *It is ordered*. That the petition to reopen the record, filed November 15, 1968, by Georgia Radio, Inc., *Is granted;* that the record *Is reopened;* that the proffered evidence *Is accepted;* and that the record *Is closed*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] Also before the Board are: (*a*) Broadcast Bureau Opposition, filed Nov. 26, 1968; and (*b*) reply, filed Dec. 9, 1968, by WPLK.

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FCC 68-1226

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of LIMA TELEPHONE CO., AND OHIO TELEPHONE CO., ASSIGNORS, AND UNITED TELEPHONE CO. OF OHIO, ASSIGNEE For Consent to Assignment of Domestic Public Radio Service Stations	Files Nos. 553 through 567-C1-P/L-69 and 548/549-C2-P/L-69

DECEMBER 18, 1968.

UNITED TELEPHONE CO. OF OHIO,
13 Park Avenue West,
Mansfield, Ohio 44901.

Attention: Mr. H. A. Hubbard, president.

GENTLEMEN: This concerns the assignment on April 5, 1968, of 16 radio stations licensed in the Commission's Domestic Public Radio Service from Lima Telephone Co. and Ohio Central Telephone Co. to United Telephone Co. of Ohio. Although you filed applications for consent to the assignment after the fact, the referenced applications for authority to construct and operate these stations were filed on July 29, 1968, after the Commission, through its Common Carrier Bureau staff, advised that United of Ohio had no authority to operate said stations. Your company is now operating the stations under special temporary authority originally granted on June 28, 1968.

By letters of counsel dated June 12 and June 20, 1968, you pointed out that United Telephone Co. of Ohio was formed through the merger, as approved by the Public Utilities Commission of Ohio, of Lima Telephone, Ohio Central Telephone and seven other telephone companies, all of which were commonly owned by United Utilities, Inc., and, as such, there was no substantial change in control or ownership of the radio stations involved. You questioned whether, under these circumstances, prior Commission consent was required and made various alternative legal arguments in an effort to obviate the need for such consent.

A reasonably careful reading of section 310(b) of the Communications Act will indicate that no radio license shall be assigned without Commission consent. The only exception in the act for assignments not involving a substantial change in ownership or control concerns the 30-day public notice requirement (sec. 309(c)(2)(B)). Contrary to your argument, the operation of State law cannot serve to transfer a radio authorization (see *Station WOW, Inc.* v. *Johnson*, 326 U.S. 120) nor can the retention of a shell corporate licensee disguise the fact that operational control of a radio station has passed to another.

It appears that your company and the previous licensees of the sta-

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tions (Lima Telephone and Ohio Central Telephone) consummated an assignment of radio facilities in careless disregard of the Communications Act and the Commission's rules. As subsidaries of a major independent telephone system, such disregard is particularly inexcusable. Nonetheless, since the unauthorized assignment of facilities did not involve a substantial change in ownership or control, and in consideration of the public interest in maintaining a valuable public service, we will permit the continued operation of the facilities by your company. However, in order to evaluate further your capability as a carrier and licensee, the authorization will be for a short term only. Further violations of the act or the rules may raise substantial questions concerning the qualifications of your company to continue as a Commission licensee.

Accordingly, the referenced applications *Are hereby granted* with the term of license to expire on February 1, 1970.

Commissioner Robert E. Lee dissented; Commissioner Cox was absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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68D–68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of LITTLE DIXIE RADIO, INC., SALLISAW, OKLA. For Construction Permit	Docket No. 17918 File No. BP–16768

APPEARANCES

David H. Lloyd on behalf of Little Dixie Radio, Inc.; and *Martin A. Blumenthal* on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued November 6, 1968; Effective December 27, 1968, Pursuant to Section 1.276)

PRELIMINARY STATEMENT

1. By memorandum opinion and order, released December 21, 1967, the Commission designated the mutually exclusive applications of Little Dixie Radio, Inc., Sallisaw, Okla. (Little Dixie), Ozark Broadcasting Co., Inc., Ozark, Ark. (Ozark), and Hilton & Wiederkehr Enterprises, Ozark, Ark. (Hilton) for consolidated hearing. The application of Hilton for operation on 1510 kc was mutually exclusive with the applications of Ozark on 1540 kc and Little Dixie on 1510 kc, but the Little Dixie and Ozark applications were not mutually exclusive. These applications were designated for hearing on the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.
2. To determine whether any of the applicants are financially qualified to construct and operate their proposed station.
3. To determine whether the transmitter site proposed by Ozark Broadcasting Co., Inc., is satisfactory with particular regard to any conditions that may exist in the vicinity of the antenna system which would distort the proposed antenna radiation pattern.
4. To determine whether Ozark Broadcasting Co., Inc., in view of its proposal, as to staff, is qualified to operate its station in the manner proposed.
5. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
6. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above captioned applications would better serve the public interest.
7. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

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2. By order released April 9, 1968, the Review Board approved an agreement whereby the Hilton application was dismissed and the principals of the Hilton application purchased all the issued and outstanding stock of the Ozark applicant for an amount equal to the reasonable and prudent expenses incurred by that applicant. In the same order the Review Board accepted an amendment to the Ozark application reflecting the new ownership. The amendment also included a new financial plan intended to satisfy Ozark's burden with regard to issue (2), a new staffing proposal designed to satisfy Ozark's burden with regard to issue (4), and additional transmitter site information designed to satisfy Ozark's burden as to issue (3). The Board found that this information permitted it to resolve the issues outstanding against Ozark in the applicant's favor. The Ozark application was thereupon granted.

3. By order released May 1, 1968, the examiner accepted an amendment to the Little Dixie application indicating that Gene Stipe, secretary, director, and majority stockholder of Little Dixie, had been indicted for perjury and income tax evasion. By petition filed May 15, 1968, the Broadcast Bureau requested special relief from the Review Board pending the outcome of the criminal proceedings against Mr. Gene Stipe. By memorandum opinion and order released July 3, 1968, the Review Board ordered the examiner to withhold his initial decision until notified by the applicant of the result of the criminal proceeding. The examiner was instructed that, "If the case is resolved in Stipe's favor, the initial decision may issue. Should Stipe be found guilty on any or all of the charges, the examiner shall add such further issues and hold such further proceedings as may be necessary to determine the qualifications of the applicant." On July 30, 1968, Little Dixie filed an amendment indicating that Mr. Gene Stipe had been acquitted on all counts. That amendment was accepted by the hearing examiner by order released August 23, 1968. The proceeding is now ready for decision on the financial issue, the only issue not mooted by the Review Board's order granting the Ozark application.

4. Prehearing conferences were held on January 31, 1968, February 28, 1968, and July 8, 1968. Hearing was held on October 8, 1968, at which time the record was closed.

Findings of Fact

5. According to the Gates equipment proposal, Little Dixie's cost of constructing the proposed station will be as follows: Transmitting equipment, $6,082.10; monitoring equipment, $1,745; Transmission line equipment, $762.60; studio equipment, $3,814.52. The total cost of equipment, including 2 percent Oklahoma State sales tax, will be $12,652.30. Other equipment to be utilized, including additional studio equipment and the proposed antenna system, is on hand at Little Dixie's existing stations KNED and KNED-FM, McAlester, Okla. The applicant has paid all engineering, consulting and legal fees incurred as of the date of the hearing. Little Dixie estimates that an additional $700 is required for engineering proof of performance. Installation of the equipment will be handled largely by Little Dixie employees. Thus, the total cost of construction is $13,352.30.

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6. Based on its experience at KNED, KNED–FM and consultations with others, Little Dixie projects its monthly operating expenses during the first year to be $3,185, or $38,220 for the entire year, and the total cost of constructing the station and operating it for 1 year would be $51,572.30.

7. Under the terms of a credit letter dated October 1, 1968, from the Gates Radio Co., a downpayment of 25 percent ($3,150) is to be made at the time of the order, and the balance of 75 percent ($9,502.30) to be financed over 36 months at an interest rate of 5.5 percent per annum. The total interest to be paid over the 3-year life of the credit agreement will be $1,567.88. Thus, the total interest plus principal is $11,070.18, one-third of which ($3,690.06) will be paid in the first year. Little Dixie's equipment costs to be paid during the first year is therefore $6,840.06, which consists of the downpayment plus the first year's payments to Gates, and its total cost of construction to be paid during the first year is $7,540.06, consisting of equipment payments plus $700 for proof of performance. In addition, Little Dixie's cost of operation includes a $200 monthly rental for land and building to house its studio and transmitter. The land and building are owned by Francis D. Stipe, president of Little Dixie, who will lease them to the applicant. The lease agreement provides for a $200 monthly rental for a period of 5 years, but no lease payments will be required during the first year of operation. Little Dixie's estimated cost of operation for the first year is therefore $35,820 ($38,200 less 1 year's rent at $200 per month). Thus, it will have to expend $43,360.06 to cover the cost of construction and the cost of operation for the first year.

8. To finance construction and first year's operation, Little Dixie relies on a $30,000 loan from the First National Bank, Stigler, Okla., and a $15,000 loan from McAlester Industrial Credit Corp., McAlester, Okla. The terms of the bank loan are set forth in a letter dated May 20, 1968, and require that Mr. Francis Stipe and Mr. Gene Stipe personally endorse or guarantee the loan. The first payment will fall due 1 year from the date of the note, to be repaid in 60 equal installments with interest at 7 percent from date of note. The letter indicates that Little Dixie has advised the bank that it is obtaining an additional $15,000 in loan commitments and that it will receive about $10,000 in credit from Gates Radio Co. on an installment sale. The $15,000 loan from McAlester Industrial Credit Corp. is evidenced by a letter dated February 27, 1968. The terms of the loan set forth in that letter provide that Mr. Francis Stipe and Mr. Gene Stipe, along with their respective wives, will have to personally endorse or guarantee the note. The first payment would fall due 1 year from the date of the note to be repaid in 36 equal installments with interest at 7.5 percent from the date of the note. The letter also indicates that Little Dixie has advised McAlester Industrial Credit Corp. that it is obtaining an additional $30,000 in loan commitments and that it will receive about $10,000 in credit from Gates Radio Co. on an installment sale.

9. Mr. Gene Stipe, and his wife, Mrs. Agnes Stipe along with Mr. Francis Stipe and his wife, Mrs. Billy Jean Stipe have indicated that they will provide their personal guarantee for loans to Little Dixie in the total amount of $45,000 to be made by the First National Bank

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and the McAlester Industrial Credit Corp. A profit-and-loss statement and statement of conditions of the McAlester Industrial Credit Corp. dated July 31, 1968, indicates that the corporation has net liquid assets in excess of the amount required to meet its loan commitment to Little Dixie. Little Dixie, therefore, has available to it $45,000 to meet its cost of construction and cost of operation for the first year.

10. In addition, profits from Little Dixie's operation of KNED and KNED–FM will be available for use in the Sallisaw operation. The affidavit of Francis Stipe indicates that in 1966 Little Dixie earned in excess of $10,000 and in 1967 Little Dixie earned $9,994.50, and the balance sheet of Little Dixie Radio, Inc., dated July 31, 1968, indicates that the corporation has retained earnings in excess of $82,000.

Ultimate Findings and Conclusions

1. Little Dixie's estimated cost of construction is $13,352.30. Under the terms of the installment sale agreement with the Gates Radio Co., Little Dixie will have to pay $6,840.06 during the first year to construct the proposed station (downpayment to Gates in the amount of $3,150 plus 1 year's payments to Gates under the credit agreement in the amount of $3,690.06). The cost of engineering proof of performance in the amount of $700 increases the total cost of construction to be paid during the first year to $7,540.06.

2. Little Dixie estimates that it will cost $38,220 to operate its station for the first year. However, this figure includes payments under the lease agreement with Francis Stipe. Under the terms of that agreement no payments will be required during the first year of the station's operation. The cost of operation should therefore be reduced by 1 year's rent, e.g., $2,400. Little Dixie will therefore require $35,820 to operate the proposed station for 1 year.

3. The amount required to construct the proposed station and operate it for 1 year will be $43,360.06. To finance the construction and operation, Little Dixie proposes to borrow $30,000 from the First National Bank, Stigler, Okla., and $15,000 from the McAlester Industrial Credit Corp. These loans are properly evidenced by letters of intent from the lending institutions. The applicant has also established that Mr. Francis Stipe and Mr. Gene Stipe and their respective wives will personally endorse or guarantee the notes, and that the McAlester Industrial Credit Corp. has adequate assets to meet its loan commitment.

4. The applicant therefore has $45,000 in loans to cover the estimated $43,360.06 cost of construction and operation of the proposed station for 1 year. The $1,639.94 cushion provided for in this financial plan is further supplemented by the applicant's willingness to use profits from its existing radio station to further cover the cost of construction and operation of the proposed Sallisaw station.

5. Based on the foregoing findings, and the entire record in this proceeding, it is concluded that Little Dixie Radio, Inc., has established that it is financially qualified to construct and operate its proposed station in Sallisaw, Okla. It is further concluded that the public

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interest, convenience and necessity will be served by a grant of its application.

Accordingly, *It is ordered*, That, unless an appeal to the Commission from this initial decision is taken by any of the parties or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.276 of the rules, the application of Little Dixie Radio, Inc., for a construction permit for a new standard broadcast station to operate on 1510 kHz with 1 kw (500 w CH), daytime only, at Sallisaw, Okla., *Be, and the same is, hereby granted*, subject to the following conditions:

1. Any presunrise operation must conform with sections 73.87 and 73.99 of the rules, as amended June 28, 1967 (32 F.R. 10437), supplementary proceedings (if any) involving docket No. 14419, and/or the final resolution of matters at issue in docket No. 17562.

2. Before program tests are authorized, permittee shall submit sufficient field intensity measurement data to establish that the inverse distance field intensity at 1 mile toward station WLAC, Nashville, Tenn., is essentially 127 mv/m/500 w as proposed.

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FCC 68R-534

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH AMERICAN BROADCASTING CO., INC., BOYNTON BEACH, FLA.	Docket No. 18310 File No. BP-17843
RADIO BOYNTON BEACH, INC., BOYNTON BEACH, FLA.	Docket No. 18311 File No. BP-17999
BOYNTON BEACH COMMUNITY SERVICES, INC., BOYNTON BEACH, FLA.	Docket No. 18312 File No. BP-18000
J. STEWART BRINSFIELD, SR., J. STEWART BRINSFIELD, JR., J. LUTHER CARROLL, AND MAX R. CARROLL, D.B.A. RADIO VOICE OF NAPLES, NAPLES, FLA.	Docket No. 18313 File No. BP-17991
FOR Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted December 23, 1968)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER CONCURRING. BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. This proceeding involves the mutually exclusive applications of North American Broadcasting Co., Inc. (North American), Radio Boynton Beach, Inc. (Radio Boynton), and Boynton Beach Community Services, Inc. (Community), each requesting an authorization to construct a new standard broadcast station utilizing the deleted facilities (1510 kHz, 1 kw, day) of former station WZZZ [1] at Boynton Beach, Fla.; and the mutually exclusive application of J. Stewart Brinsfield, Sr., J. Stewart Brinsfield, Jr., J. Luther Carroll, and Max R. Carroll, doing business as Radio Voice of Naples (Naples), seeking a construction permit for a new standard broadcast station at Naples, Fla. By memorandum opinion and order, FCC 68-904, released September 11, 1968, these applications were designated for consolidated hearing on various issues, including section 307(b) and contingent comparative issues. Presently before the Review Board is a petition to enlarge issues, filed October 17, 1968, by Broward County Broadcasting Co. (Broward),[2] which seeks the addition of an issue to determine whether each of the Boynton Beach proposals would cause objectionable interference to the operation of station WIXX, Oakland Park,

[1] Station WZZZ had been silent since September 1965. On May 4, 1967, the Commission returned its renewal application; reconsideration of this action was subsequently denied. In accepting the Boynton Beach applications for the deleted facility, the Commission waived rules 73.37(a) and 1.571(c). Public notice, FCC 67-1176, released Oct. 27, 1967.

[2] Broward, licensee of WIXX, Oakland Park, Fla., and WIXX-FM, Fort Lauderdale, Fla., was made a party to this proceeding by the examiner. Memorandum opinion and order, FCC 68M-1500, released Nov. 7, 1968.

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Fla., and if so, the nature and extent thereof, the areas and populations affected thereby and the availability of other broadcast service to such areas and populations.[3]

2. In support of its request, Broward submits that since 1965, when WZZZ ceased broadcasting, its station, WIXX, has been operating without objectionable interference from any station operating on 1510 kHz; that the public has been able to receive station WIXX without such interference; and that station WIXX's license was renewed in 1967 free from this interference. However, according to petitioner, it now appears that each of the Boynton Beach applicants would subject WIXX to adjacent channel interference.[4] While Broward recognizes that the Commission specifically waived rule 73.37(a) in accepting the Boynton Beach applications (see footnote 1, supra), petitioner argues that the Commission did not purport to adjudicate petitioner's rights to interference-free operation or determine the public interest questions relating to such service.[5] Petitioner argues that such questions must be resolved on the basis of the facts as they presently exist in the market, i.e., the public interest determination should be based on recent population figures rather than the 1950 census data which existed at the time the Boynton Beach and Oakland Park facilities were originally authorized.

3. The Review Board agrees with the position set forth in the opposition and the Broadcast Bureau's comments that Broward is not entitled to protection from the interference caused by the Boynton Beach proposals which it had formerly received from station WZZZ. As previously indicated, prior to designation of this proceeding for hearing, the Commission waived the provisions of rule 73.37 "to permit acceptance and expeditious consideration of [applications] to reestablish the deleted facilities of station WZZZ, Boynton Beach, Fla. * * *" Public notice, FCC 67–1176. Thus, the Commission, well aware of the instant overlap violation, was nonetheless disposed to waive the provisions of its rules for the reasons referred to above.[6] The Board is of the view that Broward has failed to realistically distinguish the facts of the instant case from those in *Pike-Mo Broadcasting Co.*, supra, wherein the Commission granted without hearing an interim application which would cause substantially the same amount of interference previously suffered by a complaining licensee. The Commission specifi-

[3] Also under Board consideration are: (*a*) Opposition, filed Oct. 31, 1968, by Radio Boynton Beach, Inc.; (*b*) opposition, filed Nov. 4, 1968, by Boynton Beach Services, Inc.; (*c*) comments, filed Nov. 18, 1968, by the Broadcast Bureau; and (*d*) reply, filed Dec. 6, 1968, by Broward.

[4] According to petitioner's consulting engineer, a grant of the Community proposal would deprive station WIXX of primary service to 29 percent of the area it presently serves; a loss of 25 percent could be expected under the Radio Boynton proposal; and a loss of 27 percent under the North American proposal. Boynton Beach Community Services Inc., in its opposition, notes that, since adjacent channel interference is involved, the service of the proposal causing the interference would be substituted for that of station WIXX.

[5] Petitioner cites and attempts to distinguish *Pike-Mo Broadcasting Co.*, FCC 65–1157, 6 R.R. 2d 581, released Dec. 27, 1967, affirmed sub nom. *Beilot Broadcasters, Inc., et al.*, 365 F. 2d 962, (D.C. 1966), wherein the Commission stated that the license of an existing station would not be illegally or improperly modified where the interference received from a new proposal would not exceed the amount already received from an existing station. Broward argues that the continuity of service and continuity of interference which existed in that case are absent in the instant proceeding since WIXX has received no interference from a station operating on 1510 kHz since 1965.

[6] It is also interesting to note that in the designation order of this proceeding the Commission evidenced its concern with the overlap created by the Radio Voice of Naples proposal; yet, as pointed out by the Bureau, a discussion of the overlap problem described by Broward is conspicuous by its absence from the order.

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cally distinguished these circumstances from a situation where a "* * * grant of an interim authorization would, *for the first time*, create interference to existing stations." [Emphasis added.] As noted by the Boynton Beach applicants and the Broadcast Bureau, WIXX has previously received interference from WZZZ similar to that which would result from a grant of any of the Boynton Beach applications.[7] Equally unpersuasive is Broward's contention that, inasmuch as station WZZZ has been silent since 1965, the reestablishment of a Boynton Beach facility would, to varying degrees, disrupt the interference-free service presently provided to significant portions of station WIXX's service area.[8] Continuous operation of the deleted service is not, in our view, a prerequisite to allowing a new station to reestablish such service. In *Audubon Broadcasting Corp.*, FCC 66–843, 31 F.R. 2811, released September 27, 1968, the Commission, in part, denied a request for special temporary authority to continue the operation of a station whose license was canceled more than 3 months prior to the designation of applications to restore the deleted service. The Review Board in that proceeding, subsequently held that an intervenor whose station had previously received interference from the defunct station was not entitled to a hearing on the question of interference (FCC 67R–46, 6 FCC 2d 725).[9] For these reasons, the addition of the requested issue is unwarranted.

4. Accordingly, *It is ordered*, That the petition to enlarge issues filed October 17, 1968, by Broward County Broadcasting Co., *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[7] Station WZZZ, Boynton Beach, Fla., commenced operations in 1962, more than 1 year before WIXX began operating. Station WZZZ's authorization to operate was terminated on May 4, 1967, when the Commission returned the licensee's renewal application. Subsequent to station WIXX's license renewal in January 1967, WZZZ's petition for reconsideration was denied on Aug. 18, 1967.

[8] However, as previously noted, Broward contends that the Boynton Beach proposals would cause varying amounts of interference to station WIXX (see footnote 4, supra); and to the extent such alleged differences exist, they may be explored under the designated contingent standard comparative issue. Similar comparative inquires relating to broadcast efficiency have been authorized by the Board. *Salter Broadcasting Co. (WBEL)*, 8 FCC 2d 1036, 10 R.R. 2d 606 (1967); FCC 67R–303, 8 FCC 2d 1042.

[9] Also see *Lorain Community Broadcasting Co.*, 5 FCC 2d 133, 8 R.R. 2d 985 (1966), where the Commission stated that "* * * a license, whose operation *previously* received interference from a *now defunct station*, is not entitled to a hearing as a matter of law * * * where a new applicant seeks authority to *restore* the preexisting broadcast service." [Emphasis supplied.]

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FCC 68R-532

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ORANGE COUNTY BROADCASTING, INC., MONTE E. LIVINGSTON, EDWARD D. TISCH, FRANK L. BRET, THOMAS WALKER, AND RICHARD S. STEVENS, D.B.A. ORANGE COUNTY BROADCASTING CO., ANAHEIM, CALIF., ET AL. For Construction Permit for New Television Broadcast Station	Dockets Nos. 18295, 18296, 18297, 18298, 18299, 18300 File No. BPCT-4018

MEMORANDUM OPINION AND ORDER

(Adopted December 23, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. This proceeding involves six applicants for a construction permit for a new television broadcast station to operate on channel 56, at Anaheim, Calif. By order, FCC 68-856, released August 30, 1968, the applications were designated for hearing. Presently before the Review Board is a petition to enlarge issues, filed September 20, 1968, by Golden Orange Broadcasting Co., Inc. (Golden Orange),[1] requesting the enlargement of issues to include: (1) A comparative efforts issue; (2) suburban issues against all of the other applicants; and (3) a comparative programing issue.

COMPARATIVE EFFORTS

2. Golden Orange alleges that its efforts vary significantly, both qualitatively and quantitively, from the efforts made by the other applicants in this proceeding. Specifically, petitioner alleges that it is the only applicant whose efforts reflect a personal and continuing involvement of numerous principals in the assessment of needs through man-on-the-street surveys, mail and phone questionnaires, personal contacts, and invitational community leader luncheons. These efforts, Golden Orange avers, manifest more varied methods of ascertaining needs and interests, more meaningful contacts, more personal involvement of its principals, and contacts representing a broader diversity of community leaders and interests. For purposes of comparison.

[1] Other related pleadings before the Board are: (a) Broadcast Bureau's comments, filed Oct. 31, 1968; (b) opposition, filed Oct. 31, 1968, by Orange Empire Broadcasting Co. (Orange Empire); (c) comments, filed Nov. 7, 1968, by the Voice of the Orange Empire, Inc., Ltd. (Voice of Orange); (d) opposition, filed Nov. 7, 1968 by Dana Communications Corp. (Dana Communications); (e) Broadcast Bureau's supplementary comments, filed Nov. 7, 1968; (f) reply (properly an opposition), filed Nov. 7, 1968, by Orange County Communications; (g) response (reply) to Broadcast Bureau's comments and supplement, filed Nov. 12, 1968, by Orange County Broadcasting Co. (Orange County Broadcasting); and (h) reply, filed Dec. 4, 1968, by Golden Orange.

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Golden Orange describes the efforts of the other applicants which range from a single mail questionnaire survey by Orange County Communications to the three-pronged approach of mail, personal and telephone surveys utilized by Dana Communications. The use of yes-no responses to questionnaires is criticized by Golden Orange as not being evocative of meaningful responses. Moreover, Golden Orange alleges, the differences in efforts are reflected in the various program proposals.

3. The opposing applicants[2] allege that Golden Orange has not shown that a significant disparity in efforts exists between the applicants; that Golden Orange has not shown that its novel efforts, i.e., shopping center interviews and community leader luncheons, are superior to the more conventional efforts made by the other applicants; and that Golden Orange has not shown a lack of diligence on the part of the other applicants.

4. The Review Board finds that a substantial question as to comparative efforts has been raised. In *Chapman Radio & Television Co.*, 7 FCC 2d 213, 9 R.R. 2d 635 (1967), the Commission held that a comparative ascertainment of needs issue is warranted where a significant disparity in efforts to ascertain community needs and interests exists between applicants. In the instant case the apparent deficiencies in Orange County Communications' efforts, when compared to the efforts of the other applicants, are twofold: (1) Orange County Communications' dependence upon a single method approach; and (2) its substantially fewer contacts. The methods utilized by the other applicants, on the other hand, are more numerous and are designed to elicit information from both random population and community leaders.[3] In contrast, Orange County Communications relied upon a mail questionnaire which apparently was sent solely to community leaders. The Commission, however, has indicated that it contemplates more than contacts with community leaders in applicants' efforts to ascertain community needs and interests.[4] Thus, the failure to contact random population may constitute a significant disparity. Orange County Communications also appears to have contacted fewer persons than the other applicants. Orange County Communications contacted 109 persons, whereas the contacts made by the other applicants range from 340 to 1,100 persons. This comparative lack of contacts could reflect that Orange County Communications also solicited less diverse responses.[5] The requested issue will therefore be added.

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[2] Voice of Orange urges the addition of the comparative efforts issue and alleges that its efforts outweigh those of the other applicants.

[3] The following is a summary of the efforts of the other applicants: Golden Orange utilized phone questionnaires to both random respondents and community leaders, man-on-the-street interviews, mail questionnaires to community leaders, and invitational community leader luncheons; Orange County Broadcasting, Inc., utilized telephone interviews with population selected at random and personal interviews with community leaders, a mail survey to random population, and knowledge gained through residence in the community; Dana Communications utilized phone interviews and mail questionnaires to random population, personal interviews with community leaders, and the assistance of market research personnel; Orange Empire utilized a phone survey to random population, a community leader survey, and the assistance of market research personnel; and Voice of Orange utilized personal interviews with community leaders and a mail survey of selected populations.

[4] In its "Policy Statement on Comparative Broadcast Hearings," 1 FCC 2d 393, 5 R.R. 2d 1901 (1965), the Commission stated: "* * * the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background. * * * Contacts with local civic and other groups and individuals are also an important means of formulating proposals. * * * Failure to make them will be considered a serious deficiency. * * *"

[5] *Cf. Lee Broadcasting Corp.*, 8 FCC 2d 624, 10 R.R. 2d 486 (1967).

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SUBURBAN ISSUE

5. Golden Orange alleges that each of the other applicants in this proceeding failed to satisfy the requirements of *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968). Specifically, petitioner alleges the following: (1) Orange County Communications' application does not contain any evaluation of program suggestions, nor is there any correlation between its mail survey and the proposed programing; (2) Dana Communications' application reflects an absence of suggestions received and personal evaluation by the applicant; (3) Voice of Orange's reliance upon yes-no response survey is an inadequate basis upon which to meaningfully relate suggestions received to any program proposal; (4) Orange County Broadcasting's failure to reflect suggestions received in its application renders its program proposal basically unrelated to its surveys; and (5) Orange Empire Broadcasting's application reflects an inadequate underlying telephone survey since the questionnaire merely consisted of a preference for categories of program titles.

6. In opposition, the applicants severally allege that Golden Orange has set forth no information regarding survey efforts unknown to the Commission at the time of designation and in the absence of such additional information no issue may be added; that the instant case, where applicants have provided the Commission with extensive documentation of surveys and analyses, is distinguishable from *Minshall*, supra, where only fragmentary information was supplied to the Commission; that the thrust of Golden Orange's argument, i.e., that its survey efforts represent the ultimate and that to the extent any applicant's survey varied from Golden Orange's, it is to that degree deficient, has been previously rejected by the Commission; and that Golden Orange has not shown any needs and interests significantly different from those shown by the other applicants.

7. In *Minshall Broadcasting Company, Inc.*, supra, the Commission instructed applicants to provide full information on: (1) The steps they have taken to inform themselves of the real needs and interests of the area; (2) the suggestions they have received; (3) their evaluation of those suggestions; and (4) the programing proposed to meet the community needs as they have been evaluated. The Review Board finds that substantial questions exist as to whether or not three of the applicants have complied with this requirement. Orange County Communications has not provided the Commission with an adequate evaluation of the suggestions received. With the exception of two statements to the effect that Orange County residents are aware of a lack of television coverage in their own community, and that many civic groups are anxious to participate in programing reflecting the community's interests, the application provides no evaluation of suggestions received. Orange County Communication's allegation that there is an implicit causal relationship between suggestions received and program proposals is unsatisfactory under the *Minshall* standard. Dana Communications has failed to provide the Commission with an enumeration of specific suggestions received from community leaders. Moreover, its evaluation does not reflect the careful evaluation and

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analysis required of applicants for new stations. Rather, the applicant supplied a list of needs and interests alleged to reflect the needs and interests of the community without description of how it evaluated the suggestions received.[6] Orange County Broadcasting has failed to supply the Commission with a list of suggestions received from community leaders. Moreover, the only identification of community leaders was by title, not by name and title.[7] The evaluation proffered by the applicant was not clearly correlated to the results obtained. Rather, the applicant submitted a statement of conclusions. In view of these deficiencies an issue will be added. The requested issue as to the two remaining applicants is unwarranted. Golden Orange's allegation that Voice of Orange is unable to meaningfully relate suggestions received to any program proposal because of reliance on yes-no surveys is without merit. Not only did Voice of Orange elicit essay responses in addition to yes-no answers, but the Review Board would in any event be hesitant to add an issue on the basis of the form of the questionnaire used.[8] Golden Orange's allegation that Orange Empire's underlying telephone survey is inadequate because based only on preferences for categories is without merit. Orange Empire solicited essay responses in addition to preferences and, as previously stated, the Review Board is unwilling to evaluate a survey solely on the basis of the form of responses elicited. The requested issue will be added with respect to Orange County Communications, Dana Communications and Orange County Broadcasters.

COMPARATIVE PROGRAMING

8. Golden Orange alleges that it has demonstrated a superior devotion to public service and has shown significant differences between its program proposals and those of the other applicants in this proceeding. In support of this allegation, Golden Orange submits a breakdown of percentages of time to be devoted to program areas which it has concluded satisfy the real needs and interests of the community.[9] Golden Orange attacks the program proposals of the other applicants as being unrelated to the surveys. Evidence of this, Golden Orange contends, is the failure of other applicants to show how specific programs are directly responsive to survey results.

9. In opposition, the applicants allege that there is substantial similarity in program proposals among the applicants; that Golden Orange's alleged differences in programing do not go beyond ordi-

[6] *Cf. Sumiton Broadcasting Co., Inc.*, FCC 68-576, 13 FCC 2d 221.
[7] *Sumiton Broadcasting Co., Inc.*, supra: Also see "Public Notice Regarding Ascertainment of Community Needs by Broadcast Applicants," FCC 68-847, issued Aug. 22, 1968.
[8] *Cf. James B. Childress*, FCC 66R-99, 8 R.R. 2d 258 (1966).
[9] See the following table:

[In percent]

	News	*Public affairs*	*All other programs, etc.*	*Total*
Golden Orange	13.29	11.97	19.96	45.22
Orange County Communications	9.6	7.4	8.75	20.8
Voice of Orange	4.6	8.5	12.7	25.8
Orange County Broadcasting Co	9.05	5.25	19.24	33.54
Orange Empire	7.1	4.28	24.3	35.68
Dana Communications	10.3	6.7	9.1	26.1

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nary differences in judgment, nor do they show a superior devotion to public service; and that Golden Orange's alleged differences in program proposals are the result of preparation of a proliferation of detail which the Commission has stated should not be considered under the programing issue.[10]

10. The Review Board finds that Golden Orange has made a sufficient showing to add the requested comparative programing issue. Golden Orange has submitted a table reflecting substantial differences in percentages of time to be devoted to certain program areas. The total percentage of time devoted to news, public affairs and all other programs exclusive of entertainment and sports, is over twice the percentage proposed by one of the other applicants. The variance between Golden Orange and the applicant proposing the second highest percentage of time to such programing is over 10 percent. Golden Orange has indicated in its application (incorporated in part by reference in the petition to enlarge) what its survey and suggestions received establish with respect to community needs and interests. Moreover, it bas clearly detailed how the program proposals relate to its ascertainment of community needs and interests. Thus, the Review Board finds that Golden Orange has complied with the standards set forth in *Chapman Radio & Television*, supra. The requested issue will be added.

11. Accordingly, *It is ordered*, That the petition to enlarge issues, filed September 20, 1968, by Golden Orange Broadcasting Co., Inc., *Is granted* to the extent indicated below, and *Is denied* in all other respects; and that issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain the needs and interests of the community and area each proposes to serve.

(2) To determine on a comparative basis the significant differences between the applicants with respect to their program proposals and the manner in which they propose to meet the needs and interests of the community and area each proposes to serve.

(3) To determine the efforts made by Orange County Communications to ascertain the programing needs and interests of the area to be served and the manner in which that applicant proposes to meet such needs and interests.

(4) To determine the efforts made by Dana Communications Corporation to ascertain the programing needs and interests of the area to be served and the manner in which that applicant proposes to meet such needs and interests.

(5) To determine the efforts made by Orange County Broadcasting Co. to ascertain the programing needs and interests of the area to be served and the manner in which that applicant proposes to meet such needs and interests.

12. *It is further ordered*, That the burden of proceeding and proof under issues 3 through 5 will be on the respective applicants against whom those issues are specified.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[10] Citing "Policy Statement on Comparative Broadcast Hearings," supra.

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FCC 68-1233

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
LESTER POSNER
Against Station WBAL-TV Concerning Political Broadcast Under Section 315

DECEMBER 23, 1968.

FREDRICK H. WALTON, Jr., Esq.,
Dempsey and Koplovitz,
Bowen Building,
Washington, D.C. 20005.

DEAR Mr. WALTON: This refers to your letter dated December 13, 1968, concerning the request of Mr. Lester Posner for use of the broadcast facilities of station WBAL-TV under section 315 of the Communications Act. You state that Mr. Posner claims to be a legally qualified candidate for the office of Governor of Maryland subject to election by the Maryland General Assembly upon the resignation of Governor Spiro T. Agnew.

Attached to your letter was an opinion of James J. Doyle, Jr., Esquire, local counsel to the station, to the effect that Mr. Posner has not shown himself to be a legally qualified candidate. Also, on December 16, 1968, you forwarded to the Commission a letter to Mr. Doyle from Robert F. Sweeney, Esquire, Deputy Attorney General of Maryland, which stated that "the impending legislative action (by the General Assembly) is not an election" as defined by the Maryland statutes and that "the present contest for the office of Governor is not a process by which the voters of this state shall elect a governor."

On November 25, 1968, the Commission had received a letter from Mr. Posner enclosing a copy of his letter to station WBAL-TV, with enclosures, requesting equal time under section 315. We also received a letter from Mr. Posner dated December 19, 1968, setting forth reasons why he believes he should be entitled to use of your broadcast facilities.

We have carefully reviewed all of the material submitted, and we do not believe that the position of station WBAL-TV that Mr. Posner is not entitled to time under section 315 is unreasonable in light of the circumstances of the case.

Commissioners Bartley, Wadsworth and H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68R-541

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WILLIAM D. STONE (WRDS), SOUTH CHARLESTON, W. VA. CLAUDE R. HILL, JR., FAYETTEVILLE, W. VA. For Construction Permits	Docket No. 18366 File No. BP-17145 Docket No. 18367 File No. BP-17560

MEMORANDUM OPINION AND ORDER

(Adopted December 27, 1968)

BY THE REVIEW BOARD: BOARD MEMBERS SLONE AND KESSLER ABSENT.

1. The Review Board has under consideration a petition to delete issue, filed November 13, 1968, by William D. Stone (WRDS),[1] an applicant in the above-captioned proceeding. The proceeding involving WRDS' application for authority to change the frequency and power of its existing standard broadcast station, and the mutually exclusive application of Claude R. Hill, Jr., for authority to construct a new standard broadcast station. The applications were designated for hearing by Commission order (FCC 68-1076, released November 6, 1968), which specified, inter alia, *Suburban* issues against both applicants. In the petition now under consideration WRDS requests the Board to delete the *Suburban* issue specified against it.

2. In support of its request, WRDS notes that it filed an amendment to section IV-A of its application form on October 29, 1968, 1 day prior to the adoption of the designation order, and suggests that the Commission therefore probably did not consider the amendment when it specified the *Suburban* issue. According to WRDS, the amendment contains a list of 17 community leaders who were contacted and the program suggestions made by such leaders, as well as the applicant's evaluation of these suggestions, and a list of programs proposed to serve such needs. WRDS concludes that the information supplied by the amendment more than satisfies the suburban requirements as enunciated in the "Public Notice on Broadcast Applicants' Ascertainment of Community Needs," 33 F.R. 12113 (published Aug. 27, 1968), and warrants deletion of the issue as to it.

3. The Bureau, in opposition to the petition, concedes that the amendment was probably not before the Commission when the matter was set for hearing, but urges that the amendment does not satisfy the standards set by the Commission. According to the Bureau, the amend-

[1] Also before the Board are: Opposition, filed Nov. 26, 1968, by the Broadcast Bureau; and reply, filed Dec. 5, 1968, by WRDS.

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ment contains the results of the survey but consists of no more than a capsule description of program suggestions received, and a list of program titles. The amendment, insists the Bureau, is devoid of any meaningful program proposals and does not relate the program plans to the community needs as evaluated by the applicant. (Citing *Sundial Broadcasting Co.*, FCC 68–1082.) In reply, WRDS contends that it would be difficult to imagine an interest group that was not contacted by the applicant, that the application form requires no more than the capsulation of program suggestions, and that the listing of program title is sufficient since the title itself indicates the manner in which the program responds to the needs as evaluated. Citing a number of instances in which the Commission has granted an application without hearing and which, according to WRDS, contained information comparable to that set forth in its amendment, WRDS contends that the Bureau's reliance on *Sundial*, supra, is entirely misplaced. In that case, according to WRDS, both applicants failed to specify the program suggestions received, one failed to contact a broad cross section of the community, and both failed to evaluate the suggestions.

4. In our view, deletion of the issue is not warranted. The survey described in petitioner's October 29, 1968, amendment appears to cover a reasonably broad cross section of the interest groups in the community; and we do not regard the use of a capsulation of the recommendations received as sufficient, of itself, to warrant retention of the inquiry.[2] However, absent from the amendment is any meaningful, complete evaluation of the suggestions received and any showing of serious efforts to develop programs to meet such needs as evaluated. The "Public Notice" enjoins applicants to evaluate the relative importance of the suggestions received, which necessitates a judgment of the priority of needs and the feasibility of the station satisfying such priority. See *Virginia Broadcasters, Inc.*, FCC 68–1097, 14 R.R. 2d 738. By contrast, the WRDS evaluation consists of no more than a general overview of the suggestions received and a noncritical summarization of program proposals,[3] claimed to be derived from such suggestions. We cannot find that this evaluation, in any sense, assesses the relative importance of the suggestions received. In addition, since there is no meaningful evaluation, we cannot find that the program proposal is responsive to the suggestions as evaluated. We do not think that the "Public Notice" necessarily calls for a detailed description of program format, and it is possible that in some cases the mere listing of program titles would suffice. However, some indication of the substance of the program and the manner in which it will respond to the community needs is clearly called for by the "Public Notice." WRDS' list of program titles entirely fails to meet that requirement. For these reasons, the deletion of the issue is not warranted.

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[2] Attached to the original application are letters from a number of the community leaders containing more detailed suggestions.

[3] Interestingly, none of the suggestions are explicitly rejected. A number of the recommendations would appear to entail extensive use of special equipment and perhaps additional personnel, yet WRDS neither questions the feasibility of any suggestions nor seeks to show that these elaborate prerequisites could be met.

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5. Accordingly, *It is ordered*, That the petition to delete issue, filed November 13, 1968, by William D. Stone, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 68-1228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHUT BROADCASTING CO., INC., ASSIGNOR, TO EASTERN BROADCASTING CORP., ASSIGNEE For Assignment of License of Station WHUT, Anderson, Indiana	File No. BAL-6411

WHUT BROADCASTING CO., INC.
Anderson, Ind. 46015, December 18, 1968.

EASTERN BROADCASTING CORP.
4115 Chesapeake St. NW.,
Washington, D.C. 20016.

GENTLEMEN: This refers to your application for voluntary assignment of the license of station WHUT, Anderson, Ind., from WHUT Broadcasting Co., Inc., to Eastern Broadcasting Corp. (BAL-6411).

As you know, Eastern Broadcasting Corp. was granted a short-term license renewal for WCVS (Springfield, Ill.) because of misleading programing (the "Lucky Bucks" contest) broadcast by that station. As you further know, a $10,000 forfeiture has been imposed on Eastern Broadcasting Corp. as a result of misleading practices in connection with broadcast of the "Christmas Daddy" contest over station WALT, Tampa, Fla., formerly licensed to assignee.

In view of the foregoing, the Commission is unable to make the finding that the public interest would be served by a grant of BAL-6411 without hearing.

It is also noted that Eastern Broadcasting Corp. has bought and sold broadcast stations over the past 10 years as evidenced by the following transactions:

Standard broadcast station, WCHV, Charlottesville, Va., was acquired by assignment of license on December 3, 1958. WCCV FM was acquired by construction permit on June 24, 1959. Both stations were sold pursuant to an application for assignment granted March 12, 1968.

Standard broadcast station WILA, Danville, Va., was acquired by an assignment of license on May 27, 1959. Thereafter the station was sold and the license assigned on July 20, 1960.

Standard broadcast station WHAP, Hopewell, Va., was acquired by an assignment of license on April 13, 1960. This station is still owned by Eastern Broadcasting Corp.

Standard broadcast station WALT, Tampa, Fla., was acquired by assignment of license on June 13, 1962. Thereafter the station was sold and the license assigned on February 11, 1966.

Standard broadcast station WCVS, Springfield, Ill., was acquired by assignment of license on March 9, 1966. This station is still owned by Eastern Broadcasting Corp.

In addition to the proposed acquisition of station WHUT at Anderson, Ind., the Commission takes note of the fact that Eastern also has

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pending a proposal to acquire the licenses of stations WBOW AM and FM at Terre Haute, Ind.

The foregoing pattern of acquisitions and sales of broadcast stations when coupled with the pending proposals to acquire licenses for stations in Anderson and Terre Haute, Ind., require specification of an issue to determine whether Eastern Broadcasting Corp. is engaged in trafficking in broadcast licenses.

It is requested that you notify the Commission within 20 days from the date of this letter if you desire to prosecute this application through the hearing process.

Commissioner Cox absent.

By DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ASHTABULA CABLE TV, INC., COMPLAINANT *v.* ASHTABULA TELEPHONE CO., DEFENDANT	Docket No. 17482

ORDER TO SHOW CAUSE

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On May 24, 1967, Ashtabula Cable TV, Inc., filed a complaint pursuant to section 208 of the Communications Act against the Ashtabula Telephone Co., Ashtabula, Ohio. The complainant, operator of a CATV system at Ashtabula, alleged, in part, that the Ashtabula Telephone Co. had undertaken the construction of lines and associated facilities to provide for the transmission and distribution of CATV signals to Lake Erie Cable Corp., a competing CATV operator, without first having obtained the certificate required by section 214 of the act.

2. At the time the complaint was filed, the question of whether section 214 was applicable to facilities used to provide CATV channel service was under consideration by the Commission in docket No. 17333. By a petition filed January 26, 1968, the Common Carrier Bureau requested that action in the complaint proceeding be deferred pending the conclusion of the proceeding in docket No. 17333.

3. In a letter dated February 9, 1968, counsel for complainant advised the Commission that it was withdrawing its complaint against the telephone company. The Bureau, in a supplemental pleading filed February 15, 1968, stated that, despite the request for withdrawal, further action in the complaint proceeding, including action on the withdrawal request, should be deferred. The Commission agreed with the Bureau and stated that, should it be determined that section 214 of the act were applicable to the construction which was the subject of the complaint, a violation of section 214 had occurred which might require further Commission action. Accordingly, we granted the Bureau's petition. We also placed the telephone company on notice that the Commission had this legal question under consideration and, should it be determined that the certificate requirements of section 214 were applicable, any construction or extension of lines might be the subject

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of appropriate remedial action, including the issuance of a cease and desist order tailored to the facts of the case.[1]

4. On June 26, 1968, the Commission released its decision in docket No. 17333,[2] holding that pursuant to section 214 of the act, common carriers must obtain certificates of public convenience and necessity before constructing or operating channel facilities for CATV operators and issued cease and desist orders directed against the carriers who were respondents in that case, subject to certain conditions that were set forth in the decision.

5. By letter dated August 22, 1968, the Commission informed Ashtabula Telephone of the said decision and that it had constructed and was providing channel service to CATV operators in violation of section 214 of the act. Ashtabula Telephone was requested to take prompt action to comply with the act in accordance with the applicable findings and conclusions reached by the Commission in its decision. It was also requested to advise the Commission as to its intentions.

6. By letter dated September 6, 1968, counsel for Ashtabula Telephone informed the Commission that, on Feburary 5, 1968, Ashtabula Telephone had purchased an existing underground cable system from Ashtabula Cable and commenced channel service to Ashtabula Cable later that month. Immediately after such acquisition, Ashtabula Telephone commenced construction to extend the system to serve the entire city of Ashtabula. This construction continued to September 5, 1968, when, upon advice of counsel, it was halted.[3]

7. Ashtabula Telephone contends that it should not be required, at this time, to file an application pursuant to section 214 of the act; that any such requirement should be deferred until the court of appeals issues its final decision on the appeal of the telephone companies respecting the Commission's decision in docket 17333; that the Commission's decision to stay partially the effectiveness of its decision [4] as to those systems completed and operating as of June 26, 1968, suggested to it that the Commission's decision was not of general applicability but was directed to the 34 respondents involved in that proceeding; that the June 26th date should not be dispositive of Ashtabula Telephone's case as it was not a party to that proceeding; and that no notice directing it to stop construction was ever addressed to it.

8. The Commission believes that an order to show cause should be directed against Ashtabula Telephone. Even though it was not a party to the docket 17333 proceeding, and, thus, was not bound by the cease and desist orders entered therein, Ashtabula Telephone was bound by the resolution of the issue in that proceeding (i.e., that a certificate of public convenience and necessity pursuant to section 214(a) of the

[1] *Ashtabula Cable TV, Inc.* v. *Ashtabula Telephone Co.* (FCC 68–181) released Feb. 28, 1968.

[2] *General Telephone Co. of California et al.*, 13 FCC 2d 448.

[3] The Commission notes the changed circumstances of this case. Ashtabula Cable, in its complaint, sought injunctive relief against Ashtabula Telephone to prevent its construction of CATV channel facilities for a competing CATV operator, alleging that the construction was undertaken without sec. 214 certification and, hence, illegal. It now appears that Ashtabula Cable is receiving CATV service without certification having been granted the telephone company, but is not now heard to complain.

[4] *General Telephone Co. of California et al.*, 14 FCC 2d 170.

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Act must be obtained by a telephone company before undertaking the construction of distribution facilities to provide channel service to a CATV system). Counsel for Ashtabula Telephone has failed to consider the Commission's language in its memorandum opinion and order deferring action on the complaint here before us. As previously noted, the Commission put Ashtabula Telephone Co. on express notice that, should it be determined that the construction of CATV channel facilities were subject to section 214, any construction or extension of lines might be the subject of appropriate remedial action, including the issuance of a cease and desist order tailored to the facts of the case. Under these circumstances, the telephone company cannot be heard to complain that it had no notice that a cease and desist order might be issued. We also reject Ashtabula Telephone's contention that it should not be required to file a section 214 application for facilities not operational on June 26, 1968. The possibility that this may be unnecessary should the court reverse the Commission's decision does not prevent the Commission from fulfilling its obligation to prevent what it has found to be a violation of the Act.

9. In our decision in docket 17333, we stated that there were a number of pertinent factors to be taken into account in fashioning cease and desist orders, such as whether the carrier had been classified as a connecting carrier pursuant to section 2(b)(2) of the act. We held, as particularly significant, the date when the carrier was first placed on notice that a question existed as to the applicability of section 214 to construction for CATV channel service. Other circumstances included the filing of a formal complaint by a CATV operator, or prospective operator, challenging the lawfulness of such construction in a particular community. In the case presently before us, Ashtabula Telephone was on actual notice as early as May 1967 that such a question existed and, consequently, any construction to provide channel service to CATV systems was undertaken with knowledge of its possible unlawfulness. Ashtabula Telephone also assumed the risk that such construction might be the subject of remedial action by the Commission.

10. In view of the foregoing, we consider May 29, 1967, as the appropriate date in connection with any cease and desist order to be issued herein. However, by our partial stay order (14 FCC 2d 170), we stayed the effectiveness of our decision as to all CATV channel facilities constructed and in operation as of June 26, 1968. If we should issue a cease and desist order herein, we will entertain a request for a similar stay here.

11. We here are concerned with insuring compliance with section 214(a) of the Communications Act, part 63 of our rules, and established interim procedures relating thereto [5] and find that the public interest requires that the situation in Ashtabula, Ohio, be resolved expeditiously. Accordingly, the Commission finds that due and timely execution of its functions imperatively and unavoidably requires that the examiner certify the record in this matter, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within 10 calendar days after the date the record is closed.

[5] Public notice—C, FCC 68-816, released Aug. 9, 1968, 33 F.R. 11559.

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12. Accordingly, *It is ordered*, That pursuant to section 312 (b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312 (b) and (c), and 409(a), Ashtabula Telephone Co. *Is directed to show cause* why it should not be ordered to cease and desist from the further construction of any facilities for the purpose of providing channel service to CATV systems until an application for a certificate of public convenience and necessity for such construction has been filed as required by section 214 of the Communications Act, part 63 of the Commission's rules, and established interim procedures, and approval thereof is obtained from the Commission.

13. *It is further ordered*, That Ashtabula Telephone Co. *Is directed to show cause* why it should not be ordered to cease and desist from the operation of any CATV channel distribution facilities which were not completed and in operation on May 29, 1967.

14. *It is further ordered*, That Ashtabula Telephone Co., Ashtabula Cable TV, Inc., Lake Erie Cable Corp., and the Chief, Common Carrier Bureau, *Are made parties* to the proceeding.

15. *It is further ordered*, That Ashtabula Telephone Co. is directed to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C., at a time and place and before an examiner to be specified in a subsequent order, unless the hearing is waived, in which event a written statement may be submitted within 30 days of the service of this order.

16. *It is further ordered*, That upon the closing of the record it shall be certified immediately to the Commission for final decision, and that the parties hereto shall file proposed findings of fact and conclusions of law within 10 days after the date the record is closed.

17. *It is further ordered*, That the Secretary of the Commission shall send copies of this order by certified mail, return receipt requested, to Ashtabula Telephone Co.

18. *It is further ordered*, That to avail itself of the opportunity for hearing herein provided, Ashtabula Telephone Co. shall file its appearance in accordance with section 1.91(c) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF CENTENNIAL RADIO CORP., LICENSEE OF STATION KAPI, PUEBLO, COLO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION:

1. The Commission has under consideration (1) its notice of apparent liability dated February 7, 1968, addressed to Centennial Radio Corp., licensee of station KAPI, Pueblo, Colo., and (2) licensee's response to the notice of apparent liability dated February 29, 1968 and filed March 7, 1968.

2. The notice of apparent liability in this proceeding was issued because an improperly licensed operator was on duty and in actual charge of KAPI's transmitting apparatus on February 7–17, 19–24, and 27–28; March 1–10, 13–18, and 20–31, and April 1–3 and 19–21, 1967, in violation of section 73.93(b) of the Commission's rules, and for failure to make equipment performance measurements at yearly intervals, in violation of section 73.47 of the rules. The *Notice* provided that, pursuant to section 503(b) of the Communications Act of 1934, as amended, licensee had incurred an apparent liability for forfeiture in the amount of $1,000.

3. In response to the notice of apparent liability the licensee acknowledges the violations as charged but requests that its apparent liability for forfeiture be remitted or reduced. In support of its request, licensee states that the violations resulted either through oversight or lack of knowledge of the Commission's rules. Licensee also states that it took immediate corrective action and that a forfeiture of $1,000 would be excessive in relation to the station's volume of business.

4. We have carefully considered licensee's response and the circumstances surrounding the violations in this proceeding, including licensee's financial condition, but we find no reason to remit or reduce the amount of licensee's apparent forfeiture liability. The violations in this proceeding were repeated and we have consistently held that corrective action taken subsequent to citation does not excuse the original violations. *Executive Broadcasting Corp.*, 3 FCC 2d 699 (1966). Furthermore, licensees are expected to be aware of and comply with all the requirements of the Communications Act and the rules

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thereunder and the Commission has never considered "oversight" or lack of knowledge of the rules as valid excuses for failure to do so. See *Mid-Tex Broadcasting Co.*, 8 FCC 2d 854 (1967). In this connection it is noted that the licensee had already been fined once for operator violations and, therefore, should have been aware of Commission requirements. See, *Centennial Radio Corp.*, 3 FCC 2d 328 (1966).

5. In view of the foregoing, *It is ordered*, That Centennial Radio Corp. forfeit to the United States the sum of $1,000 for repeated failure to observe sections 73.93(a) and 73.47 of the rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of Commission rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

6. *It is further ordered*, That the Secretary of the Commission send a copy of this memorandum opinion and order by certified mail—return receipt requested to Centennial Radio Corp., licensee of station KAPI, Pueblo, Colo.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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FCC 69–3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2, 81 AND 83—REDUCTION OF CHANNEL SPACING TO 25 KC/S, ALLOTMENT OF CHANNELS, ESTABLISHMENT OF REVISED TECHNICAL CRITERIA AND CATEGORIES OF COMMUNICATION IN THE MARITIME MOBILE SERVICE BAND 156–162 MC/S FOR VHF RADIOTELEPHONY.	Docket No. 17295

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE NOT PARTICIPATING.

1. The Commission has under consideration its report and order (FCC 68–740) released July 25, 1968, in the above-entitled proceeding and a request for reconsideration filed in letter form by the American Merchant Marine Institute, Inc. (AMMI), and supported by the Pacific American Steamship Association. AMMI requests the Commission to: (*a*) withdraw its report and order in docket 17295; (*b*) consider the report and order as a further notice of proposed rule making; and (*c*) grant a period of 60 days in which additional views may be submitted.

2. Briefly summarized, the principal allegations contained in request are that: (*a*) The notice instead of describing actual rules for consideration by the public was in the form of general discussion paragraphs and the public never saw the actual text of the rules until the report and order was issued; (*b*) subsequent to the termination date for filing comments a World Administrative Radio Conference (WARC) was held at which matters involved in this proceeding were considered at the international level; (*c*) AMMI expected following the termination of WARC that there would be a further notice with respect to VHF and cites the fact that notices were issued (dockets 18218 and 18271) after and in implementation of WARC concerning radiotelegraph service and transition to single sideband; (*d*) provision is made for exemption from the requirement for a watch on 156.8 Mc/s for public coast stations but not limited coast stations; (*e*) section 83.223(b) presently exempts vessels with MF and compulsorily equipped radiotelegraph from a watch in the medium frequency band and AMMI feels this same exemption should apply with respect to 156.8 Mc/s; and (*f*) section 81.104(c)(2)(i) requires the ability of each coast station to transmit and receive on 156.80 Mc/s by March 1,

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1969, which is an unrealistic implementation date. A detailed treatment of these allegations in the order set forth in this paragraph begins with paragraph 4 below.

3. This rulemaking proceeding, under 5 USC 553, was initiated by the Commission with the issuance of a notice of proposed rulemaking, adopted March 15, 1967, which was published in the Federal Register on March 24, 1967 (32 F.R. 4501). Comment and reply comment dates were specified as April 24, 1967 and May 8, 1967, respectively. By order released April 25, 1967, the comment and reply comment dates were extended until May 8, 1967 and May 15, 1967, respectively. Approximately 27 comments were received and analyzed by the Commission prior to the adoption of the report and order in this proceeding. In addition the report and order gave detailed treatment to the comments. The authority for the rule changes adopted is contained in sections 4(i) and 303 (a), (b), (c), (e), (f), (g) and (r) of the Communications Act of 1934, as amended.

4. AMMI's allegation, that the notice instead "of describing actual rules for consideration by the public the material was in the form of general discussion paragraphs—more akin to the text found in a notice of inquiry" and the "public had never seen the actual text of the rules" until publication of the report and order, does not state any error. Neither the Commission's rules section 1.413 nor 5 USC 553 requires the publication of the text of the rules in the notice. Briefly, the requirements of the content of a notice are as follows:

(*a*) A statement of the time, place, and nature of public rulemaking proceedings;

(*b*) Reference to the legal authority under which the rule is proposed: and

(*c*) Either the terms or substance of the proposed rule or a description of the subjects and issues involved.

All of these requirements have been met by the notice of proposed rulemaking in docket 17295.[1]

5. AMMI is correct in its allegation that after the comment period in this proceeding closed the WARC subsequently considered matters that were also the subject of this proceeding. This proceeding, however, was initiated independent of and prior to the WARC. It was finalized because it did not propose any changes inconsistent with those adopted by WARC. The Commission's authority to effect the changes proposed in docket 17295 was not dependent on the WARC. However, had any changes been adopted by the WARC inconsistent with those proposed in this proceeding further rulemaking would, in all likelihood have been initiated. This paragraph is also dispositive of the allegation summarized in paragraph 2(c) above covering AMMI's expectation of a further notice after WARC.

6. AMMI feels that an inequity exists in the rules because there is an "escape clause" in the rules for public coast stations with respect to maintaining a watch on 156.8 Mc/s during their hours of service

[1] In its lengthy discussion the notice set forth detailed information with respect to the proposals and the reasons for the proposals. We note also that none of the 27 commentators stated that the notice failed to provide sufficient information on which suitable comments could be prepared, and indeed, that many of the comments contained extensive, detailed technical comments responsive to the notice.

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while no such clause is provided for limited coast stations. The Commission agrees this omission was an oversight and the matter was corrected in the Errata released September 3, 1968.

7. AMMI seeks to have the exemption in "section 83.233(b)" which relieves vessels compulsorily equipped with radiotelegraph and also equipped with MF radiotelephone from standing a watch on 2182 kc/s apply to the watch on 156.8 Mc/s. The exemption referred to by AMMI is set forth in section 83.223(b) of the rules. The Commission feels that the requirement for VHF equipped ships to maintain a watch on 156.8 Mc/s as set forth in section 83.224 is in accord with the objective of establishing 156.80 Mc/s as a national distress frequency. Justification for the requirement is set forth in paragraphs 13, 14 and 15 of the report and order in docket 17295. AMMI has presented no reasons for setting aside the requirement.

8. An implementation date of March 1, 1969, has been set for coast stations to have both a transmit and receive capability on 156.80 Mc/s. AMMI states that "we are informed" that this is an unrealistic implementation date. "At least a year should be allowed for the authorization, purchase, manufacture and installation of such additional equipment." The early establishment of a viable national distress system on 156.80 Mc/s clearly serves the public interest, and AMMI's unsupported statements do not justify extending the March 1, 1969 date.

9. AMMI concludes its list of what it considers to be inequities by saying the "above is not intended to be an all-inclusive listings of amendments that may be found justified, but rather as illustrations that inequities do, in fact, exist." AMMI had full opportunity to set forth all of its objections to and proposals for changes in the rules. It did set forth certain specific allegations and, as indicated above, they do not justify reconsideration of our action nor the special relief which AMMI has requested. The additional allegation that there may be other unspecified inequities in the rules is purely conjectural and clearly does not warrant grant of AMMI's request.

10. In view of the foregoing, the relief requested by AMMI *Is hereby denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69–31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re requests of:	
COMMUNITY FIRST CORP., JACKSONVILLE, FLA.	File No. BPCT–3681
NEW HORIZONS TELECASTING CO., JACKSONVILLE, FLA.	File No. BPCT–3731
FLORIDA GATEWAY TELEVISION CO., JACKSONVILLE, FLA.	File No. BPCT–3732
For Conditional Grant Pursuant to Section 1.592(b) of the Commission's rules.	

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; JOHNSON AND H. REX LEE VOTING FOR THE INTERIM OPERATION BUT WOULD HAVE FAVORED A CONDITION THAT WOULD ALLOCATE THE PROFITS IN A REASONABLE MANNER TO LOCAL EDUCATIONAL BROADCASTERS. COMMISSIONER COX CONCURRING IN THE RESULT.

1. The Commission has before it for consideration (*a*) the above-captioned requests for interim authority to operate on channel 12, Jacksonville, Fla., pursuant to the provisions of section 1.592(b) of the Commission's rules and (*b*) comments filed by all the parties concerning implementation of the mandate of the United States Court of Appeals for the District of Columbia Circuit in *Community First Corp.* v. *Federal Communications Commission* (Nos. 21, 253 and 21, 257) and *Consolidated Nine, Inc.* v. *Federal Communications Commission* (Nos. 20, 961 and 21,274).

2. The Commission on July 5, 1967, denied requests for interim authority by Community First Corp., Florida Gateway Television Co. and New Horizons Telecasting Co., Inc., and continued the operating authority of Florida-Georgia Television Co., Inc. to operate on channel 12, Jacksonville.[1]

3. That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit in *Community First* v. *Federal Communications Commission* No. 20, 961. The Court remanded the case to the Commission with orders to vacate the interim grant to Florida-Georgia. The Court also indicated that the Commission could either deny any request for interim authority or grant such an authorization in compliance with the provisions of the Commission's rules (section 1.592(b)). The Commission subsequently filed a motion with the Court for clarification or enlargement of the man-

[1] Florida-Georgia Television Co., Inc., et al., 9 FCC 2d 235.

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date, to ascertain whether it could entertain applications for interim authority by non-parties to the comparative proceeding. The Court in a per curiam decision denied the Commission's motion and further ordered compliance with its mandate forthwith.

4. The Commission, on September 18, 1968, addressed letters to the parties applicant in the comparative television case for channel 12, Jacksonville, in which it afforded the parties an opportunity to submit their views with respect to the establishment of an interim service. In reply, Florida-Georgia recommended the authorization of a new interim operation subject to the following conditions: (*a*) that the interim operation utilize the existing facilities and staff of WFGA–TV; (*b*) that pending completion of a comparative hearing, the interim operation should be on a nonprofit basis with all of the operating profits donated to a charitable purpose; and (*c*) that such authority be granted to a single unified entity rather than to a joint group composed of antagonistic applicants in this proceeding. The imposition of these conditions is opposed by the other parties to the comparative proceeding on the grounds that these conditions are beyond the scope of Commission authority and inconsistent with the statutory scheme.

5. The Commission is of the view that in the circumstances of the case the imposition of the conditions urged by Florida-Georgia is not appropriate. The basic public interest concern in this matter has been to provide a continuation of the channel 12 service to Jacksonville, while assuring all parties a fair hearing. The operation of an interim service on a nonprofit basis is not in our view necessary to achieve this result. It should be clear, however, that if the parties desire to donate the profits to charitable institutions there would be no legal impediment to such a course of action. This, however, is a decision which, properly, only the interim group can make. The same may be said for the condition relating to retention of the present staff of WFGA–TV. In this connection, we would express the hope that the interim group would, insofar as possible, keep job loss and resultant dislocation to a minimum. As to the grant of authority to a non-party applicant, the Courts per curiam decision has rendered that question moot.

6. In view of the foregoing, the Commission finds that continuation of service on channel 12, Jacksonville is in the public interest and that, therefore a conditional grant of an interim authorization pursuant to the provisions of section 1.592(b) of the rules is warranted. Moreover, since Florida-Georgia has indicated its willingness to lease its facilities subject to negotiating the terms thereof, and also indicated its willingness to have any disputes as to terms subject to binding arbitration, it would appear that as soon as it is able the interim group may take over the operation of station WFGA–TV. However, since the terms for leasing the facilities have not yet been negotiated, and, therefore, not subjected to Commission scrutiny, we will require that the interim group submit to the Commission for its approval, the terms of the agreement with Florida-Georgia within 30 days from the date of this order. In addition, there must be submitted to the Commission for its approval the terms of the agreement whereby

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each of the parties to the comparative proceeding who wishes to do so will participate in the interim operation.

7. Accordingly, *It is ordered*, That the requests for conditional grant pursuant to section 1.592(b) of the rules *Are granted;* that the request of Florida-Georgia Television Co., Inc., for specified conditions *Is denied.*

8. *It is further ordered*, That the interim group shall submit to the Commission for its approval within 30 days from the date of this order, (*a*) the terms and conditions of the agreement with Florida-Georgia Television Co., Inc., under which it will operate the existing facilities of television broadcast station WFGA–TV, channel 12, Jacksonville, Florida; and (*b*) the terms of the agreement under which the parties to the comparative proceeding will participate in the interim operation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of: CONSOLIDATED NINE, INC., ORLANDO, FLA. COMINT CORP., ORLANDO, FLA. For Conditional Grant Pursuant to Section 1.592(b) of the Commission's Rules	File No. BPCTI-7 File No. BPCT-3738

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; JOHNSON AND H. REX LEE VOTING FOR THE INTERIM OPERATION BUT WOULD HAVE FAVORED A CONDITION THAT WOULD ALLOCATE THE PROFITS IN A REASONABLE MANNER TO LOCAL EDUCATIONAL BROADCASTERS. COMMISSIONER COX CONCURRING IN THE RESULT.

1. The Commission has before it for consideration (*a*) the above-captioned applications seeking interim authority to operate on channel 9 at Orlando pursuant to the provisions of section 1.592(b) of the Commission's rules; (*b*) Comments filed by Consolidated Nine, Inc., and Mid-Florida Television Corp. concerning implementation of the mandate of the United States Court of Appeals for the District of Columbia Circuit in *Consolidated Nine, Inc.* v. *Federal Communications Commission*, No. 20,961.

2. The Commission on March 29, 1967, denied requests for interim authority filed by Consolidated Nine, Inc., and Comint Corp., and continued the operating authority of WFTV by Mid-Florida Television Corp. to operate on channel 9 at Orlando.[1]

3. That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit in *Consolidated Nine, Inc.* v. *Federal Communications Commission*, case No. 20,961. The Court on September 3, 1968, remanded the case to the Commission with orders to vacate the interim grant to Mid-Florida. Further, the Court indicated that the Commission had two alternatives, i.e., either grant an interim proposal (Consolidated Nine, Inc. or Comint) or deny any such request. The Commission subsequently filed a motion with the Court for clarification or enlargement of its mandate, to ascertain whether it could entertain applications for interim authority by parties not seeking permanent authority. The Court in a per curiam decision issued December 26, 1968, denied the motion and ordered the Commission to comply with the Court's mandate forthwith. The Court also on the same day granted petitions filed by Consolidated Nine, Inc.,

[1] *Consolidated Nine, Inc.* et al. 7 FCC 2d 801.

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and Comint Corp. for expedited implementation of the Court's mandate.

4. In the Commission's prior decision [2] we determined that the public interest required continued operation on channel 9. Moreover, we also found that the proposal by Comint did not comply with the requirements of section 1.592(b) of the rules, but that since Comint has already indicated a desire to join with Consolidated Nine, Inc., it would be considered part of that proposal. In effect then, the only proper application for interim authority before us is that of Consolidated Nine, Inc., and the only question is upon what specific conditions the grant should be made.

5. Mid-Florida submitted a "statement of Mid-Florida Television Corp. on Action to be Taken By The Commission in View of the Decision of The Court of Appeals in *Consolidated Nine, Inc.*, v. *Federal Communications Commission*", urging that the grant to Consolidated Nine be conditioned to require (*a*) retention of all present staff; (*b*) assumption of existing labor contract with IBEW covering 40 employees; (*c*) use of new high tower being built by the Outlet Co., licensee of WDBO–TV, channel 6 to house both the channel 9 and 6 antennas; and (*d*) that a reasonable rate of return be fixed for investments and loans with the remaining profits to be utilized by civic, educational, and charitable institutions. Consolidated Nine opposes these conditions and indicates that these conditions are beyond the scope of Commission authority and inconsistent with the statutory scheme.

6. The Commission is of the view that, in the circumstances of this case, the conditions urged by Mid-Florida should not be imposed upon the interim operator. Our basic concern in this matter is to permit operation of the station during the course of the hearing in a manner that will not result in prejudice to any of the parties to the hearing. We do not believe that imposition of the requested conditions would help achieve this result. On the other hand, we wish to make it clear that we have no objection to the voluntary acceptance of any or all of the conditions by Consolidated Nine. If it wishes to move to the new high tower being built by WDBO–TV, the Commission will consider an application for modification on the interim operation to accomplish this end. This and the other conditions urged by Mid-Florida, however, are matters which we believe should be left to the discretion of the interim operator, or as, for example, in the case of the collective bargaining agreement with IBEW, to the operation of law.

7. We do, however, express the hope that the interim operator will give serious consideration to retention of the present staff, insofar as possible, so as to keep job loss and resultant dislocation to a minimum. In this connection, we are encouraged by the statement by Consolidated Nine, Inc., that it may well retain most if not all of the present staff.

8. In view of the foregoing, the Commission finds that the application (BPCTI–7) of Consolidated Nine, Inc., complies with the requirements of section 1.592(b) of the Commission's rules, and that grant of

[2] See footnote, supra.

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interim authority to operate on channel 9 at Orlando would serve the public interest. Moreover, since Mid-Florida Television Corp. has indicated that it will lease its facilities to the interim operator duly authorized by the Commission, operation by Consolidated Nine, Inc., pursuant to the interim authority, may commence as soon as Consolidated Nine, Inc., is able to assume actual control of the operation. Since the terms for leasing the facilities have not yet been negotiated, and, therefore, not subjected to Commission scrutiny, we will require that Consolidated Nine, Inc., submit to the Commission for its approval, the terms of the agreement with Mid-Florida within 30 days from the date of this *Order*. In addition, there must also be submitted to the Commission for its approval the terms of the agreement whereby each of the parties to the comparative proceeding who wishes to do so will participate in the interim operation.

9. Accordingly, *It is ordered*, That the application of Consolidated Nine, Inc. (BPCTI–7), for conditional grant pursuant to section 1.592(b) of the Commission's rules *Is granted;* that the request of Comint Corp. for interim authority *Is denied;* and that the request of Mid-Florida Television Corp. for a grant of the Consolidated Nine, Inc., application subject to specified conditions *Is denied.*

10. *It is further ordered*, That Consolidated Nine, Inc., shall submit to the Commission for its approval within 30 days from the date of this *Order*, (*a*) the terms and conditions of the agreement with Mid-Florida Television Corp. under which it will operate the existing facilities of television broadcast station WFTV, channel 9, Orlando, Fla.; and (*b*) the terms of the agreement under which the parties to the comparative proceeding will participate in the interim operation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
GEORGE F. COOLEY, SEATTLE, WASH., AGAINST
STATION KING
Concerning Fairness Doctrine

OCTOBER 27, 1967.

(TELEGRAM)

KING BROADCASTING CO.,
Licensee of Station KING,
320 Aurora Avenue,
Seattle, Wash. 98109

Your response to complaint of George E. Cooley has been received. Cooley states that your offer of six 20-second announcements to respond to twenty-four 20-second editorials endorsing his opponent is not in compliance with the fairness doctrine.

Commission rules provide that when a licensee editorially endorses candidates it shall within 24 hours after broadcast of such editorial transmit to other candidates for same office an offer of a reasonable opportunity for such candidates or spokesmen therefor to respond over the licensee's facilities. In scheduling 24 brief editorials in which five candidates are endorsed you apparently made a judgment that your broadcast time can be most effectively used by frequent broadcasts of longer statements of reasons for your endorsement.

Complainant seeks to avail himself of a comparable opportunity and contends that the six exposures do not constitute a reasonable opportunity for response. From material submitted to us it does not appear that the offer of six announcements constitutes reasonable opportunity for response to your 24 editorials and that you have not fully complied with the requirements of the fairness doctrine.

Accordingly, you are requested to advise the Commission immediately of the manner in which you intend to comply with that doctrine and of such action as you may take. In view of imminence of election, we stress that this is a matter for immediate good faith negotiation between you and complainant.

BEN F. WAPLE, *Secretary.*

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NOVEMBER 1, 1967.

(TELEGRAM)

KING BROADCASTING CO.,
Licensee of Station KING,
320 Aurora Avenue,
Seattle, Wash. 98109

The Commission has today considered your petition for review of the ruling of October 27, 1967, in the matter of the complaint of George E. Cooley. This ruling found that your offer of response time to Cooley was not in full compliance with section 73.123 of the Commission's rules and regulations and requested you to negotiate in good faith with Cooley concerning adequate response time.

In accordance with the Commission's rules, the licensee may make a good faith judgment as to what constitutes a "reasonable opportunity to respond" in the particular circumstances of each case. In this instance, the station has made a determination to broadcast editorials of 20 seconds duration urging the election of the candidates supported by your station and has determined to broadcast these editorials on 24 occasions. It follows that in making a judgment as to what constitutes a reasonable opportunity for response, the station must give consideration both to the amount of time directed to each candidate and to the frequency of the announcements (which involve the factors of effective repetition and the reaching of possibly different audiences). No question has been raised concerning your determination to allot 120 seconds of response time per candidate. Cooley's complaint goes directly, however, to your determination as to what constitutes an adequate number of responses.

Although you have decided to broadcast an editorial campaign in which you reach the audience 24 times with your editorial endorsement of selected candidates, you have offered Cooley an opportunity to reach that audience on only 6 occasions—a disparity of 4 to 1. While Cooley has requested opportunity to make additional responses, you have denied this request without advancing any basis upon which the Commission can make a judgment that this restriction is reasonable. For example, it is not alleged that a 10-second announcement, resulting in 12 opportunities to reach audiences appropriately characterized as early daytime, daytime, prime time (as you have done in the case of the six announcements), is not feasible, and indeed, based upon the Commission's experience, the 10-second spot is oft-times used in political campaigns.

Your reliance on the *Massart* ruling is misplaced. As the Commission there stated, the delineation of both the total amount of time to be afforded for response and the frequency of presentation is a matter for good faith, reasonable judgment by the licensee and negotiation with the candidate involved. Thus, in the case of a 120-second allotment of time, some candidates may propose to have only two announcements but with the longer time period of 60 seconds each to develop some particular issue; Massart accepted 6 with 20 seconds

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duration. Cooley, on the other hand, has opted for greater frequency, and as stated, no reason appears to support your judgment that Cooley or his spokesman should not be afforded greater frequency of response in these circumstances.

In view of the foregoing, your petition for review is denied.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

NOVEMBER 6, 1967.

(TELEGRAM)

Mr. GEORGE E. COOLEY,
9713 35th Avenue NE.,
Seattle, Wash. 98105

Reurtel requesting Commission to immediately issue a cease and desist order against station KING quote preventing the broadcast of editorials that are being made now and which do irreparable damage to my election unquote. Fairness doctrine and Commission rules look to provision of reasonable opportunity to respond. The Commission's order directs licensee's compliance therewith and is not intended to prevent broadcast of station's editorial endorsements. Your petition is therefore denied. We understand judicial review of Commission ruling is being sought.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69–7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 87 OF THE COMMISSION'S RULES TO MAKE PROVISION FOR THE ESTABLISHMENT OF AN INDUSTRY FREQUENCY ADVISORY COMMITTEE FOR COORDINATION OF FREQUENCIES IN THE 1435–1535 MC/S BAND.	Docket No. 18234 RM 1198

REPORT AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION:

1. The Commission on July 3, 1968, adopted a notice of proposed rulemaking in the above-entitled matter (FCC 68–692) which made provision for the filing of comments. The notice was published in the Federal Register on July 12, 1968 (33 F.R. 10020). At the request of the Aerospace and Flight Test Radio Coordinating Council (AFTRCC), the time for filing comments and reply comments was extended to August 26, 1968, and September 6, 1968, respectively, by order adopted July 31, 1968.

2. The notice of proposed rulemaking was issued in response to a petition filed by AFTRCC which requested amendment of part 87—Aviation Services to make provision for an industry frequency advisory committee for coordination of frequencies in the 1435–1535 Mc/s band. Subsequently, AFTRCC in comments filed in dockets 17870 and 18004 requested, among other things, that their petition be expanded to include all flight test frequencies. The proposals in the notice were limited to the 1435–1535 Mc/s band; however, it was stated that comments detailing the need for coordination of all flight test frequencies would be considered.

3. Comments were filed by AFTRCC, whose membership consists of major companies in the aerospace manufacturing field, and Collins Radio Co. Reply comments were filed by Collins Radio Co. The comments are treated in detail in the following paragraphs. It is noted that AFTRCC has had many years of experience in the informal coordination in the use of flight test frequencies among its members.

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4. AFTRCC has stated that they will submit, as a separate matter, data in support of the proposition that equipment for which licensing is requested in the 1435–1535 Mc/s must meet Inter-Range Instrumentation Group Standards 106–66. With regard to remaining matters the council recommends revised language in the proposed rules and submits justification for expanding the rules to cover coordination of VHF as well as the band 1435–1535 Mc/s.

5. AFTRCC feels that under proposed language an advisory committee could comment without indicating the frequency that could be used with the least adverse impact upon existing operations. It proposes, therefore, that the rules be changed to specify the obligation of the frequency committee to make the best frequency recommendation and to provide that the advisory committee may make whatever comment it deems appropriate concerning interference that might result or other relevant considerations.

6. With respect to expanding the frequency coordination procedures beyond that requested in its original petition, AFTRCC feels because of the expanded eligibility for the use of flight test frequencies (docket 17870) and the expected increased use of these frequencies that the requirement for pre-assignment coordination for all flight test frequencies with the exception of high frequencies is necessary. It is the position of the council that only by proper and effective coordination can cochannel interference be kept to a minimum, and only through a Commission recognized coordinator can a single contact point in each area exist where assignment records are maintained and where all local area users can schedule operations when absolute interference free communications are essential for mission accomplishment as well as safety of life and property.

7. AFTRCC points out that these same advantages are generally true in regard to coordination of the HF flight test channels. It feels, however, that because propagation at high frequencies is such that coordination and sharing pose special problems, the Commission should take final action in this proceeding only with respect to VHF and the band 1435–1535 Mc/s and not include HF until such time as AFTRCC can study the problems and submit appropriate proposed language to the Commission to govern coordination of flight test HF. Until such HF procedures are developed AFTRCC recommends that the Commission limit the licensing of flight test HF to periods not to exceed 1 year.

8. The council feels that for effective coordination and possible event scheduling and to maintain accurate records, the advisory committee would have to be informed of all frequencies assigned or applied for in each area. To this end, it recommends that the advisory committee, in addition to having knowledge of existing licensees,

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be informed when an application is submitted based on a field study, and of the content of such an application, so that comments may be submitted when appropriate. It further recommends that applications for modification be exempt from coordination where frequencies, power, emission, antenna heights and antenna locations are not changed.

9. Collins Radio Co. filed comments and reply comments to the AFTRCC comments. Essentially, Collins does not object to coordination procedures for frequencies above 25 Mc/s but feels, like AFTRCC, that coordination of HF at this time poses significantly different problems. Collins recommends that the language proposed by AFTRCC (sec. 87.334(c)(1)) be amended to remove from committee consideration the question of eligibility. It feels that eligibility is a matter strictly within the purview of the Commission.

10. The Commission feels that the changes proposed by AFTRCC and supported by Collins concerning a requirement for a committee to recommend a frequency and other related matters are improvements to the rules as proposed in the notice that should assure, to the extent possible, maximum frequency coordination effectiveness. Appropriate changes have been made in the rules to reflect these changes proposed by AFTRCC. Concerning eligibility, the Commission agrees with Collins that this is a matter for the Commission and not a frequency advisory committee.

11. The VHF flight test frequencies are authorized for use on a shared basis by an appreciable number of licensees. With the continued growth of aviation and the expanded flight test eligibility, prudence requires that some provision be made to lessen the impact of the ever growing number of flight test licensees and missions. The inclusion of flight test VHF in the coordination procedures as proposed by AFTRCC and supported by Collins would appear to be a suitable method. Accordingly, the rules, as set forth in the appendix, have been modified to add the requirement for coordination of the flight test VHF band.

12. Both AFTRCC and Collins have indicated that they do not favor including flight test HF in the coordination procedures at this time. The reasons advanced by both commentators and set forth above appear valid; therefore, no requirement for coordination of flight test HF is added to the rules at this time. Limiting HF flight test licenses to 1 year as proposed by AFTRCC would cause an added burden to both the Commission and licensees. It is recognized, however, that with the limited number of high frequencies available usage could soon load the frequencies so that any coordination procedures established at a later date could be ineffectual especially if grants were to be for 5 years. Accordingly, future grants for flight test HF will be limited to 1-year periods until further notice.

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13. In view of the foregoing, *It is ordered*, pursuant to the authority contained in sections 4(i) and 303 (f) and (r) of the Communications Act of 1934, as amended, that effective July 1, 1969, part 87 of the Commission's rules is amended. *It is further ordered*, That this proceeding *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

REQUEST BY MINERAL KING BROADCASTERS FOR INTERIM AUTHORITY TO OPERATE FACILITIES PREVIOUSLY LICENSED TO STATION KDFR (FM), TULARE, CALIF.

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING, COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (*a*) Mineral King Broadcasters' request for interim authority to operate the above facilities pending action on its application for a construction permit; and (*b*) Arthur Nersasian's opposition to this request.

2. On July 3, 1968, the Commission adopted an order to show cause looking toward the revocation of the license for station KDFR (FM), Tulare, Calif. Thereafter, the licensee of the station, Blue Ridge Broadcasters, indicated that it would be willing to surrender the license for the station in order to permit the continuity of service by an applicant for these facilities. Blue Ridge indicated that it would surrender the license on December 16, 1968, but it neglected to file a renewal application and the license expired by its own terms on December 1, 1968. The station has remained on the air by virtue of an order of the Ninth Circuit Court of Appeals in *Central California Musicast, Inc.* v. *U.S.A. and F.C.C.*, case No. 23649, directing that the status quo be maintained pendente lite.[1] Our action here is of course contingent on dissolution of the stay, and our order is intended to be effective only in this eventuality. We are acting at this time in order to remove, insofar as we can, the uncertainties with respect to the continued operation of KDFR–FM that led to that appeal.

3. The current posture of the case is essentially this: The station continues to be operated by the prior licensee pursuant to the Court's order, and two applicants have filed for construction permits for these facilities.[2] One of them, Mineral King Broadcasters, requests interim authority to operate the station pending resolution by the Commission of the question of the ultimate grant of regular authority on this frequency. Nersasian, on the other hand, opposed this interim authority on the grounds that it would be improper and prejudicial to authorize such an operation by Mineral King when Nersasian himself would

[1] The stockholders of Mineral King Broadcasters are owners of Central California Musicast, Inc.

[2] These applications, Mineral King Broadcasters and Arthur Nersasian, were designated for comparative hearing on Jan. 8, 1969.

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shortly be filing an application.[3] Thus, it was Nersasian's view that any grant of the requested interim authority to Mineral King Broadcasters alone could only have the effect of damaging his chances in a hearing required on these applications. In addition, Nersasian indicated that he did not believe that the request provided sufficient justification to meet the requirements of section 309(f) of the act and, as a result, that an "emergency" operation was not warranted.[4] In his later opposition, Nersasian opposes grant even of an open-ended interim because he does not wish to participate, because there is allegedly no need for the service in the public interest, and because a grant of interim authority without his participation would prejudice his right to a fair hearing.

4. Mineral King has provided two basic reasons in support of its interim authority request. First, it argues that it would be significantly damaged if the subsidiary communications authority (SCA) currently operated on a station KDFR subchannel were terminated as a result of the station's being forced off the air. In addition, and more importantly, Mineral King has stated that station KDFR is currently providing a uniquely valuable service to citrus and other agricultural interests in the area in the form of 24-hour a day frost warnings. This position, supported by representatives of various affected interests, is that the coverage provided by other area stations is not really the significant point; rather, it is the fact that only this station is equipped, because of its direct connection with the weather bureau, to render this service. It has been argued that without this service being rendered to the area growers, they would not be in a position to take prompt and effective action in the event of a freeze in the area.

5. Although we do not find an emergency situation exists, we believe that it would be in the public interest to grant authority to the applicants to operate the station during the course of the comparative hearing. This station is one of only two FM stations assigned to Tulare, and provides the only 24-hour frost warning service in the area. Although there is some dispute as to the urgency of the need for such service, it is not contested that such warnings do serve a very useful purpose. In any case, the Commission has in several situations in the past found that continuing an operation previously licensed during the course of a comparative hearing for the facility is in the public interest. Thus, we authorize Oak Knoll Broadcasting Corp. to operate the facilities of KRLA, Pasadena, Calif., during the course of a comparative hearing for that facility. 2 R.R. 2d 1011. We also authorized a group of applicants to continue the operation of KWK, St. Louis, Mo., during the hearing for that frequency. *Pike-Mo Broadcasting Co.*, 2 FCC 2d 207 (1965), affirmed *sub nom Beloit Broadcasters* v. *F.C.C.*, 365 F. 2d 692. We, likewise authorized an interim operation on channel 13 in Las Vegas, Nev., to an entity composed of a group of applicants for that frequency. Nine FCC 2d 703. In each of these cases, of

[3] On Jan. 3, 1969, Nersasian renewed and enlarged upon his opposition to the proposed interim operation. We have fully considered those arguments in arriving at our decision herein.

[4] An interim authorization under section 309(f) of the act is no longer possible, in any case, since a competing application has been filed.

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course, our decision to allow interim operation rested not only on a finding that it was in the public interest, but also provided that the operation be on a basis which assured fairness and equal treatment among competing applicants.

6. Since only one of the competing applicants in this case has requested interim operating authority, it will be granted to that applicant, but only on conditions which will permit full and equal participation by the competing applicant, if he wishes to do so. Of course, no comparative advantage will accrue to either applicant as a result of participation or nonparticipation in the interim operation, and a condition to such effect is included in the interim authorization.

7. In view of the foregoing, *It is ordered*, That the request for interim authority filed by Mineral King Broadcasters *Is granted*, subject to the following conditions:

(*a*) That Arthur Nersasian shall be permitted to participate in the interim operation on a fair and equal basis, and that no comparative or other advantage will accrue to either applicant as a result of participation or nonparticipation in the interim operation.

(*b*) That the terms of the agreement for the use of the facilities of station KDFR shall not require the winning applicant in the comparative hearing to purchase or otherwise utilize such facilities, and that the terms of the agreement for interim use shall be reported to the Commission for its approval within 30 days from the date of this order.

(*c*) That Mineral King Broadcasters shall report to the Commission for its approval within 30 days of the date of this order the terms and conditions under which the competing applicant is participating or may participate in the interim operation.

(*d*) That the interim authority herein granted will be terminated if the conditions specified above are not complied with.

8. *It is further ordered*, That the interim operation herein authorized shall terminate upon grant of program test authority to the winning applicant in the forthcoming regular hearing proceeding, or upon final denial of all applications in that proceeding.

9. *It is ordered*, That this action *Is effective* only in the event the stay issued by the Court of Appeals for the Ninth Circuit on December 11, 1968, in *Central California Musicast, Inc.*, v. *U.S.A. and F.C.C.* is dissolved.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69–20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter
LIABILITY OF PRAIRIE STATES BROADCASTING CO., INC.,
LICENSEE OF STATION KAWL, YORK, NEBRASKA
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION:

1. The Commission has under consideration (1) its notice of apparent liability dated February 28, 1968, addressed to Prairie States Broadcasting Co., Inc., licensee of station KAWL, York, Nebr., and (2) licensee's response to the notice of apparent liability dated March 12, 1968.

2. The notice of apparent liability in this proceeding was issued because of the licensee's apparent willful or repeated violation of the provisions of section 73.93(b) of the Commission's rules in that an improperly licensed operator was on duty and in actual charge of KAWL's transmitting apparatus during portions of each week day from March 14 through April 14, 1967. The notice provided that, pursuant to section 503(b) of the Communications Act of 1934, as amended, the licensee had incurred an apparent liability for forfeiture in the amount of $500.

3. In response to the notice of apparent liability, licensee does not deny the violations as charged but, apparently in mitigation, states that the improperly licensed operator was immediately relieved of his duties at the transmitter until he took and passed the Commission's examination 4 days after KAWL was inspected. The licensee also asserts, in effect, that the station had not been previously cited for operator violations and that it is "* * * most interested that there never be a repetition of this matter."

4. We have carefully considered the licensee's replies to the notice of apparent liability and to the official notice of violation and the circumstances surrounding the violations in this proceeding, but we find no reason to reduce the amount of licensee's apparent forfeiture liability. The violations of section 73.93(b) were repeated and, in view of licensee's response to the official notice of violation issued in this proceeding, it appears that such repeated violations resulted from licensee's failure to examine the license of the operator in question in order to insure that it was properly endorsed for broadcast

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station operation. See *Executive Broadcasting Corp.*, 3 FCC 2d 699 (1966). Although corrective action was taken, we have consistently held that such action subsequent to citation will not, absent other factors, excuse the original violations. See *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967).

5. In view of the foregoing, *It is ordered*, That Prairie States Broadcasting Co., Inc. forfeit to the United States the sum of $500 for repeated failure to observe the provisions of section 73.93 of the rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of the Commission rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

It is further ordered, That the Secretary of the Commission send a copy of this memorandum opinion and order by certified mail—return receipt requested to Prairie States Broadcasting Co., Inc., licensee of station KAWL, York, Nebr.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 68–1212

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of ROBERT J. KELLY (TRANSFEROR) and WILLIAM L. GRATOPP (TRANSFEREE) For Transfer of Control of Valley Broadcasting Co., Licensee of Station KRFS, Superior, Nebr.	Docket No. 18407 File No. BTC–5537

MEMORANDUM OPINION AND ORDER

(Adopted December 18, 1968)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it the above application in which Robert J. Kelly seeks Commission authorization for the transfer of control of Valley Broadcasting Co., licensee of station KRFS, Superior, Nebr., to William L. Gratopp.

2. Commission records indicate that Kelly acquired control of KRFS by grant dated July 19, 1967. He had been the manager of the station since March 27, 1967. The subject application was accepted for filing on January 5, 1968. Because Kelly held control of KRFS for less than 3 years, his application to transfer control comes within the purview of the Commission's 3-year rule (section 1.597 of the Commission's rules).

3. That section, promulgated to discourage trafficking in licenses and to encourage a continuity of program service, requires that a hearing be held if it appears that the transferor who is disposing of a controlling interest in a licensee of a station has held such interest for less than 3 successive years. The rule provides certain exceptions which are not relevant to this application. Aside from these exceptions provided for in the rule itself, the Commission has waived the rule when it considered such waiver served the public interest, convenience, and necessity.

4. In the above application Kelly requested such waiver of the rule for the following reason:

> Robert J. Kelly desires waiver of the 3-year rule and an orderly transfer can be made to the applicant. Transferor expected to move wife and six children from Fairbury to Superior, 54 miles apart. As of now, wife of transferor has refused to move to Superior, creating a personal family problem. Applicant has generously offered to purchase the stock of Robert J. Kelly.

5. While advancing this as his reason for the transfer of control of the licensee of KRFS, on January 23, 1968, Kelly filed an application requesting consent for his acquisition of another station—KASL,

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Newcastle, Wyo. (BAL–6284), which is about 375 air miles from his home in Fairbury. In a letter to Kelly dated June 19, 1968, the Commission requested that he resolve any inconsistency between his ability to move 375 miles to Newcastle, Wyo., and his inability to move 54 miles to the area served by the subject station, KRFS.

6. Mr. Kelly's response stated, in pertinent part, as follows:

> * * * As for now, my wife will not move to Superior, Nebr., but this should have little bearing on whether she would or would not move—to Newcastle, Wyo. I presume the Commission may need a notarized statement to that effect.

The KASL application (BAL–6284) was dismissed on August 20, 1968.

7. In response to an earlier letter from the Commission's broadcast bureau requesting further information relative to the applicability of section 1.597 of the Commission's rules, the transferor stated:

> In reference to letter of February 9, 1968, BTC–5537, David L. Tucker is in charge of the radio station. I am not being paid any salary or other remuneration since Tucker has been placed in charge of the station. I request that the transfer be approved so I can be relieved of my responsibility of the station and so I can get my investment out of the station.

8. The Commission was not persuaded that a waiver of section 1.597 of its rules would serve the public interest, convenience and necessity in the above instance and on September 5, 1968, it addressed a letter to Kelly which advised him that pursuant to section 1.597 of the rules, his application for transfer of control of Valley Broadcasting Co., licensee of station KRFS (BTC–5537) would be set for hearing. He was also requested to notify the Commission "* * * within 20 days from the date of this letter as to whether you desire to prosecute this application through the hearing process."

9. Mr. Kelly's response of September 12, 1968, stated in pertinent part, that he would be unable to attend a hearing due to financial reasons and again requested that section 1.597 of the Commission's rules be waived on the grounds of his inability to move to Superior, Nebr. Since Kelly indicated that he would not prosecute his application through the hearing process, on September 24, 1968, the application was dismissed without prejudice.

10. Thereafter, on September 25, 1968 (within the 30-day period of the Commission's action of September 5, 1968), the Commission received a telegram from Kelly expressing an intention to proceed to hearing. We will therefore reinstate the application and being unable to make a finding that a grant of the subject application would serve the public interest, convenience, and necessity and pursuant to request from the transferor, the application will be designated for hearing.

11. Accordingly, *It is ordered*, That the KRFS transfer application (BTC–5537) is reinstated and is designated for hearing, at a time and place to be specified in a subsequent order, upon the following issues:

> 1. To determine whether the acquisition by Kelly of control of the licensee of station KRFS on July 19, 1967, and his application to transfer control of the same licensee on January 5, 1968, constitutes trafficking in licenses.

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2. To determine the disruptive effects on broadcast service, if any, which would result from the proposed change in ownership.
3. To determine whether the alleged changes in circumstances create hardships necessitating the sale of the license of KRFS, remove any question of 'trafficking', and justify a transfer despite any disruptive effects which might otherwise result from the short-term change in ownership.
4. To determine in light of the above issues, whether the public interest, convenience and necessity would be served by waiver of section 1.597 of the Commission's rules and grant of this application.

It is further ordered, That to avail himself of the opportunity to be heard, Robert J. Kelly, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicants shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69R-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of AMERICANA BROADCASTING CORP., NEW ORLEANS, LA. LOYOLA UNIVERSITY, NEW ORLEANS, LA. For Construction Permits	Docket No. 17607 File No. BPH-5404 Docket No. 17608 File No. BPH-5466

ORDER

(Adopted January 14, 1969)

BY THE REVIEW BOARD:

1. The Review Board having before it for consideration a petition for leave to amend, filed October 7, 1968, by Loyola University;

2. *It appearing*, That the proposed amendment is necessary to reflect the current changes in the composition of Loyola University's board of directors and corporate officers, effective September 5, 1968; and

3. *It further appearing*, That the proposed amendment is not opposed by any other party to this proceeding and would not result in the addition of new parties or issues, prejudice to other parties, or a comparative advantage to Loyola University;

4. *It is ordered*, that the petition for leave to amend, filed October 7, 1968, by Loyola University, *Is granted* and that the amendment *Is accepted.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

106-522—69——1

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FCC 69-74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF EDWIN A. ANDERSON, TRADING AS ANDERSON BROADCASTING SERVICE, LICENSEE OF STATION KVLH, PAULS VALLEY, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 22, 1969)

BY THE COMMISSION: COMMISSIONERS WADSWORTH AND H. REX LEE ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability, dated December 13, 1967, addressed to Edwin A. Anderson, trading as Anderson Broadcasting Service, licensee of station KVLH, Pauls Valley, Okla., and (2) the licensee's response to the notice of apparent liability by letter dated April 26, 1968.

2. Station KVLH is licensed for operation on 1470 kiloHertz with a power of 250 watts, daytime. Average sunrise and sunset times as specified in the station's license in central standard time are as follows:

January	7:30 a.m. to 5:45 p.m.	February	7:15 am. to 6:15 p.m.
March	6:45 a.m. to 6:30 p.m.	April	6:00 a.m. to 7:00 p.m.
May	5:30 a.m. to 7:30 p.m.	June	5:15 a.m. to 7:45 p.m.
July	5:30 a.m. to 7:45 p.m.	August	5:45 a.m. to 7:15 p.m.
September	6:15 a.m. to 6:30 p.m.	October	6:30 a.m. to 6:00 p.m.
November	7:00 a.m. to 5:30 p.m.	December	7:30 a.m. to 5:15 p.m.

3. The notice of apparent liability in this proceeding was issued after an inspection of KVLH on April 21, 1967, revealed the following violations of the terms of the station's authorization and Commission rules:

Records indicated aftersunset operation during December 1966. For example, the station signed off the air at 5:30 p.m., c.s.t., during December 1966, whereas the current authorization indicates the hours of operation during December to be from 7:30 a.m., c.s.t., to 5:15 p.m., c.s.t.

Section 73.922.[1]—Equipment to receive the emergency action notification or termination by radio was inoperative. This same violation was called to the licensee's attention on October 7, 1965.

Section 73.112(a)(1) [should be 73.112(a)(4)].—The time of each station identification announcement is not always entered in the program log. For example, there were no entries from 6:59 a.m., c.s.t., to 11:59 a.m., c.s.t., April 14, 1967, of the station identification time. This same violation was called to the licensee's attention on October 7, 1965.

Section 73.47(b).—Failure to provide data concerning equipment performance

[1] Effective Aug. 4, 1967, sec. 73.922 was amended and redesignated as sec. 73.933.

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measurements as required by section 73.47(a). For example, the two such reports available were dated January 15, 1966, and February 18, 1967. This same violation was called to the licensee's attention on October 7, 1965.

4. The notice of apparent liability provided that, pursuant to sections 503(b)(1)(A) and (B) of the Communications Act of 1934, as amended, the licensee had incurred an apparent forfeiture liability in the amount of $1,000 for willful or repeated failure to observe the terms of KVLH's license and sections 73.922, 73.112(a)(4), and 73.47(a) of the Commission's rules. In response to the notice, the licensee states that "KVLH has to plead 'No Defense' to * * *" the charges. Licensee asserts in mitigation, however, that the "* * * violations * * * were not deliberate" and "[a]lthough some of the violations were repeated, [they] were not repeated on purpose." Licensee also cites the station's service to the community, promises future compliance and avers that the $1,000 apparent forfeiture liability is too severe a penalty.

5. We have carefully considered the licensee's replies to the official notice of violation and the notice of apparent liability, as well as the circumstances surrounding the violations in this proceeding, but we find no reason either to remit or reduce the amount of licensee's apparent forfeiture liability. The hours of sunrise and sunset are specified in KVLH's license, which must be posted at the station, and the facts disclose that KVLH was operated throughout the month of December 1966 until 5:30 p.m., c.s.t., whereas the station's license requires licensee to terminate its broadcast day at 5:15 p.m., c.s.t., during that month. Thus, these violations were repeated within the meaning of the Communications Act and the Commission's rules and the licensee will not be relieved of liability because, as asserted in the licensee's response to the official notice of violation, the violations occurred through oversight or ignorance. See *Paul A. Stewart*, 25 R.R. 375 (1963), *Friendly Broadcasting Company*, 23 R.R. 893 (1962), and *Mid-Tex Broadcasting Company*, 8 FCC 2d 854 (1967). It is also evident from a review of the facts that the licensee was in repeated violation of sections 73.922, 73.112(a)(4), and 73.47(a) of the Commission's rules. In view of the statutory alternative provided in section 503(b)(1)(B) of the Communications Act we need not make a finding that the violations were deliberate or willful. However, although not a part of this proceeding, the facts disclose that the licensee was cited for the same rule violations on October 7, 1965, and this record of recurring violations may well indicate a willful disregard of the Commission's rules. See *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967). Although licensee stated in its response to the citation notice in this proceeding that it had taken corrective action, we have consistently held that such action subsequent to citation will not excuse the prior violations (*Executive Broadcasting Corporation*, 32 FCC 706 (1962)). Lastly, the licensee's financial condition was considered when the notice of apparent liability in the amount of $1,000 was issued.

6. In view of the foregoing, *It is ordered*, That Edwin A. Anderson, trading as Anderson Broadcasting Service, *Forfeit* to the United States the sum of $1,000 for repeated violations of the terms of station KVLH's license and for willful and repeated violation of the pro-

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visions of sections 73.922, 73.112(a)(4), and 73.47(a) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of Commission rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

It is further ordered, That the Secretary of the Commission send a copy of this memorandum opinion and order by certified mail—return receipt requested to Edwin A. Anderson, trading as Anderson Broadcasting Service, licensee of station KVLH, Pauls Valley, Okla.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ARGONAUT BROADCASTING CO. (KFAX), SAN FRANCISCO, CALIF.
Application for Modification of License (Tendered March 24, 1965)
Request To Operate During Certain Nighttime Hours
Petition for Reconsideration of Commission Action Adopted February 28, 1968 (FCC 68-229), *Inter Alia* Amending Section 73.7 of the Rules

MEMORANDUM OPINION AND ORDER

(Adopted January 15, 1969)

BY THE COMMISSION:

1. The Commission here considers two petitions for reconsideration filed by Argonaut Broadcasting Co. (KFAX), licensee of standard broadcast station KFAX, San Francisco, Calif., a limited-time station on 1100 kc/s,[1] a U.S. I-A channel on which the I-A station is station WKYC, Cleveland, Ohio, licensed to National Broadcasting Co., Inc. (NBC). There is also an authorized (but not yet operational) class II-A station on this channel, KREX, Grand Junction, Colo. Since 1959, KFAX has been authorized 50-kw directional facilities for use during daytime hours (local sunrise to local sunset) and 1-kw nondirectional facilities (at a different site) for use during nighttime hours. For many years KFAX has had a rather unusual operating schedule, operating during daytime hours (local sunrise to local sunset) and again from approximately 10 p.m. to 3 a.m., P.s.t. It is continuation of this nighttime operating schedule, and which of the above facilities are to be used during it, which are at issue here.[2] In a petition for reconsideration filed June 10, 1966, KFAX seeks reversal of a Commission action taken in a letter of May 11, 1966, returning the KFAX application (first captioned above) to use its 50-kw daytime facilities during its nighttime hours, and ordering it to cease operation during those hours except when station WKYC is not operating (presently, only a few hours early Monday mornings). Permission to

[1] Under sec. 73.23(b) limited-time stations such as KFAX may operate until local sunset "and in addition during night hours, if any, not used by the dominant station or stations on the channel."

[2] KFAX has also long operated during presunrise hours, under former sec. 73.87 of the rules and present sec. 73.99. This operation is not directly involved here. It is under consideration in dockets 17562, 18023, and 18036, which will be decided shortly.

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continue its schedule pending consideration of its petition was later granted.

2. The second KFAX petition for reconsideration, filed April 8, 1968, seeks reversal of a Commission action taken February 28, 1968, making numerous editorial, interpretive, and clarifying changes in parts 73 and 74 of the rules. The part of that action objected to is the amendment of section 73.7 redefining "nighttime" as "that period of time between local sunset and local sunrise" instead of local sunset to midnight as formerly provided. Because of the nature of the changes, prior rulemaking proceedings were not held. See FCC 68–229, released March 8, 1968, paragraphs 6, 13; 12 R.R. 2d 1591, 1593, 1595. The change is asserted to have possible impact on one of the bases on which KFAX claims the right to operate during the 10 p.m.–3 a.m. period mentioned above.

3. One of the important points in KFAX's argument is that, operating at night with either its 1-kw nighttime facilities or its 50-kw directionalized daytime facilities, it does not cause interference, under the full nighttime standards of the rules, to the 0.5-mv/m 50-percent skywave service area of I–A station WKYC, Cleveland; the 50-kw directionalized facilities would radiate less toward WKYC than the nighttime 1-kw operation. However, it is also to be borne in mind that in the general standard broadcast (AM) allocation structure, I–A stations like WKYC are, with some exceptions not including KFAX, assigned to be the only stations in the 48 States on their channels at night. The 0.5-mv/m 50-percent protection standard applies to I–B stations, but to I–A stations only with respect to those other operations which are specifically permitted in the rules. See section 73.21(a), 73.182(a)(1).

4. There must also be considered here the possible impact from KFAX nighttime operation on class II–A station KREX, Grand Junction, Colo., mentioned above. Class II–A stations are those provided for in section 73.22 of the rules, assigned in specified States of the West primarily to render wide-coverage nighttime primary service to underserved areas. Nighttime operation by class II stations further west can obviously have a substantial impact on these stations. In the case of KFAX and KREX, the KFAX showing is that the I–A station, WKYC, limits KREX to its 4.35-mv/m contour under full nighttime conditions. With its 1-kw nondirectional facility KFAX would increase this limit to 4.99 mv/m; with its 50-kw directional facility it would not increase it at all.

5. *Hours of operation.*—In defense of its use of nighttime hours even though WKYC now operates during nearly all of them, KFAX advances a series of arguments based on various provisions of the Commission's rules. As set forth in the petition and an earlier statement (November 1965) incorporated by reference, it is urged that operation from 10 p.m. until 2 or 3 a.m., P.s.t. (which, it is said, does not involve interference), has been conducted since 1935, with the consent of the Cleveland I–A station until very recently and with the full knowledge of the Commission, which granted applications for renewal of license showing the operating schedule and thus in effect approved it. During part of this time the Cleveland I–A station did

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not operate during the hours involved, approximately 1 a.m. to 6 a.m., e.s.t., at Cleveland; and thus the hours were clearly "night hours not used by the dominant station." However, KFAX asserts that during part of this period the Cleveland station did operate 24 hours a day and nevertheless agreed to the operation. In 1965 NBC, which has been operating the station 24 hours a day except early Monday mornings since it reacquired WKYC in 1965, and did not enter into the previously prevailing memorandum of understanding, and the last agreement by the licensee of the I–A station (then Westinghouse) expired November 30, 1965.[3]

6. KFAX contends that even though WKYC now operates during the 10 p.m.–3 a.m., P.s.t., period (1 a.m.–6 a.m., e.s.t.), these are not night hours as far as it is concerned. The argument is that prior to the rule amendments of February 1968, sections 73.6, 73.7, and 73.10, read together, divided the day into three parts: daytime (local sunrise to local sunset), nighttime (local sunset to midnight), and the experimental hours (midnight to local sunrise). It is asserted that since all of the hours involved are after midnight at Cleveland they are not WKYC's night hours but its experimental hours, and thus operation by KFAX during them does not impinge on any night hours of WKYC. Aside from this, it is asserted, operation after sunrise Cleveland—which can be as early as 1:45 a.m., P.s.t. (4:45 a.m., e.s.t.)—is not during such hours since it is during "daytime" hours at Cleveland, those after sunrise there. Therefore, it is argued, section 73.23(b) (footnote 1, above) gives KFAX the privilege of operating during these hours. It is also argued that the hours in question are not within WKYC's broadcast day, defined in section 73.9 as local sunrise to midnight; and that the last sentence of section 73.10, concerning the experimental period, accords KFAX this privilege in stating that daytime or specified hours stations may not present regular programs during the experimental period, but not making the same statement as to limited-time stations such as KFAX. The doctrine of expressio unius is said to apply in the latter connection.

7. As NBC points out in opposing KFAX's position, these arguments all have one basic flaw: they assume that KFAX has the right to operate at all times, unlimited as to time, except during night hours which are in fact used by the I–A station, whereas in fact, like all AM stations, KFAX is limited to those hours specified in its license and in the rules for its category of station. Here, these are daytime hours, plus presunrise hours as permitted under applicable rules, plus night hours not used by WKYC. NBC is correct in this view. Under section 73.87 of the rules as adopted in 1967, and earlier provisions to the same effect, stations are forbidden to operate outside of the hours specified in their license (except for presunrise and emergency broadcasting under sections 73.98 and 73.99, not involved here). In the case of KFAX, the hours specified are limited time,

[3] NBC points out that for many years the agreements, executed every 3 years corresponding to KFAX's license periods, asserted that: "It is understood that consent to the within operating schedule is given without prejudice to WTAM's [later KYW and now WKYC] rights as the dominant station on the 1100 kc/s clear channel and that said operating schedule is subject to revision or revocation at any time during the aforementioned license period by station WTAM."

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continue its schedule pending consideration of its petition was later granted.

2. The second KFAX petition for reconsideration, filed April 8, 1968, seeks reversal of a Commission action taken February 28, 1968, making numerous editorial, interpretive, and clarifying changes in parts 73 and 74 of the rules. The part of that action objected to is the amendment of section 73.7 redefining "nighttime" as "that period of time between local sunset and local sunrise" instead of local sunset to midnight as formerly provided. Because of the nature of the changes, prior rulemaking proceedings were not held. See FCC 68–229, released March 8, 1968, paragraphs 6, 13; 12 R.R. 2d 1591, 1593, 1595. The change is asserted to have possible impact on one of the bases on which KFAX claims the right to operate during the 10 p.m.–3 a.m. period mentioned above.

3. One of the important points in KFAX's argument is that, operating at night with either its 1-kw nighttime facilities or its 50-kw directionalized daytime facilities, it does not cause interference, under the full nighttime standards of the rules, to the 0.5-mv/m 50-percent skywave service area of I–A station WKYC, Cleveland; the 50-kw directionalized facilities would radiate less toward WKYC than the nighttime 1-kw operation. However, it is also to be borne in mind that in the general standard broadcast (AM) allocation structure, I–A stations like WKYC are, with some exceptions not including KFAX, assigned to be the only stations in the 48 States on their channels at night. The 0.5-mv/m 50-percent protection standard applies to I–B stations, but to I–A stations only with respect to those other operations which are specifically permitted in the rules. See section 73.21(a), 73.182(a)(1).

4. There must also be considered here the possible impact from KFAX nighttime operation on class II–A station KREX, Grand Junction, Colo., mentioned above. Class II–A stations are those provided for in section 73.22 of the rules, assigned in specified States of the West primarily to render wide-coverage nighttime primary service to underserved areas. Nighttime operation by class II stations further west can obviously have a substantial impact on these stations. In the case of KFAX and KREX, the KFAX showing is that the I–A station, WKYC, limits KREX to its 4.35-mv/m contour under full nighttime conditions. With its 1-kw nondirectional facility KFAX would increase this limit to 4.99 mv/m; with its 50-kw directional facility it would not increase it at all.

5. *Hours of operation.*—In defense of its use of nighttime hours even though WKYC now operates during nearly all of them, KFAX advances a series of arguments based on various provisions of the Commission's rules. As set forth in the petition and an earlier statement (November 1965) incorporated by reference, it is urged that operation from 10 p.m. until 2 or 3 a.m., P.s.t. (which, it is said, does not involve interference), has been conducted since 1935, with the consent of the Cleveland I–A station until very recently and with the full knowledge of the Commission, which granted applications for renewal of license on schedule and thus in effect approved it. During this time Cleveland I–A station did

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6. KFAX contends that even though WKYC now operates the 10 p.m.–3 a.m., P.s.t., period (1 a.m.–6 a.m. e.s.t.) [illegible] night hours as far as it is concerned. The argument [illegible] the rule amendments of February 1965, sections [illegible] read together, divided the day into three parts: [illegible] to local sunset), nighttime (local sunset to [illegible] mental hours (midnight to local sunrise). [illegible] of the hours involved are after midnight [illegible] WKYC's night hours but its experimental [illegible] by KFAX during them does not impinge [illegible] WKYC. Aside from this, it is asserted [illegible] Cleveland—which can be as early as [illegible] e.s.t.)—is not during such hours since [illegible] Cleveland, those after sunrise there. [illegible] 73.23(b) (footnote 1, above) gives KF[illegible] during these hours. It is also argued [illegible] not within WKYC's broadcast day [illegible] sunrise to midnight; and that the rule [illegible] cerning the experimental period [illegible] stating that daytime or specified [illegible] regular programs during the experimental [illegible] the same statement as to limitations [illegible] doctrine of expressio unius is said [illegible]

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KREX becomes [illegible] of that station's [illegible] is established [illegible] ering signals [illegible] interference. [illegible]ing, 17 F.C.C. [illegible]3).

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[3] NBC points out that for [illegible] ing to KFAX's license permit [illegible] operating schedule is given [illegible] rights as the dominant [illegible] schedule is subject to revision [illegible] period by station WTAM.

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followed by the listing of the times of sunrise and sunset at San Francisco. The limited-time hours rule, section 73.23(b), is a part of this license, and gives KFAX the right to operate, in addition to those daytime hours, during certain hours not used by WKYC. If the hours in question here do not fall either between sunrise and sunset at San Francisco, or qualify as night hours not used by WKYC, then KFAX cannot use them at all. Therefore to argue that if they are not night hours but experimental hours at Cleveland they can be used, completely misses the point. In any event, the experimental hours concept is not applicable here, any more than in other cases where stations have attempted to justify use of daytime facilities during nighttime hours on the ground that the time was after midnight. As pointed out in *Music Broadcasting Company*, 18 FCC 320, 10 R.R. 20 (1954), and the February 1968 action amending this section the purpose of section 73.7 is merely to distinguish those hours during the night in which experimentation is not permitted, from the so-called experimental period. It was never designed to permit regular operation with other than authorized nighttime facilities during the time between midnight and sunrise, for example use of daytime rather than nighttime modes of operation or continued presunrise operation under former section 73.87 in the face of a valid interference complaint (involved in the *Music Broadcasting* case).[4]

8. Moreover, these arguments would apply the definitions of the rules to KFAX's operation in terms of *Cleveland* time rather than time at San Francisco, where KFAX is located. This is not a reasonably tenable construction. The term "daytime," for example, in section 73.23(b) as elsewhere obviously means the hours between sunrise and sunset at San Francisco; i.e., the hours between the average sunrise and sunset times for each month specified in the KFAX license. KFAX would surely be the first to complain if it were required to sign off at 2 p.m., P.s.t., in December, or 2:15 in January, the times corresponding to sunset at Cleveland in those months (5 and 5:15 p.m., e.s.t.). It is clearly appropriate, and only logical, to give the terms "night" or "nighttime" the same meaning—the hours between sunset and sunrise at San Francisco. To the extent that WKYC does not use some of these hours, KFAX may operate during them; otherwise it may not.[5]

9. It is clear, moreover, that operation by KFAX during such hours, when WKYC is operating, violates the basic clear channel allocation scheme, referred to in paragraph 3, above. I–A stations such as WKYC are assigned as the only stations in the conterminous 48 States on their frequencies at night, except for certain specific exceptions in the rules including II–A stations such as KREX but not KFAX. As such, they are permitted to operate at night free

[4] KFAX attempts to distinguish two cases in this area on the ground that they involved use of daytime rather than nighttime facilities before 4 a.m. It does not mention the *Music Broadcasting* case in which this principle and the quotation in the text were set forth in the context of operation vel non. KFAX also refers to a 1940 Commission press release concerning new presunrise rules, which pointed out that any interference resulting would be during experimental hours rather than the regular broadcast day. Whatever significance this informal pronouncement may have had, the principle properly applicable is that set forth in the later *Music Broadcasting* decision, cited.

[5] Thus, if the experimental period concept urged by KFAX had any validity in this connection, it would apply only to operation by KFAX after midnight San Francisco time.

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from any cochannel sources of interference to their service in the 48 States. The protection of the 0.5-mv/m 50-percent skywave contour concept emphasized by KFAX applies to I–B channels and stations generally, but to I–A stations and channels only in relation to those operations specifically contemplated by the rules.[6] Class II operation on these channels is strictly secondary (see secs. 73.21(a)(2) and 73.182(a)(2)). Presunrise operation by class II stations on these channels west of the dominant stations is permitted, under section 73.99 as under earlier section 73.87, but only after sunrise at the I–A location and therefore not causing interference to significant skywave service. Operation by KFAX during the hours in question here is thus a secondary use, to be permitted only as long as the hours are not used by the dominant station and not permitted when they are.

10. Nor is KFAX's argument based on the language of section 73.10, concerning the experimental period, a meritorious one. As is clear from the *Music Broadcasting* case, *supra*, and other decisions cited by KFAX, the experimental period is simply what its name implies: a period during which stations in general may operate for experimental purposes in testing and maintaining apparatus, even though they are not authorized by their licenses to operate during these hours. It was never intended to, and does not, afford the privilege of regular operation during these hours with other than facilities authorized for use at that time. At the time the rule was adopted, perhaps to a lesser extent than today, many fulltime stations did not operate during the hours immediately after midnight, and it was believed that therefore such testing and maintenance could be performed during these hours with a minimum of undesirable impact. The rule has long contained the provision that such operation on an experimental basis must not cause interference to other stations regularly operating within the period. It is doubtful whether that would ever be true of a class II station on a I–A channel during night hours when the I–A station is actually operating, since any operation within the 48 conterminous States is a source of interference to nighttime I–A service under the basic allocation scheme. But we need not decide this question here, since KFAX does not, and obviously cannot, claim that its use of these hours is experimental. The last sentence of the section, specifically forbidding daytime and specified-hours stations from regular program transmissions during these hours, is no warrant for assuming that other stations (e.g., limited-time stations) can so use them. Rather, it is simply a precautionary note to the effect that the experimental privileges given by the section do not apply to permit regular broadcasting by the two groups of stations who are never authorized to operate during these hours. The failure to mention limited-time stations as similarly precluded simply reflects the fact that under some circumstances—i.e., when the class I station is not using the hours—these stations can broadcast regularly during the

[6] See secs. 73.21(a)(1) and 73.182(a)(1), and also 73.25(a). When KREX becomes operational it will cause interference to WKYC's skywave service outside of that station's 0.5-mv/m 50-percent contour. However, skywave interference to skywave service is evaluated on an individual basis, not taking into account the existence of other interfering signals either as masking the interference from one or as combined with it in an R.S.S. interference calculation. *Argus Press Co.* 14 F.C.C. 790, 6 R.R. 173 (1950); *Radio Reading*, 17 F.C.C. 118, 7 R.R. 801 (1952); *Flathead Valley Broadcasters*, 5 R.R. 2d 550 (1965).

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midnight-sunrise period. To state in section 73.10 that they cannot would simply add a somewhat confusing qualification to the privilege accorded by section 73.23(b).

11. In our view, the long history of this operation, with a series of agreements by the I–A station and grants of renewal by the Commission on the basis of KFAX applications showing these broadcasting hours, is no basis for holding it to be either consistent with the rules or permissible. As noted above, during at least part of the period since 1935, and apparently originally, the arrangement was based on the fact that the I–A station was not using the early morning hours at Cleveland which are involved—in which case KFAX clearly was entitled to operate under the provisions of section 73.23(b). To the extent that the KFAX operation did take place (and was agreed to) simultaneously with the Cleveland station's operation, it was not permitted under the rules, with or without agreement. While agreement by the class I station was formerly, under section 73.87, a basis for presunrise operation by class II stations, it was never the basis for operation such as that by KFAX as long as the class I–A station is using the hours. It is highly doubtful whether agreements of this sort should be the basis for permitting operations conflicting with the basic AM allocation pattern, as this one does; and the present presunrise rule does not permit it even in that area. Certainly now that the I–A station does not give its consent and opposes the operation, this cannot be held to be a significant factor. The same is true of any Commission renewals of license where the application contemplated this operation. See in this connection *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). At times the Commission action related to an operation which was permissible under the rules, as noted; and, since there was continuing agreement and the KFAX and Cleveland renewals were in recent years never under consideration simultaneously, there was no reason to question the arrangement at other times.[7] Now that NBC no longer agrees to the operation and the operation clearly conflicts with the rules, action to terminate it is appropriate.

12. Therefore operation by KFAX during the 10 p.m.–3 a.m. (P.s.t.) period is clearly prohibited by the rules to the extent WKYC operates during these hours. Its petition for reconsideration of the action of May 11, 1966, must be denied insofar as it seeks to continue this operation on the basis of the rules mentioned. Likewise, its petition for reconsideration of April 8, 1968, objecting to the recent change in section 73.7 (redefinition of nighttime) must be denied. As mentioned above, that action merely changed the rule to reflect settled Commission policy as established in the Music Broadcast and other decisions, and was appropriately taken without rulemaking. In any event, the change had no effect on KFAX's operating privileges. This petition is therefore denied in toto.

13. *Rights under section 73.81.*—Somewhat more significance should be attached to KFAX's arguments concerning section 73.81 of the rules, relating to class I and class II stations unable to agree

[7] Under the present geographic licensing arrangement which has existed since the early 1950's, the KFAX license expires 14 months after one WKYC expiration date and 22 months before the next.

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on operating hours. This matter—which is the subject of a rule-making being instituted today and is the basis for our handling of this situation for the immediate future—is discussed below, at the end of this document.

14. *Use of daytime facilities during nighttime hours.*—The second question involved here is whether—to the extent KFAX is permitted to operate during nighttime hours—it should be permitted to use its 50-kw directionalized nighttime facilities, as requested in the March 1965 application. In view of the foregoing observations, this of course is relevant only: (1) To the extent WKYC is now not operating during these hours; i.e., a few hours on Monday mornings, and (2) to whatever extent WKYC may not use these hours in the future.

15. The Commission's letter of May 11, 1966, of which KFAX seeks reconsideration, stated that its application was returned as inconsistent with the provisions of section 73.25(a)(5) of the rules, relating to class II facilities on U.S. I–A channels. KFAX mentions section 73.38, concerning limited-time stations (there are limited-time stations on both I–A and I–B channels). Section 73.25(a) provides that class II stations may be assigned to U.S. I–A channels as follows: class II–A stations, full-time class III stations at San Diego, Calif., and Anchorage, Alaska, other full-time stations in Alaska, Hawaii, the Virgin Islands and Puerto Rico meeting specified criteria as to protecting the continental United States, daytime and limited-time stations in those areas, and ((a)(5)(ii)), within the continental United States excluding Alaska, where the station would operate with the facilities authorized as of October 30, 1961. This rule was adopted in the 1961 Clear Channel decision (docket 6741, 31 FCC 565, 21 R.R. 1801).

16. KFAX's argument is essentially that this section, read in the light of the Clear Channel decision which adopted it, was not intended "to abolish, or to circumscribe to any further degree, *existing* limited time stations *then* operating on I–A frequencies" (emphasis in original), nor to preclude minor changes in the facilities of such stations. We note initially that the application involved here, to use daytime facilities during nighttime hours, is not a minor change, even though it does not involve the construction of facilities not previously authorized. See section 1.571. KFAX's argument must be evaluated in the light of the purpose of the rule, as reflected in the Clear Channel decision. As a reading of that decision makes clear, the I–A channels were regarded as highly important in providing for future overall improvement in standard broadcast service to the Nation, and therefore it was decided, for the time being, to preclude the assignment of new stations on these frequencies, lest they impair optimum use thereof to meet allocations objectives not met up to then under the traditional AM assignment process. See paragraphs 54–56 of the Clear Channel decision, 31 FCC 584–585, 21 R.R. 1821.[8] While the decision itself was silent

[8] "Therefore * * * we have concluded that the I–A channels should not be opened for the assignment of stations on the same uncontrolled basis prevailing in the AM service generally. * * * Further assignments on the I–A channels should be made in accordance with an overall plan which will achieve our various objectives, including provision of maximum service to underserved areas, provision of local outlets for the maximum number of communities, and others. * * *

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as to changed, as opposed to new, facilities, section 73.25(a), as amended, clearly precluded changed facilities as well. After the Clear Channel decision the Commission considered the situation of various applications for increased, rather than new, facilities on these channels, and concluded that, except for certain applications on file for many years, they should be dismissed, because of the impact grant thereof would cause on other, more nearly optimum uses of the channels in furtherance of overall allocations objectives. See *KXA, Inc.*, 5 R.R. 2d 338 (May 1965) and 5 FCC 2d 60, 8 R.R. 2d 723 (1966); *affirmed, KXA, Inc.* v. *FCC* (C.A.D.C. 1967).[9]

17. In our judgment the same principles must apply here. While, as KFAX asserts, use of its 50-kw directionalized facilities during nighttime hours would have no greater, and in fact less, impact on the cochannel I–A and II–A stations than does its 1-kw facility used at night, the impact on other potential uses of the channel is substantial. The radiation, suppressed toward the east, is very high toward the north and northwest, and would thus preclude or make more difficult assignment of a station in that portion of the country which is where optimum further use of the frequency might well be made, providing full-time service to underserved areas. In this connection it must be borne in mind that any nighttime facility on the channel (even one using the small number of hours involved here) not only is a source of potential interference to a new station but imposes protection requirements on such an operation. Thus, the ultimate optimum further use of the channel, to be decided on rulemaking as contemplated in the Clear Channel and KXA decisions cited above, would be prejudiced. The concomitant benefit would only be some improvement in KFAX's service during these hours to the well-served San Francisco area. We do not see here any reason for deviation from the literal language of section 73.25(a)(5), or not to apply that language.

18. Actually, much of the KFAX argument is devoted to an analysis of the import of section 73.38 of the rules, specifically concerning limited-time stations. It is urged that this is applicable because section 73.25(a)(5), mentioned, states that further class II assignments on these channels shall be—

> consistent with the class I, class II–A, and Anchorage and San Diego assignments provided in this paragraph, *and, in the case of limited time stations, subject to the restrictions contained in* § *73.38* * * * (emphasis in KFAX petition).

It is urged that section 73.25(a), adopted some 2 years later than 73.38, thus continues the privileges afforded by that earlier section, which, as modified in September 1959, does not bar (in itself) changes in limited-time facilities which do not increase radiation toward the cochannel dominant station. This is incorrect. Section 73.25(a)(5) simply refers to the *restrictions* in section 73.38. Where changes in facilities are otherwise acceptable under section 73.25(a)(5), they will nevertheless not be permitted unless they also comply with the restrictions in section 73.38. Where section 73.25(a)(5) by its other terms preclude changed facilities—as it does here—section 73.38 does not come into

[9] KXA, Seattle, like KFAX, is a limited-time class II station on a U.S. I–A channel.

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operation.[10] We hold that acceptance of the KFAX application is precluded by section 73.25(a)(5) of the rules.[11]

19. *Requests for waiver.*—In both of the above respects—operation during certain nighttime hours, and use of its 50-kw daytime facilities—the KFAX petition requests waiver of the rules if they are construed to preclude its requests. These were not advanced at length, and on the basis they are presented here there is no reason to consider them extensively. In view of the amount of full-time AM service available in San Francisco, we find nothing in what is now before us to justify waiver of the rule concerning hours of operation when that interferes with the basic I–A allocation scheme, or of the class II acceptability rule where the proposed facilities would have a substantial impact on future use of the channel. However, we realize that KFAX may not have made all of the arguments in favor of a waiver (rather than the meaning of the rule) which could be advanced. If KFAX wishes to make a further showing in support of a waiver request, by the time comments are due in the proceeding begun today concerning section 73.81, it will be considered.

20. *Section 73.81.*—Section 73.81 of the rules relates to relations between limited-time class II and class I operation and provides as follows:

§ 73.81 Secondary station; failure to reach agreement.

If the licensee of a secondary station authorized to operate limited time and a dominant station on a channel are unable to agree upon a definite time for resumption of operation by the station authorized limited time, the Commission shall be so notified by the licensee of the station authorized limited time. After receipt of such statement the Commission will designate for hearing the applications of both stations for renewal of license, and pending the hearing the schedule previously adhered to shall remain in full force and effect.

This rule was adopted in its present form in 1939 (when the AM rules were codified into what is basically their present form), and is essentially the same as Federal Radio Commission rule 160, adopted in 1931. It has very seldom been used, never in recent years except in the present matter. Here, after the Commission's staff questioned KFAX's application and nighttime hours of operation in 1965, that station's November 1965 statement in reply claimed rights under this section. It was stated that KFAX wished to continue its longstanding schedule, and that it was notifying the Commission of its inability to reach agreement with NBC (WKYC) for the ensuing license period, and invoking the mandatory procedure specified in section 73.81 if the Commission believes that NBC's consent is required and it is not forthcoming. It renews this position briefly in its petition for reconsideration.

21. NBC, in replying to the KFAX 1965 statement and opposing its

[10] Sec. 73.38 was adopted in 1959 in the Daytime Skywave proceeding (Docket 8333). It was designed to insure against increases in interference to class I service resulting from changes in the facilities of such stations, and to avoid any additions in number to this rather ambiguous category of stations. Sec. 73.25(a)(5), adopted 2 years later, represented a largely different concept, outlined above: preserving the potential of the I–A channels for optimum use on a controlled basis. This modified the earlier concepts as to limited-time stations, as well as daytime stations, on I–A channels.

[11] We also note that sec. 73.23(b) of the rules, defining the hours of operation of limited-time stations, states that such stations operate with facilities authorized as of Nov. 30, 1959.

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present petition, takes the position that it is in no position to agree to a KFAX schedule which violates the Commission's rules; and that the rules certainly do not contemplate that KFAX shall be in a position to dictate the I–A station's operating hours, in complete contravention of the basic clear channel allocation scheme. It states that there is a definite time when KFAX can resume operation, using the language of section 73.81—9 p.m., P.s.t. (midnight e.s.t.), Monday mornings. It is stated that the provisions of this section were clearly not designed to override section 73.23(b), permitting KFAX operation only during unused nighttime hours; but rather, taken together with section 73.80, designed to insure that the I–A station's hours are not so indefinite that the class II station cannot know what hours are available to it.[12] Here, it is said, the hours are definite—midnight to 5:30 a.m. Monday morning—and the rule does not apply.

22. We agree with NBC that under present circumstances, with nearly all class I stations operating 24 hours a day most of the week, the rule should provide only for a definite schedule of the dominant station's hours so that the class II stations may know what nighttime time is available to it. But it is far from clear that this is what the rule in its present form provides. It could be argued that it contemplates an agreement by the two stations providing for a reasonable amount of class II operation, or otherwise a determination by the Commission after a comparative proceeding. In order to eliminate any uncertainty in this respect, and bring the rule into clear accord with what the public interest in maximum radio service requires, we are today instituting a rulemaking proceeding on the subject. KFAX and NBC may wish, in the comments we assume they will file, to discuss the correct interpretation of the present language as well as the merits of the proposed revision.

23. The KFAX application for renewal of license, which is now pending, will be conditioned on the outcome of this rulemaking. Meanwhile, pending the outcome of this rulemaking proceeding, we believe it appropriate to permit its longstanding operation, with 1-kw nighttime facilities, to continue. It will be permitted to continue until 30 days after a decision in this proceeding, and if it appears appropriate the decision will order termination at that time.

24. In view of the foregoing, *It is ordered*, That:

(1) The petitions for reconsideration filed by Argonaut Broadcasting Co. (KFAX) on June 10, 1966, and April 8, 1968, and listed in the caption hereof *Are denied.*

(2) Until 30 days after a decision in docket 18421, station KFAX, San Francisco, *May operate*, with its facilities authorized for nighttime use, during the hours from 10 p.m. to 3 a.m., Pacific standard time.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[12] Section 73.80 reads as follows:
"§ 73.80 Secondary station; filing of operating schedule.
"The licensee of a secondary station which is authorized to operate limited time and which may resume operation at the time the dominant station (or stations) on the same channel ceases operation, shall, with each application for renewal of license, file in triplicate a copy of its regular operating schedule, bearing a signed notation by the licensee of the dominant station of its objection or lack of objection thereto."

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FCC 69R-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications BALTIMORE BROADCASTING CO., BALTIMORE, MD.	Docket No. 17740 File No. BPCT-3810
THE MEADOWS BROADCASTING CO., INC., BALTIMORE, MD.	Docket No. 17741 File No. BPCT-3878
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE REVIEW BOARD:

1. Baltimore Broadcasting Co. (Baltimore), and the Meadows Broadcasting Co., Inc. (Meadows), are applicants seeking authorization to construct a new television broadcast station at Baltimore, Md., on Channel 54. By order, FCC 67-1064, released September 28, 1967, the mutually exclusive applications were designated for hearing under a comparative issue. On October 8, 1968, the applicants filed with the Commission a joint request for approval of agreement,[1] which contemplates dismissal of the Meadows application and the grant of the Baltimore application. The joint agreement provides for the following successive steps: (1) Dismissal of the Meadows application, (2) grant of the Baltimore application, (3) upon notice by Knott Industries, Inc., the sole stockholder of Meadows, the formation of a new corporation to be known as Baltimore Broadcasting Corp. (BBC), in which Baltimore and Meadows will each own one-half of the common voting stock, (4) filing of an application for assignment of the construction permit from Baltimore to BBC, (5) the assistance of certain offices and employees of Lewron Television, Inc. (Lewron),[2] in the construction and operation of the station, and (6) ownership of one-third of the outstanding common stock of BBC by Lewron, Knott, and Baltimore.[3] The agreement calls for reimbursement by BBC of the expenses incurred in the prosecution of applications to the date of this agreement of Baltimore, Meadows,

[1] Other related pleadings before the Board for consideration are: (*a*) Broadcast Bureau's comments, filed Nov. 4, 1968; (*b*) petition for acceptance of late filing, filed Dec. 2, 1968, by Baltimore and Meadows; and (*c*) reply, filed Dec. 2, 1968, by Baltimore and Meadows. In view of the complexity of the issues involved herein, the Review Board finds that sufficient reason to support the petition for acceptance of late filing has been shown.

[2] Lewron is a former applicant in this proceeding. Its application was amended to include Meadows as the applicant. See par. 5, infra.

[3] The arrangements for effectuating the new corporation encompass detailed plans for its organization and capitalization. None of these plans, however, appear to detract from the bona fides of the proposed merger, and, therefore, they need not be reiterated herein.

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and Lewron. Additionally the agreement provides that Baltimore shall be reimbursed the costs of organizing BBC.

2. The petitioners have submitted affidavits from all parties to the agreement setting forth the exact nature of the consideration involved, the details regarding the initiation and history of the negotiations, and the reason why the agreement is considered to be in the public interest; i.e., it would permit an immediate grant of the Baltimore application, thereby expediting the inauguration of a new television broadcast service.

3. Baltimore, Meadows, and Lewron have each supplied itemized statements of expenses allegedly incurred in the preparation and prosecution of their applications. Baltimore's listed expenditures total $29,730.87. Of this amount, however, Baltimore has provided no substantiation for the following items: $15,000 for consideration for an option on towersite; $1,000 for the professional services of a communications consultant; $935.23 for structural analysis of tower; and $150 for a title examination for the towersite. The remaining items have been adequately substantiated, and therefore reimbursement to Baltimore can be approved in an amount of $12,645.64. We cannot, however, approve reimbursement to Baltimore of the expenses of organizing BBC. These expenses, which have not yet been incurred, cannot be determined at this time. In any event, such expenses clearly cannot be regarded as out-of-pocket expenditures at this time.

4. The itemized expenses of Meadows total $6,421.53. All of the expenses are adequately substantiated, with two exceptions. Meadows lists as an expenditure an amount of $577.18 for organization expense. In response to the Bureau's comments, wherein this item was challenged, petitioners, with their reply pleading, submitted an affidavit from John A. Pryor, the treasurer and general counsel of Meadows & Knott Industries, Inc. He states, "that the organizational expenses consist of $350 paid to himself for legal expenses and $277.18 for fees to the State of Maryland." Although we believe that fees paid in connection with the incorporation of Meadows are reimbursable, approval of reimbursement for the legal fee paid to Pryor cannot be approved absent further substantiation in light of Pryor's position as an officer of Meadows & Knott. See *Miss Lou Broadcasting Corp.*, FCC 68R–30, 11 FCC 2d 589. A listed expenditure of $828.75 for engineering expenses was further broken down in petitioners' reply pleading into $51.50 for a "Horizon photograph" from "Charese" and $777.25 for a consulting engineer. There is no further substantiation of the $51.50 expense, which must therefore also be disallowed. Meadows has therefore adequately substantiated expenses in an amount of $6,020.03.

5. Lewron itemizes expenses which total $5,131.28. The Broadcast Bureau, in its comments, questions whether Lewron has already been reimbursed for these expenditures in view of a provision in the agreement between Lewron and Meadows whereby Lewron agreed to transfer at cost to Meadows its previous submissions to the FCC. However, Pryor in his affidavit submitted with petitioners' reply pleading, states, "that the Lewron-Meadows agreement was not effectuated because of the consummation of the subject agreement, and that Lewron

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was therefore not reimbursed for its expenses." Under these circumstances, we are of the view that Lewron may be reimbursed for legitimate expenditures. However, one of the listed expenditures, $924.85 for engineering expenses, cannot be approved in full. The consulting engineer for Lewron and Meadows submitted an affidavit with petitioners' reply pleadings, in which he states "that charges of $1,549.85 were billed to Lewron and Meadows." Since Meadows claimed to have paid this engineer $777.25, the amount that can be approved for Lewron is $772.60. The remaining expenditures listed by Lewron have been adequately substantiated, and therefore reimbursement in an amount of $4,979.03 will be approved.

6. Accordingly, *It is ordered*, That the petition for acceptance of late filing, filed December 2, 1968, by Baltimore Broadcasting Co. and the Meadows Broadcasting Co., Inc., *Is granted;* that the agreement *Is approved* to the extent indicated herein; that the application of the Meadows Broadcasting Co., Inc. (BPCT–3878), *Is dismissed* with prejudice; that the application of Baltimore Broadcasting Co. (BPCT–3810) *Is granted;* and that this proceeding *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of J. C. BLANCETT, TRADING AS BLANCETT BROADCASTING CO., HARDINSBURG, KY. DR. O. C. CARTER, PAUL FUQUA AND DR. ROBERT D. INGRAM, DOING BUSINESS AS BRECKINRIDGE BROADCASTING CO., HARDINSBURG, KY. For Construction Permit	Docket No. 17856 File No. BPH-5815 Docket No. 17857 File No. BPH-5927

ORDER

(Adopted January 8, 1969)

BY THE REVIEW BOARD:

1. The Review Board having before it for consideration the motion for leave to amend and to reopen the record, filed December 19, 1968, by Dr. O. C. Carter, Paul Fuqua, and Dr. Robert D. Ingram, doing business as Breckinridge Broadcasting Co. (Breckinridge):[1]

2. *It appearing*, That the proposed amendment is necessary to reflect a change in the legal entity prosecuting the Breckinridge application; i.e., from the partnership entity to Breckinridge Broadcasting Co., Inc., a corporation formed under the laws of Kentucky; and

3. *It further appearing*, That on December 13, 1968, the Commission granted the application for voluntary assignment of the license of standard broadcast station WHIC, Hardinsburg, Ky., from the partnership entity to Breckinridge Broadcasting Co., Inc.; and

4. *It further appearing*, That the proposed amendment is unopposed by the other parties to this proceeding, will neither necessitate the addition of new parties or issues[2] nor prejudice the other parties:

5. *It is ordered*, That the motion for leave to amend and to reopen the record, filed December 19, 1968, by Dr. O. C. Carter, Paul Fuqua, and Dr. Robert D. Ingram, doing business as Breckinridge Broadcasting Co. *Is granted;* that the record *Is reopened;* that the amendment *Is accepted;* and that the record *Is closed.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] The initial decision of Chief Hearing Examiner James D. Cunningham (FCC 68D-59, 14 R.R. 2d 173, released Sept. 16, 1968), proposing a grant of the Blancett Broadcasting Co. application and a denial of the Breckinridge application, is presently before the Review Board on exceptions filed by Breckinridge.

[2] The three partners of Breckinridge have retained the same equal ownership interest in the corporate entity.

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FCC 69-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
BOONE BIBLICAL COLLEGE (KFGQ-FM),
BOONE, IOWA
Has: 99.3 mc, No. 257; 310 w; 200 ft.
Req: 98.9 mc, No. 255; 27.5 kw; 330 ft.
For Construction Permit

ORDER

(Adopted January 15, 1969)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; WADSWORTH, AND H. REX LEE DISSENTING.

1. The Commission has before it for consideration the above-captioned and described application and the applicant's request for a waiver of the mileage separation requirements of section 73.207(a) of the Commission's rules to permit acceptance of the application.

2. The transmitter site specified by the applicant involves a 17-mile short spacing with station KEYC-FM, Mankato, Minn.

3. In support of the request for waiver, Boone Biblical College states (*a*) the site is immediately available, (*b*) the site is near the principal city and is centrally located with regard to the rural area to be served, (*c*) a site meeting the spacing with KEYC-FM would present operating difficulties as it would be removed from the principal city, (*d*) more than equivalent protection would be afforded KEYC-FM, (*e*) it is unable to locate a site meeting the spacing with KEYC-FM without creating a short-spacing problem with KDPS, Des Moines, Iowa, and (*f*) KEYC-FM has stated it would not object to the proposal if certain conditions were accepted by KFGQ-FM.

The assignment of channel 255 was an unfortunate assignment as it would require a site approximately 18 miles south of Boone to meet the minimum spacing requirement with KEYC-FM, whereas a site even 5 miles south of Boone would introduce a new short spacing with station KDPS, Des Moines, Iowa (channel 201), which lies approximately 35 miles south-southeast of Boone. A site approximately 33 miles east-southeast of Boone would be required for use of channel 255 with no short spacings.

5. The Commission finds that the proposed 17-mile short spacing with KEYC-FM is excessive and has concluded that the reasons advanced by Boone Biblical College are not sufficient to justify a waiver of its rules. Furthermore, because of the impracticability of selection of a site and facilities for use of channel 255 and which would be in conformance with the Commission's rules, the Commission will

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institute a rulemaking proceeding to delete assignment of channel 255 from Boone, Iowa.

6. Accordingly, *It is ordered*, That the request of Boone Biblical College for waiver of section 73.207(a) of the Commission's rules *Is hereby denied*, and that the above-captioned proposal *Is returned* to the applicant.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69R-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of AUGUSTINE L. CAVALLARO, Jr., BAYAMON, P.R. For Construction Permit	Docket No. 16891 File No. BP-16182

APPEARANCES

Jerome S. Boros, on behalf of Augustine L. Cavallaro, Jr., applicant; *Thomas B. Fitzpatrick*, *Robert W. Geweke*, and *John B. Letterman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted January 16, 1969)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND SLONE.

1. This proceeding involves the application of Augustine L. Cavallaro, Jr. (Cavallaro), requesting a construction permit for a new class II standard broadcast station at Bayamon, P.R. By memorandum opinion and order, FCC 66-866, 5 FCC 2d 138, the Commission designated this application for hearing, together with that of the then pending mutually exclusive application of Luis Prado Martorell (docket No. 16890),[1] on site suitability and financial issues as to Cavallaro, and areas and populations, suburban community, section 307(b) and contingent comparative issues as to both applicants. A site availability issue as to Cavallaro was subsequently added by the Board (memorandum opinion and order, FCC 67R-67, 7 FCC 2d 73, released Mar. 1, 1967).

2. In an initial decision, FCC 68D-17, released February 27, 1968, Hearing Examiner Elizabeth C. Smith resolved all outstanding issues, except that relating to the suburban community presumption, in favor of the applicant. With respect to this issue, the examiner concluded that Cavallaro had failed to rebut the suburban community policy statement presumption;[2] that it appeared that the applicant realistically proposed a local transmission facility for San Juan; and that the proposal satisfied the technical requirements of section 73.30, 73.31 and 73.188(b) (1) and (2) of the rules for a station assigned to San Juan. The examiner therefore proposed to grant Cavallaro's application subject to the condition that the application be amended to specify

[1] The Martorell application was subsequently dismissed in hearing on Mar. 9, 1967, for failure to prosecute.

[2] Policy statement on Sec. 307(b); Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 R.R. 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 R.R. 2d 1908 (1966).

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San Juan as the station location. The proceeding is presently before the Review Board on exceptions filed by the Broadcast Bureau. Various interlocutory pleadings were subsequently filed by the Bureau and Cavallaro, requesting specific Board action in light of the Commission's recent suburban community policy statement clarification, 13 FCC 2d 391, 13 R.R. 2d 1901 (1968). The Board has reviewed the initial decision in light of the exceptions, its examination of the record, the interlocutory pleadings, and the oral arguments presented before a panel of the Board on November 12, 1968; and, concurs in and adopts the examiner's findings (as corrected by Bureau exceptions 1 and 2) and conclusions on all issues in this proceeding except those which relate to the examiner's ultimate grant of Cavallaro's application as a San Juan station.

3. The Bureau's four major exceptions (exceptions 3 to 6)[3] are directed to statements of the examiner which either assert or are based upon the premise that the amended application should not be removed from hearing status and returned to the processing line.[4] In exceptions filed at a time when V.W.B., Inc., 13 FCC 2d 400, 13 R.R. 2d 487 (1968), was still under Commission consideration, the Bureau contended that the Commission's action therein would be controlling in the instant case. In reply, Cavallaro argued that V.W.B., Inc., would not be determinative and that this fact was recognized by the Board in its refusal to grant the Bureau's request for an extension of time in which to file exceptions until the Commission disposed of V.W.B., Inc.'s application for review (order, FCC 68R–190, released May 3, 1968).

4. On June 12, 1968, the Commission adopted its memorandum opinion and order in V.W.B., Inc., supra, holding that a lone applicant, V.W.B., Inc., was improperly relying on provisions of the suburban community policy statement to obtain a grant for a community, other than the station location specified in the application, in a manner which would not otherwise be permitted under the rules. Inasmuch as that applicant had not "categorically disclaimed" any further intention to prosecute its application for the station location it had originally specified, the Commission gave the applicant a final opportunity to elect whether it would make a showing under the suburban community issue or would amend its application to specify the larger community. If the latter alternative was selected, the Commission directed the examiner to remove the application from hearing and return it to the processing line. On the day V.W.B., Inc., was adopted the Commission also issued its policy statement clarification, which states, in part, that:

> **Where a lone applicant originally proposes to serve a smaller community and subsequently seeks an authorization for the nearby larger community, he will be required to petition to amend his application to specify that larger community. If the amendment is granted, the application will be removed from hearing, returned to the processing line, assigned a new file number, and the applicant will be required to comply with all of the provisions of our regulations and policies for that larger community before his application will be granted.**

[3] Broadcast Bureau exceptions 1 and 2 are corrective and supplementary and are dictated by the record.

[4] Specific reference is made to pars. 13, 19, 20, and 22 of the examiner's conclusions.

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5. On July 11, 1968, the Bureau filed a pleading entitled "Petition for Review Board Action"—the first in a series of interlocutory pleadings to be filed by the parties to this proceeding. The Bureau argued that, pursuant to V.W.B., Inc., supra, and the policy statement clarification, supra, Cavallaro, as a "lone applicant," should be directed to indicate (within 10 days) whether he proposes to amend his application to specify San Juan as his principal community. The Bureau contends that if Cavallaro fails to notify the Board of his intention to amend or fails to amend (within 30 days), the application should be summarily denied but if, within the prescribed period, he amends his application to specify San Juan, the application should be returned to the processing line. A motion to dismiss the Bureau's petition was filed by Cavallaro on August 1, 1968, requesting that the Bureau's pleading be dismissed as unauthorized or, in the alternative, be accepted as a supplement to the Bureau's brief in support of exceptions to the initial decision; and, should the latter alternative be utilized, Cavallaro asks Board consideration of a forthcoming supplemental reply. On August 12, 1968, the Bureau filed an opposition to the Cavallaro motion to dismiss. The Bureau argues that its petition is not unauthorized because "there is nothing in the rules which forecloses a party to a proceeding from filing at any time a plea for special action by the authority before whom or before which the proceeding is pending." In a reply, filed August 29, 1968, Cavallaro indicates that he has "reconsidered his position" and is now of the opinion that the Board may consider the merits of the Bureau's "Petition for Review Board Action" provided Cavallaro's supplemental reply is also considered; said reply was filed on September 13, 1968.

6. In its supplemental reply, Cavallaro maintains that V.W.B., Inc., is factually distinguishable from the instant case and that the policy statement clarification is inapplicable. Contending that his status as a "lone applicant" was the unavoidable result of the unsolicited and unexpected withdrawal of Martorell, Cavallaro submits that he could have originally applied for the larger community under the Martorell cutoff notice [5] since the application, although specifying Bayamon, met all of the technical requirements for San Juan; that no other applicant was precluded from filing its proposal pursuant to this notice because Cavallaro filed the day before the cutoff date; that he has already ascertained the programing needs and interests of both Bayamon and San Juan and has found no significant differences; that the Commonwealth of Puerto Rico is sui generis in its political and socioeconomic structure in that the city-suburb distinctions and relationships which exist in the U.S. mainland are inapposite in Puerto Rico; and that this applicant continues to propose a facility to serve the common broadcast needs of Bayamon and San Juan. Thus, Cavallaro avers, the problems which the clarification was designed to obviate; i.e., failure to meet the technical requirements for the larger city before the application is accepted for filing, failure to make a suburban showing for the larger community, and the discouraging of other ap-

[5] On Mar. 19, 1964, the Commission released a cutoff notice (FCC 64–233), which announced the Commission's intention to accept applications "specifying substantially the same facilities" as Martorell.

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plications for the larger or another community, are not present here. In addition, Cavallaro argues that almost 5 years have been devoted to the prosecution of this application; that his other radio station (WTTT, Amherst, Mass.), has been sold; and that further litigation with respect to this application would constitute an unreasonable financial burden. On September 20, 1968, the Bureau filed a motion to strike Cavallaro's supplemental reply as an unauthorized pleading. The Bureau requested that in the event the supplemental reply is not stricken by the Board, the Bureau be authorized to file a response directed to the merits of the supplemental reply. Cavallaro filed an opposition to this motion on October 3, 1968. Pursuant to Board order, FCC 68R–443, released October 22, 1968, the Bureau filed final comments on October 24, 1968. The Bureau there characterizes Cavallaro's conduct as a "classic illustration" of an attempt to secure a grant by any means possible, without prior compliance with Commission requirements applicable to a San Juan proposal.

7. Cavallaro's argument that the absence of the traditional city-suburb relationship in Puerto Rico renders the policy statement presumption inapplicable, must be rejected. In addition to Cavallaro's failure to except to the examiner's specific rejection of this contention, the Board finds nothing in the designation order of this proceeding, the policy statement, or the clarification which supports the assertion that the communities in the San Juan, P.R., area are or should be exempt from the operation of the Commission's suburban community policy.[6] Finally, the arguments raised in Cavallaro's supplemental reply fail to justify a departure from the application of our traditional standards. While as a "central city," San Juan may exert a degree of influence over other proximate communities, such a circumstance does not appear to be significantly dissimilar to the traditional "mainland" experience, and a different standard is therefore not warranted in the instant case.

8. In our view, the procedural circumstances of this case bring it within the ambit of the policy statement clarification. Thus, Cavallaro, a lone applicant[7] who has failed to rebut the policy statement presumption and who meets the technical requirements for the larger community, will, if it files the required amendment, be in the position of seeking a grant for the larger community without prior compliance with all applicable Commission rules and policies. While Cavallaro argues that his status as a lone applicant was "unsolicited and unexpected," it is nonetheless clear that at all critical states of this proceeding Cavallaro was able to prosecute his application without particular concern for the comparative strength and merit of his proposal. Thus, after the Martorell withdrawal, Cavallaro suffered no comparative disadvantage in conceding that the policy statement presumption could not be overcome. In addition, there is no indication in

[6] In another context, the Commission has drawn no distinction in the applicability of its policies to communities in the San Juan area. *Island Teleradio Service, Inc.*, 30 FCC 52, 55, adopted Jan. 11, 1961.

[7] The competing applicant, Martorell, had been dismissed for failure to prosecute prior to the time Cavallaro made his evidentiary showing under the policy statement issues.

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the clarification or since that it is not to be applied if a proceeding, at its inception, involved multiple parties.[8]

9. Cavallaro has recently argued that he has been "forced, coerced, [and] compelled to amend for San Juan" and that he continues to be "interested in a grant for Bayamon." However, this applicant's present protestations can be accorded little weight when it is recognized that not only did Cavallaro previously fail to express displeasure with his station location by excepting to the examiner's recommended San Juan grant, but additionally took no exception to the examiner's conclusion that the "proposed station would, it appears, provide a local transmission facility for San Juan, the central city in the metropolitan area in which Bayamon is located."[9]

10. Viewing Cavallaro as a San Juan applicant, as is required by the record, neither the application which was accepted for filing and designated for hearing, nor amendments thereto, nor the evidentiary showing demonstrate that he has complied with the various Commission rules and policies applicable to such a proposal. Thus, Cavallaro has not given prior notice of his intention to serve San Juan so that, at least technically, interested parties might have an opportunity to propose service for the same or a needier community (1 day remained for filing applications prior to the cutoff date), or to object to the proposed service. More importantly, however, the record fails to indicate that Cavallaro has sufficiently investigated the programing needs and interests of San Juan, or that he proposes to meet such needs and interests. No issues relating to San Juan programing needs were specified in this proceeding and the examiner made no finding and drew no conclusion as to Cavallaro's efforts in this regard. As a result, there is a dearth of evidence in the record as to Cavallaro's efforts to ascertain San Juan programing needs or his attempts to program to satisfy such needs. The scant data in the record concerning the city of San Juan is merely the byproduct of Cavallaro's expressed desire to ascertain Bayamon programing needs. Thus, for example, only a minority of the questionnaires utilized by Cavallaro were, in fact, completed by San Juan residents.[10] In addition, the record fails to disclose any substantial efforts made by this applicant to contact San Juan

[8] While it was recognized in the clarification that the circumstances discussed herein could arise in a multiple applicant proceeding, the Commission found it more appropriate to reserve judgment on the procedure to be followed in such circumstances until the specific facts were under consideration.

[9] With respect to the examiner's resolution of the suburban community issue the Board notes that counsel for Cavallaro concluded on the record that—

"there are to our opinion no substantial unsatisfied needs based upon our study of the programming needs of the Municipio of Bayamon, and we believe that what needs exist are essentially coterminous with the needs of San Juan and these needs are being met by existing Bayamon and San Juan stations." Tr. 992.

Although, at oral argument, counsel for Cavallaro attempted to show a contradiction between such statements and the hearing record, the Board remains unpersuaded that Cavallaro has demonstrated that any substantial, unsatisfied needs exist in either Bayamon or San Juan. In this regard, the Board notes the examiner's findings that all urban areas within the proposed service area now receive a minimum of eight and a maximum of 17 daytime primary services; and the rural portions of such area are served by a minimum of 15 and a maximum of 25 daytime services. At night, a minimum of four and a maximum of 16 stations serve any one portion of the proposed nighttime interference-free contour; and a minimum of nine and a maximum of 13 stations serve any one portion of the municipio of Bayamon.

[10] Although Cavallaro alleges in his supplemental reply that "more than half of the questionnaires seemingly were completed by San Juan residents," the Board's review of the record reveals that of the 71 questionnaires produced at hearing, only 21 were authored by San Juan residents.

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community civic, social or religious leaders. Therefore, the Board is unable to determine whether Cavallaro has made sufficient efforts to ascertain San Juan programing needs or whether he proposes to meet such needs and interests.

11. One final comment is warranted. Cavallaro argues that the clarification requirement that certain applications be returned to the processing line "* * * is a pretty bad ballgame when in the fourth quarter the rules are changed." Be that as it may, the Board, having concluded that the clarification is applicable here, is in no position to alter its provisions. Moreover, Cavallaro has been on notice since his application was designated for hearing that his intention to serve a community of 15,109 persons with a 10 kw, directionalized operation which would place a 25-mv/m signal day and night over all of a city of approximately 432,000 was not being accepted without proof.[11] The burden imposed on an applicant in these circumstances remains unchanged; it is only the consequences of his failure to meet this burden which have been amplified by the clarification. When Matorell's application was dismissed, Cavallaro, by the evidentiary record he made, abandoned any serious pretense of being a Bayamon applicant and, contrary to the contention made at oral argument, virtually conceded that this proposal would now be for San Juan. By this action, which could be viewed as a de facto amendment of his application, any equitable claim he may have had to exemption from the clarification procedures was lost. As previously noted, the examiner concluded that "the proposed station would, it appears, realistically provide a local transmission facility for San Juan * * *," and granted the application subject to a condition that it be amended to specify San Juan as the station location. No exceptions were addressed to that conclusion or to the conditional grant. If, at this juncture, Cavallaro is compelled to go through the prehearing processing procedure again, this consequence is, in part, a result of his own action.[12]

12. For the reasons stated herein, the exceptions filed by the Broadcast Bureau are hereby granted. Cavallaro will be required to notify the Board within 10 days of the release date of this decision whether he proposes to amend his application to specify San Juan, P.R., as his station location; and if such amendment is filed within 30 days of the release of this decision, the application will be returned to the processing line.[13] If the applicant fails to indicate within the 10-day period that it will amend, or if having indicated that it will amend, fails to file such amendment within 30 days of the release of this decision, the application will be denied.

13. Accordingly, *It is ordered*, That the petition for Review Board action, filed July 11, 1968, by the Broadcast Bureau, *Is granted;* that

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[11] The Policy statement on sec. 307(b): Consideration was adopted Dec. 22, 1965, 2 FCC 2d 190, over 9 months before the designation order herein.

[12] In addition, to the extent that Cavallaro bemoans the long duration of this proceeding or characterizes the hearing process as a "treadmill procedure from which there is no ultimate escape save denial," the Board notes that the evidence which requires that this application be returned to the processing line cannot be outweighed by Cavallaro's private interests because of the long pendency of this proceeding. See *The Tidewater Broadcasting Co.*, 12 FCC 2d 471, 12 R.R. 2d 1133 (1968); *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546, 13 R.R. 2d 615 (1968).

[13] In light of the action taken herein, Cavallaro will then be given an opportunity to submit an additional amendment if he chooses to modify his San Juan proposal.

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the motion to dismiss "Petition for Review Board Action," or for alternative relief, filed August 1, 1968, by Augustine L. Cavallaro, Jr., *Is denied;* that the motion to strike, filed September 20, 1968, by the Broadcast Bureau, *Is denied;* and

14. *It is further ordered,* That Augustine L. Cavallaro *Is afforded* 10 days from the release date of this decision in which to notify the Review Board as to whether he intends to file, within 30 days from the release date herein, an amendment to specify San Juan as his principal city location.

DONALD J. BERKEMEYER, *Member.*

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FCC 68D-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of AUGUSTINE L. CAVALLARO, Jr., BAYAMON, P.R. For Construction Permit	Docket No. 16891 File No. BP-16182

APPEARANCES

Jerome S. Boros, on behalf of Augustine L. Cavallaro, Jr., applicant; and *John B. Letterman*, on behalf of the Broadcast Bureau of the Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

(Issued February 21, 1968)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Augustine L. Cavallaro, Jr. (Cavallaro), requesting a construction permit for a class II standard broadcast station at Bayamon, P.R. By memorandum opinion and order (FCC 66-866) adopted September 28, 1966, released October 4, 1966 (5 FCC 2d 138), the Commission designated this application for hearing, together with that of the then pending mutually exclusive application of Luis Prado Martorell (docket No. 16890), upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposals and the availability of other primary service to such areas and populations.
2. To determine—
   (*a*) Whether conditions exist in the vicinity of the antenna-transmitter site proposed by Cavallaro which would preclude satisfactory adjustment and maintenance of the proposed directional antenna system; and
   (*b*) In light of the evidence adduced with respect to (*a*), whether the antenna-transmitter site proposed by Cavallaro is suitable.
3. To determine, with respect to the Cavallaro application—
   (*a*) Whether Cavallaro's estimate of the cost of clearing and preparing his proposed transmitter-antenna site is reasonable, and, in the light of the evidence adduced with respect to that question, whether his estimate of initial construction and first-year operating costs is reasonable;
   (*b*) Whether Cavallaro's father has sufficient cash and other liquid assets available to permit him to meet his loan commitment to Cavallaro;
   (*c*) The extent of Cavallaro's own cash and other liquid assets, and the proportion of those assets which he intends to provide, if necessary, to meet the initial construction and first-year operating expenses of his proposed station;
   (*d*) Whether the San Martin Mortgage & Investment Corp. possesses sufficient liquid assets to enable it to lend $100,000 to Cavallaro, and, if so, whether such San Martin loan will be available to Cavallaro if his application is granted;
   (*e*) The basis for Cavallaro's estimate of revenues in the proposed sta-

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tion's first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon to yield necessary funds for the operation of the proposed station during the first year; and

(*f*) In light of the evidence adduced pursuant to 3 (*a*) through (*e*), whether the applicant is financially qualified.

4. To determine whether the application of Luis Prado Martorell will realistically provide a local transmission facility for his specified station location or for another, larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to—

(*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(*c*) The extent to which the applicant's program proposal will meet the specific, unsatisfied programing needs of his specified station location; and

(*d*) The extent to which the projected sources of the applicant's advertising revenues within his specified station location are adequate to support his proposal, as compared with his projected sources from all other areas.

5. To determine, in the event that it is concluded, pursuant to issue 4, that the Martorell proposal will not realistically provide a local transmission service for his specified station location, whether the proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b) (1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically prove a local transmission service.

6. To determine whether the application of Augustine L. Cavallaro, Jr., will realistically provide a local transmission facility for his specified station location or for another, larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to—

(*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast station;

(*c*) The extent to which the applicant's program proposal will meet the specific, unsatisfied programing needs of his specified station location; and

(*d*) The extent to which the projected sources of the applicant's advertising revenues within his specified station location are adequate to support his proposal, as compared with his projected sources from all other areas.

7. To determine, in the event that it is concluded, pursuant to issue 6, that the Cavallaro proposal will not realistically provide a local transmission service for its specified station location, whether the proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b) (1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

8. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

9. To determine, in the event that is is concluded, pursuant to the foregoing issue, that a choice between the two applicants should not be based solely on considerations relating to section 307(b), which of the proposals would better serve the public interest.

10. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

2. By memorandum opinion and order (FCC 67R–67) dated February 28, 1967, released March 1, 1967, and pursuant to petition to enlarge issues filed by Luis Prado Martorell while an applicant in this proceeding, the Review Board added the following issue with respect to the application of Augustine L. Cavallaro, Jr.:

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To determine whether Augustine L. Cavallaro, Jr., has sufficient land available to him to accommodate the directional antenna system for his proposed facility.

3. The Commission also ordered that, in the event of a grant of the Cavallaro application, the construction permit shall specify the following conditions:

Painting and lighting of the proposed antenna system shall be in accordance with paragraphs 1, 3, 12, 21, and 22 of FCC Form 715.

In the event that interference is caused to the Commission's monitoring facilities in the vicinity of Sabana Seca, P.R., or to any other U.S. Government facility, immediate remedial action shall be taken to eliminate the problem involved.

4. On March 9, 1967, during the course of the evidentiary hearing, and before he had completed the presentation of his direct case in support of his application, Luis Prado Martorell personally announced in open hearing that, "he did not intend to present any additional testimony or to participate further in the proceeding." In light of the statement and action by Mr. Martorell and upon motion made by counsel for the Broadcast Bureau, in which counsel for Cavallaro joined, the application of Luis Prado Martorell was dismissed for failure to prosecute.[1] Issues 4, 5, 8, and 9 were, thus, rendered moot.

5. Prehearing conferences were held on October 18, December 1, and 12, 1966, and the evidentiary hearing was held on March 1–3, 6–9, 14–17, 20–21, July 28, and August 3, 1967; the record being closed on the last mentioned date. Proposed findings of fact and conclusions of law were filed by the applicant and by the Broadcast Bureau and reply findings were filed by the applicant; the last reply findings being filed on January 19, 1968.[2]

FINDINGS OF FACT

6. The instant application requests a construction permit for a new class II [3] standard broadcast station at Bayamon, P.R., to operate on 1030 kc with 10 kw power, unlimited, using the same three-tower directional antenna, day and night.

Community Involved

7. The Cavallaro application has designated the Municipio of Bayamon, P.R., as its community. The proposed station's studio will be located at the proposed transmitter site, 2.3 miles south of El Ocho on route 829 in the Municipio of Bayamon. Bayamon, founded in 1772, is located about 12 miles southwest of San Juan. It has four shopping centers and over 60 industries including an oil refinery, food processing plants, and needlework factories, as well as a number of financial institutions. It is the site of several universities or branches thereof. Bayamon Doctors Center, and four hospitals with a total bed capacity

[1] See Tr. 863.

[2] Pursuant to agreement of counsel, the proposed findings and conclusions were filed by steps.

[3] A class II station is a secondary station which operates on a clear channel and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations.

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of 1,206, are also located in Bayamon. The Municipio [4] of Bayamon has a population of 72,221 persons, [5] of whom 41,731 reside in that portion which is urbanized. Within the urbanized portion of the Municipio of Bayamon is the town or pueblo of Bayamon which has a population of 15,109. The Municipio of Bayamon is near the Municipio of San Juan [6] which has a population of 451,658 persons, of whom 432,377 reside in San Juan City. Bayamon is one of four municipios (Catano and Guaynabo, in addition to Bayamon and San Juan) which make up the San Juan standard metropolitan statistical area. The San Juan urbanized area includes San Juan City, part of Bayamon Municipio (all of Bayamon pueblo or town), part of Catano Municipio, part of Carolina Municipio, part of Guaynabo Municipio and part of San Juan Municipio (including all of San Juan City). The populations of the San Juan standard metropolitan statistical area and of the San Juan urbanized area are 588,805 and 542,156 persons, respectively. The Municipio of Bayamon is rectangular in shape about 10 miles in length running north and south and 4 miles wide. Its total area is 44 square miles.

8. Two standard broadcast stations are now authorized for Bayamon, P.R.; namely, WRSJ (1560 kc, 250 w, 5 kw-LS, U, II) and WLUZ (1600 kc, 1 kw, DA–1, U, III). There are also two FM stations; namely, WBYM (94.7 mc, 30 kw, 105 ft., B) and WRSJ–FM (100.7 mc, 50 kw/155 ft. (H), 50 kw/150 ft. (V), B), but no television station. San Juan has 9 AM, 7 FM and four TV stations.

Engineering Considerations

9. The Cavallaro application was filed during the cutoff period established in connection with the then pending Martorell application for Loiza, P.R.[7] Cavallaro, however, chose to specify Bayamon as his community of station location. The possible site locations for the Cavallaro application, according to the testimony of an engineering witness for Cavallaro, had to meet the following criteria: (*a*) Place required primary signal over Bayamon; (*b*) place required primary signal over Loiza; (*c*) limit the signal over the FCC monitoring station to a value of less than 10 mv/m; and (*d*) place a signal of less than 25 uv/m (10 percent skywave) over the U.S. coastline. According to this witness, Cavallaro did not specify a specific signal intensity be placed over the city of San Juan, nor was San Juan considered as primary community to be served, and any coverage of San Juan is

[4] For purposes of local government, the Commonwealth of Puerto Rico is divided into 76 separate municipios, among which are those of San Juan and Bayamon.

[5] All population figures herein are based upon 1960 U.S. census, unless otherwise indicated.

[6] A narrow necklike portion of the Municipio of Guaynabo lies between the Municipio of Bayamon and that of San Juan.

[7] The Martorell application was originally filed on Apr. 10, 1962. Because of a major change in his proposal, the Commission on Mar. 4, 1964, and pursuant to sec. 1.571(j)(1) of the rules, ordered that it be assigned a new file number and placed on a new cutoff list. The Cavallaro application was tendered for filing one day prior to the cutoff date established in connection with the Martorell application. The Cavallaro application was accepted for filing by order of the Commission released Aug. 4, 1964 (FCC 64–749). In that order, the Commission stated that while the Cavallaro proposal does not specify substantially the same facilities as those proposed by Martorell, the application is mutually exclusive within the meaning of *Ashbacker Radio* v. *FCC*, 326 U.S. 327 (1945), and under the doctrine of *Kessler* v. *FCC*, 326 F. 2d. 673 (1963), it must be accepted. Bayamon and Loiza are located in different directions from the city of San Juan, and thus that city lies between the two specified locations.

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incidental to the instant proposal and flows from meeting the above criteria.

Coverage

10. The coverage of the Cavallaro proposal is as follows:

Contour (mv/m)	Population [1]	Area (square miles)
Day:		
2.0	1,115,088	965
0.5 (normally protected)	1,246,312	1,290
Night:		
2.5 (normally protected)	1,010,063	817
Interference	[2] 64,933	[2] 149
3.44 (interference-free)	945,120	668

[1] 1960 U.S. census minor civil division maps were used in making population counts, subtracting any towns or cities not receiving adequate service, and where contours cut a minor division assuming uniform distribution of population within the division, to determine the population included in the contour.s
[2] (6.4 percent.)
[3] (18.2 percent.)

The 25-mv/m contour would encompass an area of 239 square miles having a population of 663,279. Of the 1,246,312 persons who would receive service during the daytime, 651,162 reside in urban areas and 595,150 in rural areas. At night, of the 945,120 persons served, 604,597 reside in urban areas and 340,523 in rural areas.

11. The proposed 25-mv/m contour would encompass 35 square miles, or 79.5 percent of the total area of the Municipio of Bayamon. The southwest sector not covered is rural and the northwest sector not covered is partly rural and partly residential. All of the business and industrial areas of the Municipio lie within the proposed 25-mv/m contour. The proposed daytime 5.0-mv/m contour and nighttime 3.44 mv/m interference-free contour would also include all of the Municipio.

12. The proposed daytime and nighttime 25-mv/m contours would cover all of the city of San Juan, P.R. San Juan has a population in excess of 50,000 and more than twice the population of the Municipio of Bayamon. Since the proposed signal intensity that encompasses San Juan is 5.0 mv/m or greater, the city of San Juan qualifies as a presumed community to be served under the Commission's *Suburban Community Policy*, 6 R.R. 2d 1901 (1965). The proposal meets all of the technical requirements of section 73.188(b) (1) and (2) of the rules with respect to coverage of San Juan.[3]

Other services available

13. Daytime, eight stations (WKAQ, WKYN, WAPA, WIAC, WKVM, WIPR, and WITA, in San Juan, and WUNO in Rio Piedras) place a 0.5-mv/m signal over all of the rural area proposed to be served and 27 others serve varying portions thereof. A maximum

[3] Sec. 73.188(b) (1) and (2) of the rules reads in pertinent part as follows:
"§ 73.188 Location of transmitters.
"(b) The site selected should meet the following conditions:
"(1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.
"(2) A minimum field intensity of 5 to 10 mv/m will be obtained over the most distant residential section."

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of 25 and a minimum of 15 stations serve the rural portions of the proposed service area during the daytime.

14. Twelve stations (WKAQ, WKYN, WAPA, WIAC, WKVM, WHOA, WIPR, WITA, and WBMJ in San Juan, WUNO in Rio Piedras, WNEL in Caguas, and WRSJ in Bayamon) provide primary service (2.0 mv/m or greater) daytime to all of the Municipio of Bayamon. WLUZ in Bayamon serves 98 percent of the Municipio; WRAI in Rio Piedras—80 percent; WVOZ in Carolina—67 percent; WPAB in Ponce—7 percent; WMDD in Fajardo—2 percent; and WMNT in Manati—1 percent. A minimum of 13 and a maximum of 16 stations serve any one portion of the Municipio of Bayamon daytime. All urban areas within the proposed service area now receive a minimum of eight and a maximum of 17 primary services (2.0 mv/m or greater), daytime.

15. At night, San Juan stations WKAQ, WAPA, and WKVM provide primary service (2.0 mv/m or greater) to all of the area within the proposed nighttime interference-free (3.44 mv/m) contour, and 17 others serve portions. A minimum of four and a maximum of 16 stations serve any one portion. Urban areas within the proposed service area receive a minimum of six and a maximum of 15 other primary services (2.0 mv/m or greater).

16. Nighttime, stations WKAQ, WAPA, WIAC, WKVM, WHOA, WIPR, and WITA in San Juan, and WUNO in Rio Piedras provide primary service (2.0 mv/m or greater) to all of the Municipio of Bayamon; WRSJ in Bayamon serves 90 percent; WBMJ in San Juan and WLUZ in Bayamon—87 percent; WRAI in Rio Piedras—57 percent; and WKNY in San Juan—10 percent. A minimum of nine and a maximum of 13 stations serve any one portion of the Municipio of Bayamon.

Site adequacy

17. The issue to determine whether Cavallaro has sufficient land available to him to accommodate his proposed directional antenna system was added by memorandum opinion and order released March 1, 1967 (FCC 67R-67), and grew out of certain land leveling proposed by the applicant which appeared to require encroachment upon adjacent property not encompassed in the plot of land available to Cavallaro for his transmitter site. The contemplated land fill was also a consideration in the financial qualifications of Cavallaro as hereafter discussed. Cavallaro's cut and fill projections were thereafter modified pursuant to an amendment to his application[9] which reduced the height of the site from 240 to 234 meters above mean sea level. Under the revised plan, the fill requirements will not occasion the use of any property other than that available to Cavallaro at his proposed site. It is thus found that the applicant has available sufficient land to accommodate his proposed directional antenna system.

[9] Petition for leave to amend to reflect such change was granted by order released June 19, 1967 (FCC 67M-1013).

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Site suitability and antenna array

18. Issue No. 2 requires a determination of whether conditions exist in the vicinity of the transmitter site which would preclude satisfactory adjustment and maintenance of the proposed antenna array and, thus, whether the proposed antenna site is suitable. In this connection, Cavallaro's engineer inspected the site and the surrounding terrain on November 19, 1966, after having previously studied topographic maps and photographs of the site. He observed that there were no prominent manmade objects such as transmission lines, poles, water towers, or any metal object capable of objectionable reradiation in the vicinity of the site and out to the horizon.

19. While the terrain in the vicinity of the antenna site is rolling, such terrain, in the experience of the engineering witness, does not preclude a successful adjustment of the directional antenna. In rolling terrain, some measurements taken on the ground are masked by intervening elevated locations and tend to stray from values which would be obtained in flat terrain. It is planned to overcome any difficulty in making field intensity measurements by supplanting ground measurements taken at elevated locations by measurements taken by helicopter. Based upon his experience, such aerial measurements are superior to ground measurements. A greater number of points can be taken along the radial and thus more data obtained. The site is readily accessible by a new paved road.

20. Under the revised proposal, the ground at the site will be leveled to 234 meters (768 feet) above mean sea level so as to obtain a flat area to accommodate the ground system of the antenna. All three towers will be constructed on leveled land. This is a basic condition for successfully establishing the proposed radiation pattern. The directional array will be at an elevated position and the surrounding terrain will not prevent proper adjustment of the pattern in such a way as to provide protection to the U.S. coastline. On the basis of the foregoing factors, it was the unchallenged opinion of this engineering witness that the site proposed by Cavallaro is suitable for the erection and proper adjustment of the proposed directional antenna.

21. A study was also made of the stability of the proposed array. The fields of the two outer towers of the three-tower in-line array were varied plus and minus 2 percent and the phases plus and $-2°$ from the nominal values, using the center tower as reference, and the highest radiation values were obtained. The resultant values are still below the maximum permissible values required to protect the U.S. coastline. A Nems-Clarke type 112, phase monitor, with a Vidar type 500 digital voltmeter for readout, will be installed. Under this arrangement, a resolution of 0.2 percent in current ratio and 0.2° in phase will be achieved. It is, thus, found that the directional antenna can be maintained so as to protect the U.S. coastline.

22. A second expert engineering witness testified for the applicant. He submitted profile graphs for three radials running through area covered by the major lobe of the proposed directional antenna system out to a distance of approximately 1.5 miles in the directions of

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45°, 90°, and 135° true,[10] in the direction of the major lobe of radiation. The ground around the site is gently rolling, with hillsides having slopes generally less than 20° from the horizontal, and is predominantly rural and free of manmade objects. There is a hilltop about 1.5 miles from the antenna in the area of the major lobe of radiation. The radiated field at this point is approximately 700 mv/m; and using procedures described by Krause,[11] it was calculated that a reasonant quarter wave antenna, 73 meters or 240 feet high, located at this point and having a terminal impedance of zero and no losses would reradiate a power of 57w. Since the soil conductivity in the area is indicated to be 10 mmhos/m maximum, the soil resistance was computed to be 100 ohms per meter and the power reradiated to be 38.5 μw. This was considered equivalent to a reradiated field of approximately 0.035 mv/m at 1 mile, which value would not be noticeable in the proposed null zone where the theoretical effective field is about 43 mv/m.

23. Over the past 20 years, this second engineering witness has designed and adjusted many directive antennas having null zones with radiation restrictions equal to and greater than requested for the proposed operation and at no time has significant reradiation been noted from terrain when it lacks manmade objects, as in the instant case. Thus, in his opinion, the terrain factors in the vicinity of the proposed antenna location would not preclude the satisfactory adjustment or maintenance of the proposed antenna. A study of the area within 1 wavelength of the proposed antenna site was made to determine the radiation or reflection effects which might be caused by terrain factors immediately beyond the ground system. Profile graphs are in evidence covering the directions north and south, northeast and southwest, east and west, and southeast and northwest in support of the engineering testimony. As already discussed, the site will be leveled by cut and fill. The graphs show that the terrain in some directions slopes down from the edge of the ground system to the foot of the filled area at an angle of approximately 45°. The greatest change in elevation is about 40 meters or approximately ⅛ wavelength at the proposed operating frequency. Each antenna is equipped with a quarter wave ground system consisting of 120 equally spaced radial wires. In the direction of the major lobe and null zone, the leveled area and ground system extends ½ wavelength for the center tower and ¾ wavelength for the far tower.[12]

24. The studies further disclosed that for angles greater than 54°, the reflection of all parts of all towers occurs within the bounds of the ground system. Assuming sinusoidal current distribution in the towers, it was found that the lower half of the 125° tower radiates 50 percent of the energy. Thus, 50 percent of the reflected energy from the near tower, and all of the reflected energy from the center and far

[10] Another set of profile graphs was submitted based on a different scale showing these same directions plus the directions 180°, 225°, 270°, 315°, and 0° true out to a distance of 2 kilometers, or 1.24 miles. In none of the latter five directions is the elevation of the top of the towers exceeded except along the 180° radial at 1.95 kilometers, or 1.21 miles, where the elevation is 410 meters or 1,345 feet. These five radials are in the directions of minimum radiation.

[11] Calculations were based on procedures described by John D. Krause, "Antennas," 1950, ch. 3.

[12] The ground system will consist of three sets of 120 evenly spaced copper radials, 240 feet, more or less, buried 6 inches, one for each tower. Intersecting radials will terminate at and be bonded to a copper strap, halfway between the towers. At the base of each tower, a 24-by-24 foot ground screen will be installed and bonded to the copper radials.

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towers in the null and major lobe directions were found to be mirrored by the copper ground system for an angle of 35° or greater above the horizontal. Assuming that each of the three towers radiates equal amounts of energy (⅙ directed and ⅙ reflected for each tower), it was shown that, at a distant point in the null or major lobe directions and 35° above the horizontal, all of the direct energy (⅓), all of the reflected energy from two towers (⅔), and 50 percent of the reflected energy from the third tower (1/12) appears without loss or dispersion from uneven terrain for a total of 11/12 (approximately 92 percent). At an angle of 25° above the horizontal, this approach finds a total of 82 percent of the energy is either radiated directly or reflected from the level surface within the bounds of the proposed ground system. Thus, it was found that, generally, the radiation at angles greater than 25° above the horizontal cannot be materially affected by uneven terrain beyond the end of the proposed ground system because most of the energy is either direct or reflected from the level area encompassed by the radial ground system. At the lesser angles with respect to the horizontal, the reflecting surface rapidly extends beyond the ground system, being approximately 1.0 wavelength long at 20°, 2 wavelengths long at 10°, 4 wavelengths long at 5°, etc. The maximum pertinent vertical angle toward the U.S. territorial limits (protection to the dominant class I–B station) is 4.5°. The only other protection requirement is toward a Cuban station with a vertical angle of 7.5°. At these angles, the reflecting surface is 4.4 wavelengths, 1.27 kilometers (4,160 feet) long, and 2.65 wavelengths, 0.77 kilometer (2,520 feet) long, respectively. The reflected wave is thus considered to have ample opportunity over such large reflecting surfaces to average itself across any downward and upward sloping terrain encountered. In theory, radio waves reflected from the conducting smooth plane reinforce the direct wave and any departure from theory which might be caused by an irregular surface could only decrease reinforcement from the reflected wave. Thus, it is not anticipated that the actual radiated fields towards cochannel facilities will be increased by reflection from irregular surfaces beyond the end of the ground system. Decreases in radiated field, if caused by reflection (or the lack of reflection) from the irregular surfaces are expected to be insignificant.

Financial Qualifications

25. Cavallaro's cash requirements for the construction and first-year operation of his proposed station, at the time of the order of designation, were estimated at about $168,346. Thereafter, the estimates were changed by postdesignation amendments hereinafter noted. The revised cash requirements include downpayment on equipment of $15,772; land lease, $2,000; site clearance and preparation, $81,700; buildings, $2,500; first-year equipment payments (principal and interest), $18,611; miscellaneous, $6,500; and first-year operation costs, $84,100,[13] for a total of $211,083.

[13] The cost figures for land lease, $2,000; buildings, $2,500; miscellaneous costs, $6,500; and first-year working capital, $84,000, are based on determinations of the Commission, set out in its order of designation. Other cost items vary from those specified in such order; the changed figures growing out of postdesignation amendments to the application for which specific citations are hereinafter shown.

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26. Several facets of Cavallaro's financial ability to construct and operate his proposed station for the first year were placed in issue by the Commission in its order of designation. At that time, Cavallaro relied upon, among other sources of funds, $27,695 from his own "net quick" assets and a $50,000 personal loan from his father. Among the questions placed at issue were: (*a*) Whether Cavallaro's estimate on the cost of clearing and preparing his proposed transmitter site was reasonable; (*b*) whether his father had sufficient cash and other liquid assets to permit him to meet his loan commitment to his son; (*c*) the extent of Cavallaro's own cash and other liquid assets and the proportion of those assets which he intends to provide, if necessary, to meet the initial construction and first-year operating expenses of the station; (*d*) whether another proposed source of funds possesses liquid assets to enable it to lend $100,000 to Cavallaro, and, if so, whether such loan will, in fact, be available; and (*e*) the basis of Cavallaro's estimate of revenues for the first year of operation, whether such estimate is reasonable, and the extent to which revenues may be relied upon for funds for the first year of operation.

27. As already indicated, Cavallaro's plan of financing was changed in several aspects by postdesignation amendments.[14] Under the plan, as revised by the February and March 1967, amendments, the applicant now proposes a loan of $180,000 from the Second National Bank of New Haven, Conn.; a loan of $100,000 from San Martin Mortgage & Investment Corp.; $47,316 credit from Gates Radio Co., on equipment purchases; and $180,000 in first-year revenues, for a total of $507,316. By the June 1967, amendment, the site elevation was reduced from 240 to 234 meters above mean sea level, with a resultant effect upon cost of clearing and leveling the site.

28. In the designation order, the Commission expressed concern about the adequacy of Cavallaro's estimate of $33,250, which he had then allocated, for land clearance and preparation of his transmitter site for installation of equipment; and, accordingly, specified an issue relative thereto. Subsequently, Cavallaro's cost estimate was revised upward by approximately $50,000 so that he now represents that $81,700 will be necessary to clear and prepare his transmitter site. The site leveling and clearance is to be done by Empresas Calzadilla, Inc., for a contract price of $81,700. Empresas Calzadilla, Inc., is a Puerto Rico engineering firm regularly engaged in demolition, excavation, earth moving, road construction, and general construction work. The project will entail a cut of 291,590 cubic meters and a fill of 286,627 cubic meters, to be obtained by use of cut material. This revised plan eliminates offsite trucking of fill, amounting to approximately 417,177 cubic meters. In addition, the present contract price is more than twice the original estimate ($81,700 contrasted to $33,250) and the work to be performed is substantially less than that originally contemplated. Details of the work and equipment necessary to prepare the transmitter site are shown in the evidence. It is found that Caval-

[14] Changes in the application affecting the plan of financing were specified in postdesignation amendments of Feb. 20, 1967, and Mar. 7, 1967, permitted by order (FCC 67M–490) released Mar. 24, 1967, and amendment of June 9, 1967, permitted by order (FCC 67M–1013) released June 19, 1967. (The dates on which petitions for leave to amend were filed are used as the dates of the respective amendments.)

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laro's revised estimate of $81,700 to clear and prepare his proposed transmitter site is reasonable.

Sources of funds

29. Cavallaro has a proposal from Gates Radio Co., extending credit on his purchase of equipment. The total cost of equipment is estimated at $63,088 of which 25 percent or $15,772 is to be paid when a firm order is placed. The remainder is to be paid in 36 equal monthly installments, with the first payment due 60 days after shipment of the transmitter. The interest rate will be that in effect at the time a firm order is placed, and for the purposes of this proceeding a 6-percent interest charge has been assumed.

30. Cavallaro also relies upon a bank loan of $180,000 from the Second National Bank of New Haven, Conn. This loan is to be guaranteed by Dr. Augustine L. Cavallaro, the applicant's father. Dr. Cavallaro has agreed to guarantee the loan. This loan will require no amortization of principal during the first year of station operation; interest only being payable during such period.

31. Cavallaro further relies upon a $100,000 loan from the San Martin Mortgage & Investment Corp., of San Juan, P.R. This loan will be made at the prevailing rate of interest and no amortization of principal will be required during the first year of operation of the station. The evidence shows that San Martin Mortgage & Investment Corp., possesses sufficient liquid assets to enable it to lend $100,000 to Cavallaro.[15] Its balance sheet as of September 30, 1966, shows current liquid assets over current liabilities in excess of $100,000, including cash in excess of $115,000. Certain language in the original commitment letter was found by the Commission to raise a question as to the availability of the loan.[16] The chairman of the board of directors of San Martin, Rene Aponte Caratini, under date of February 8, 1967, confirmed that there are no conditions to the loan commitment other than that Cavallaro obtain an incontestable grant of a construction permit for a new standard broadcast station in Puerto Rico and Cavallaro's agreement to be personally liable on the note. It is, thus, found that San Martin Mortgage & Investment Corp., has ample ability to make the proposed loan of $100,000 and is committed to do so.

32. In summary, Cavallaro will need approximately $211,083 to construct and operate the proposed station for the first year, has available to him for such purpose $280,000 in loan commitments, and need not rely in any degree upon first-year revenues from the station.

33. There is somewhat extensive evidence on the subject of estimated first-year revenues. Cavallaro made an estimate based on several factors, including: (*a*) His 13 years of experience in advertising and broadcasting; (*b*) studies of the Puerto Rico economy; (*c*) a review

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[15] In the order of designation, the Commission found that the San Martin Mortgage & Investment Corp., balance sheet of Dec. 31, 1964, demonstrated "ample ability to lend him $100,000," but in view of the age of the balance sheet directed inquiry as to its current financial position. The liquidity of the company appears not to have changed in any material manner between December 1964 and Sept. 30, 1966, date of the last balance sheet available at the time of the hearing.

[16] The sentence which gave rise to the question is as follows: "This loan is subject to our satisfaction at the time the loan is advanced with the borrower's financial condition and the proposed management of the station." In par. 17(c) of the order of designation, the Commission termed this language unusual. It has now been eliminated from the loan commitment.

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of Commission statistics dealing with the revenues, expenses, and income of Puerto Rico stations; (*d*) an evaluation of potential competition from communications media including those other than broadcasting; (*e*) inquiries in the advertising and broadcast field; and (*f*) on-the-scene surveys, etc., and arrived at a figure for first-year revenues of $180,000. The $280,000 available in loans, less the $211,083 needed during the first year for construction and operation, leaves a margin of $68,917. Since principal payments on the loans will not be required during the first year the station is in operation, this margin leaves ample reserve to meet any contingencies that might arise and the applicant is financially qualified without resort to first-year revenues. Thus, findings and conclusions with respect to the revenue estimates would have no decisional significance.

Suburban Community

34. Issue 6 requires the determination of whether the Cavallaro proposal will realistically provide a local transmission facility for Bayamon, his specified community, or for San Juan. In this issue, the Commission listed four factors to be considered but did not, however, limit the consideration of this overall question to such factors. The listed factors are: (*a*) The extent to which Bayamon has been ascertained by the applicant to have separate and distinct programing needs; (*b*) the extent to which the needs of Bayamon are being met by existing standard broadcast stations; (*c*) the extent to which the program proposal will meet specific unsatisfied programing needs of Bayamon; and (*d*) the extent to which the projected sources of advertising revenue within Bayamon are adequate to support his proposal, as compared with his projected sources from all other areas.

35. The order of designation also provided (issue 7) that, in the event, it is found pursuant to issue 6 that the proposal will not realistically provide a local transmission service for Bayamon, determination is to be made as to whether the proposal meets all of the technical provisions of the rules, including secs. 73.30, 73.31, and 73.188(b) (1) and (2), for a standard broadcast station assigned to the city of San Juan.

36. As hereinbefore found, the Cavallaro application has designated the Municipio of Bayamon as its community and will locate its transmitter and main studio therein; that the Municipio of Bayamon, with a population of 72,221 persons, is near the Municipio of San Juan, with a population of 451,658 persons of whom 432,377 reside in San Juan City; and that both municipios are a part of the San Juan metropolitan area.

37. Cavallaro proposes to operate with 10 kw power, unlimited time, utilizing the same directional pattern, day and night. The proposed transmitter site is situated in a rural area in the southern part of the Municipio of Bayamon, south-southwest of the urbanized portion of the municipio and southwest of the city of San Juan. The directional antenna pattern is so oriented that the major lobe is directed due east. Three minor lobes radiate toward the northwest, west, and southwest. Because of the higher ground conductivity along coastal areas of

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Puerto Rico, the high fields of the major lobe falls in the city of San Juan. The 5-mv/m contour of this proposal encompasses all of the Municipio of Bayamon, as well as all of the Municipio of San Juan: and the proposed 25-mv/m contour, although encompassing all of the Municipio of San Juan, does not cover the extreme northwestern and southwestern portions of the Municipio of Bayamon.

38. As already indicated, the main studio is to be located at the transmitter site. Cavallaro will also have an auxiliary studio in San Juan. This will be designed and equipped to permit origination of programs for broadcast over the Bayamon facility and will be comparable to those planned for the main studio.[17]

39. To meet his burden of proof under issue 6, Cavallaro [18] relied, in part, on a program survey made by him in 1964, prior to filing his application, and supplemented in the late summer or early fall of 1965. The data from the 1964 survey were used by him in formulating his original proposal and the 1965 survey, in its later revisions.

40. Cavallaro contacted over 500 persons. Most of the contacts were on an informal basis; however, between 100 and 150 persons were interviewed by Cavallaro using a questionnaire designed by him to assist in determining and evaluating the needs and interests of the population that would receive service from his proposed facility. The questionnaire was prepared in both English and Spanish because it was not known at the time of the preparation whether all of the persons to be interviewed could read and understand English. Most of the questionnaires were completed in Cavallaro's presence. However, others were made available at local governmental offices to be filled in by interested persons and returned to Cavallaro for use in his program study. Interviews were conducted in the Municipio of Bayamon and in San Juan and samplings were also undertaken in both rural and urban areas. The interviewees were selected on a random basis and respondents represented not only residents of the pueblo of Bayamon and the city of San Juan, but also included persons living in the several barrios of the Municipio of Bayamon and in the Municipios of San Juan, Guaynabo, and Loiza, located in the proposed service area.

41. The purpose of the surveys was to ascertain whether Bayamon had special program needs distinct from those of the residents of San Juan and other persons residing in other areas to be served by the proposed station. According to Cavallaro, the survey data failed to disclose that any such separate program needs existed; rather, on the basis of his study of the data collected, he decided that the needs and interests of the residents of Bayamon were essentially the same as those persons living in San Juan and in other areas which would be served by the proposed facility. The most pressing need—based upon the greatest interest shown on the part of the residents interviewed—was for programing featuring classical and semiclassical music and for a

[17] An existing three-room house at the transmitter site will be used for the main studio and such changes and additions as are necessary to adapt the building for a studio will be made. In San Juan, it is contemplated that a separate building—at one time a combination garage and servant's quarters—located in back of Cavallaro's house will be adapted and used for the auxiliary studio.

[18] Cavallaro had been a resident of Bayamon about 8 months at the time he testified in mid-March 1967. He spent 2 months in the area in 1965, and had also made numerous other trips there, some of them somewhat extended, prior to becoming a resident.

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radio station that would operate on a 24-hour basis, not available from any other station in the Bayamon-San Juan area.[19] Many residents noted objections to the manner in which commercial messages were being carried over existing stations. The survey data also indicate that, generally, the radio broadcast services presently available in Bayamon and San Juan do a somewhat less than adequate job in presenting agricultural, discussion, religious, and educational programs; that news features are, in the overall, satisfactory; that sports broadcasts are, in the main, good; and that reporting of weather conditions was good or satisfactory.

42. Cavallaro also monitored the San Juan and Bayamon stations and, as a result, concluded that such stations were programing essentially for San Juan and Bayamon without distinction; that, while the program format used by them varied, on the whole there was no difference in program orientation, in the sense that it was impossible to determine their location (Bayamon contrasted to San Juan) from their respective presentations.

43. Cavallaro testified that he spoke with people in connection with programing, such as the mayor of Bayamon, but "only in the sense that a well-programed station is a financially successful station in my [Cavallaro's] opinion." No other person occupying an official position in the government of the municipio or pueblo was contacted and none of the employees of the pueblo were interviewed. While Cavallaro advised the mayor that the station would be available for use by him and the mayor indicated interest in using the facility, no programs are planned that contemplate participation on a regular basis by the mayor or any employee of the municipio. A forum program is proposed on which the mayor could participate. Firm program arrangements were made with Mr. Gonzalez, a locally stationed agricultural agent employed by the Agriculture Extension Service with headquarters at Mayaguez, P.R., who is to participate on a regularly scheduled agriculture program.

44. Cavallaro made no study and contacted no person to ascertain the needs or interests of either Bayamon or San Juan for local live programs sponsoring local talent (musicians, singers, and the like) and he plans no such programs, except those using the services of an announcer. No regularly scheduled programs devoted to the activities of local Bayamon civic organizations are proposed. According to Cavallaro, such organizations are, for the most part, branches of groups in San Juan and, while he recognized that they had meetings separate and apart from the corresponding organizations in San Juan, no regular programs are contemplated. He does plan to broadcast spot announcements of their meetings and affairs. While Cavallaro contacted no church or spiritual organizations in Bayamon or San Juan, he plans to have religious programs featuring speakers on a rotating basis, but has no commitments from any of them. The same is generally true of programs classified as discussion. No public school

[19] While there are stations licensed for unlimited operations in the area, it was testified none actually operate on a 24-hour basis. Cavallaro proposes to operate on a 24-hour basis, 7 days a week, except for a period of several hours during early Monday mornings.

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official of Bayamon was contacted and no regularly scheduled programs for the local schools are planned.

45. Many of the civic and public organizations for Bayamon have headquarters in San Juan. For example, Bayamon police protection is furnished by the Commonwealth's police system, with headquarters in San Juan. Likewise, the Bayamon schools are a part of the overall Commonwealth system and, according to testimony, the "authority rests entirely in the San Juan headquarters and the people involved in the various towns and educational district merely carry out their orders."

46. Father Leo, who heads up Catholic University which has a branch in Bayamon, was contacted, but he expressed no interest in participation over the proposed facility, giving as his reason, "the Government of Puerto Rico is licensee of an educational noncommercial station and they have a fairly large staff which devotes itself exclusively to educational programing" and Catholic University is doing a program on this Government station. Cavallaro also contacted members of the staff of the University of Puerto Rico but as a result of such contacts, no plans were made for participation of anyone as representative of the university on any planned program of the applicant.

47. Cavallaro testified that he will program to meet expressed desires and interests of the people residing in the entire service area of the proposed station.

48. In his opinion, in many categories the needs throughout the service area are the same.[20] This determination was based on his survey efforts and was reached prior to the time he formulated and submitted his program proposal.

49. According to Cavallaro, there is no line of demarcation between the two population centers and no open country; rather it is a continuous built-up area all the way from San Juan to Bayamon with heavy populations and continuous residential and business areas, consisting of stores, houses, industrial complexes, restaurants, gasoline stations, and shopping centers. People living in Bayamon shop in San Juan and vice versa.

50. During the course of the hearing, counsel for Cavallaro made several admissions on the record in connection with the relationship between Bayamon and San Juan and their respective needs, which are of particular interest and importance. For example, he stated that "San Juan is so much the center of the island [Puerto Rico] in terms of governmental hegemony that the programing needs, which are sometimes existent in American cities because of different municipal governments and the like, don't apply in San Juan, * * * Bayamon is an integral part of San Juan for programing * * * If you are going to reach a balanced decision, there is not enough here to say there is anything really separate. Obviously Bayamon has its own shopping centers, some items are more of an interest to Bayamon people than others, but *on an overall basis the balance must be struck in saying*

[20] In the language of the proposed findings of the applicant, "These surveys established that in programing categories such as music, religion, education, and noncommercial spot announcements, area interests and program needs are indifferential throughout the San Juan metropolitan area."

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that people are so San Juan-oriented in the area of Bayamon that we do not believe we can meet the issue as to separate and distinct needs." (Emphasis supplied.)

51. Counsel for Cavallaro also stated: "I tell you [as to issue] 6(a), 6(b), 6(c), as far as we are concerned, *we will stipulate there are to our opinion no substantial unsatisfied needs based upon our study of the programing of needs of the Municipio of Bayamon, and we believe that what needs exist are essentially coterminous with the needs of San Juan and these needs are being met by existing Bayamon and San Juan stations.*" (Tr. 992, lines 7–12.) (Emphasis supplied.)

52. Of the $180,000 in revenues which Cavallaro estimates for the first year of station operation, he believes that $80,000 will be derived from retail businesses in Bayamon, principally the large shopping centers situated in the municipio, and $100,000 from large retailers and advertising agencies in San Juan. He further estimates that not more than 44 percent of the total expected revenues will come from Bayamon sources and that the balance (56 percent) will come from advertising by San Juan agencies and businesses.

No consideration re Martorell

53. Cavallaro stated, under oath, that he had not, directly or indirectly, paid or promised any consideration in connection with the failure of Martorell to complete prosecution of the conflicting application, and its resultant dismissal in accordance with the provisions of section 1.525(c)(1) of the Commission's rules.

CONCLUSIONS

1. The applicant seeks authority to construct and operate a new class II standard broadcast station in the Municipio of Bayamon, P.R., on 1030 kc, with 10 kw power, unlimited time, utilizing the same directional antenna, day and night.

2. The issue with respect to Cavallaro's financial ability to construct and operate his proposed station for 1 year is resolved in the affirmative. It is concluded from the foregoing findings that the cash requirements for construction and first-year operation will be $211,083. This includes the item of $81,700 for leveling the transmitter site which has been demonstrated to be reasonable in view of the revised proposal for this work. To meet the first-year cash requirements of $211,083, Cavallaro has available $280,000 in loans, of which $100,000 is to be loaned by the San Martin Mortgage & Investment Corp. As to this corporation, the Commission indicated the necessity for further information as to whether San Martin Mortgage & Investment Corp., possesses sufficient liquid assets to enable it to make the loan, and also whether there were conditions attached to the loan that would affect its availability. It has been clearly shown that no such conditions exist and that the company has sufficient liquid assets to enable it to make the loan as proposed, and it is so concluded. Cavallaro

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will also have available $180,000 from a loan by the Second National Bank of New Haven, Conn.,[21] which will be guaranteed by his father.

3. The plan of financing leaves Cavallaro with a margin of $68,917 ($280,000 less $211,083) over and above the cash requirements for the first year. This leaves ample reserve to meet any contingency that might arise. Cavallaro also estimates revenues of $180,000 for the first year of station operation. With more than adequate funds to meet first-year cash requirements without reliance on revenues, it is concluded that station revenues need not be relied upon to yield necessary funds for the construction and operation of the proposed station during the first year. Thus, detailed findings on this aspect and conclusion as to the reasonableness of such estimate would not have any decisional significance.

4. An issue was added relative to the sufficiency of the proposed transmitter-site land for the installation of the proposed directional antenna system. This matter was questioned because of cut and fill requirements present under the original leveling proposal. The plan for leveling the site was subsequently modified, and it is now clear that there will be no need to use property adjacent to the Cavallaro site for lateral support of the antenna, or for any other purpose. It is, thus, concluded that Cavallaro has sufficient land available to him to accommodate his proposed directional antenna system.

5. Issue 2 requires the determination of whether conditions exist in the vicinity of the proposed transmitter site which would preclude satisfactory adjustment and maintenance of the proposed directional antenna system; and, ultimately, whether the antenna transmitter site is suitable. As previously found, there are no conditions in the vicinity of the antenna transmitter site which would preclude satisfactory adjustment and maintenance of the proposed directional antenna, and it is, therefore, concluded that the proposed site is suitable.

6. Cavallaro's main studio will be at his transmitter site in Bayamon and he will have an auxiliary studio in San Juan. He plans to originate a majority of the programs at the main studio. It is concluded that Cavallaro's proposal complies with the provisions of sections 73.30 and 73.31 of the Commission's rules for a standard broadcast station assigned to San Juan, as well as one assigned to Bayamon.

7. The Municipio of Bayamon, with a population of 72,221, is a part of the San Juan metropolitan area. The urbanized portion of the municipio has a population of 41,731, including 15,109 persons residing in the pueblo or town of Bayamon. Bayamon, P.R., has two AM and two FM radio stations assigned to it. The city of San Juan (population 432,377) has nine AM, seven FM and four TV stations assigned to it. The proposal will serve 1,246,312 persons residing in an area of 1,290 square miles during the daytime. Eight standard radio stations presently serve all of the rural area therein; 27 stations serve portions thereon, with a minimum of 15 and a maximum of 25 serving any one

[21] This loan commitment from the New Haven bank was first shown in a postdesignation amendment to the application and is in lieu of a loan from the applicant's father and certain funds from the applicant's own assets referred to in the order of designation. The New Haven bank loan, like the San Martin loan, requires no payment of principal during the first year of operation.

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portion thereof. From eight to 17 stations serve the urban areas therein. Twelve stations serve all of the Municipio of Bayamon during the daytime; six others serve portions thereof, with a minimum of 13 and a maximum of 16 stations serving any one portion. At night, the proposal would be limited to its 3.44-mv/m contour and would serve 945,120 persons in an area of 668 square miles.[22] Three stations now serve all of such area; 17 serve portions thereof, with a minimum of four and a maximum of 16 serving any one portion. From six to 15 stations render primary service to the urban areas therein. Eight stations serve all of the Municipio of Bayamon at night; five others serve portions thereof, with a minimum of nine and a maximum of 13 stations serving any one portion thereof.

8. The proposed 25-mv/m contour would encompass 79.5 percent of the area of the Municipio of Bayamon and cover all of the business and industrial areas therein. The daytime 5 mv/m and the nighttime 3.44 mv/m (interference-free) contours would cover all of the municipio. Day and night, the proposed 25-mv/m contour would encompass all of the city of San Juan. It is, therefore, concluded that the proposal meets all of the technical requirements of section 73.188(b) (1) and (2) of the Commission's rules with respect to a station assigned either to Bayamon or the city of San Juan.

9. No payment has been made or promised and no circumstance or action has been shown to exist in connection with the failure of Luis Prado Martorell to complete prosecution of his application which reflects in any way adversely on Cavallaro or which would otherwise constitute a bar to the grant of the instant application.

10. There remains for determination the question of whether Cavallaro's operation will realistically provide a local transmission service for Bayamon, his specified station location, or for San Juan, the larger community encompassed by his 5-mv/m proposed service contour. Issue 6 [23]—as does issue 7—has its roots in the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, released December 27, 1965 (FCC 65–1153), 6 R.R. 2d 1901, reconsideration denied, 6 R.R. 2d 1908 (1966). There the Commission pointed out that as power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify with the entire metropolitan area rather than with the particular needs of the specified community; and it would be Commission policy in the future, under section 307(b), to examine every application for new or improved standard broadcast facilities to determine whether the applicant's proposed 5-mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community, and when such conditions exist, a presumption will attach that the applicant realistically proposes to serve the larger community rather than his smaller specified community.

[22] The area between the 2.5-mv/m and the 3.44-mv/m contours represents 6.4 percent of the population and 18.2 percent of the area within the normally protected (2.5 mv/m) nighttime contour.

[23] Text of all issues set forth on pp. 1–4, supra.

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11. The policy statement further provided that where the aforementioned presumption attaches, the applicant will be required to rebut the presumption; and, thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programing needs and to show the extent to which his program proposal will meet the specific unsatisfied programing needs of his specified community, as well as the extent to which the specified community's needs are met by existing standard broadcast stations. Such an applicant would also be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared with revenues from all other areas. It was also pointed out that, if an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all considerations which flow therefrom; if not, "he will be treated as an applicant for the larger community" and required to meet all of the technical provisions of the rules for stations assigned to such larger community. An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for the larger community.

12. The Broadcast Bureau argues that the technical aspects of the proposed operation tend to fortify the presumption that this application must be considered realistically as one for the central city of San Juan rather than for Bayamon, pointing out that the applicant will use 10 kw power, with a directional array which produces a field of 25 mv/m over the entire city of San Juan, and urging that, if the total intent were to provide a local transmission service for Bayamon, then such mode of operation would not have been necessary or, considering the expense of operating directionally with higher power, even desirable. On the other hand, Cavallaro urges that the proposal's 5-mv/m coverage of San Juan "was an inevitable consequence of applicant's observance of Commission direction," contained in the public notice of cutoff date for filing applications in connection with the Martorell application.[24]

13. It has been found—and, in fact, admitted by the applicant—there are no substantial programing needs of Bayamon separate and distinct from those of San Juan; and, based upon applicant's study of the programing needs of Bayamon, there are no substantial unsatisfied needs of Bayamon and such needs as do exist are essentially coterminous with those of San Juan and are being met by existing Bayamon and San Juan stations. Furthermore, according to the applicant's own estimate, only 44 percent of the revenues expected from the first year of operation will be derived from Bayamon businesses and the remainder (56 percent) from San Juan businesses and agen-

[24] The evidence establishes that Cavallaro's application had to be tailored to satisfy the requirements of a Commission public notice, which did not permit him unlimited latitude in blocking out the technical aspects of his proposal. Cavallaro urges that, since, the Martorell application against which his application was directed, proposed high power with attendant broad coverage, his application as it now stands should be granted ex post facto presumptions aside.

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cies. These factors, coupled with the high-signal coverage of San Juan, compel the conclusion that the proposal will not realistically provide a local transmission facility for Bayamon, and Cavallaro has, therefore, failed to sustain his burden of proof necessary to rebut the presumption contemplated by the policy statement and specifically placed at issue in this proceeding under issue 6. On the contrary, the proposed station would, it appears, realistically provide a local transmission facility for San Juan, the central city in the metropolitan area in which Bayamon is located.

14. As has already been shown, the proposal places a signal far in excess of 5 mv/m over the entire city of San Juan. It has been further shown that the proposal meets the requirements of sections 73.30, 73.31, and 73.188(b) (1) and (2) of the rules for a station assigned to San Juan, as well as for one assigned to Bayamon.

15. Cavallaro's position that the policy statement, supra, is not, or should not be, applicable to his proposal is untenable. He urges that such statement was formulated in response to allocation considerations arising in the continental United States whose governmental structure differs from the machinery of government in the Commonwealth of Puerto Rico, that there is no showing that the reason for the rule embodied in the policy statement has any roots in Puerto Rico, that the record is to the contrary, in that, it shows "Puerto Rico to be an integrated, homogeneous, and unitary socioeconomic and governmental entity." In this connection, he lists numerous departments of the Commonwealth of Puerto Rico which have headquarters in San Juan, the capital of the Commonwealth, and furnish services Commonwealth-wide, relating to the operation of the public school system, health, housing and urban renewal, public assistance, utilities, planning, labor, etc. Cavallaro also argues that the presumption contained in the policy statement, supra, "with its retroactive invalidation of the application as a Bayamon proposal was adopted without notice to applicant and without according him the opportunity which was extended to other applicants before the Commission of participation in the proceeding which spawned the 'policy statement'."

16. The Commission specifically found that the public interest required the application of the policy enunciated in its policy statement, supra, to "all pending applications as well as to those filed in the future, whether opposed or not, since it will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas." See memorandum opinion and order in *T. J. Shriner* (FCC 68–130), released February 14, 1968.

17. The Broadcast Bureau suggests three alternatives for the disposition of the application: (1) That the applicant amend his proposal to specify San Juan as a station location; (2) that the applicant amend to propose a truly local Bayamon facility with coverage appropriate for such operation; or (3) that the application be denied. It is the position of the Bureau that should the first alternative be adopted and the application amended to specify San Juan, rather than Bayamon, as a station location, such amendment would constitute "a major amendment of his application, requiring removal from hearing and return to the processing line." No citation of authority

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or precedent is cited in support of such position. This is of particular interest when it is noted that the second of the alternatives suggested by the Bureau would also require a substantial amendment of the application, including the engineering proposal, but necessity for return to the processing line under those circumstances is not urged. The applicant urges that his application either should be granted outright, or upon condition that the proposal be amended "to specify the larger community [San Juan] as his station location." The applicant has expressed strong disagreement with the Bureau's position, that amendment of his application to change station location to San Juan would necessitate return of the application to the processing line.

18. The rules relating to amendment of applications in hearing status are not inflexible. Amendment and retention in hearing have been permitted in numerous cases as, for example, those involving TV or FM applications where there have been changes by the Commission in its allocation tables; likewise, applicants in hearing status affected by a new policy consideration such as the new financial ability test enunciated in *Ultravision*, 1 FCC 2d 544 and 5 R.R. 2d 343 (1965), and subsequent *Clarification Notice*, 1 FCC 2d 550, 5 R.R. 2d 349. After the enunciation of that policy, applicants for AM, FM, and TV facilities in hearing status were permitted to amend their applications with respect to programing, as well as financial plans. It is true that, in many of such cases, the Commission specifically afforded the right to amend to conform with a new policy statement or allocation order. Other applications over the years have been permitted to amend, even though no new policy or allocation was involved, and remain in hearing status. As early as 1953, in a proceeding involving competing applicants (*Telanserphone, Inc., et al.*, docket 9847, et al., FCC 53–358), the Commission en banc, after an initial decision had been issued, vacated and set aside such decision, reopened the record and remanded the proceeding to the hearing examiner; and, on its own motion, granted one of the applicants leave to amend its application to change the specification of the antenna height of the proposed station which substantially affected the coverage of the station and further ordered that "if in proper form, said amendment shall be accepted by the Commission's license section." Such amendment did not grow out of any new policy of the Commission, but was for the purpose of permitting an applicant to correct an error in his application which could have or should have been known to him long before.

19. The language of the Commission contained in the policy statement, supra, indicates clearly the right to amend an application in hearing status to reflect a change in station location, even where competitive applications are involved, and remain in hearing status. The language in paragraph 11 of such policy statement is controlling, and it spells out the course of action open to an applicant for a suburban community station caught under the new policy, including necessity for amendment during the hearing process to change station location under circumstances such as are found in this proceeding. Such course of action does not require removal from hearing status and return to the processing line, as is argued by the Broadcast Bureau. To construe otherwise the specific language hereinafter quoted would result in its

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nullification. In the words of the Commission, "if the applicant fails to rebut the presumption, *he will be treated as an applicant for the larger community* and required to meet all of the technical provisions of our rules, including sections 73.30, 73.31, and 73.188(b) (1) and (2), for stations assigned to that larger community. *An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community.*" (Footnote omitted; emphasis supplied.) The Commission also pointed out that as an applicant for the larger community, "he will be accorded only the section 307(b) preference to which that larger community is entitled *and will be granted only upon the condition that he amend his application to specify the larger community as his station location.*" (Emphasis supplied.) This language certainly does not contemplate that the amended application must be removed from hearing and returned to the processing line.

20. No case has been cited, or found during research on this matter, where an application has been amended and as a result *returned to the processing line* under conditions and circumstances growing out of the policy statement, supra. In fact, the only cited case involving an amendment growing out of the new burden imposed on suburban applicants is that of *Sleighter, et al.*, 3 FCC 2d 646, 8 R.R. 2d 23 (1966), affirmed, 6 FCC 2d 662 (1967), where an applicant was permitted to amend to reduce power from 5 kw to 1 kw, after the hearing record had been closed, for the purpose of avoiding issues flowing from the Commission's new policy statement relating to applications for suburban facilities. There, the amendment was permitted over the protests of competing applicants and the application retained in hearing status. The applications in that proceeding had not only been filed long prior to the adoption of the policy statement, supra, but the hearing in the proceeding had been completed prior to such date. One of the competing applicants petitioned to enlarge the issues to encompass the new policy considerations and soon thereafter the applicant against which the petition was directed filed a petition for leave to amend to reduce power in order to eliminate the possibility of its 5-mv/m signal reaching the so-called central city. The amendment was permitted and, on appeal, the Review Board affirmed such action. In its affirmation, the Review Board pointed out, "the absence of any definitive statement concerning amendments in the section 307(b) policy directive does not mean that pending applications have no right to amend. In such circumstances, amendments are to be governed by the good cause requirements of section 1.522(b) of the rules." (Footnote omitted.) The policy statement, supra, contains no reference whatever to the treatment of amendments of applications in hearing status which seek to reduce power for the purpose of avoiding the presumption which attaches under the new policy relating to proposals for stations in suburban communities, as was done in the *Sleighter* case; whereas, there is clear and unequivocal language with respect to the treatment to be accorded applicants in the position of Cavallaro in the instant proceeding.

21. The applicant has been found by the Commission to be qualified to construct and operate the proposed station, except as indicated by

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the specified issues; and all such issues, except that with respect to the presumption relating to station location, have been resolved in favor of the applicant.

22. Upon consideration of the entire record, the foregoing findings and conclusions, and the policy statement on section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, supra, it is concluded that the public interest, convenience, and necessity will be served by a grant of the Cavallaro application, subject to the conditions hereinafter set forth. Under such policy statement, an applicant that fails to rebut the presumption that its proposal is for the suburban community and yet meets all of the technical provisions of the rules of the Commission, including sections 73.30, 73.31, and 73.188(b) (1) and (2), for a station assigned to the larger community, will be permitted to prosecute his proposal as if he were an applicant for that larger community, but will be granted only on the condition that he amend his application to specify the larger community as his station location. Here the applicant has failed to rebut the attached presumption, but his proposal does meet fully all of the applicable technical provisions of the rules for a station assigned to the central city. Accordingly, the application should be granted, subject to the specific condition that he amend his application to specify San Juan as his station location, in conformity to the course of action set forth in the policy statement.

It is, therefore, ordered, That unless an appeal to the Commission from this initial decision is taken by a party to the proceeding or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.276 of the rules, the application of Augustine L. Cavallaro, Jr. (BP-16182), for a construction permit for a new class II standard broadcast station to operate on 1030 kc, 10 kw power, unlimited time, using the same three-tower directional antenna, day and night, *Be* and the same *Is hereby granted*, subject to the following conditions:

(1) That the applicant timely file a petition for leave to amend his application to specify the station location as San Juan, rather than Bayamon, P.R., in conformity with the course of action enunciated in paragraph 11 of the policy statement on section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities.

(2) Painting and lighting of the proposed antenna system shall be in accordance with paragraphs 1, 3, 12, 21, and 22 of FCC Form 715.

(3) In the event that interference is caused to the Commission's monitoring facilities in the vicinity of Sabana Seca, P.R., or to any other U.S. Government facility, immediate remedial action shall be taken to eliminate the problem involved.

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FCC 69-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: CHANNEL 16 OF RHODE ISLAND, INC. (WNET), PROVIDENCE, R.I. For Extension of Construction Permit	Docket No. 18420 File No. BMPCT-6836

ORDER

(Adopted January 9, 1969)

BY THE COMMISSION:

1. The Commission has before it for consideration (*a*) the above-captioned application (BMPCT-6836) of Channel 16 of Rhode Island, Inc. (Channel 16), permittee of television broadcast station WNET, Channel 16, Providence, R.I., for an extension of time within which to complete construction; (*b*) a "Petition To Dismiss With Prejudice and/or Deny," the above-captioned application, filed July 10, 1968, by Vision Cable Co. of Rhode Island, Inc. (Vision Cable); (*c*) a "Motion To Strike Petition To Dismiss With Prejudice and/or Deny," filed July 30, 1968, by Channel 16.

2. Under sections 309(d)(1), 309(b), and 309(c)(2)(D) of the Communications Act of 1934, as amended, a petition to deny does not lie against an application for an extension of time within which to complete construction. Consequently, the petition to deny filed by Vision Cable must be dismissed. However, we will consider the pleading as an informal objection, pursuant to section 1.587 of the Commission's rules.[1]

3. On June 17, 1965, following the oral arguments regarding the "Idle UHF" stations, the Commission in its memorandum opinion and order, *Joe L. Smith, Jr., et al.*, FCC 65-528, 5 R.R. 2d 582, granted, inter alia, television broadcast station WNET a 6-month extension of time within which to complete construction following Commission action on its application for modification of construction permit to make changes in the station's facilities, provided that such an application was filed within 2 months following the release of the order. At the oral argument, Channel 16 made an express representation to the Commission that the station would be operative within 6 months of a grant of its modification application. On August 27, 1965, an application (BMPCT-6154) was filed for changes in the station's facilities and this application was amended on November 7, 1967, and on January 12, 1968, to request certain changes in the proposed facilities.

[1] In its pleading, Vision Cable asserts that WNET has not demonstrated due diligence in the construction of the station and WNET has not complied with its prior unconditional commitment to build the station.

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During the pendency of this application, an application (BTC–4921) was filed on October 8, 1965, for voluntary acquisition of positive control of the permittee corporation by Harold C. Arcaro through the purchase of stock from John M. Dunne and this application was granted on October 20, 1965. Subsequently, the modification application was granted on January 25, 1968, and the construction permit, under the terms of the Commission's order of June 17, 1965, was extended until July 25, 1968.

4. On June 12, 1968, the above-captioned application (BMPCT-6836) was filed for an extension of time within which to complete construction of station WNET. In support of its request, Channel 16 alleges that uncertainty as to what action the Commission will take in connection with the pending proposal of Vision Cable to carry certain Massachusetts television signals on proposed CATV systems in Providence and other Rhode Island cities has caused Channel 16 to delay its plans for the completion of construction of station WNET. It is argued that since station WNET once suffered heavy financial losses by reason of increased local VHF competition in the Providence market, it would be unfair and contrary to the public interest to require the present expenditure of a large amount of money to place station WNET on the air at a time when the Commission has left open the possibility that after such facilities have been constructed, it would permit Vision Cable and/or other CATV systems in station WNET's service area to carry the programs of distant stations.[2] In further support of its extension request, the permittee alleges that Mr. Arcaro, the controlling stockholder, has personally purchased an additional 20 acres adjoining the station's present site in order to construct a 1,000-foot tower; that he has had conferences with prospective managers for the station for the purpose of hiring personnel to operate the station and that he has communicated with several companies for the purpose of obtaining their financial participation in order to minimize the risk involved and that such efforts have not been successful. In this connection, Channel 16 asserts that if the construction permit is extended for about 1 year, Mr. Arcaro will attempt to reorganize the corporation in an effort to go public. Moreover, the permittee alleges that RCA has advised Mr. Arcaro that it could not have the station's equipment completely installed and ready to operate by June 25, 1968, and that RCA would not proceed with the delivery of equipment until Mr. Arcaro personally endorsed the equipment contract.

5. On July 31, 1968, the Commission advised Channel 16 that the foregoing sequence of events raised a question concerning the permittee's failure to exercise due diligence in the construction of the station. Specifically, the permittee was advised that it appeared that delay in construction had been due not to any difficulty in the procure-

[2] In a memorandum opinion and order *Vision Cable Company of Rhode Island, Inc.*, docket No. 18317, 14 FCC 2d 654, released Sept. 17, 1968, the Commission designated for hearing the proposals of Vision Cable to operate its CATV systems in and around Providence, R.I. One of the issues specified in the order was to determine the effects of current and proposed CATV service in the Providence area upon existing, proposed and potential television broadcast stations in the market. Channel 16 was made a party to the proceeding. However, under the procedure adopted by the Commission in its notice of proposed rulemaking and notice of inquiry in docket No. 18397, FCC 68–1176, released Dec. 13, 1968, all top 100 market hearing proceedings, including footnote 69 proceedings such as the Providence proceeding are to be halted.

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ment of equipment or to an inability to complete construction because of reasons beyond the permittee's control, but rather to the permittee's voluntary decision to postpone construction because of economic and other considerations. Channel 16 was also advised that its contention that it should be permitted to delay construction of the station until the Commission resolved the request of Vision Cable to operate a CATV system in Providence was contrary to the permittee's prior express representation that construction of the station would be completed within 6 months after a grant of the application for changes in the station's facilities. The Commission's letter concluded that a grant of the application would not be warranted and that in the event that Channel 16 notified the Commission that it wished to proceed with the prosecution of its application, it would, at the most, be entitled to an oral argument to determine whether the failure to complete construction was due to causes not under its control, or whether the permittee could make the requisite showing of other matters sufficient to justify the extension, within the meaning of section 319(b) of the Communications Act of 1934, as amended, and section 1.534(a) of the Commission's rules. The permittee was also advised that it could request a full evidentiary hearing, a grant of which would depend upon a showing of other factors requiring a factual resolution.

6. In its response to the Commission's letter, Channel 16 states that it desires to proceed with the prosecution of its application and that it recently purchased equipment from RCA having a total purchase price of $762,800 and that Mr. Arcaro personally guaranteed payment and made a down payment of $15,256 or 2 percent of the total purchase price. Furthermore, Channel 16 asserts that it is entitled to a full evidentiary hearing with respect to its extension application since the question of whether Vision Cable's proposed CATV systems might have a deleterious impact on the development of UHF service by Channel 16 or other UHF stations is a matter requiring factual resolution.

7. We have carefully considered the response submitted by Channel 16, and are of the view that the permittee has neither supported its request for a grant of its extension application nor its request for a fully evidentiary hearing on the question of an extension of its construction permit. Channel 16 has failed to demonstrate that it has been diligent in proceeding with the construction of station WNET or that it has been prevented from completing construction by causes not under its control. Moreover, it appears that the delay in construction has been due to the permittee's voluntary decision to postpone construction because of economic considerations. A permittee who voluntarily postpones construction because of economic factors is exercising his independent business judgment and such postponement is clearly due to causes under the permittee's control. Channel 16 states that it is entitled to a full evidentiary hearing in order to determine whether Vision Cable's proposed CATV systems might stifle the development of UHF service by Channel 16. We do not agree. It is apparent that Channel 16 views the pendency of the CATV proposals as a new factor or a factor beyond its control which would justify a delay in construction of Station WNET until there has been a resolution of

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Vision Cable's proposal. However, Channel 16 was aware of the pendency of the proposals when, at the time of the grant of its modification application (BMPCT-6154) in January 1968 it reaffirmed its prior unconditional commitment to complete construction within 6 months or by July, 1968. Under these circumstances, we believe that Channel 16 is only entitled to an oral argument on the question of whether the failure to complete construction was due to causes not under the permittee's control or that the reasons stated are sufficient to justify an extension within the meaning of section 319(b) of the Communications Act of 1934, as amended, and section 1.534(a) of the Commission's rules.

It is ordered, That, the above-captioned application of Channel 16 of Rhode Island, Inc., *Is designated for oral argument* before the Commission en banc in Washington, D.C., at 10 a.m. on February 24, 1969, on the following issue:

To determine whether the reasons advanced by Channel 16 of Rhode Island, Inc., in support of its request for an extension of completion date, constitute a showing that failure to complete construction was due to causes not under control of the permittee, or constitute a showing of other matters sufficient to warrant further extension within the meaning of section 319(b) of the Communications Act of 1934, as amended, and section 1.534(a) of the Commission's rules.

It is further ordered, That, to avail itself of the opportunity to be heard, the applicant, in person, or by attorney, shall, within 20 days of the mailing of this order, file with the Commission an original and 19 copies of a written appearance stating an intention to appear on the date set for the oral argument and present arguments on the issue specified, and shall have until 10 days prior to oral argument to file a brief or memoranda of law.

It is further ordered, That, the petition to dismiss with prejudice and/or deny, filed by Vision Cable Co. of Rhode Island, Inc., *Is dismissed*, and when considered as an informal objection *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69R-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, DOING BUSINESS AS CHAPMAN RADIO & TELEVISION CO., HOMEWOOD, ALA.	Docket No. 15461 File No. BPCT-3282
ALABAMA TELEVISION, INC., BIRMINGHAM, ALA.	Docket No. 16760 File No. BPCT-3706
BIRMINGHAM BROADCASTING CO., BIRMINGHAM, ALA.	Docket No. 16761 File No. BPCT-3707
For Construction Permit for New Television Broadcast Station	
BIRMINGHAM TELEVISION CORP. (WBMG), BIRMINGHAM, ALA.	Docket No. 16758 File No. BPCT-3663
For Modification of Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted January 16, 1969)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The Review Board has before it an appeal from adverse ruling of hearing examiner, filed October 14, 1968, by Birmingham Television Corp. (WBMG).[1]

2. A brief statement concerning the background and current status of the proceeding is necessary to understand the question raised herein, and the Board's resolution of that question. The above-captioned applications were designated for hearing by Commission order, FCC 66-636, released July 20, 1966. An initial decision, looking toward the grant of the application of Alabama Television, Inc., was released by Hearing Examiner David I. Kraushaar on August 30, 1968 (FCC 68D-58, 14 R.R. 2d 6). On September 27, 1968, the Review Board released an order (FCC 68R-402) granting WBMG's motion for an extension of time within which to file exceptions to the initial decision. On October 3, 1968, the Secretary of the Commission sent a notice of filing of transcript to the parties, informing them that "suggested corrections to the transcript of hearing may be considered only if received by the Commission within 10 days from the date of this notice."[2] Subsequently, on October 7, 1968, WBMG filed a motion for correction of record. The motion was directed to the hearing

[1] The Broadcast Bureau filed a comment on WBMG's appeal on Oct. 24, 1968.

[2] The notice referred the parties to sec. 1.261 of the rules, which prescribes the procedure for filing a motion to correct a transcript. The pertinent portion of rule 1.261 reads as follows:

"Within 10 days after the date of notice of certification of the transcript, any party to the proceeding may file with the presiding officer a motion requesting the correction of the transcript. * * * Thereafter, the presiding officer shall, by order, specify the corrections to be made in the transcript. * * *"

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examiner. On October 8, 1968, the examiner dismissed WBMG's motion, stating that:

> This motion is addressed improperly to the hearing examiner who no longer has jurisdiction, inasmuch as the initial decision was issued August 26, 1968. Moreover, it is grossly untimely in any event. See rule 1.261.[3]

It is from this order that WBMG has appealed.

3. In support of its appeal, WBMG contends that its motion for correction of record was properly filed with the examiner in view of rule 1.261, which provides that a motion to correct the transcript should be filed "with the presiding officer." Noting the provision in rule 1.267(c) which states that "the authority of the presiding officer over the proceedings shall cease when he has filed his initial or recommended decision," WBMG argues that "rule 1.261 places a qualification on rule 1.267(c), so that the examiner retains a limited jurisdiction for the purpose of making corrections pursuant to rule 1.261 even though he has released his initial decision." WBMG also maintains that its motion was timely filed. WBMG requests the Board to: (1) Reverse the examiner; (2) set a specific date when other applicants may file oppositions or comments on WBMG's motion; and (3) direct the examiner to consider and resolve the motion and any oppositions or comments relating to it.

4. The Review Board agrees with the Broadcast Bureau that, since WBMG "filed its motion within the 10-day period specified in the Commission's notice [of filing of transcript], there is no sound basis for declaring the motion to be an untimely one." To do so, would, in our view, be tantamount to faulting a party for complying with a Commission directive. However, we also agree with the Bureau that the examiner correctly dismissed the motion "for the reason that he no longer had any jurisdiction in this proceeding." The proceeding is now before the Board on exceptions to the initial decision and correcting the record is now a matter for Board consideration. See rules 0.341(a) and 0.365(d). See also *Video Service Company*, FCC 68R-412, released October 8, 1968 (order). Moreover, while there is some merit to appellant's contention that the examiner is in the best position to decide motions to correct the transcript of hearing records, we believe that the most expeditious and orderly procedure under the circumstances here is to rule on the motion ourselves. Each of the other parties to this proceeding may file a pleading in support of or in opposition to WBMG's motion within 5 days of the release date of this document. See rule 1.261.

5. Accordingly, *It is ordered*, That the appeal from adverse ruling of hearing examiner, filed October 14, 1968, by Birmingham Television Corp. (WBMG) *Is granted* to the extent indicated herein and *Is denied* in all other respects; and that the other parties to this proceeding *Are afforded* 5 days from the release date of this document in which to file a pleading in support of or in opposition to the motion for correction of record, filed October 7, 1968, by Birmingham Television Corp. (WBMG).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[3] FCC 68M-1392, released Oct. 10, 1968.

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FCC 69-38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 87 OF THE RULES TO PERMIT CIVIL AIR PATROL (CAP) RADIO STATIONS TO EXCHANGE COMMUNICATIONS WITH CERTAIN U.S. AIR FORCE STATIONS	RM-1348

ORDER

(Adopted January 15, 1969)

BY THE COMMISSION:

1. The Commission has been requested by the Civil Air Patrol (CAP), a civilian auxiliary of the U.S. Air Force, and the Chief, Frequency Management Group, Directorate of Command Control and Communications, Headquarters, U.S. Air Force, to amend its rules to permit CAP stations to communicate with Air Force stations participating, or involved, in CAP activities, on CAP frequencies. Presently, the CAP, pursuant to section 87.515 of the rules, may communicate only with other CAP stations.

2. In support of this request the Air Force asserts that the authority for CAP to communicate with these Air Force stations is needed to improve the CAP capability when engaged in training and when conducting search and rescue mercy-type missions. CAP's reasons for requesting the rule changes are essentially the same.

3. The rule changes requested by the CAP and the Air Force appear to be reasonable and in the public interest. The frequencies used by the CAP and listed in subpart 0 of our rules are now used only by the CAP. To grant the requested changes, therefore, would not affect any users of radio other than the parties to this proceeding.

4. This matter has been discussed with and concurred in by the Interdepartmental Radio Advisory Committee (IRAC).

5. The amendment adopted herein pertains to frequencies used only by the U.S. Air Force and the CAP, both parties to this proceeding, hence, compliance with the prior notice, procedure, and effective date provisions of 5 U.S.C. 553 would serve no useful purpose and therefore is unnecessary.

6. In full view of the foregoing, *It is ordered*, That, pursuant to the authority contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, part 87 of the Commission's rules *Is amended*, effective January 28, 1969.

7. *It is further ordered*, That this proceeding *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69-16

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of COLUMBIA BROADCASTING SYSTEM, INC. (W13AV), VALPARAISO, IND. For Construction Permit for New VHF Television Broadcast Translator Station	File No. BPTTV-3381

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application of Columbia Broadcasting System, Inc. (CBS), licensee of television broadcast station WBBM-TV, channel 2, Chicago, Ill., requesting a construction permit for regular authority to operate a 1-watt VHF television translator station (W13AV) which had been authorized by the Commission on an emergency special temporary basis [1] and a letter, dated October 9, 1968, directed to CBS, in which the Commission advised the applicant that, because of the adverse impact which regular operation of station W13AV might have on UHF station WSBT-TV, channel 22, South Bend, Ind. (CBS), the Commission was unable to find that a grant of the application would serve the public interest, convenience and necessity. The Commission afforded CBS an opportunity to dismiss its application and to file a new application for a UHF translator and advised CBS that the Commission was unable to extend its emergency special temporary authorization beyond October 28, 1968.[2]

2. The Commission also has before it for consideration a petition for reconsideration and for extension of the emergency special temporary authorization, filed October 25, 1968, by CBS, and an opposition thereto, filed November 6, 1968, by South Bend Tribune, licensee of station WSBT-TV. CBS alleges that the facts which gave rise to the Commission's determination, in granting the emergency authorizations, that extraordinary circumstances exist requiring emergency operation in the public interest, have not changed. It argues that operation of the VHF translator until it can relocate the antenna of station WBBM-TV would have no adverse competitive impact on station

[1] *Columbia Broadcasting System, Inc.*, 12 FCC 2d 743; *Columbia Broadcasting System, Inc.*, 14 FCC 2d 226.

[2] The emergency special temporary authorization granted July 31, 1968 (14 FCC 2d 226) expired Oct. 28, 1968. The Commission is informed that station W13AV ceased operation on that date.

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WSBT–TV because Valparaiso is within the area of dominant influence of the Chicago television market area.

3. Neither we nor the UHF station desire to foreclose CBS's efforts to provide temporary translator service to that part of the Valparaiso area which is shadowed by construction in Chicago of the First National Bank Building, blocking WBBM–TV's antenna. This end can be accomplished by a UHF translator. We have simply determined that regular operation of the VHF translator in Valparaiso even temporarily, would offend our rules [3] and our overriding policy of fostering optimum conditions for the growth and development of UHF television in the area.[4] The applicant has alleged nothing in its petition which persuades us that a departure from the rules and the UHF policy are warranted in this case.

Accordingly, *It is ordered*, That the petition for reconsideration and extension of emergency special temporary authority *Is denied.*

It is further ordered, That the above-captioned application of Columbia Broadcasting System, Inc., *Is dismissed*, pursuant to section 1.566(a) of the Commission's rules as patently not in accordance with the rules, and the call letters *Are deleted.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] The application is inconsistent with sec. 74.732(d) of the rules which prohibits intermixture of VHF translators and UHF television stations or translators.

[4] We have held that our UHF policy is paramount to our policy of encouraging VHF stations to provide the best possible service to the largest number of persons where the two policies are in conflict. E.g., *WLVA, Incorporated* (WØ5AA), FCC 68–1190, released Dec. 19, 1968.

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FCC 69-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petitions by DELAWARE COUNTY CABLE TELEVISION CO. ET AL.	Docket No. 18140 et al. File No. CATV 100-18 et al.
BUCKS COUNTY CABLE TV, INC., FAIRLESS HILLS, PA. Request for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules	Docket No. 18432 File No. SR-106811

MEMORANDUM OPINION AND ORDER

(Adopted January 22, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONERS WADSWORTH AND H. REX LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On May 17, 1968, Bucks County Cable TV, Inc., gave notification pursuant to section 74.1105 of the Commission's rules of its intention to commence CATV operation in Falls Township, Bucks County, Pa. On June 18, 1968, WIBF Broadcasting Co., permittee of station WIBF-TV, Philadelphia, Pa., and U.S. Communications of Philadelphia, Inc., licensee of station WPHL-TV, Philadelphia, Pa., filed a petition requesting temporary and permanent relief pursuant to section 74.1109 of the rules against carriage of New York signals by Bucks County on its CATV system in Falls Township. This petition is opposed by Bucks County, and WIBF Broadcasting and U.S. Communications have replied.[1]

2. Bucks County proposes to commence operations in Falls Township carrying the following local signals: KYW-TV, WFIL-TV, WCAU-TV, WIBF-TV, WPHL-TV, WUHY-TV, WKBS-TV, Philadelphia, Pa.; WHYY-TV, Wilmington, Del., and WNEW-TV, WOR-TV, WPIX, WNDT, New York, N.Y. WIBF Broadcasting and U.S. Communications urge that the rationale of footnote 69 of the second report and order requires that the New York signals not be carried on Bucks County's system pending hearing.

[1] On Oct. 23, 1968, Bucks County filed a petition requesting the Commission to permit Bucks County to commence its CATV service with the carriage of stations set out in its notice dated May 17, 1968, pending consideration of the above mentioned petitions. This petition which in effect asks for a waiver of the "mandatory stay" provision of sec. 74.1105(a) of the rules is denied because Bucks County has made no showing to justify the extraordinary relief requested.

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3. In the second report and order, the Commission determined that CATV systems should generally carry the signals of all local television stations, that is those providing predicted grade B contours over the systems. See also, *Shen-Heights TV Association*, FCC 68–168, 11 FCC 2d 814. Footnote 69 recognizes that there may be special circumstances that would justify an exception to this rule when there is predicted grade B overlap between two major markets.

4. New York is the first major market and Philadelphia is the fourth, according to the 1968 ARB ranking. The carriage of New York signals in the Philadelphia market may interfere with the development of the independent UHF stations in the area. Accordingly, consistent with the rationale of footnote 69, we will explore the question in hearing. Bucks County may operate in the interim carrying the Philadelphia and Wilmington signals.

Accordingly, *A hearing is ordered* to be consolidated with the hearing in docket No. 18140–18166 at a time and place to be specified in a further order, upon the following issues:

1. To determine the present and proposed penetration and extent of CATV service in the Philadelphia television market.
2. To determine the effects of current and proposed CATV service in the Philadelphia market upon existing, proposed, and potential television broadcast stations in the market.
3. To determine (*a*) the present policy and proposed future plans of petitioners with respect to the furnishing of any service other than the relay of the signals of broadcasting stations; (*b*) the potential for such services; and (*c*) the impact of such services upon television broadcast stations in the market.
4. To determine whether carriage of predicted grade B or better signals from New York City stations should be authorized.
5. To determine whether the applications and proposals are consistent with the public interest.

Bucks County Cable TV, Inc., WIBF Broadcasting Co., and U.S. Communications of Philadelphia, Inc., are made parties to the proceeding and to participate must comply with the applicable provisions of section 1.221 of the Commission's rules.

It is further ordered, That respondent, Bucks County Cable TV, Inc., has the burden of proceeding and the burden of proof with respect to issues 1, 2, and 3 insofar as it relates to its own CATV system, and that petitioners have the burden of proceeding and the burden of proof with respect to issue 4. Issue 5 is conclusory.

Accordingly, petition of WIBF Broadcasting Co. and U.S. Communications of Philadelphia, Inc., *Is granted* to the extent indicated above and is otherwise *Denied*.

We note that Bucks County has filed a complaint and motion for preliminary injunction against the United States and the Federal Communications Commission in the U.S. District Court for the Eastern District of Pennsylvania, civil action No. 68–2773. In view of the pendency of that proceeding (in connection with which a motion to dismiss for lack of jurisdiction has been filed by the Commission), we take this action further to make clear our position. We stress the requirement that Bucks County must comply with our rules and policies and emphasize that we intend to take all appropriate steps to bring about such compliance. We also point out that while the matter of the

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objections to Bucks County's carriage of the New York signals is placed in hearing, the course of such hearing will, of course, be determined by our notice of proposed rulemaking and notice of inquiry in docket No. 18397, released December 13, 1968 (see par. 51).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in authorizing Bucks County to carry the local signals of Philadelphia and Wilmington stations.

I dissent to the order for a hearing on carriage of signals from New York City stations. The order is meaningless, in view of the Commission's action of December 12, 1968, docket No. 18397, notice of proposed rulemaking and notice of inquiry, which froze all such hearings. Therein, the Commission stated:

Interim Procedures

51. We turn now to the procedure to be followed by the Commission while this rulemaking is pending. Effective upon the issuance of this notice, the Commission will halt the hearing process in all top 100 market proceedings (including those with a footnote 69 issue) wherever it stands, even at the Review Board or Commission level.[23] There is no point in requiring the parties and the Commission to expend the resources and effort necessary to continue such hearings if the definitive policy is to supplant that process. We will also stop processing petitions for waiver of the hearing requirement. * * *

52. CATV systems now carrying grade B signals from a major market within the grade B contour of a station in another major market, or those proposing to do so, are not proscribed by the existing rules except where the filing of a timely section 74.1109 petition continues the operative effect of section 74.1105(c). Commission action on pending and future section 74.1109 petitions of this nature will be held in abeyance pending the outcome of this proceeding. * * *

I believe that the interim procedures are invalid (for the reasons given in my dissent thereto), but since the Commission has implemented the procedures, it is a sham here to order a hearing which cannot take place because of those procedures.

[23] We will, however, consider the appropriateness of resolving issues in hearings which do not involve the question of impact upon broadcasting stations.

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FCC 69R-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HEART OF GEORGIA BROADCASTING CO., INC., GORDON, GA.	Docket No. 18278 File No. BPH-5906
MIDDLE GEORGIA BROADCASTING CO., MACON, GA.	Docket No. 18279 File No. BPH-6123
For Construction Permits.	

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive application of Heart of Georgia Broadcasting Co., Inc. (Heart of Georgia), and Middle Georgia Broadcasting Co. (Middle Georgia), each seeking an authorization to construct a new FM broadcast station. By order, FCC 68-793, released August 6, 1968, the applications were designated for hearing under various issues, including, inter alia, a limited financial issue as to Heart of Georgia. Presently before the Board [1] is a petition to enlarge issues, filed November 14, 1968, by Middle Georgia, requesting an expansion of the inquiry into Heart of Georgia's financial qualifications.

2. In support of its request, petitioner points out that Heart of Georgia, in its application, indicated that it would need $34,895 to construct its proposed station and operate for 1 year, and that it was relying on an equipment credit of $25,000, cash in an amount of $1,142, and $3,500 in stock subscriptions to meet this requirement. Since no letter from the equipment supplier was included with the application, a limited financial qualifications issue was specified. However, petitioner alleges, Heart of Georgia's financial status has changed drastically since the time of designation. Petitioner alleges that on September 30, 1968, Heart of Georgia filed a petition to the U.S. District Court for the Middle District of Georgia requesting an arrangement under the Bankruptcy Act. In support of this allegation, Middle Georgia attached a certified copy of that petition.[2] Prior to this proceeding, Middle Georgia points out, Heart of Georgia's only business activity was its standard broadcast station, WCIK. Middle Georgia alleges that the facts revealed in the bankruptcy documents clearly undermine the basis of Heart of Georgia's financial showing in its

[1] Also before the Board is the Broadcast Bureau's comments, filed Dec. 5, 1968.

[2] Attached to the petition is a certified copy of a "Summary of Debts of Assets" filed by Heart of Georgia in the bankruptcy proceedings. This summary, Middle Georgia notes, indicates that Heart of Georgia has debts outstanding in the amount of $70,951.59 and assets of only $24,372.04.

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application. The Broadcast Bureau supports the addition of the requested issue. No opposition was filed by Heart of Georgia.

3. The Review Board agrees with the petitioner and the Broadcast Bureau that the changed circumstances raise substantial questions as to various aspects of Heart of Georgia's financial proposal. Since the applicant's estimates of construction and operation costs are based, at least in part, on receiving a credit from an equipment supplier, and since the equipment supplier is already a creditor of Heart of Georgia,[3] costs of construction and first year's operation must be placed in issue. A further doubt as to the estimated costs of operation is raised by the fact that Heart of Georgia proposes to utilize personnel from its standard broadcast station to operate the proposed FM station. In addition, it is clear that the recent bankruptcy proceeding is sufficient basis for an evidentiary inquiry into the amount of funds that Heart of Georgia has available. Finally, as noted by the Broadcast Bureau, Heart of Georgia's proposed FM station would be operated in conjunction with and as an adjunct of its existing standard broadcast station,[4] and therefore the ability of that station to continue to operate will also be made the subject of a hearing issue.

4. Accordingly, *It is ordered*, That the petition to enlarge issues, filed on November 14, 1968, by Middle Georgia Broadcasting Co. *Is granted;* and that issue 1, as specified in the designation order, *Is amended* to read as follows:

1. To determine, as to Heart of Georgia Broadcasting Co., Inc.—
   (*a*) The basis of its estimated construction and first year's operating costs;
   (*b*) The amount of funds it has available to meet construction and first year's operating costs;
   (*c*) Whether it has the ability to continue to operate standard broadcast station WCIK, Gordon, Ga.;
   (*d*) Whether, in light of the evidence adduced pursuant to (*a*), (*b*), and (*c*), above, it is financially qualified.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] Petitioner points out that the summary of debts and assets reflects that Heart of Georgia is already indebted to the equipment supplier in an amount of approximately $21,000.

[4] The Bureau notes that on Dec. 4, 1968, the Commission granted an application (BAL-6523) for involuntary assignment of the license of WCIK to a debtor in possession.

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FCC 69-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
HICKORY HILL BROADCASTING CO. (WTWA)
THOMSON, GA.
Has: 1240 kc, 250 w, Specified-Hours 6 a.m. to 7:15 p.m., Class IV
Requests: 1240 kc, 250 w, Unlimited-time, Class IV
For Modification of License

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration the above-captioned application for modification of license to increase hours of operation.

2. Since this applicant proposes an increase in hours on a permanent basis, it is a major change proposal within the meaning of section 1.571(a) of the Commission's rules. As such it comes within the purview of our recent AM "freeze."[1] However, since class IV stations are allocated solely on the basis of daytime separation under section 73.182(a), and since, under section 73.23(e) class IV stations licensed for specific hours may upon notice to the Commission operate beyond those hours specified in their licenses, this request by WTWA for modification of its license to provide specifically for unlimited time operation on a regular basis is essentially a pro forma proposal. Since the AM "freeze" was not intended to bar this type of application, a waiver will be granted.

3. Accordingly, *It is ordered, on our own motion*, That the provisions of note 2 to section 1.571 *Are waived* and the above application *Is hereby accepted* for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] *Interim Criteria to Govern Acceptance of Standard Broadcast Applications*, 13 FCC 2d 866, 13 R.R. 2d 1667.

106-522—69——5

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FCC 69-71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF INTERSTATE BROADCASTING CO., LICENSEE OF STATION KRKT, ALBANY, OREG.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 22, 1969)

BY THE COMMISSION: COMMISSIONERS WADSWORTH AND H. REX LEE ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated June 4, 1968, addressed to Interstate Broadcasting Co., licensee of station KRKT, Albany, Oreg., and (2) licensee's response to the notice of apparent liability dated June 6, 1968.

2. The notice of apparent liability in this proceeding was issued because of the licensee's failure to observe the provisions of sections 73.47(b) and 73.116(b) of the Commission's rules in that the results of KRKT's equipment performance measurements for a 2-year period were not available for examination as required. The notice provided that, pursuant to section 503(b) of the Communications Act of 1934, as amended, the licensee was subject to an apparent forfeiture liability in the amount of $200 for its apparent willful or repeated violation of the recited provisions of the Commission's rules for a period in excess of 10 days.

3. In response to the notice of apparent liability the licensee does not claim that KRKT's equipment performance measurements were available for examination as required by sections 73.47(b) and 73.116 (b). Licensee avers, however, that it should not be held liable for forfeiture since its failure to comply "* * * * was done not intentionally," but was due to an oversight. Licensee also asserts that it understood that equipment performance measurements had to be made "* * * each 2-year period," and that, noticing this oversight, licensee "immediately contracted [for] a new proof of performance, which was completed on December 2, 1967."

4. We have carefully considered licensee's reply and the circumstances surrounding the violations in this proceeding, but we are not persuaded by licensee's arguments either to remit or reduce the amount of its apparent forfeiture liability. Section 73.47(b) of the rules requires a licensee to keep on file equipment performance measurements for a period of at least 2 years and to make such measurements available for examination, upon request, to any duly authorized representa-

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tive of the Commission. From the facts in this proceeding it is evident that KRKT's equipment performance measurements were not on file and available for examination when the station was inspected (November 20, 1967), in violation of sections 73.47(b) and 73.116(b), and that these violations were continued until new measurements were conducted and made available as required (December 2, 1967). It is clear, therefore, that the licensee was in repeated violation of the recited provisions of the Commission's rules for a period in excess of 10 days. See *WTMC, Inc.*, 6 FCC 2d 801 (1967). Furthermore, although not so charged in the notice of apparent liability issued in this proceeding, it is observed that the licensee was in violation of former section 73.47(a) of the rules in that KRKT's equipment performance measurements were not made at yearly intervals. See *Mt. Sterling Broadcasting Co.*, 12 FCC 2d 571 (1968), wherein the Commission stated that "[t]he simple construction of this rule requires such measurements to be made once a year at dates no more than 12 months apart," rather than every 2 years as asserted by licensee. It should also be observed that licensee was in violation of the subsequently amended requirements of section 73.47(a), since a period of more than 14 months elapsed between the making of equipment performance measurements for KRKT. See *Amendment of Part 73 of the Commission's Rules and Regulation*, 14 FCC 2d 230 (1968). Oversight is no excuse for violations of the Commission rules, *Mid-Tex Broadcasting Co.*, 8 FCC 2d 854 (1967), and corrective action after citation will not justify either remission or mitigation. *Ponce Broadcasting Corp.*, 8 FCC 2d 244 (1967).

In view of the foregoing, *It is ordered*, That Interstate Broadcasting Co., *Forfeit* to the United States the sum of $200 for repeated failure to observe the provisions of sections 73.47(b) and 73.116(b) of the rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of Commission rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

It is further ordered, That the Secretary of the Commission send a copy of this memorandum opinion and order by certified mail—return receipt requested to Interstate Broadcasting Co., licensee of Station KRKT, Albany, Oreg.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69R-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LAWRENCE COUNTY BROADCASTING CORP., LOUISA, KY. TWO RIVERS BROADCASTING CO., INC., LOUISA, KY. For Construction Permits	Docket No. 18235 File No. BP-17188 Docket No. 18236 File No. BP-17239

MEMORANDUM OPINION AND ORDER

(Adopted January 21, 1969)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications for a new standard broadcast station were designated for hearing by Commission order, FCC 68-694, released July 11, 1968, 33 F.R. 10166. Two Rivers Broadcasting Co., Inc. (Two Rivers), has petitioned to enlarge the issues in the proceeding as follows: [1]

> To determine whether Lawrence County Broadcasting Corp. submitted complete and accurate information in response to the inquiries in the Commission's application form, FCC 301, and has continued to keep the Commission advised of "substantial and significant changes" as required by Section 1.65 of the Commission's rules, and the extent to which the facts so adduced bear upon the comparative qualifications of Lawrence County Broadcasting Corp., to be a licensee of this Commission.

2. In support of its request, Two Rivers alleges that when Lawrence County Broadcasting Corp. (Lawrence County) filed its application, Hobart Clay Johnson was listed as a 16⅔-percent stockholder. In response to the question concerning other broadcast interests, Johnson listed a 10 percent interest in WPKE AM and FM, Pikeville, Ky. During oral testimony in this proceeding, Johnson testified that he had owned 10 percent of WPKE AM and FM from 1965 to 1966 or 1967, at which time he acquired an additional 5 percent interest in those stations. Petitioner notes that the instant application was not amended to reflect Johnson's acquisition of the additional 5 percent interest in WPKE AM and FM. It argues that thus Two Rivers has failed to comply with section 1.65 of the Commission's rules [2] and an issue concerning the matter is warranted.

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[1] The Review Board has before it for consideration a petition to enlarge issues, filed Dec. 9, 1968, by Two Rivers Broadcasting Co., Inc.; an opposition, filed Dec. 18, 1968, by Lawrence County Broadcasting Corp.; and Broadcast Bureau's comment, filed Dec. 24, 1968.

[2] Sec. 1.65 of the Commission's rules reads in pertinent part as follows:

"Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate."

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3. The Board agrees with the Bureau's statement that "it is the duty of applicants to maintain their application in an up-to-date and correct status." However, in the circumstances of this case, the requested issue is not warranted. Johnson acquired his additional 5 percent interest in WPKE AM and FM from a Mr. May who is also a 16⅔-percent owner of Lawrence County and the majority stockholder of WPKE AM and FM. The realinement of a 5 percent ownership interest in a radio station, as between two 16⅔-percent stockholders of the applicant, which has no bearing on the control of that station or their ownership in the applicant, is not a significant and substantial change and therefore the failure to report the change in this proceeding does not warrant the addition of a rule 1.65 issue.[3] Cf. *Sumiton Broadcasting Co., Inc.*, FCC 68R–317, 14 R.R. 2d 208. The petition to enlarge issues will be denied.

4. *It is ordered*, That the petition to enlarge issues, filed by Two Rivers Broadcasting Co., Inc., on December 9, 1968, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] Petitioner contends that the change, which was reported to the Commission in a form 323 ownership report, "affect[s] the question of control of the mass media of communications admissible under the general comparative issue." However, petitioner does not attempt to explain, and the Board does not perceive, how the change could be significant to a comparative evaluation of the applicant under this criterion.

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FCC 69-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of LEE ENTERPRISES, INC., OTTUMWA, IOWA For a Construction Permit for New UHF Television Broadcast Translator Station	File No. BPTT-1783

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONER COX DISSENTING ON THE GROUNDS THAT THE TRANSLATOR DOES NOT HAVE REBROADCAST PERMISSION AS TO THE NETWORK PROGRAMS OF KHQA; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned application (BPTT-1783) of Lee Enterprises, Inc. (Lee), licensee of television broadcast station KHQA-TV, channel 7, Hannibal, Mo. (CBS), for a new UHF television broadcast translator station to serve Ottumwa, Iowa, on output channel 71; a petition to deny filed on July 22, 1968, by Cowles Communications, Inc. (Cowles), licensee of television broadcast station KRNT-TV, Des Moines, Iowa (CBS), and various pleadings filed in connection therewith.[1]

2. The proposed translator would serve approximately 46,000 persons in Ottumwa and the surrounding area. Ottumwa receives direct off-the-air television signals from only one television broadcast station: KTVO, Kirksville, Mo. (ABC). Two translator stations, licensed to Ottumwa Area Translator System, Inc. (OATS), are presently serving Ottumwa: K76BZ, which rebroadcasts WHO-TV, channel 13, Des Moines, Iowa (NBC), and K74CO, which rebroadcasts KRNT-TV, channel 8, Des Moines, Iowa (CBS). The proposed translator would rebroadcast the signals of KHQA-TV, Hannibal, Mo. (CBS).

3. Lee disputes Cowles' standing to file its petition. Lee states that Cowles' claim to standing is too remote and intangible to meet the requirements of section 309(d) of the Communications Act. Cowles, however, says that it solicits advertising in Ottumwa and local and regional advertisers who buy time in the Des Moines market do so with the understanding that they will receive circulation also in Ottumwa. Consequently, it is apparent that Cowles competes for viewership and advertising revenues in Ottumwa and, on this basis, we find that it has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 R.R. 2008.

[1] The Commission also has before it for consideration an opposition to petition to deny filed July 22, 1968, by Lee and a reply to opposition to deny filed Aug. 19, 1968, by Cowles.

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4. Cowles alleges that Lee has not established that there is a need for the proposed translator since CBS programing is already provided to Ottumwa by OATS' station K74CO, which rebroadcasts petitioner's station KRNT–TV. The applicant, however, states that its station KHQA–TV carries more CBS programing than KRNT–TV. While the amount of nonduplicated CBS programing which would be broadcast by the proposed translator is disputed, there seems to be agreement that KHQA–TV carries CBS programs which KRNT–TV does not carry.[2] There is, of course, also KHQA–TV's locally originated programing which would not otherwise be available to Ottumwa. To the extent that the translator would provide unduplicated programing, we think that a need for the translator has been established.[3]

5. Cowles alleges that the proposed translator would operate without depending upon public contributions, causing OATS financial ruin by depriving it of the public financial support upon which it subsists. The allegation is wholly speculative and is unsupported by facts. Aside from that, however, we believe that it is apparent that if the people of Ottumwa wish to continue to receive the programs provided by station K74CO, they will continue their financial support; if not, they will withdraw that support, indicating that they no longer feel a need for that service. In any event, we believe that this is not a choice which we should make, but it is one properly left to the people of Ottumwa.

6. Cowles has alleged that Lee has not obtained the consent of CBS for rebroadcast of CBS programing by the proposed translator. Lee proposes to rebroadcast its own station KHQA–TV and it obviously has that consent. It has, moreover, filed a letter from the Rate and Affiliation Committee of CBS recommending that rebroadcast consent be given by CBS. We find, therefore, that the proposed translator has the rebroadcast consent required by section 325(a) of the Communications Act. *Hubbard Broadcasting, Inc.*, 10 FCC 2d 381, 11 R.R. 2d 433.

7. Cowles, as alternative relief, prays that the Commission grant the application subject to a nonduplication condition to protect station KRNT–TV. A nonduplication condition would be inappropriate in this case. Our rules and the policy announced in the second report and order in docket No. 14895 (2 FCC 2d 725, 6 R.R. 2d 1717) require the imposition of a nonduplication condition only upon a licensee-owned VHF translator located within the predicted grade A contour of a television station whose programing would be duplicated and outside the predicted principal city contour of the primary station. Furthermore, we stated in the report and order in docket No. 15971, 13 FCC 2d 305, 13 R.R. 2d 1577, that we would continue such policies with respect to nonduplication conditions pending a further study of the

[2] For example, KHQA–TV carries "CBS Morning News," the CBS "Friday Night Movie," and the football games of the St. Louis Cardinals, none of which are carried by KRNT–TV. KRNT–TV, of course, carries programs which would not be available from KHQA–TV.

[3] It also seems that K74CO is experiencing interference to its input signals, caused by station WQAD–TV, channel 8, Moline, Ill., making its retransmissions less than satisfactory. Cowles states that this is a situation which is being remedied. We have not, therefore, considered it as a factor in our decision.

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entire problem. Where, as in this case, the proposed translator is a UHF, we have consistently adhered to our stated policy. E.g. *Spokane Television, Inc.* (K14AA), 12 FCC 2d 462, 12 R.R. 2d 1167. There have been no facts presented here which require a different result.

Accordingly, *It is ordered*, That the petition to deny filed herein by Cowles Communications, Inc., *Is denied*, and the above-captioned application of Lee Enterprises, Inc., *Is granted*, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENTS OF PARTS 2, 81, AND 83—TO ESTABLISH A SCHEDULE OF DATES, REVISED TECHNICAL STANDARDS, FREQUENCIES AND OTHER REQUIREMENTS FOR THE ORDERLY TRANSITION OF SHIP AND COAST RADIOTELEGRAPH STATIONS FROM PRESENT FREQUENCY ASSIGNMENTS IN THE LOW, MEDIUM, AND HIGH FREQUENCY BANDS TO NEW ASSIGNMENTS WITHIN ALLOTMENTS AND/OR FREQUENCY USAGE AS ADOPTED BY THE ITU WORLD ADMINISTRATIVE RADIO CONFERENCE ON MARINE MATTERS, GENEVA, 1967	Docket No. 18218

REPORT AND ORDER

(Adopted January 22, 1969)

BY THE COMMISSION: COMMISSIONERS WADSWORTH AND H. REX LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. A notice of proposed rulemaking in the above-captioned matter was released on June 25, 1968, and was published in the Federal Register on July 3, 1968 (FCC 68-639, 33 F.R. 9665). By order, released on July 29, 1968, an extension of time was granted in which to file comments. In the notice, the Commission proposed to amend its rules governing stations in the Maritime Services to establish a schedule of dates, revised technical standards, frequencies and other requirements for the orderly transition of ship and coast radiotelegraph stations from present frequency assignments in the low, medium, and high frequency bands to assignments within allotments and/or frequency usage as adopted by the ITU World Administrative Radio Conference on marine matters (WARC), Geneva—1967.

2. Comments were filed by: American Merchant Marine Institute, Inc., (AMMI), Collins Radio Co. (Collins), Pacific Far East Line, Inc., (PFEL), RCA Communications, Inc., (RCA), and Tropical Radio Telegraph Co. (TRT). No reply comments were filed.

3. The comments of AMMI were directed to the matter of frequency tolerance to be applied to ship stations using A1 (radiotelegraphy) emission in the bands between 4,000 and 27,500 kc/s. The comments of RCA were principally concerned with the same matter. In the filings submitted by Collins, PFEL, and TRT, no comment was made in regard to the frequency tolerance matter described above. Collins did, however, recommend that the frequency tolerance applicable to ship

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stations employing narrow-band direct-printing telegraph and data transmissions systems be reduced to a value less than 100 cycles per second. Both of these matters are treated in later paragraphs in this report and order.

4. Collins recommended that sections 83.552 and 83.553 be amended to include the use of emission A2H (single sideband, full carrier, tone modulation), as an alternative to emission A2. The inclusion in the Rules of emission A2H, as requested by Collins, would be in accord with WARC and, therefore, is adopted. Collins further recommended these two sections be amended to include appropriate technical criteria that would produce the current signal levels comparable to that produced when emission A2 is employed. With regard to this latter recommendation, the Commission currently has under consideration the matter of antenna power necessary for compliance with sections 83.552 and 83.553. It would be premature and possibly misleading to amend sections 83.552 and 83.553 to include a value of equivalency for emission A2H prior to resolution of the above matter. Accordingly, during the interim period it will be necessary for transmitters operated with emission A2H under the provisions of sections 83,552 and 83.553 to comply with the antenna power specified for emission A2. The procedure for determining antenna power is set forth in section 83.552(e)(1) and in section 83.553(e).

5. Collins recommended that footnotes be added to the appropriate bands within the allocation table of part 2 to provide for use of 4136.1 kc/s at coast stations and for use of 4434.9 and 6518.0 kc/s at ship stations. Since this recommendation is more appropriate to the Commission's proceeding in docket No. 18271, released August 8, 1968, it will be treated in that docket as will the frequencies in footnote NG27.

6. To facilitate licensing, RCA recommended that the frequency column symbol "CS" be employed in referring to the special calling channels. (See the bottom of the table 1b, sec. 83.318(b).) This would facilitate licensing and has been included in the table.

7. RCA and TRT each called attention to typographical changes which should be made to several of the frequency tables. These changes have been included in the respective tables.

8. PFEL recommended that the proposed section 83.320(a) be amended to permit ship stations employing narrow-band direct-printing telegraph and data transmission systems to apply for two frequency column symbols (four families of frequencies), in lieu of one frequency column symbol (two families of frequencies) as proposed by the Commission. In support thereof PFEL states they have two vessels now equipped and six more vessels under construction; that these vessels handle a high volume of traffic and that the justification for installation of the radioteletype equipment was based on the need to handle a high volume of diversified traffic.

9. PFEL notes that the frequencies (of the same megacycle order) specified within one frequency column symbol are adjacent and a single source of interference could render both channels unusable. In brief review, the spacing between adjacent channels in the bands allocated for narrow-band direct-printing telegraph and data transmission systems, as provided by the WARC, is 0.5 kc/s in the 4, 6, and 8

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Mc/s bands and 1.0 kc/s in the 12, 16, and 22 Mc/s bands. The spacing proposed by the Commission between the two frequencies of the same megacycle order within one frequency column symbol is as follows: 5 kc/s for the 6 and 8 Mc/s bands; and 10 kc/s for the 12, 16, and 18 Mc/s bands. It will be noted that this is the maximum possible separation which can be provided, if the spacing between the "A" and "B" frequencies is made uniform for all frequency column symbols.

10. In preparing the table of section 83.320(b), the Commission provided the maximum separation between the "A" and "B" frequencies of one frequency column symbol in the belief that this approach offered the greatest probability of avoiding disruption of both channels due to interfering transmissions by a single station located, for example, midway between the two channels.

11. In their comments PFEL concludes that the number of frequencies which would be available to them (in the proposals for the bands allotted for narrow-band direct-printing telegraph and data transmission systems) would be less than the number which they are presently authorized to use (in the high traffic ship radiotelegraph working frequency bands). On the basis of total frequencies available, FFEL's conclusion is correct. A conclusion based on total number of frequencies, alone, can be and in this particular case is misleading.

12. Such conclusion disregards the varying degree to which differing emissions can live together. Radioteletype emissions employing a uniform bandwidth and a minimum of frequency tolerance (this will be the case with narrow-band direct-printing telegraph and data transmission systems), can occupy adjacent channels quite satisfactorily. This is the basic situation which led to the establishment of separate bands for narrow-band direct-printing telegraph and data transmission systems. On the other hand, a similar situation does not exist with respect to radioteletype and manual radiotelegraph, where each system has incompatible aspects relative to the other.

13. Eighteen frequencies are currently authorized to PFEL, in the 12, 16, and 22 Mc/s bands. Of these, 12 are shared on an equal basis between all of the "H" frequency column symbols; and three frequencies (one at each magacycle order) are allotted exclusively to H8 and three are allotted exclusively to H10. Eight frequencies are also authorized to PFEL in the 2, 4, 6, and 8 Mc/s bands. These frequencies, one at each megacycle order for H8 and one each for H10, are allotted exclusively to H8 and H10. The degree to which the shared channels can be employed by PFEL for satisfactory service will depend upon utilization of those frequencies by other vessels. Since the shared frequencies are common to H1 through H11, it would appear that disruption would occur at frequent intervals. With increased use of H1 through H11 in the future, such disruption would be expected to occur at even more frequent intervals. On the other hand, the frequencies allotted exclusively to H8 and to H10 would appear to be subject to a lesser degree of interference, because they would be available only to ships which are assigned H8 and H10. The number of ships assigned H1 through H7, H9, and H11, should be many times greater than those assigned H8 and H10. For this reason, no particular

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significance is attached to the availability to PFEL of these shared frequencies.

14. As concerns frequencies in the bands 2065–2089.5 kc/s and 2092.5–2107 kc/s, availability to radiotelegraph ship stations has been withdrawn, on the basis of the pressing need for more radiotelephone frequencies and the absence of radiotelegraph use of frequencies in these bands. Thus, replacement frequencies at 2 Mc/s will not be available to PFEL. At 4 Mc/s, the number of frequencies allocated to and available for narrow-band direct-printing telegraph and data transmission systems are less than in the bands at 6, 8, 12, 16, and 22 Mc/s, where 20 frequencies were allocated in each band. At 4 Mc/s, 12 frequencies were allocated. Thus, to effect the frequency plan of section 83.320(b), two frequencies each from 6, 8, 12, 16, and 22 Mc/s bands were grouped with one frequency from the 4-megacycle band to form each "N" frequency column symbol. The two remaining 4-megacycle-order frequencies were made available to all of the "N" frequency column symbols.

15. In its notice, the Commission proposed to delete from the rules the distinction in availability of frequencies allocated for low traffic and those allocated for high traffic radiotelegraph ships (adopted in principle at the ITU Radio Conference, Atlantic City—1947; expanded by the ITU Radio Conference, Geneva—1959; and left to the discretion of administrations by the ITU WARC, Geneva—1967), and provided that these bands would be equally available to all high frequency radiotelegraph ship stations. Prior to the WARC, utilization by Commission licensees of the high traffic ship radiotelegraph working frequency bands was slight, due to limitations in availability. It is envisaged that the proposed change will, on an evolutionary basis, bring usage of the low traffic and high traffic ship radiotelegraph bands into balance. In regard to other administrations, it is reasonable to expect that similar relaxation will be effected by many of those administrations. Thus, it can be expected that utilization of the frequencies specified by symbols H8 and H10 will, in the future, suffer an increasing interference. Under these conditions, it would be expected that PFEL will obtain an improved service in the bands allocated for narrow-band direct-printing telegraph and data transmission systems, when those bands become available for use.

16. In regard to the current radio station authorization and the frequencies assigned thereunder, PFEL in their comments gives no information as to the number of frequencies actually used, quantitative information as to the volume of traffic handled, or actual circuit time required to transmit and receive that traffic. Failing this information, a positive determination can not be made that frequencies in addition to those provided by each N frequency symbol are required and should be provided. In any event, assignments are made by the Commission on the basis of public need, in contrast to the individual need. The factors which caused PFEL to lead the way by installation aboard their fleet of equipment employing new techniques will be similarly applicable to other fleets, of U.S. and foreign registry. Thus, it is reasonable to expect that more and more ships will be equipped for use of the same or similar system(s). On the one hand, the number of fre-

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quencies authorized for PFEL use should be adequate for the proper functioning of that system; on the other hand, the number authorized should not exceed the actual system needs, or be such that frequencies are not available for other licensees desiring to use the same or similar system.

17. In the view of the Commission, the information submitted by PFEL does not justify assignment of a number of frequencies in excess of that provided by a single frequency column symbol in the N series. Accordingly, the recommendation of PFEL that section 83.320(a) be amended to permit assignment of two frequency column symbols to a licensee is not adopted.

18. In regard to the frequency tolerance to be applied to coast and ship stations operating in the narrow-band direct-printing telegraph and data transmission systems, Collins urges the adoption of values of 20 cycles per second for coast stations and 50 cycles per second for ship stations. In support of these values, Collins points to the benefits which will accrue from their adoption and use. These benefits include the avoidance of manual methods of transmitter and receiver adjustment, tuning and protracted test transmissions to establish a circuit. No opposing views were filed.

19. From the frequency management and utilization point of view, it is a desired objective to reduce to a practical minimum the number of frequencies used and the duration of transmission on those frequencies. While it is appropriate to look to discontinuance of the practice of calling on manual telegraph channels to make arrangement for machine transmission on other channels, followed by test transmissions and preparatory adjustments on the machine frequencies, a program of that magnitude, would require both national and international coordination, among other things, and, therefore, is not within the scope of this proceeding.

20. The providing and maintenance of an adequate minimum difference in frequency between the coast station receiver and the ship station transmitter, or vice versa, is an essential system element for optimum performance of the narrow-band direct-printing telegraph and data transmission system(s). In the case of this system(s), the bandwidth of each channel is small and the selectivity of the receiver, to reject undesired adjacent channels, must be sharp. To avoid preparatory test transmissions and tuning, the transmitted signal, plus deviation, must be maintained within the receiver selectivity and, within practical limits, be centered on the discriminator detector (or other detector, where used). It is appropriate, therefore, to adopt in this proceeding a frequency tolerance which offers reasonable promise of optimum system(s) performance. Accordingly, a coast station tolerance of 20 cycles and a ship station tolerance of 50 cycles per second is adopted.

21. In their comments, Collins expresses the view that it is premature to establish a fixed assignment arrangement of frequencies for narrow-band direct-printing telegraph and data transmission systems, or to make such arrangement in proportion to manual radio-

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telegraph frequency assignment arrangements. In support of their view, Collins states:

> * * * Specific planning for the use of these frequencies is largely a matter of conjecture and not based on operational plans that have had sufficient government and industry consideration. * * * We recommend * * * that the Commission defer this part of the proposed rulemaking, except to make provision for assignment of any of the groups of frequencies on a case by case basis pending further study by interested parties. Such a study, for example, could be done within the Radio Technical Commission for Marine Services, where government and/or industry could have sufficient time to develop a sound operating plan for the assignment and use of the frequencies.

22. In the view of the Commission, these supporting arguments of Collins offer little basis for withdrawing the frequency table of section 83.320, for amending section 83.321 to delete the N frequency column symbols, and to add provisions, at an appropriate place, for assignment of frequencies for narrow-band direct-printing telegraph and data transmission systems on a case by case basis. First, the Commission does not agree that specific planning for the use of these frequencies is largely a matter of conjecture. For example, pairing of frequencies into families to provide for propagation over variable and extended distances is a longstanding principle. That principle has been applied to aviation, marine, broadcasting and fixed radio services for decades. It appears there is no alternative to doing this in the case of assignment of frequencies for narrow-band direct-printing telegraph and data transmission systems. Further, Collins submits no information to indicate there will or should be an exception in this instance.

23. In regard to Collins comment that "Specific planning for the use of these frequencies is * * * not based on operational plans that have had sufficient government and industry coordination," the Commission is unable to interpret this as justification for withholding action. In regard to operational planning for the use of these frequencies, it is noted that Collins does not state there is need for development of operational plans, that the development of such plans is in progress, or that Collins intends to urge the development of such plans. Accordingly, guidance to industry appears necessary and sections 83.320 and 83.321 are adopted as proposed.

24. In their comments, AMMI and RCA opposed adoption of the frequency tolerances proposed by the Commission, section 83.131(b)(7)(i) and (ii), for application to ship stations using class A1 emission in the bands between 4,000 and 27,500 kc/s. The current rules provide that these ship stations shall conform to a frequency tolerance of 200 parts per million (p.p.m.), or 0.02 percent. The Commission proposed this tolerance be reduced to 50 parts per million (p.p.m.), or 0.005 percent. As proposed, the tolerance of 50 p.p.m. would be applicable to all types of transmitters after January 1, 1973, and to new types of transmitters brought into service after January 1, 1970. Types of transmitters authorized in ship stations prior to January 1, 1970, could continue use of 200 p.p.m. until January 1, 1973.

25. In their comments, RCA urged that the changes in frequency

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tolerance not exceed those values adopted by the ITU World Administrative Radio Conference on marine matters (WARC), Geneva, 1967. The frequency tolerances adopted by the WARC for ship stations operating class A1 emissions in these bands are as follows:

	P.p.m
Low traffic ships	[1] 200
High traffic ships	[1] [2] 50

26. RCA indicated changes in frequency tolerance as adopted by the WARC are acceptable. On the other hand, AMMI gives conditional indication that the arrangement for low traffic ships, as adopted by the WARC, is acceptable. Specifically, AMMI does not indicate that the tolerance of 50 p.p.m., made applicable by WARC to the lowest and highest frequency of the calling frequencies, is acceptable. Further, AMMI gives no indication that the arrangement of frequency tolerance for high traffic ships, as adopted by WARC, is acceptable. As submitted, the AMMI comments support continuation without termination of the frequency tolerance of 200 p.p.m.

27. It is appropriate at this point to tabulate frequency tolerance versus channel spacing in the six exclusive maritime frequency bands available for high traffic ships, calling band, and low traffic ships. For convenience the frequency bands are rounded off to even megacycles. Three frequency tolerances, expressed in parts per million (p.p.m.), are shown in the following table:

[In kilocycles per second]

Mc/s	Frequency tolerance at 200 p.p.m.	Channel spacing	Frequency tolerance at 100 p.p.m.	Channel spacing	Frequency tolerance at 50 p.p.m.	Channel spacing
4	±0.8	0.5	±0.4	0.5	±0.2	0.5
6	±1.2	.75	±.6	.75	±.3	.75
8	±1.6	1.0	±.8	1.0	±.4	1.0
12	±2.4	1.5	±1.2	1.5	±.6	1.5
16	±3.2	2.0	±1.6	2.0	±.8	2.0
22	±4.4	2.5	±2.2	2.5	±1.1	2.5

28. As indicated in the table, (*a*) with a tolerance of 200 p.p.m.—

At 4 Mc/s, the ship station transmitter is permitted to vary within a band of ±0.8 kc/s, or 1600 c.p.s. The channel width, however is only 0.5 kc/s, or 500 c.p.s. Similarly,

At 22 Mc/s, the ship transmitter is permitted to vary within a band of ±4.4 kc/s, or 8800 c.p.s.; where the channel width is 2.5 kc/s.

(*b*) With a tolerance of 100 p.p.m.—

At 4 Mc/s, the ship station transmitter is permitted to vary within a band of ±0.4 kc/s, or 800 c.p.s. The channel width is 0.5 kc/s, or 500 c.p.s. Similarly,

[1] A frequency tolerance of 50 parts in 10^6 shall be applicable, in the case of assignments made after Apr. 1, 1969, to ship stations using the lowest or highest series of (1) calling frequencies; (2) working frequencies for low traffic and high traffic ships.

[2] Applicable to new transmitters installed after Apr. 1, 1969. Ship station transmitters installed before this date may continue to have a tolerance of 200 parts in 10^6 until Jan. 1, 1973, from which date all high traffic ship station transmitters shall have a tolerance of 50 parts in 10^6.

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At 22 Mc/s, the ship transmitter is permitted to vary within a band of ±2.2 kc/s, or 4400 c.p.s. The channel width is 2.5 kc/s.

(*c*) With a tolerance of 50 p.p.m.—

At 4 Mc/s, the ship station transmitter is permitted to vary within a band of ±0.2 kc/s, or 400 c.p.s. The channel width is 0.5 kc/s. Similarly,

At 22 Mc/s, the ship transmitter is permitted to vary within a band of ±1.1 kc/s, or 2200 c.p.s. The channel width is 2.5 kc/s.

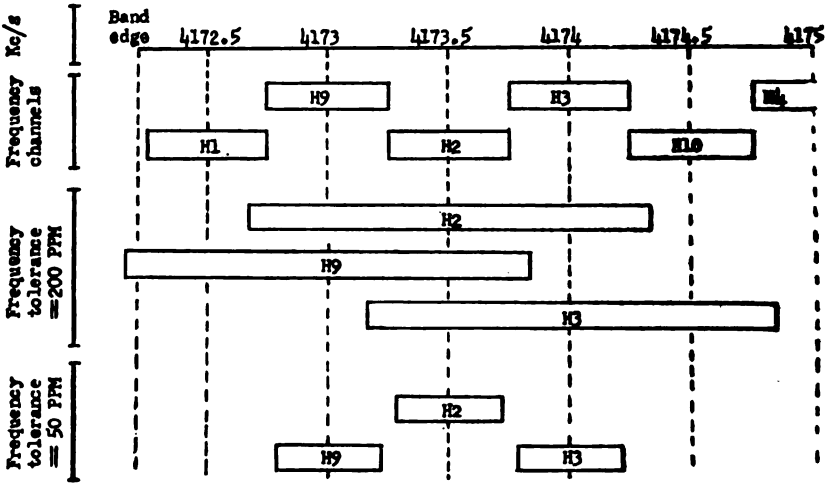
29. On the basis of the foregoing, the percentage of ship transmitter variation which is outside of the allotted channel width, for the three values of frequency tolerance, is shown in the following table:

Frequency tolerance (p.p.m.)	Band (Mc/s)	Channel width (c.p.s.)	Transmitter variation (c.p.s.)	Variation outside channel (*Percent*)
200	4	500	1600	220
	22	2500	8800	212
100	4	500	800	60
	22	2500	4400	76
50	4	500	400	0
	22	2500	2200	0

30. With regard to continued application of a frequency tolerance of 200 p.p.m., it is appropriate to select one frequency and examine its impact upon neighboring frequencies, under the channeling arrangement adopted by the WARC. For example, 4173.5 kc/s, ±200 p.p.m., extends from 4172.665 to 4174.335 kc/s. Overlaying these limits on the frequency plan proposed by the Commission for the high traffic band, it is noted:

H2 (4173.5 kc/s) would extend through H9 (4173 kc/s) and into H1 (4172.5 kc/s), on the low frequency side; and through H3 (4174 kc/s) and into H10 (4174.5 kc/s), on the high frequency side.

The positioning of these frequencies is illustrated in the following:



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If we now examine the added effect created (within the same general spectrum) by H9 and H3, it is noted:

H9 would extend through H1, beyond the band edge, and into the highest frequency channel (4172 kc/s) allotted for narrow-band direct-printing telegraph and data transmission systems, on the low frequency side; and through H2 and into H3, on the high frequency side; and

H3 would extend through H2 and into H9, on the low frequency side; and through H10 and into H4 (4175 kc/s) on the high frequency side.

31. From the practical point of view, a receiver having capability to receive a single radiotelegraph channel (0.5 kc/s at 4 Mc/s) could be expected to receive ship stations transmitting on channels as follows, with the receiver tuned as indicated:

Receiver tuned to—	*Ship stations transmitting on—*
H1 (4172.5 kc/s)	H1, H9 and part of H2.
H9 (4173 kc/s)	H9, H1, H2 and part of H3.
H2 (4173.5 kc/s)	H2, H9, H3 and part of H1 and H10.
H3 (4174 kc/s)	H3, H2, H10 and part of H9 and H4.

32. In the case of assignments to ship stations made after April 1, 1969, as adopted by the WARC, a tolerance of 50 p.p.m. is applicable to the following frequencies:

4172.5	6258.75	8342	12504	16662	22187
4177.5	6266.25	8355	12532.5	16710	22221
4178.5	6267.75	8357	12535.5	16714	22225
4186.5*	6279.75*	8373*	12559.5*	16746*	22265
4187.5	6281.25	8375	12562.5	16750	22270
4229	6343.5	8458	12687	16916	22370

*CS (special calling frequencies). These frequencies, by frequency column symbol, are positioned in the proposed frequency tables as follows:

Proposed section:

	Frequency column symbols
83.317(b)	H1, H6,[1] H8, H9.[1]
83.318(b)	C1, CS (special calling), C9.[1]
83.319(b)[2]	L29,[1] L30,[1] L34, L41,[1] L42.

[1] 22 Mc/s only.
[2] Group "B" only.

33. In examining the information set forth in paragraphs 27, 28, and 29, above, it is apparent that with a frequency tolerance of 200 p.p.m., once the WARC channel spacing comes into force:

(*a*) A ship station assigned, for example, H1, H9, or H8 in the 4 Mc/s band, could be within tolerance while operating on a frequency which is outside the (high traffic) band; or a ship station assigned H2 could be within tolerance while operating on H9, H3, H1, or H10.

(*b*) To assure that a ship station transmitting on H2 was within the pass band of a radiotelegraph receiver, tuned to H2, the bandwidth of that receiver would have to be such that, at 4 Mc/s, it would accept H3, H9, and part of H1 and H10. Under these circumstances there would be little if any incentive to develop receiving equipment having the capability to receive a single WARC frequency and to reject both adjacent frequencies.

(*c*) To contain ship station transmissions within band limits, thirty-six WARC frequencies proposed in the Notice could not be assigned and would have to be withdrawn.

34. On the basis of the foregoing, it is apparent the Commission would be unable to determine the assigned frequency on which a

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ship station was transmitting, or whether that ship station was on-frequency or off-frequency. Thus, the Commission would be unable to administer the WARC agreement. Contrary thereto, however, the Commission is of the view that the channel spacing adopted by the WARC in the high traffic ship, calling, and low traffic ship bands is adequate to meet the needs of the maritime services and should be adopted. In the view of the Commission, the WARC channeling arrangement can not be implemented if a frequency tolerance of 200 p.p.m. is adopted.

35. In their comments, RCA urged that the value of frequency tolerance adopted not exceed the values adopted by the WARC (see par. 25, above). As set forth in paragraph 29, above, in order to operate on 36 of the WARC frequencies, ship station transmitters must comply with a tolerance of 50 p.p.m. on and after April 1, 1969. Further, on and after January 1, 1973, WARC specifies a tolerance of 50 p.p.m. for all high traffic ship station transmitters. RCA offers no comment in regard to compliance, or lack thereof, with the tolerance of 50 p.p.m., effective April 1, 1969, which is applicable to the lowest and highest series of calling frequencies and working frequencies for low traffic and high traffic ships. It is appropriate to note that a ship station, having the capability to comply with a tolerance of 50 p.p.m. at both ends of the small bands here involved, will also have the capability to comply with 50 p.p.m. at the intermediate frequencies.

36. In their comments, RCA, in reference to WARC recommendation No. MAR 7, states "* * * It is undesirable and burdensome to require large-scale replacement of crystals and modification or replacement of a large amount of ship transmitting equipment by January 1, 1973, as proposed by the Commission when there is a strong likelihood that additional changes will be necessary pursuant to actions taken by the next appropriate WARC."

37. In regard to changing of crystals, it is apparent that as a result of the band adjustments and channel splitting adopted by the WARC, the frequencies which will become available will differ from those currently available. In the frequency tables of sections 83.317(b), 83.318(b), and 83.319(b), the current frequency is shown in the "until" column and the replacement frequency is shown in the "after" column. The amount of difference (change within each of the various frequency column symbols) can be ascertained by a comparison of these two columns. The percentage of change; i.e., one or more frequencies changed within a frequency column symbol, is tabulated by megacycle order for each of the high traffic, calling, and low traffic bands, as follows:

	Frequency band (Mc/s)					
	4	6	8	12	16	22
High traffic bands (percent change)	36	70	[1] 57	[2] 40	[3] 32	[4] 28
Calling bands (percent change)	[5] 52	[5] 52	[5] 52	[5] 52	[5] 52	[5] 52
Low traffic bands (percent change)	15	24.5	24.5	24.5	24.5	68

[1] Does not include 3 new frequencies.
[2] Does not include 6 new frequencies.
[3] Does not include 14 new frequencies.
[4] Does not include 8 new frequencies.
[5] Includes the C8 (special calling) frequencies.

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38. From the foregoing, with no change in the value of frequency tolerance specified in the Commission's rules, it will be necessary to replace a substantial number of crystals aboard ship in order to operate on the revised frequencies adopted by the WARC. It is noted, however, that a relatively small number of ships are authorized for radiotelegraph operation, approximately 1,800 vessels. In view thereof, the Commission is not persuaded that compliance with a tolerance of 50 p.p.m. is either undesirable or burdensome.

39. Turning now to recommendation No. MAR 7, which is entitled "Relating to Harmonic Relationship and Channel Spacing in the High Frequency Bands Used by Ship Stations for Radiotelegraphy," that recommendation considers the need for maximum efficiency in use of the HF spectrum, new developments (frequency synthesizers), tentatively accepts that use of harmonically related frequencies may hinder fullest future use of the bands, recognizes that replacement of present equipment may require a period of 20 years; the recommendation states—

> 1. That administrations should study, in the light of advancing techniques, the problems relating to future use of harmonic relationship in ships' radio equipment and to the determination of the optimum channel spacing and the number of channels in the bands allocated for calling and for high and low traffic ships, as indicated in appendix 15 to the radio regulations, and should submit their proposals for consideration by the next World Administrative Radio Conference competent to deal with the matter;
>
> 2. That administrations should consider whether the use of synthesized transmitters by ship stations will make it desirable to modify the provisions for low traffic ships of Nos. 1196 to 1201 of the radio regulations, in order to allow more flexibility in the choice of actual working frequencies.

40. The substance of recommendation No. MAR 7 is directed to long-range planning for the next generation of ship board radiotelegraph equipment. It was not the intent of WARC that recommendation No. MAR 7 be used as a basis for not implementing the channel spacing or replacement frequencies provided by that Conference. It is not possible, at this time, to forecast the year during which "the next World Administrative Radio Conference competent to deal with the matters," set forth under paragraph 1 of the recommendation, will be convened. Based on the spacing between earlier such conferences, however, a period of 8 years would be expected. Thus, the next competent conference could be held around 1975. In the view of the Commission, a delay of such magnitude in implementing the WARC channel spacing and replacement frequencies has not been justified.

41. RCA states that it is essential to retain a frequency tolerance of 200 p.p.m. in order to preserve the random distribution of signals around each assigned frequency. With this distribution the coast station operator, by use of the beat-frequency oscillator in the receiver, varies the tone of the audio signal produced at the receiver output as a means of separating transmissions of the desired ship station from transmissions by other, or undesired ship stations. The technique referred to by RCA has been used in manual radiotelegraph operation for many decades. The question here is not whether this technique should be continued, which it certainly must, but whether this

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technique can be successfully applied if ship stations are operated with a tolerance of 50 p.p.m. Beat-frequency oscillators commonly operate at the second/late intermediate frequency (IF) and are injected into the final detector of the receiver. The difference or beat frequency is that produced by the difference between the incoming signal at the (last) IF frequency and the beat-frequency oscillator. In the detection process, the radio frequency is removed and the difference frequency, at audio, is produced at the output. The difference frequency may be varied by the operator by adjustment of the frequency of the beat-frequency oscillator. If two ship station transmissions enter the receiver IF separated by 100 cycles per second, they will also be 100 c.p.s. apart at the receiver audio output. A difference of 100 c.p.s. may be adequate for satisfactory reception by the operator. If not, by varying the beat-frequency oscillator, advantage can be taken of the receiver audio response, headphone resonances, or disparities in operator hearing to obtain a preferred status for the desired signal and, thus, to separate it from other (undesired) transmissions.

42. In the example set forth in paragraph 27, above, with a tolerance of 200 p.p.m., ship stations may be operating on any one of three channels plus parts of two others. As a practical matter, the ships on these channels could be lumped into a narrow band. Under that condition, the number of ships could substantially exceed the number which would be observed if they were required to operate on a specific assigned frequency, with a tolerance of 50 p.p.m., and their number distributed through the band.

43. The "Ship Radiotelegraph Frequency Plan" is set forth in section 83.321. The objective of that plan is to provide order in the use of the available frequencies by assigning ships to specific frequencies as a means of distributing the communications load throughout the bands, and thereby, to reduce the probability of bunching of ship stations on a few frequencies, with consequent congestion. Under this plan, with a frequency tolerance of 200 p.p.m., ships served by RCA would be intermingled with ships served by I.T. & T., TRT, et al., and vice versa. It is, thus, apparent that the orderly use of the available frequencies provided by section 83.321 would be defeated.

44. Based on the foregoing considerations, the Commission is adopting the amendments to the frequency tolerance tables of parts 81 and 83 as set forth in the notice. The recommendations of AMMI and RCA, that a tolerance of 200 p.p.m. be continued without termination is rejected.

45. An application for modification submitted solely for a frequency change that is necessary to comply with any rule amendments adopted as a result of this proceeding may be submitted without a fee.

46. In view of the foregoing, *It is ordered*, That, pursuant to the authority contained in sections 4(i) and 303(c) (e) and (r) of the Communications Act of 1934, as amended, parts 2, 81, and 83 of the Commission's rules *Are amended* effective March 7, 1969.

47. *It is further ordered*, That the proceeding in docket No. 18218 *Is terminated.*

FEDERAL COMMUNICATIONS COMMISSION,
Ben F. Waple, *Secretary.*

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of
MEREDITH BROADCASTING CO., LICENSEE OF RADIO STATION KCMO, KANSAS CITY, MO.
PANAX CORP., LICENSEE OF RADIO STATION KFEQ, ST. JOSEPH, MO.
MARK TWAIN BROADCASTING CO., LICENSEE OF RADIO STATION KHMO, HANNIBAL, MO.
For Presunrise Operating Benefits Beyond Those Conferred by Section 73.99 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION:

1. The Commission has for consideration (*a*) the above-captioned proposals, (*b*) associated petitions for waiver and/or other special relief as more fully described in the final paragraph, and (*c*) opposition pleadings filed on behalf of cochannel dominant stations affected by these proposals.

2. All applicants are fulltime class II standard broadcast stations operating on U.S. I–B clear channels, on which a U.S. I–B station is located to the west of the class II station. All are eligible for conventional presunrise service authorizations (PSA's) under section 73.99 (a) (1) of the rules. If requested and granted, a conventional PSA would allow the use of the daytime antenna system prior to local sunrise, but with power reduced to protect the 0.5 mv/m 50 percent nighttime skywave interference contour of the western dominant station assigned to the same channel. Presumably because of the severity of this clear channel protection requirement, none of the above-captioned applicants has requested a conventional PSA; rather, they have continued to use their licensed nighttime facilities during the presunrise hours, by means of which better early morning coverage is achieved than would be obtainable under a conventional PSA. All of the proposals look toward the use of power in excess of the 500-w ceiling imposed by section 73.99 (b) (1) of the rules.

3. The specific proposals are outlined below:

KCMO, Kansas City, Mo. (50 kw day, 10 kw night, DA–N). The station operates on 810 kHz, to which radio stations KGO (ABC) San Francisco, and WGY, Schenectady, hold class I–B nighttime clear channel priorities. KCMO proposes operation between 6 a.m. (or sunrise at Schenectady, whichever is later) and local sunrise, with a power

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of 5,850 w into the daytime (nondirectional) antenna. The station serves a large early morning agricultural audience, and for a number of years provided presunrise program service with its full daytime (nondirectional) facilities under the permissive provisions of former section 73.87. This operation was based on a 1948 agreement with KGO. By letter of January 4, 1968, KGO withdrew its acquiescence to presunrise usages by KCMO beyond the terms of the latter's license. KGO has not furnished detailed calculations concerning the interference impact of KCMO's current presunrise proposal. According to our study of the matter, the KCMO proposal, while meeting international protection requirements, would result in substantial interference to KGO (now a 24-hour station). This interference would substantially exceed that presently caused to KGO by KCMO's licensed operation.

KFEQ, St. Joseph, Mo. (5 kw day and night, DA–2). The station operates on 680 kHz, to which radio station KNBR (NBC), San Francisco, holds the sole class I–B nighttime clear channel priority. KFEQ's nighttime directional pattern sharply limits radiation to the west of St. Joseph, in an agricultural area which receives a good signal during daytime hours. KFEQ proposes operation between 6 a.m. and local sunrise with its full daytime facilities. The station operated in this fashion for approximately 20 years in supposed compliance with former section 73.87 of rules, although KNBR had never consented to the resulting interference. As in the case of KCMO, the KFEQ proposal would meet treaty protection requirements but would, at the same time, cause massive early morning skywave interference to the dominant station (KNBR). The proposal is opposed by KNBR, engineering calculations on behalf of which establish a midwinter total loss of skywave service and a substantial midwinter destruction of groundwave service during the hours in question. Specifically, over 300,000 persons in rural areas would lose groundwave service from KNBR (in an area of 28,250 square miles), and more than 3 million additional persons would lose KNBR's secondary service in an area of 574,300 square miles. Much of the area now receiving interference-free primary service at night from KNBR receives no other AM service, and the KNBR skywave signal provides one of the few secondary services available throughout a large portion of the Western United States. These showings are not rebutted by KFEQ.

KHMO, Hannibal, Mo. (5 kw day, 1 kw night, DA–2). The station operates on 1,070 kHz to which radio stations KNX (CBS), Los Angeles, and CBA, Sackville, New Brunswick, hold the class I–B nighttime clear channel priorities. Like KCMO and KFEQ, KHMO serves an early morning agricultural audience and, on frequent occasions, provides information about school closings and changes in schoolbus schedules. The need for the latter service is documented by numerous supporting statements of school officials and others. KHMO proposes alternative forms of presunrise operation, the least objectionable of which is a 6 a.m. sign-on with a power of 3,500 w into the daytime directional antenna—a reduction necessary to protect radio station CHOK, Sarnia, Ontario. At sunrise, Sarnia, KHMO would increase power to the full daytime level (5,000 w). The rationale of this proposal is that it can be done without substantial impact on the clear

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channel operations of KNX. This claim rests on the argument that KNX's protected service area is already under heavy interference from various other sources, notably from CBA (Sackville, New Brunswick) and CMAB, Pinar del Rio, Cuba. The KHMO proposal is opposed by KNX, as well as by two of the 11 full-time class II stations assigned to 1,070 kHz (WIBC, Indianapolis, and WDIA, Memphis). Calculations accompanying the KNX opposition show that CBA does not cause interference to KNX after sunrise at CBA, when full nighttime conditions no longer obtain. However, KHMO's 3,500-w proposal—involving as it does a wholly dark transmission path between Hannibal and Los Angeles—would create a 403,500-square-mile belt of skywave interference between eastern Nevada and western Colorado. This would be escalated to 690,600 square miles when KHMO's power was increased to 5,000 w (sunrise at CHOK). The KNX opposition discounts the alleged interference impact of CMAB, since the latter station is internationally notified at only 2 kw (nighttime) and in any event involves adjacent channel interference of a type not recognized by our rules. KNX also cites the proposal's added interference impact to five of the 11 full-time class II stations on 1,070 kHz. As already mentioned, two of these have separately objected to the KHMO proposal. We note that KHMO's long history of early morning operation with its daytime facilities was never consented to by KNX, and therefore violated former section 73.87 of the rules which, among other things, relied on the consent of the dominant station for operations infringing the latter's 0.5 mv/m 50 percent skywave contour.

4. By decision of June 28, 1967 (docket No. 14419; 8 FCC 2d 698), we abandoned the former permissive system of presunrise operation, and in its place laid down a 6 a.m./500-w formula under which early morning operating privileges (beyond those specified in the station license) are obtainable only upon specific Commission approval. The validity of the new presunrise rule (sec. 73.99) has been fully sustained by the courts, and is now generally in effect. *WBEN et al.* v. *USA & FCC*, 396 F. 2d 601 (1968), cert. denied by the Supreme Court October 21, 1968.

5. The decision in docket 14419 is dispositive of the three proposals now before us.[1] Each would inflict massive skywave interference, as recognized and calculated under our rules, on a I–B clear channel station. The status of class II vis-a-vis class I–B stations was exhaustively considered in the rulemaking proceeding which preceded our adoption of the new presunrise rules. Prior to our 1967 decision, class I–B clear channel stations frequently availed themselves of the permissive element of former section 73.87 by operating prior to sunrise with their own daytime facilities. We recognized in that decision that this practice had to some extent been undertaken in self-defense against the very type of incursions posed by the applications here before us. In terminating this practice, we noted:

*** * * The requirement that class I–B stations operate with their licensed patterns during all nighttime (including presunrise) hours, on the basis of un-**

[1] None of the present applicants filed comments or otherwise participated directly in the rulemaking proceeding.

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qualified protection to their 0.5 mv/m 50 percent skywave contours, will assure the integrity of the wide-area nighttime coverage which these clear channel stations are intended to provide * * *. Moreover, any residual skywave interference (unrecognized under our technical standards) resulting from the practice at many class II stations of signing on at sunrise at the dominant station to the east will, as a practical matter, be largely eliminated by our decision to apply an across-the-board 500-w power limit to all class II presunrise operations [on I-B clear channels].

6. This conclusion was affirmed on reconsideration—10 FCC 2d 283—wherein we stated that waiver requests for powers in excess of the 6 a.m./500-w formula would be denied except "* * * on the basis of conventional domestic nighttime protection (in addition to the usual foreign protection showings)." It is tacitly conceded by all applicants that their proposals fail to meet domestic clear channel protection standards.

7. We are not unmindful of the need for early morning agricultural programing and school announcements. Under section 73.98 the stations involved may, of course, employ their full daytime facilities prior to local sunrise (without regard to interference caused to other stations) in connection with serious weather emergencies affecting populations otherwise unserved. We also note that FM broadcast channels have been assigned to all three communities here involved, and that at least one class C FM station is operating in each. Because propagation conditions in the FM broadcast band do not essentially differ between day and night, these facilities are licensed on an unlimited time basis. As class C FM outlets, all are or could be operating with an effective radiated power of 100 kw.

8. We conclude that to grant the above-captioned proposals, or any of them, would unacceptably compromise the integrity of the early morning clear channels services, and that we must adhere to the balance struck between class II and class I–B usages in our 1967 presunrise decision. The issues presented by these proposals were considered in depth and rejected in the rulemaking proceeding which preceded that decision. Under these circumstances, they are clearly dismissible without hearing. *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *WBEN*, *supra*.

9. In view of the foregoing, *It is ordered*, That the following requests and petitions *Are denied:*

(*a*) Letter request and engineering statement filed December 1, 1967, by Meredith Broadcasting Co. (KCMO);

(*b*) Request for temporary presunrise authority filed November 28, 1967, on behalf of Panax Corp. (KFEQ); and

(*c*) Application and petition of the Mark Twain Broadcasting Co. [KHMO] for presunrise operation from 6 a.m. when 6 a.m. occurs before sunrise at Hannibal, Mo., with its daytime facilities, using 3,500 w until sunrise at Sarnia, Ontario, Canada, and as may be necessary therefor, in the alternative a waiver of rule 73.99 filed February 1, 1968.

10. *It is further ordered*, That the above-captioned applications *Are dismissed.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of MINSHALL BROADCASTING CO., INC., GAINESVILLE, FLA. UNIVERSITY CITY TELEVISION CABLE CO., INC., GAINESVILLE, FLA. For Construction Permit for New Television Broadcast Station	Docket No. 17609 File No. BPCT-3879 Docket No. 17610 File No. BPCT-3939

APPEARANCES

Benito Gaguine and *James K. Edmundson, Jr.* on behalf of Minshall Broadcasting Co., Inc.; *Maurice R. Barnes* on behalf of University City Television Cable Co., Inc.; and *Martin Blumenthal* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted January 14, 1969)

BY THE REVIEW BOARD: BERKEMEYER, SLONE, PINCOCK.

1. This proceeding involves the mutually exclusive applications of Minshall Broadcasting Co., Inc. (Minshall), a corporation wholly owned by William E. Minshall, and University City Television Cable Co., Inc.[1] (University City), each seeking a construction permit to establish a new television broadcast station to operate on channel 20 at Gainesville, Fla. By order (FCC 67-853, 32 F.R. 11356) released August 1, 1967, the Commission designated the applications for hearing on a limited financial qualifications issue against University City and a standard comparative issue, under which the Commission authorized the adduction of evidence as to which of the proposals would represent a more efficient use of the frequency. The issues directed to University City were subsequently enlarged by the Commission and the Review Board to include a *Suburban* issue and, inter alia, a comparative rule 1.65 issue, respectively.[2] After hearing on all of the issues, Hearing Examiner Jay A. Kyle issued an initial decision (FCC 68D-43, released June 10, 1968) in which he concluded that the public interest would be best served by a grant of the Minshall application. In reaching his ultimate determination, the examiner concluded that,

[1] This corporate applicant is comprised of Messrs. Harkins, Shepler, Thornilley, and Cutlip who, in the aggregate, own 96 percent of the stock and Mr. James Milliken who currently possesses the remaining 4 percent. However, see note 18, infra.

[2] FCC 68-184, 11 FCC 2d 796, 12 R.R. 2d 502, released Feb. 28, 1968; and FCC 67R-479, 10 FCC 2d 647, 11 R.R. 2d 754, released Nov. 16, 1967.

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while University City has sustained its burden of proof under the financial issue directed to it,[3] the applicant "has not met the burden of proof as it relates to the *Suburban* issue because it has failed to demonstrate that its programing proposal (exhibit C) would satisfy the needs and interests of the community." The examiner also held, under the comparative issue, that Minshall's proposal represented a more efficient use of the channel and that that applicant was entitled to a decided preference with respect to the criterion of integration of local ownership and management; the rule 1.65 issue was resolved favorably to University City.

2. The proceeding is now before the Review Board on exceptions filed by University City. However, no specific exceptions were directed to the findings of fact of the initial decision. Neither Minshall nor the Broadcast Bureau filed exceptions to the initial decision, but rather chose to submit briefs in response to the exceptions of University City. We have reviewed the initial decision in light of these exceptions, the arguments of the parties before a panel of the Board on November 7, 1968, and our examination of the record. In short, we concur both in the examiner's recommendation that the Minshall application should be granted and the competing application of University City denied and in his reasons therefor. The initial decision is accordingly adopted subject to such modifications as are contained in the following discussion of University City's position and in the rulings on its exceptions in the attached appendix.

3. University City placed the responsibility for ascertaining the programing tastes, needs and interests of Gainesville[4] and its environs upon Milliken its president, who has resided in the community since the middle of 1963 as the general manager of the applicant's local CATV system.[5] Milliken personally contacted 25 various community leaders; i.e., representatives of political, educational, business, professional and eleemosynary groups. A partial enumeration of these individuals and the organizations they represented is contained in

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[3] The financial issue pertained to the ability of University City's four major stockholders to meet their respective loan commitments to the applicant. The examiner's resolution of the financial issue in favor of University City was not excepted to by either Minshall or the Broadcast Bureau. Accordingly, the examiner's determination is hereby affirmed by the Board.

[4] Gainesville, Fla., the community sought to be served, has a population of 29,701 persons (1960 U.S. Census) and is the seat of Alachua County (population 74,074). A more recent population figure for Gainesville was advanced by counsel for Minshall in its pleadings. However, the basis for such figure was not set forth by counsel; nor does the record supply the requisite substantiation. Accordingly, the untested estimate has not been utilized by the Board. See *Babcom, Inc.*, 12 FCC 2d 306, 12 R.R. 2d 998 (1968); *Harriscope Broadcasting Corp. (KTWO)*, FCC 66R-468, 5 FCC 2d 723, 724 n. 4. *Cf. Nick J. Chaconas*, 29 FCC 1226, 1227 n. 1, 19 R.R. 100, 100b n. 1 (1960). Station WUFT (channel 5), a noncommercial educational station, is the sole operating television facility in the community.

[5] While Odes Robinson, the consulting engineer who prepared the application, did advise Milliken with respect to programing (tr. 149), the suggestions elicited from this nonarea resident whose familiarity with Gainesville and its environs was not established, are unexpressed. Nor can the applicant rely upon the efforts of Harkins, one of its major stockholders, whose initial inquiries concerned the economic feasibility of a UHF operation in Gainesville and who could neither recall recommending any specific program which appears on the schedule nor naming an individual with whom he discussed the schedule prior or subsequent to the filing of the application.

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University City exhibits D and F, pp. 1 to 3.[6] Milliken testified that these individuals represented less than one-third the number of persons he actually talked to concerning program content for, as a CATV operator in the community, he had program discussions with five or six of the subscribers who frequented his office daily. The identity of these subscribers and the exact nature of the conversations with them are not in the record, but it may be noted that the CATV system of which Milliken is general manager originates no local programing except for time and weather reports. Consequently, absent more detail regarding the relationship of those conversations to the issue here involved, there can be no finding that such discussions were specifically related to an expression of the needs of the community to be served. Subsequent to filing its application, a brief television viewing preference form was prepared by University City and copies were placed in the CATV system's office to be filled out by the subscribers, and the subscribers who came into the office were requested to fill them out. Again, there is no evidence to indicate whether the questions asked were designed to elicit repsonses to specific needs of interviewees or that such survey developed any identifiable needs which were later reflected in the applicant's program proposal. The interests and tastes of the general viewing public were also sought to be ascertained by having a college student, utilizing these survey forms, canvass the man-in-the-street in and around Gainesville.[7] The results of the surveys using these forms (the number of persons interviewed, the questions asked and the responses thereto, the preferences or dislikes ascertained, etc.) are not part of the record.[8]

4. To sustain its burden under the second part of the *Suburban* issue; i.e., the manner in which the applicant proposes to meet the ascertained needs and interests, University City offered into evidence hearing exhibits C and D. Exhibit C, the applicant's program schedule, was prepared the night before the March 21 hearing session [9] and

[6] Milliken also indicated seeking program suggestions from the following: Cecil Cox, secretary and/or treasurer of the American Legion; Tom Dotson of the Rotary Club; Ed Wymen, journalism department of the University of Florida, located at Gainesville; and Mrs. Reeves, public relations director of the League of Women Voters. No description of these conversations or the ideas gleaned therefrom are articulated. A list of persons to be contacted was given to Milliken by Ed Turlington, city commissioner and director of the vocational department of Santa Fe Junior College. While Milliken testified that he did contact these individuals (and apparently discussed proposed programing), the names of the persons interviewed and the suggestions received are not part of the record for the list was not introduced into evidence, although it was available at the hearing. (Tr. 155, 174-175.)

[7] The record reveals that these forms were also employed by Milliken at a local luncheon held on Sept. 12, 1967. (Tr. 224.)

[8] Counsel for University City offered for inspection 75 of the more recent forms at the Mar. 21, 1967, hearing session. However, neither these forms nor a sample thereof were placed in evidence.

[9] Milliken's reluctance to formalize the program schedule prior to this date was allegedly motivated by his desire not to predicate the schedule upon suggestions received a few years earlier from individuals who, due to the large turnover in the area (estimated at 30 percent) could conceivably no longer be residents. Additionally, Milliken testified that he wished to avoid the interviewees ratifying programs that he had proffered rather than voluntarily revealing their preferences. However, this matter concerning the efforts made by University City in ascertaining the community needs and interests of the area to be served and the means by which the applicant proposed to meet those needs and interests had been raised by the Commission in a letter to the applicant on Apr. 4, 1967. Again, the Commission, by its order released Feb. 28, 1968, raised the same question when it added the *Suburban* issue to the proceeding and, in essence, rejected University City's previous showing based upon a lack of specificity. Moreover, the record does not reflect that between Feb. 28, 1968, and Mar. 21, 1968, University City had made additional surveys, the results of which it wished to have incorporated in its program proposal, thus accounting for its delay in formulating a program schedule. Nor has it shown that it has had insufficient time to prepare its program proposal. Thus, its failure in finalizing its proposal has not been adequately explained.

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was allegedly the result of ideas gleaned from the assorted contacts made by Milliken. Exhibit D lists the nonnetwork programs and the specific contacts with 16 community leaders whose suggestions were primarily responsible for the inclusion of the individual programs in the schedule. The individuals described in exhibit D were only those whose interviews Milliken had recorded because they were not only more specific than others in their suggestions, but also potential members of the applicant's contemplated program advisory board.[10] Milliken's testimony concerning exhibit D consisted of describing how some of the 26 individual programs were responsive to the unprompted suggestions he received [11] and how, in certain instances, the suggestions affected the format (timing) of the applicant's program schedule.

5. Based upon the foregoing facts, to which it has not excepted, University City contends that it has sustained its burden under the *Suburban* issue. The Board does not agree with this contention. To enable the Commission to determine an applicant's awareness of and responsiveness to the community's programing needs and interests, an applicant must provide the full information required by the Commission's report and order revising the television application form (*Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314, and 315*, 5 FCC 2d 175, 8 R.R. 2d 1512 (1966)),[12] and by its memorandum opinion and order adding the *Suburban* issue in the instant proceeding (11 FCC 2d 796, 12 R.R. 2d 502).[13] The necessary showing, which was specifically articulated by the Commission in adding the *Suburban* issue in this case, includes full information on (*a*) the steps taken to become informed of the real needs and interests of the area to be served; (*b*) the suggestions received as to how the proposed station could help meet the area's needs; (*c*) the evaluations of those suggestions; and (*d*) the programing proposed to meet those needs as they have been evalu-

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[10] Upon grant of its application, University City proposes to form a program advisory board comprised of representatives of local civic, religious, educational and minority groups in order to keep attuned to the needs and interests of the community and area to be served. Several organizations have indicated their willingness to participate. A monthly poll of the applicant's CATV subscribers by means of mail questionnaires is also contemplated. While these proposals are praiseworthy, they are still prospective and, accordingly, not meaningful under the issue.

[11] For example, Milliken stated that:

"I will describe it [the program entitled 'Want Ads and Swap Shop' offered at 11:30 a.m. on Wednesday] to you the way Ed Turlington described it to me. This was entirely his idea. He felt that there would be people who would want such things as baby sitters, swings for their children, and so forth * * *. We are a university town on the quarter system. Our turnover of people there is tremendous. We have a lot of people who come in and buy furniture at the used furniture shop, and when they leave they need to sell it. He thought this would be a good place for the new students who are coming in to meet the students who were leaving, and we would act as sort of a liaison." (Tr. 190.)

"* * * Mr. George Cone, the publicity director for the Gainesville area chamber of commerce, didn't give me those exact words [for the medicaid, medicine, etc. program at 12:30 p.m. on Saturday]. In other words, he said we should have a program where national or governmental functions and services could be explained to the public. That was his words. So I put it this way to be a little more specific, because he knew that this was what he was talking about." (Tr. 152.)

[12] Therein, the Commission specifically delineates the general programing responsibilities of permittees and licensees, responsibilities which were earlier set forth by the Commission and which required them to make positive, diligent and continuing efforts, including documented consultations with the general public, community leaders, and professional and eleemosynary organizations, in order to provide a program service designed to meet the needs and interests of the public to be served. *Report and Statement of Policy Re: Commission En Banc Programing Inquiry*, FCC 60-970, 25 F.R. 7291, 20 R.R. 1901.

[13] This was subsequently clarified by the Commission in its *Public Notice (Ascertainment of Community Needs by Broadcast Applicants*, FCC 68-847, 33 F.R. 12213, 13 R.R. 2d 1903, released Aug. 22, 1968).

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ated. In the above-mentioned order, paragraph 5, the Commission more specifically said, among other things, that:

> Examination of University City's proposal in light of the requirements * * * demonstrates that it has not provided sufficient information for us to determine whether it is aware of and responsive to the needs of the Gainesville area. University City merely listed the names of four persons who had been contacted and the titles of certain proposed programs, rather than supplying, as we had suggested, summaries of the steps it had taken to become informed of local needs, of the suggestions it had received, of its evaluation of those suggestions, and of the programs that it proposes to meet those needs. Although we notified University City of these deficiencies, its response was limited to a nebulous summary of suggestions offered by only 10 local residents.

6. Thus, University City's record showing must be evaluated, in light of these pronouncements. In the Board's view, the steps taken by Milliken to become knowledgeable of the real community needs and interests of the area to be served; i.e., personal contacts with community leaders, 25 of whom are named and identified, programing discussions with an indeterminate number of unnamed CATV subscribers, and a survey of the general viewing public in and around Gainesville,[14] for the reasons stated, infra, fall short of the requirements. As noted, the public notice, supra, explicitly states, under the category of suggestions received, that the "listing should include the significant suggestions as to community needs received through the consultations with community leaders, whether or not the applicant proposes to treat them through its programing service" and that (under the category, applicant's evaluation) "what is expected of the applicant is that he will evaluate the relative importance of those suggestions and consider them in formulating the station's overall program service." University City admittedly has not indicated all of the significant suggestions relative to community interests, tastes and needs which it received through Milliken's consultations with Gainesville's leaders. Since detailed notes of the conversations were not kept, the exact nature and the specifics of the suggestions are, for the most part, lacking.[15] With respect to the suggestions reflected in the record, Milliken's testimony ran the gamut from the terse "Billy Mitchell [director of the Chamber of Commerce], definitely made the remark that we should have something on agriculture" (tr. 226) to the more elaborate descriptions detailed in note 11, supra. However, Milliken's showing in this specific area, as in others, is deficient. For example, the record fails to reflect that Mr. Mitchell has any particular expertise in the field of agriculture or that he made any recommendations as to the specific type of agricultural programs or subjects to be covered in broadcasts. Thus, in the absence of evidence to

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[14] Milliken also relies upon his residence and employment in the community since the middle of 1963, his regular perusal of the local newspapers to which he subscribes, and his membership in two local organizations. However, the needs and interests derived from these sources of information and their evaluation and utilization by the applicant are not described. Thus, in the absence thereof, any reliance thereon is misplaced since in *Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691 (1968), the Commission said that "Applicants, despite long residence in the area, may no longer be considered, ipso facto, familiar with the programing needs and interests of the community." Also see *KYNO, Inc.*, 14 FCC 2d 251, 13 R.R. 2d 1126 (1968); *Sumiton Broadcasting Co., Inc.*, FCC 68-576, 13 FCC 2d 221.

[15] Note to question 1 of the application form (301), sec. IV-B provides that records to support needs and interests representations shall be kept available for inspection by the Commission for 3 years.

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show that Mr. Mitchell is a leader in agriculture or a representative of an agricultural organization (report and order, supra, 20 R.R. at 1915), the Board cannot conclude that University City is "aware of and responsive to [the agricultural] needs of the Gainesville area." Further, only 10 suggestions from the 16 community leaders named in exhibit D are articulated. Similarly omitted in University City's showing is any evaluation of the relative importance of the suggestions elicited or any consideration of the interests and tastes disregarded in formulating the station's proposed programing.[16] The extent to which Milliken evaluated all of the information obtained from his efforts or gleaned from his residence in the community cannot be determined since the only objective manifestation of such is Milliken's inclusion of the chosen programs in the schedule. No testimony was elicited with respect to why these programs were chosen rather than others for which a greater need or interest may have been ascertained.

7. Finally, in response to "what programing service is proposed to meet what needs" the applicant submitted a schedule with no description of the contents (other than inferences arising from the titles) of the 26 local programs included thereon. Some of these programs coincide with descriptions and frequency of offering contained in its application. Others do not. For example, exhibit C reveals that a program entitled "Agriculture Programs" will be presented each Monday morning. However, University City initially indicated in its application that a daily as well as a weekly program would be devoted to the area's agricultural interests. Similarly, programs entitled "One Man's Opinion," a daily short editorial, "Teen-Age Party Time." and "Youth Forum," a panel program featuring outstanding students from the area, do not appear in exhibit C. Neither the consolidation of the originally proposed programs, if such has occurred, nor the presentation of the original programs under different titles are reflected in the record. Thus, there is no indication that the changes are related to Milliken's efforts to ascertain needs. Although there is some testimony in the record as to the contents of some of these programs, it is sketchy and incomplete and, in view of the fact that there is no detailed information regarding contacts, it is virtually impossible to relate program content to specific programing suggestions for many of the proposed programs. In sum, due to the paucity of information concerning both the programing conversations and the suggestions received and Milliken's evaluation of such, the record does not provide an adequate basis for determining that the specific programs included in the schedule fulfill ascertained needs and interests for those programs, rather than Milliken's preferences and interests. In this connection, the Board notes the following examiner's findings of fact to

[16] Any objection that the requirement of delineation and analysis of discarded suggestions is an area of improper concern to the Commission, and a possible abridgement of the broadcaster's prerogative appears to have been answered by the Commission in par. 7 of the *Report and Order, supra,* 5 FCC 2d at 176, 8 R.R. 2d at 1515–16 and the *Report and Statement of Policy, supra,* 20 R.R. at 1915–16. In the latter, the Commission said, among other things: "By his narrative development * * * of the planning, consulting, shaping, revising, creating, discarding and evaluation of programing thus conceived or discussed, the licensee discharges the public interest facet of his business calling * * *."

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which, as indicated above, no specific exceptions have been filed, at paragraph 51 of the initial decision:

> * * * Additionally, [University City] had local college students filling out forms on the basis of interviews made on the streets but the record does not disclose any analyses of these surveys made by this applicant and likewise the record is void of any testimony that reflects that University City checked the responses of these surveys against its program schedules or changed its programs as the result of any survey.

and at paragraph 57:

> Milliken produced as an exhibit University City exhibit F consisting of four sheets with some dozen odd names of persons that he allegedly contacted relating to specific suggestions but the exhibit does not reflect what these suggestions were nor did the witness testify that any particular suggestions were incorporated in the original programing filed with the application * * *.

Thus, the applicant has failed to provide sufficient information for the Review Board to conclude that the applicant is aware of and responsive to the needs of the Gainesville area.

8. Since we are in accord with the examiner's resolution of the *Suburban* issue directed to University City, it is not necessary to dwell at length upon his comparative evaluation of the competing applicants, with which we substantially agree. Minshall, who intends upon grant of his application to resume his residence in Gainesville where he lived from 1962 until mid-1963 while employed as the general manager of local standard broadcast station WGGG, proposes to devote his full time to the operation of his wholly owned station. For the first few years of operation, Minshall, as general manager, contemplates allotting in excess of 48 hours per week to the station's day-to-day operation.[17] On the other hand, University City relies on the participation of two of its 30 percent stockholders, Harkins and Milliken,[18] who will act in general supervisory capacities with the responsibility for the day-to-day operation of the station being delegated to a general manager, as yet not selected. Harkins, who resides in Sarasota, Fla., 140 miles distant from Gainesville, will be present at the station 1 day a week while Milliken, the only local resident stockholder, has not articulated the amount of time he will devote exclusively to the new station nor shown whether such allocation will be meaningful; i.e.,

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[17] Minshall intends, while residing in Gainesville and directing the daily operation of the new station, to retain nominal supervision over the affairs of television station WTVX (channel 34), Fort Pierce in which he possesses a majority interest. This supervision, however, "will be secondary to, and will not interefere with, the day-to-day duties" of Minshall. Minshall exhibit 3. No party has refuted Minshall's representation. Nor are there any factual allegations to discredit Minshall's ability, willingness or likelihood of devoting 48 hours per week to the Gainesville station. If University City had doubts as to Minshall's ability to meet his commitment because of his concurrent supervision of station WTVX, an established operation, the matter should have been pursued at the hearing.

[18] Pursuant to an option agreement which expires Jan. 15, 1972, Milliken was afforded by resolution of the corporate applicant's board of directors the opportunity to purchase 200 additional shares thereby becoming an equal 20 percent stockholder in the applicant. Milliken has expressed his willingness to exercise this option if University City receives the grant and, accordingly, the Board will regard Milliken as a 20-percent stockholder. *WHDH, Inc.*, 22 FCC 767, 13 R.R. 507 (1957). The financial inability of the optionee to presently exercise the option does not discredit the agreement which, by its terms, is to expire in the future. See *The Radio Station KFH Co.*, 19 FCC 1119, 11 R.R. 1 (1955), wherein Webb, the proposed general manager who admittedly was not then able to purchase all of the shares reserved by the option, hoped to secure the required amount prior to the expiration of the option term. (19 FCC at 1171, 11 R.R. at 16.) The Commission in evaluating the integration proposals of the competing applicants, credited the applicant with the contemplated participation of Webb who, but for the optioned shares, had no ownership interest in the applicant. (19 FCC at 1148, 11 R.R. at 110.)

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on a daily basis. Having failed to show that he will devote a substantial amount of time on a daily basis, Milliken's residence in Gainesville does not appreciably enhance University City's integration proposal which we view, under the whole of the integration factor, as markedly inferior to that of Minshall. See *Mt. Carmel Broadcasting Co.*, 13 FCC 2d 155, 157, 13 R.R. 2d 215, 217–18 (1968); *La Fiesta Broadcasting Company*, 6 FCC 2d 65, 75–76, 9 R.R. 2d 295, 307–08 (1966), review denied FCC 67–472; *Community Telecasting Corp.*, 32 FCC 923, 24 R.R. 1 (1962). The examiner's findings (pars. 8 to 11) of the areas and populations encompassed within the grades A and B contours of the applicants are not disputed.[19] Although the applicants' predicted contours are concentric, Minshall's proposed grades A and B contours by virtue of its higher effective radiated power, would extend approximately 9 and 13 miles, respectively, beyond the similar contours of University City. While University City would include 70,052 persons in 768 square miles and 100,383 persons in 2,085 square miles within its grades A and B contours, Minshall, besides including all of these areas and populations, would provide a grade A signal to an additional 30,464 persons in 1,332 square miles and a grade B signal to an additional 60,519 persons in 2,746 square miles. Within the differential areas (i.e., beyond the similar contours of University City), Minshall would furnish the first signal of grade A quality from a commercial television station to 6,172 persons in 444 square miles and a first signal of grade B quality to 3,239 persons in 466 square miles. In addition, by virtue of Minshall's proposal, 7,235 persons in 693 square miles would receive a second signal of grade B quality from a commercial television station. Upon these facts, Minshall's proposal clearly represents the more efficient use of the channel. See *Ultravision Broadcasting Company*, 11 FCC 2d 394, 12 R.R. 2d 137, review denied FCC 68–1078, released October 31, 1968; *Erway Television Corporation*, 8 FCC 2d 24, 9 R.R. 2d 1376, affirmed as modified FCC 67–926, 10 R.R. 2d 1100, reconsideration dismissed FCC 67–1566; *Midwestern Broadcasting Co.*, 25 FCC 369, 15 R.R. 479 (1958). The credits attributed to Minshall's proposal under the integration factor when augmented by the credit awarded for its more efficient utilization of the channel, entitle Minshall to a preference under the first primary objective of the policy statement,[20] namely, the best practicable service to the public.

9. With respect to the second primary objective of the policy statement, the maximum diffusion of control of the media of mass communications, the Review Board believes that Minshall also warrants a preference.[21] Minshall's only interest in a media of mass communications is his majority ownership interest in television station WTVX, Fort Pierce, Fla., approximately 200 miles from Gainesville. The

[19] In determining the availability of signals from existing commercial television facilities the penetration of the service contours of WOTG–TV, Ocala, Fla., for which a construction permit is outstanding, has been considered despite Minshall's objection. WOTG–TV is to be a satellite operation of television broadcast Station WTOG (channel 44), St. Petersburg, Fla., to which a license was granted on Dec. 12, 1968. Since there is no factual showing concerning the permittee's inability or unwillingness to construct, the penetration of WOTG–TV is proper matter to be noted.

[20] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965).

[21] Although the examiner made findings and intermediate conclusions under this criterion, an ultimate conclusion was not expressed.

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service contours of WTVX do not penetrate the predicted contours of the proposed station. While the stockholders of University City do not have any interests in existing radio or television station facilities, one or more of them have at least a 50-percent ownership interest in seven CATV systems serving approximately 25,000 subscribers in 17 Florida, Ohio, Georgia, and West Virginia communities. More importantly, the corporate applicant is the 100-percent owner of the CATV system operating and serving 8,624 subscribers in Gainesville itself. Although the actual number of persons served by the CATV system is not shown, it may be noted that the 8,624 subscribers represent approximately 29 percent of the 1960 census population of Gainesville.[22] While the applicant's Gainesville CATV system is precluded from selling advertising, only the CATV's operating policy would preclude program origination. See *Lorain Community Broadcasting Company*, 13 FCC 2d 106, 112, 13 R.R. 2d 382, 390, reconsideration denied 14 FCC 2d 604, 606 n. 5, 14 R.R. 2d 155, 158 n. 5, rehearing dismissed 15 FCC 2d 388, 14 R.R. 2d 968 (1969). Even if University City's other more numerous CATV interests were equated to Minshall's ownership of television station WTVX in Fort Pierce with a 1960 census population of 25,256, the ownership of the Gainesville CATV system weighs against University City for a grant to that applicant would result in two of the three local television sources (see note 4, supra) concentrated in one entity, whereas a grant to Minshall would best achieve under the circumstances present herein, the Commission's primary objective of the diversification of the media of mass communications. Thus, from a comparative standpoint, Minshall is the superior applicant for its proposal better fulfills both primary objectives toward which the comparative process is directed.

10. In view of University City's inadequate showing on the *Suburban* issue herein, the Review Board is of the opinion that the examiner properly proposed denial of its application. On the basis of all of the foregoing, the Board, therefore, concludes that the public interest will best be served by a grant of the Minshall application.

11. Accordingly, *It is ordered*, That the application of Minshall Broadcasting Co., Inc. (BPCT–3879), for a construction permit for a new television broadcast station to operate on channel 20 at Gainesville, Fla., *Is granted;* that its request to locate its main studios at its transmitter site outside of Gainesville *Is granted;* and that the competing application of University City Television Cable Co., Inc. (BPCT–3939), for the same authorization, *Is denied.*

HORACE E. SLONE, *Member.*

[22] As the Commission stated, controlling "interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area and, finally, generally in the United States." *Policy Statement, supra,* 1 FCC 2d at 394–95, 5 R.R. 2d at 1908–09.

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APPENDIX

RULINGS ON EXCEPTIONS OF UNIVERSITY CITY TELEVISION CABLE CO., INC.

Exception No.	*Ruling*
1	Denied. See par. 8 of this dicision. It is University City's position, unsupported by citation, that although Minshall's grades A and B contours extend beyond its similar contours thereby serving greater areas and populations, no preference should be accorded Minshall since University City will provide equal coverage of the Gainesville metropolitan area. Absent evidence as to the physical characteristics of the areas beyond its contours and the need of the populace (within the differential areas) for Minshall's service, University City requests the Board to equate the applicants' proposals. This is not warranted. Pursuant to sec. 73.685(a) of the Commission's rules, a UHF applicant is required to provide a minimum field intensity signal (herein 80 dbu) over the entire principal community to be served; and no distinction between competing applicants is made if the minimum signal exceeds the boundaries of the community. See *Chicagoland TV Company*, FCC 65R-28, 4 R.R. 2d 339; *Guadulupe Valley Telecasting Co., Inc.*, FCC 64R-91, 1 R.R. 2d 1019. However, disparities with respect to areas and populations encompassed by competing applicants' grades A and B contours are proper comparative factors which should be considered. *Policy Statement, supra*, 1 FCC 2d at 398, 5 R.R. 2d at 1913. No showing tending to establish the unrealiability of the predicted contours was proffered by University City upon whom this burden rested (*Hall* v. *FCC*, 237 F. 2d 567, 14 R.R. 2009 (D.C. Cir. 1956)); nor does the record contain any indication of terrain limitation which would affect the area and population differences. Cf. *Ultravision Broadcasting Company, supra*, 11 FCC 2d at 412, 12 R.R. 2d at 157–58. Moreover, University City has not excepted to the Examiner's findings concerning the differences in the coverage of the proposals on which the examiner's conclusion is founded. While the availability of other commercial television signals within the differential areas tempers the credit attendant with Minshall's greater coverage, this credit is not dissipated, especially where, as here, there are underserved areas.
2	Denied. The broadcast experience of a participating owner is a qualitative attribute considered in weighing integration of ownership and management and, as such, is within the purview of the standard comparative issue. *Policy Statement, supra*, 1 FCC 2d at 395–96, 5 R.R. 2d at 1910. While this factor is of minor significance, it is properly considered where, as here, it enhances the full-time participation of an owner. See *Lynn Mountain Broadcasting*, 9 FCC 2d 854, 856 n. 4, 11 R.R. 2d 88, 91 n. 4 (1967).
3	Granted. Past broadcast records which rank as average only are not to be given comparative weight. Since the examiner did not conclude that the record of television station WTVX was unusually good or poor, the reiteration of the findings upon which such a determination would be premised is unnecessary.

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Exception No.	Ruling
4	Denied in substance. See par. 8 of this decision.
5	Denied for the reasons stated in par. 9 of this decision. In addition, University City's contention that an interest in a CATV system is not an ownership interest in media of mass communications within the intendment of the Commission's policy statement is without merit. The diversification criterion is not restricted to radio and television interests for the criterion encompasses all the media of mass communications since its underlying concern is with the dissemination of information. Considered under this criterion have been ownership interests in motion picture theatres (*Southland Television Co.*, 20 FCC 159, 10 R.R. 751 (1955)), in newspapers (*Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677, 7 R.R. 2002 (D.C. Cir. 1951)) and in CATV systems (*Theodore Granik*, 8 FCC 2d 1068, 10 R.R. 2d 659 (1967), review denied 12 FCC 2d 208, 12 R.R. 2d 803, reconsideration denied FCC 68-636, 13 R.R. 2d 517). Finally, as we had recent occasion to state in *Lorain Community Broadcasting Company, supra*, 14 FCC 2d at 606, 14 R.R. 2d at 159: * * * There is ample precedent which indicates that a CATV system is to be treated as medium of mass communications,[8] and petitioner [as herein] has presented no reason or precedent which persuades us that it is not.
6	Denied for the reasons stated in pars. 5, 6, and 7 of this decision.

[8] See, e.g., *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 13 R.R. 2d 2045 (1968). See also *Second Report and Order*, 2 FCC 2d 725, 6 R.R. 2d 1717 (1966); *CATV Notice of Inquiry* (docket 15971), 1 FCC 2d 453 (1965).

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FCC 68D-43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of MINSHALL BROADCASTING CO., INC., GAINESVILLE, FLA. UNIVERSITY CITY TELEVISION CABLE CO., INC., GAINESVILLE, FLA. For Construction Permit for New Television Broadcast Station	Docket No. 17609 File No. BPTC-3879 Docket No. 17610 File No. BPCT-3939

APPEARANCES

Benito Gaguine, Esq., and *James K. Edmundson, Jr., Esq.*, for Minshall Broadcasting Co., Inc.; *Maurice R. Barnes, Esq.*, for University City Television Cable Co., Inc., and *Martin Blumenthal, Esq.*, for the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued June 6, 1968)

PRELIMINARY STATEMENT

1. This proceeding involves the applications of Minshall Broadcasting Co., Inc. (Minshall Broadcasting), and University City Television Cable Co., Inc. (University City), wherein both applicants seek authority for construction permits for a new UHF television station on channel 20 in Gainesville, Fla. The matter was designated for hearing by the Commission through an order (FCC 67-853) released August 1, 1967. The specified issues by that order are as follows:

1. To determine with respect to the application of University City Television Cable Co., Inc.—

(a) Whether Ralph Shepler, Harry H. Harkins, and C. W. Thornley have liquid and current assets (as defined in sec. III, par. 4(d), FCC form 301) in excess of current liabilities in sufficient amounts to meet their respective commitments to loan $70,000 each to the applicant; and

(b) Whether, in the light of the evidence adduced pursuant to the foregoing, University City Television Cable Co., Inc., is financially qualified.

2. To determine which of the proposals would better serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

In paragraph 4 of the designation order the Commission said:

There appears to be a significant disparity in the proposed grade B contours of the applications. In accordance with the Commission's policy, evidence with respect to which of the proposals would represent a more efficient use of the

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frequency may be adduced under the comparative issue. (Citing *Harriscope, Inc.*, FCC 65–1165, 2 FCC 2d 223.)

2. The hearing examiner by an order released October 30, 1967 (FCC 67M–1828), directed that at the evidentiary hearing, evidence could be adduced under the standard comparative issue (issue 2) in regard to the coverage disparity which exists in the proposed grade A contours as well as the grade B contours of the competing applications.

3. Subsequently, the Review Board in an order released November 16, 1967 (FCC 67R–479), amended issue 1(a) to the extent that in addition to Ralph Shepler, Harry H. Harkins, and C. W. Thorniley, it added another individual; namely, J. D. Cutlip. In addition the Board added the following issue:

To determine whether University City Cable Co., Inc. (or its principals), failed to provide accurate and complete information in its pending application, as required by section I, form 301; whether it failed to keep its application up to date, as required by section 1.65 of the rules; and, if so, whether the failures reflect adversely on the applicant's comparative qualifications.[1]

4. In this same order the Review Board denied the request of Minshall Broadcasting to add a suburban issue. Minshall Broadcasting appealed the Board's ruling on the suburban issue and the Commission reversed the Review Board in order (FCC 68–184) released February 28, 1968, by enlarging the issues through the addition of the following:

To determine the efforts made by University City Television Cable Co., Inc., to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.[2]

5. Prehearing conferences were held on November 9, 1967, and January 4, 1968; a further hearing conference was held on February 27, 1968; the evidentiary hearing was held on January 11, February 1, March 19 and 21, 1968, and the record was closed on the latter date. Proposed findings of fact and conclusions of law were filed by Minshall Broadcasting, University City, and the Broadcast Bureau on May 8, 1968, and replies were filed on May 23, 1968, by University City and Minshall Broadcasting.

FINDINGS OF FACT

6. Gainesville, Fla., is located about 60 miles northwest of Jacksonville, Fla., and nearly 90 miles northwest of Daytona Beach, Fla. According to the 1960 U.S. census Gainesville had a population of 29,701 persons and the county in which it is situated had a total population of 74,074. Channel 20 is the only assigned commercial channel in Gainesville. Station WUFT, on channel 5, a noncommercial educational station, is the only operating television station in the city. The city of Gainesville has one daily and one weekly newspaper in addition to the noncommercial educational station heretofore referred to. The University of Florida, which is located in Gainesville, publishes a daily student newspaper. The cable system operated by University City in Gainesville does not carry any locally originated programs other than time and weather. The cable company's franchise prohibits it from

[1] Hereinafter referred to as sec. 1.65 issue.
[2] Hereinafter referred to as the suburban issue.

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selling advertising on its system. The principals of University City have interests in other cable systems which will be hereinafter referred to. See paragraph 29, infra.

7. The applicants seek construction permits for a new television station on channel 20 in Gainesville. Both applicants propose to construct their antennas about 5 miles northwest of the center of Gainesville at sites approximately 0.2 mile apart. Minshall Broadcasting would operate with an effective radiated power of 137 kw and an antenna height of 690 feet above average terrain. On the other hand, University City's proposed station would operate with an effective radiated power of 17 kw and an antenna height of 618 feet above average terrain. Gainesville is within the predicted grade B contours of WJXT (channel 4) and WFGA–TV (channel 12) both in Jacksonville, and also within the predicted grade A contour of station WOTG-TV (CP) in Ocala, Fla. The construction permit for the Ocala station was granted on July 19, 1967, and is now scheduled for completion in September 1968. Ocala is approximately 34 miles south of Gainesville.

8. The two applicants sponsored certain joint exhibits which were received in evidence. Since virtually the same site and antenna heights are contemplated by both applicants, Minshall Broadcasting's proposed station with its greater power will place its grade A and grade B contours at greater distances from Gainesville than will University City's station. The distance (miles) given in the following table are from the center of Gainesville to the indicated field strength contours:

Direction	Grade A (74 dbu)		Grade B (64 dbu)	
	Minshall Broadcasting	University City	Minshall Broadcasting	University City
North	28	18.5	43	28.5
Northeast	23.5	14	39.5	25
East	21	11	34	21
Southeast	20	10	33	21
South	22	11.5	36	22
Southwest	25.5	15.5	40	26.5
West	28.5	19	43	28.5
Northwest	30.5	21	45	32

9. Minshall Broadcasting's predicted grade A contour would extend about 9 miles beyond that of University City's and the grade B contour would reach about 13 miles beyond University City's grade B contour. The populations and areas within these contours are as follows:

	Minshall Broadcasting		University City	
	Population	Area[1]	Population	Area[1]
Grade A	100,516	2,100	70,052	78
Grade B	160,902	4,831	100,383	2,05

[1] Square miles.

10. Between the Minshall Broadcasting and University City grade A contours there are 30,464 persons in 1,332 square miles. In this particular area there are 6,172 persons in 444 square miles not within the

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grade A contour of any authorized commercial television station. The remainder of the differential area lies for the most part within the grade A contour of WOTG–TV (CP) and in lesser part within the grade A contour of WFGA–TV. In the portion of the differential area where the WOTG–TV (CP) and WFGA–TV grade A contours overlap, grade A coverage is provided by both stations; otherwise one or the other furnishes grade A coverage alone.

11. The additional area beyond University City's grade B contour that would be encompassed by Minshall Broadcasting's grade B contour amounts to 2,746 square miles and includes a population of 60,519 persons. In this differential area there are 3,239 persons in 466 square miles outside the grade B contour of any authorized commercial television station and 7,235 persons in a total area of 693 square miles within the grade B contour of only one commercial television station, either WOTG–TV (CP)[3] or WJXT. Elsewhere in the grade B differential area, grade B coverage is available in any one part from two to five stations.[4]

Minshall Broadcasting Co., Inc.

12. William E. Minshall is president, a director, and 100 percent stockholder of Minshall Broadcasting Co., Inc. He finished his high school education in Evansville. Ind. after attending St. Thomas Choir School in New York City from 1939 to 1941. He is a graduate of the University of Tulsa with a major in radio and television. During his college career he served as announcer for KWGS (FM), KOME, and KVOO, all in Tulsa. His college education at Tulsa was interrupted by military service. The record indicates that he was active in student affairs including membership on the student council when he was at the university. Upon graduation from college Minshall was employed for 13 years by KRMG in Tulsa. He joined KRMG in 1949 when it went on the air and remained in its employment until 1962. His employment at KRMG for the first year and a half was that of a salesman after which he was promoted to sales manager and was involved in many management decisions concerning not only programing policies but the overall operation of the station. KRMG was an affiliate of NBC. During the time that Minshall was in Tulsa he was active in civic affairs including membership in the chamber of commerce where he served on the industrial committee. Other civic activities included Tulsa Little Theatre; membership in the Tulsa Press Club; captain in the United Fund Drive; and others.

13. In 1961, as a general partner, Minshall filed an application with the Commission for a construction permit for a new radio station in Sapulpa, Okla. As a result with a merger of another application for the same frequency, the Creek County Broadcasting Co. was organized of which Minshall was president and it became the permittee

[3] The area circumscribed by University City's grade B contour will fall entirely within the grade B contour of WOTG–TV (CP).

[4] Until such time as WOTG–TV commences operation, the grade B differential area will contain 8,667 persons in 1,067 square miles outside the grade B contour of any commercial television station presently in operation and 23,150 persons in 427 square miles within the grade B contour of only one such station.

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and licensee of KREK in Sapulpa which went on the air in June 1962. He designed and supervised construction of the offices and studios, purchased and supervised installation of equipment and put the station on the air. Later in that same year Minshall sold his interest in this licensee and was appointed general manager of radio station WGGG in Gainesville, Fla.

14. Minshall was active in the local civic affairs of Gainesville during his residency there from 1962 until sometime late in 1964. It might be pointed out here that although he lived in Gainesville during this particular time, since the filing of the instant application he has been in Gainesville about 18 times over a period of approximately 3 years and spent a total of 40 or more days there in that period of time. When he was in Gainesville, Minshall as manager of WGGG, "had virtually complete authority on program innovations and changes subject to only general policy." For a short time in 1963 Minshall was with WCPO in Cincinnati as sales manager but was not involved in the programing policies of that station. He returned to Florida in 1964 and with members of his family and others Minshall formed a corporation; namely, Indian River Television, Inc., to apply for a new UHF station in Fort Pierce. That corporation became the licensee of WTVX which went on the air in April 1966. Minshall is general manager, chief executive officer, director and majority stockholder of the corporation. Fort Pierce is located on the east coast of Florida and has a population of approximately 40,000 persons.

15. The evidence is that the grades A and B predicted contours of WTVX encompass populations of approximately 80,000 and 110,000, respectively. As chief executive officer of WTVX, Minshall has been personally responsible for its operation and for the conception and execution of the locally produced programs carried by the station.

16. WTVX competes via cable with larger television stations in West Palm Beach and Miami. Its locally produced programing, Minshall contends, must therefore be equal to these stations to attract local cable viewers. Hence, it appears that WTVX has been operated on the premise that its success will depend on the quality of its locally oriented service because of its competition. A section IV type analysis of the WTVX promise versus performance record, based on the 1967 composite week, shows the following:

WTVX type analysis

	Proposed		Performance	
	Percent	Hours	Percent	Hours
(1) Entertainment	75.4	65:44	76.3	87:44
(2) Religious	2.5	2:10	2.6	2:35
(3) Agricultural	1.0	0:52	1.2	1:22
(4) Educational	3.5	3:03	2.9	3:19
(5) News	7.1	6:37	7.0	8:00
(6) Discussions (panel, forums, etc.)	2.0	1:44	2.6	2:58
(7) Talks (included here all conversation programs which do not fall under points (2), (3), (4), (5), or (6), above, including sports	8.5	7:24	7.4	8:32
Total	100.0	87:+	100.0	114:+

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17. The WTVX composite week also analyzed according to the requirements of the new section IV–B television reporting form is as follows:

1967 composite week type and source analysis

Category	Hours	Minutes	Percent of total time on air [1]
News	6	59	6.1
Public affairs	4	04	3.5
All other programs, exclusive of entertainment and sports	11	31	10.1

[1] Computations exclude commercial matter.

Source category

Time	Local	Network	Recorded
8 a.m. to 6 p.m.	0:30	51:16	10:23
6 p.m. to 11 p.m.	5:03	27:47	0:59
All other hours	2:24	2:11	10:40

18. The record reflects that since his residency in Fort Pierce, Minshall has been active in community affairs. If the Minshall Broadcasting application is granted he proposes to move to Gainesville with his family and to supervise and participate personally in the construction of the proposed station. Minshall will spend full time in the day-to-day operation of the proposed station in Gainesville and estimates that in the initial stages of operation that he will spend in excess of 48 hours per week in his duties at the station. Respecting the operation of station WTVX, Minshall expects to arrange the affairs of that station to require only his nominal supervision and will pursue the day-to-day duties at the new Gainesville station.

University City Television Cable Co., Inc.

19. The stockholders, officers, and directors of University City are as follows: James L. Milliken, C. W. Thorniley, Harry H. Harkins, Ralph Shepler, and J. D. Cutlip. With the exception of Milliken, the other four stockholders who are directors each own 240 shares of the corporation's stock which in every instance represents 24 percent of the total of 1,000 shares issued. All four of these gentlemen are directors of the corporation, Thorniley being vice president and Harkins secretary-treasurer. These four stockholders, as the record indicates, own 96 percent of the stock of the corporation. Three of these stockholders; namely, Messrs. Cutlip, Shepler, and Thorniley reside in West Virginia and Harkins' residence is in Sarasota, Fla. Neither Cutlip, Shepler, nor Thorniley participated in the preparation of the University City application and neither of the three will participate in the day-to-day operation of the station in the event the University City application is granted. In paragraphs 39, 40, and 41, infra, more

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information relative to Messrs. Cutlip, Shepler, and Thorniley is found. The operating statement of University City Television Cable Co., Inc., for the year commencing January 1, and ending December 31, 1967, is as follows:

Income:	
Cable service	$421,983.60
Connections	50,589.75
Other	6,348.65
Total	478,922.00
Expense:	
Merchandise	
Advertising	4,696.35
Auto	3,833.51
Donations	195.00
Dues	5,000.41
Light, heat, and power	12,236.14
Insurance	3,606.08
Interest	39,314.80
Microwave	
Miscellaneous	9,072.11
Office	6,939.55
Pole rental	33,850.87
Postage and freight	2,642.32
Professional	10,864.30
Rent—Office	4,075.00
Repairs and maintenance	5,179.88
Salaries—Managers	12,815.00
Salaries—Other	48,681.89
Tapoff expense	13,168.64
Taxes	29,796.45
Telephone	3,035.49
Travel	1,520.78
Total	250,524.57
Net income before depreciation	228,397.43
Depreciation expense	150,000.00
Net income for the period	78,397.43
Income—Prior years	(267,094.58)
Total income or (loss)	(188,697.15)
Undistributed income	(188,697.15)
Provision for income tax[1]	23,061.86
Balance to surplus	(211,759.01)

[1] University City Television Cable Co., Inc., revoked their election to be taxed as a partnership in 1967.

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The balance sheet as of December 31, 1967, reflects the following:

ASSETS

Current assets:	
Cash	$17,265.58
Accounts receivable	9,460.34
Notes receivable—JLM	----------
Interest receivable—JLM	----------
Prepaid expenses	1,300.00
Inventories	47,647.00
Total	75,672.92
Fixed assets:	
Land	20,887.25
Antenna cable system [1]	1,193,010.53
Automobiles	24,308.81
Other equipment	19,961.77
Total	1,258,168.36
Depreciation allowance	299,549.06
Total net	958,619.30
Other assets:	
Investments	----------
Organization expense	2,020.25
Total	2,020.25
Total assets	1,036,312.47

LIABILITIES

Current liabilities:	
Chase Manhattan Bank	148,437.50
Citizens Bank-Marietta	----------
Accounts payable	34,015.75
Accrued taxes, other	10,392.49
Accrued salaries and wages	2,125.00
Accrued income tax (net)	23,061.86
Deferred income	4,623.78
Total	222,656.38
Long-term liabilities:	
Chase Manhattan Bank	414,062.50
Shareholders' loans	511,352.60
Total	925,415.10
Capital:	
Capital stock issued	100,000.00
Undistributed income	(211,759.01)
Total	(111,759.01)
Total liabilities	1,036,312.47

[1] Notes omitted.

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20. Respecting Harkins, who lives in Sarasota, Fla., he discussed to a limited degree the preparation of the University City application with James L. Milliken who owns 40 shares or 4 percent of the total aggregate of the outstanding stock of the corporation. In addition to Milliken, Harkins discussed the University City application with Odes E. Robinson.[5] He primarily consulted with Robinson relating to information relative to the legal and financial qualifications of the University City stockholders. Relative to the programing proposal of University City, Harkins testified as follows:

Q. Can you give me the name, sir, of any specific individual in Gainesville—if there are any—with whom you personally discussed the program schedule prior to the time that the application was filed?
A. No, sir.
Q. Can you give me the name of such an individual with whom you discussed the program schedule after the application was filed?
A. No, sir.

In addition, more information relative to Harkins will be found in paragraph 25, infra.

21. As mentioned before, Milliken is president of University City as well as a director but only owns 4 percent of the corporate stock now outstanding which amounts to 40 shares. However, he has an option to purchase 200 shares of University City stock which will be discussed in paragraph 26, infra.

22. Milliken was born on February 26, 1924, in West Virginia, and after graduation from high school in 1942, he attended West Liberty College, West Liberty, W. Va., during the fall of 1942 and early 1943. In 1944 he entered the armed services and after graduation from officers' candidate school at Fort Benning, Ga., he was commissioned a second lieutenant in June 1945, and served as an infantry officer and as a courier officer in the Pacific theater for approximately 14 months. Upon return from Army duty he served as an attaché to a member of the House of Delegates to West Virginia during a legislative session in January and February 1947. Later he was employed as a sales representative from 1947 to 1950 by Hamburg Brothers, Inc., an RCA distributor in Pittsburgh, Pa., Youngstown, Ohio, and Wheeling, W. Va. In 1950 he was recalled to duty in the Army and was honorably discharged April 1, 1953. Milliken returned to employment with his former employer and traveled as a radio and television department sales representative in northern West Virginia and eastern Ohio from late 1952 until early 1959.

23. In February 1959, Milliken became manager of newly formed cable television systems in Marietta, Ohio, Williamstown, St. Marys, and Sistersville, W. Va., and supervised the installation and operation of cable television systems in these four cities. With the principals of Ohio Valley Cable Corp., named in paragraph 29, infra, he helped form the University City Cable Co., Inc., and obtained a CATV franchise in Gainesville in March 1963.

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[5] Milliken testified that Odes Robinson is an engineering consultant, not a legal consultant, residing in Fort Lauderdale, Fla., and actually prepared the original application. He testified: "* * * well actually he [Robinson] prepared our original application. * * *"

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24. Subsequently, Milliken assisted the University City Television Cable Co., Inc., principals in obtaining a CATV franchise in Waycross, Ga. Milliken supervised the construction of the Waycross and Gainesville systems. The Waycross Cable Co. (Waycross), was formed with the Georgia Theatre Co. holding 50 percent of the stock and the five stockholders of University City; namely, Messrs. Harkins, Shepler, Cutlip, Thorniley, and Milliken, each owning 10 percent. Milliken resides in and has been a resident of Gainesville since 1963. From a period in 1963 to early 1965 Milliken devoted his time equally between Waycross and Gainesville in relation to the cable systems in the respective cities. Since early 1965 he testified that the Waycross system had required very little of his time, and that most of his efforts have been devoted to the CATV system in Gainesville. When he moved to Gainesville in 1963 he went on the payroll of University City Television Cable Co., Inc.

25. Milliken testified that if the University City application is granted this applicant will employ as general manager an experienced television broadcaster who will be directly under Milliken's supervision as president. The record is silent as to the names or qualifications of any individuals that University City propose as general manager of its proposed television facility. However, Harkins testified that he would assist Milliken at times in the operation of the station. Harkins, however, does not live in Gainesville and testified that he contacted no one in Gainesville relative to the need and desire of the people of that community as it relates to programing. He has had no experience in the operation of a radio or television station. Harkins did, however, concede that virtually all day-to-day decisions, at least in the beginning, will be delegated to the general manager in view of the lack of experience of University City stockholders. He said on this point:

Q. What are Mr. Milliken's duties going to be with respect to the manager?
A. He is going to oversee the manager. In other words, be the general overseer.
Q. Have you discussed that in detail with Mr. Milliken?
A. As much detail as we can, because, as you know, we are not real familiar with the broadcasting business.
Q. Would I be correct in saying that virtually all of the day-to-day business would be delegated to the manager in view of your lack of experience?
A. In the beginning that would certainly be true.

The general manager will serve under Milliken's direction but the record does not reflect how much time Milliken will devote to the University City television facility or the Gainesville and Waycross cable systems. Milliken, from the testimony, will be responsible for the day-to-day operation of the station although the record does not disclose that he has had any experience in the operation of a television station. Both Milliken and Harkins indicated that Milliken will have to confer frequently with the Board of Directors or Harkins personally. To be more specific Milliken testified on this point as follows:

Q. Who would have the responsibility of making the, I will say, major and important decisions relating to policy of the corporation on the day-to-day basis?
A. That will be done by me at the direction of the board of directors.
Q. Should you be successful in getting a grant——
PRESIDING EXAMINER. Read that question and answer back.

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(The record was read by the reporter.)
PRESIDING EXAMINER. The answer then, is the board of directors, is that right?
The WITNESS. Yes, * * *.

26. Relative to the Milliken option to purchase 200 shares of University City stock referred to in paragraph 21, supra, this option was executed January 15, 1964, and expires January 15, 1972. In the event that the University City application is granted Milliken expects to exercise his option. It is apparent that Milliken will need approximately $20,000 to exercise the option but the record is void of any evidence to disclose how Milliken will raise the $20,000 to meet the option. However, Milliken's financial qualifications are not at issue in this proceeding. (See issue 1(a) and par. 3, supra.)

27. The finding is that the experience of Milliken as it relates to the television industry has been limited to sales and possibly the distribution of RCA radio and television equipment. Further, he has had no experience in the construction, operation, and management of either a radio or television station.

28. However, Harkins is to be subject to call and will assist Milliken in making major decisions. No indication was given as to how much time he will devote to the television operation.

CATV Interests of University City Stockholders

29. The CATV interests of the University City principals are as follows:

CATV system	Location	Principal	Percent of ownership
University City	Gainesville, Fla		100
Five Channel Cable Co	New Martinsville, W. Va.; Paden City, W. Va.	Cutlip, Harkins	98
Belington TV Cable Co	Belington, W. Va	Cutlip, Harkins	98
Ohio Valley cable corporations. (See balance sheets, par. 36, infra.)	Ohio and West Virginia	Cutlip, Harkins, Shepler, and Thornley.	100
Tygart Valley Cable Co	Elkins, W. Va	Shepler, Thornley	98
Webster Television	Webster Springs, W. Va	Harkins	100
Waycross Cable Co	Waycross, Ga	All stockholders	50
Community Cablevision, Inc	Lakeland, Fla	Harkins	10

In most cases, at least one University principal is an officer and director in the CATV corporations listed above.

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30. The subscribers and potential subscribers for those CATV systems in which University City stockholders have a 50 percent or greater interest are as follows:

CATV systems	Location	Subscribers	Potential subscribers
University City	Gainesville, Fla	8,624	10,000
Ohio Valley cable corporations	Marietta, Ohio	3,395	4,000
	Parsons, W. Va	1,100	1,000
	St. Marys, W. Va	580	600
	Williamstown, W. Va	526	550
	Sistersville, W. Va	399	500
	Crookville, W. Va	238	600
	Roseville, W. Va	218	500
	Davis, W. Va	173	----
	Thomas, W. Va	140	----
	Belmont, W. Va	106	140
Waycross Cable Co	Waycross, Ga	3,600	5,200
Tygart Valley Cable Co	Elkins, W. Va	2,692	3,000
Five Channel Cable Co	New Martinsville, W. Va	1,151	2,000
	Paden City, W. Va	840	----
Webster Television	Webster Springs, W. Va	535	600
Belington, W. Va	Belington, W. Va	353	400
Total		24,670	29,190

31. As observed, these CATV systems serve approximately 24,670 subscribers in 17 Florida, Ohio, Georgia, and West Virginia communities. As of November 1966, the 16 largest CATV companies in the United States served subscribers ranging from a high of 90,800 (30 systems H&B Communications) to 25,159 subscribers (five systems General Electric Cablevision) ("TV Factbook," services vol. 37, pp. 54–59, 1967 edition). Thus, by comparison, the holdings of University City's principals range among the largest in the country.

32. The Gainesville CATV system currently originates time and weather information on one channel. University City has no present plans to originate any other local programs on its Gainesville CATV system. However, it has no policy which would specifically preclude the origination of local programs. Moreover, the Gainesville CATV franchise restricts the station from selling advertising on the system. Therefore, as Harkins indicated, if the applicant does decide to go into programing, it would be of a public service nature.

The Financial Issue—No. 1

33. Without elaborating in great detail it is sufficient to say that Messrs. Harkins, Shepler, Thorniley, and Cutlip are successful businessmen and are evidently highly regarded in their respective communities. Of the four gentlemen only Harkins, to a limited degree, collaborated in preparing the University City application. Neither of these four gentlemen have had any experience in the construction

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and operation of a television facility. The personal balance sheets,[6] as reflected by the year ended December 31, 1967, are as follows:

Personal balance sheets—J. D. Cutlip, Harry Harkins, Ralph Shepler, and C. W. Thorniley, Dec. 31, 1967

	J. D. Cutlip	Harry Harkins	Ralph Shepler	C. W. Thorniley
ASSETS				
Cash in checking	$1,000.00	$7,500.00	$1,000.00	$5,000.00
Cash in savings	85,500.00	20,000.00		
Loans receivable:				
University City TV Cable Co	127,838.15	127,838.15	127,838.15	127,838.15
Waycross Cable Corp	26,800.00	26,800.00	26,800.00	26,800.00
C. C. Keys Music Co			25,000.00	25,000.00
Investments:				
Cutlip's, Inc	350,000.00			
Teleprompter Corp				
Grace Co	1,000.00			
Stonewall Jackson Insurance Co				1,000.00
Davis Trust Co			750.00	
Tygart Valley Cable Corp			275,000.00	275,000.00
Webster TV Cable Co		110,000.00		
Five Channel Cable [1]	218,000.00	218,000.00		
Belington TV Cable [1]	37,000.00	37,000.00		
Ohio Valley Cable [1]	345,000.00	345,000.00	345,000.00	345,000.00
Waycross Cable Corp.[1]	96,000.00	96,000.00	96,000.00	96,000.00
University TV Cable Co.[1]	425,000.00	425,000.00	425,000.00	425,000.00
Real estate	250,000.00	70,000.00	85,000.00	60,000.00
Total assets	**1,963,138.00**	**1,483,138.00**	**1,407,388.00**	**1,386,638.00**
LIABILITIES				
Notes payable:				
Chase Manhattan Bank [2]	84,375.00	84,375.00	84,375.00	84,375.00
Home Mortgage		31,608.00	12,000.00	
Davis Trust Co.—Elkins			5,000.00	
Income taxes payable	15,790.00	19,736.00	9,500.00	10,200.00
Ohio Valley Cable Corp				
Total liabilities	**100,165.00**	**135,719.00**	**110,875.00**	**94,575.00**
Net worth	**1,862,973.00**	**1,347,419.00**	**1,296,513.00**	**1,292,063.00**
Total liabilities and net worth	**1,963,138.00**	**1,483,138.00**	**1,407,388.00**	**1,386,638.00**

[1] TV cable companies are valued at $200 per customer.

[2] In addition to the notes payable to the Chase Manhattan Bank above, Cutlip, Harkins, Shepler, and Thorniley are jointly and severally liable to the bank for a loan to the University City Television Cable Co., Inc., Gainesville, Fla., in the amount of $562,500.

Life insurance	$65,000.00	$270,000.00	$200,000.00	$80,000.00
Net income 1964	42,740.00	39,315.00	37,186.00	34,424.00
Net income 1965	40,200.00	39,524.00	25,128.00	24,333.00
Net income 1966	58,175.00	56,746.00	52,483.00	49,943.00
Net income (estimated) 1967	95,400.00	97,300.00	73,800.00	75,300.00

34. University City will require $273,562 to cover its construction and first-year operating cost without reliance upon revenue. To obtain this amount of financing University City will by necessity rely upon the availability of $70,000 each from its four principal stockholders.

35. Messrs. Harkins, Shepler, Thorniley, and Cutlip are jointly and severally liable for two loans from the Chase Manhattan Bank. These two loans[7] coupled into a single loan of $1,200,000 was divided into

[6] The financial responsibility of James Milliken is not an issue in this proceeding.

[7] Hereinafter referred to as loan.

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a $750,000 loan to University City and $450,000 to the four individuals. Shepler testified respecting the $450,000 loan as follows:

Q. Would you explain that liability situation again. I don't believe I understood it.

A. I will be glad to. If the joint promissory note with the four signatures of the four individuals mentioned of which the responsibility or the liability go to either the two, three, or four remaining if something should happen to the one or two or three.

Q. This note, I presume is being paid off on some sort of installment basis?

A. It is paid on a quarterly basis over a 5-year period.

Q. And what is the source of the funds for paying off that, that have been used thus far for paying off that note?

A. The source is from the Ohio Valley Cable Corp. of West Virginia and the Ohio Valley Cable Corp. of Ohio.

Q. How long has that note been outstanding?

A. It will be paid in its entirety March 31, 1971. There is a grace period of 6 or 8 months prior to the first payment and the first payment was made June 30, 1966.

Q. So there have been approximately six payments on that note?

A. That is correct.

Q. Has it ever been necessary for anyone of the cosigners on the note to make a contribution to the regular quarterly payment?

A. No, sir; there has not.

Q. In other words, the regular quarterly payments have been made out of the profits or the income from the Ohio Valley Cable Co. of West Virginia and Ohio?

A. Yes, sir; in addition to that, we take $80,000 a year out of those two corporations for personal income tax payments to four people involved and in addition to that, there is also a surplus beyond that point to use in rebuilding and servicing the system.

Q. Are you familiar with the financial setup in the Ohio Valley Cable Co. of Ohio?

A. Yes, sir.

Q. And the West Virginia corporation by the same name?

A. Yes, sir; they are jointly owned by the four individuals (this does not include Milliken) I have just named with equal shares of stock by the four.

Q. Are you familiar with the balance sheet that was supplied for those two companies? This is a report which was handed to me along with this joint personal balance sheet.

* * * * * * *

Q. Referring to the Chase Manhattan Bank note where Messrs. Cutlip, Harkins, Shepler, and Thorniley are all jointly and separately liable, is this note reflected on the balance sheet of the Ohio Valley Cable Corp. of Ohio or the Ohio Valley Cable Corp. of West Virginia?

A. No, sir; it is not.

Q. Would you turn the page to those corporations expenses and tell me if it was listed as an expense of those corporations rather than a liability?

A. On the operating statement?

Q. Yes.

* * * * * * *

Q. I am referring to page 4, which is the balance sheet and page 5, which is the operating statement of these three cable companies, University City TV Cable and the two Ohio Valley companies, and my question was the note mentioned on the joint balance sheet in the amount of $84,375 appear anywhere on either the balance sheet of the two Ohio Valley companies or on the operating statement of the two Ohio Valley companies?

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A. It does not, sir.

Q. In other words, these two companies have made some six payments on that note and it does not show up in their balance sheet?

A. No, sir; we are subchapter S corporation. The money that they make goes to the four individuals. They in turn pay on the note.

Q. Are you liable on the $562,000 note to the Chase Manhattan Bank?

A. Yes, sir.

Q. What is the status of that liability?

A. There has been one payment made since the December 31 statement here. It was of $37,500, as I recall, from memory, sir. There is another payment to be made March 31.

Q. These are quarterly payments again?

A. They are quarterly payments in connection with the personal note payments. They are paid at the same time.

Q. And this note was taken for the purpose of financing the University City TV Cable Co.?

A. Yes.

Q. That is also a subchapter S corporation so the note would not appear on their operating statement?

A. It was as of this statement, yes.

Q. Again, if something should happen to all of the other cosigners of that note and to the companies whose profits are going to pay that note, you would be liable on the entire amount, is that correct?

A. This is true. However, as you understand, there is security under that $750,000.

Q. What is the security?

A. The stock certificate of the Tygart Valley Cable Corporation, of the Ohio Valley Cable Corporation, of the University City Cable Corporation.

Q. I am sorry, I don't understand. Let us go back to the first note. That is for $450,000 which is represented on this balance sheet as a liability of $84,000, $84,375 for yourself, Mr. Cutlip, Mr. Harkins and Mr. Shepler. Is there security on that note?

A. The notes are tied together. The original loan was $1,200,000. They were divided up into a loan to University City of $750,000 and a loan to the individuals for $450,000, making a total of $1,200,000, and the loan is tied directly to the individuals as well as the security which was pledged.

Q. What was the security that was pledged?

A. The stock certificates of the Tygart Valley Cable Corporation, the Five Channel Cable Corporation, the Belington TV Cable Corporation, the Ohio Valley Cable Corporations of West Virginia and Ohio and the University TV Cable Corporation. The Waycross Cable Corporation is not a party in any way to the loan.

Q. Mr. Shepler, how much money have you committed to the proposed television station in Gainesville?

A. Mr. Milliken has been handling that and I think the question should be directed to him.

Q. How much money have you immediate knowledge? That is for the construction of the television station in Gainesville?

A. I don't have the facts and figures before me.

Mr. BARNES. Do you mean him personally?

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By Mr. BLUMENTHAL:

Q. Personally, you.

A. $70,000. I am sorry. I misunderstood your question.

Q. That is all right. How do you propose to raise that $70,000?

A. I personally proposed to raise it by borrowing it from banks.

Q. Do you have a commitment from a bank?

A. I do not. But if the banks fail to cooperate and loan me the money, we have jointly agreed by saying we, I mean the four principals involved, five principals, let me correct that—five principals involved agreed to sell our stock in the Waycross Cable Corporation, if it becomes necessary, and the president of that corporation. Mr. John Stembler, has agreed to purchase by option our shares of stock in order that we might raise the money.

Q. What is the purchase price?

A. $25.000 [$250,000].

Q. There are five stockholders?

A. Yes.

Q. So that would be $50,000 apiece?

A. That is correct.

Q. The stock is listed on your balance sheet at value of $96,000, is that not correct?

A. That is correct.

Q. This is using the formula of $200 per customer, is that correct?

A. At that time it was. It is now in excess of $400,000 per individual. There has been that much in growth of that system since this statement was issued.

Q. Now let us assume for a second that you were able to get back a loan of $70,000, would you sell that stock in Waycross Cable Company worth $104,000 for $50,000?

A. If I was able to get a loan for my $70,000, would I sell the stock for $50,000?

Q. Yes.

A. If the other partners could not come up with their share of the money, I certainly would be honored by the commitment I made to them.

Q. Even though it would mean a book loss of $54,000?

A. We have a commitment, but if the stock is put on the market today, sir, we can get much more than $50,000 out of it.

Q. But that is not what the commitment says?

A. That is correct.

36. In summation, from the evidence, payments on the $450,000 loan are being made by the profits of Ohio Valley cable corporations of West Virginia and Ohio, while the payments on the $750,000 loan are being made from the profits of University City which liability is noted on its balance sheet. To the date of the hearing the corporations had been able to meet their obligations and the four individuals have not been called upon to contribute to the payments. It is to be noted from the balance sheets of Ohio Valley Cable Corp. of Ohio and Ohio Valley Cable Corp. of West Virginia, as of December 31, 1967, the combined undistributed income of both corporations amounts to

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$138,722.16. Their respective balance sheets are as follows as of December 31, 1967:

	Ohio Valley Cable Corp. of Ohio	Ohio Valley Cable Corp. of West Va.
ASSETS		
Current assets:		
Cash	$6,234.10	$26,203.93
Accounts receivable	5,700.87	4,043.28
Notes receivable—JLM	18,366.11	23,907.06
Interest receivable—JLM	3,620.38	5,821.25
Prepaid expenses	868.90	180.00
Inventories	4,623.65	5,267.27
Total	39,414.01	65,422.79
Fixed assets:		
Land	13,396.50	650.00
Antenna cable system	214,891.56	124,614.71
Automobiles	16,966.70	3,975.00
Other equipment	5,606.16	
Total	250,860.92	129,239.71
Depreciation allowance	185,782.73	110,880.00
Total (net)	65,078.19	18,359.71
Other assets:		
Investments	750.00	300.00
Organization expense		
Total	750.00	300.00
Total assets	105,242.20	84,082.50
LIABILITIES		
Current liabilities:		
Chase Manhattan Bank		
Citizens Bank—Marietta	9,000.00	
Accounts payable	3,630.77	2,082.15
Accrued taxes, other	1,962.86	1,194.31
Accrued salaries and wages		
Accrued income tax (net)		
Deferred income	5,917.60	1,944.86
Total	20,501.22	5,101.32
Long-term liabilities:		
Chase Manhattan Bank		
Shareholder's loans		
Total		
Capital:		
Capital stock issued	20,000.00	5,000.00
Undistributed income	64,740.98	73,981.18
Total	84,740.98	78,981.18
Total liabilities	105,242.20	84,082.50

37. Additionally, the five stockholders of the Waycross Cable Co. (Waycross) have received an offer of purchase from the West End Theatre Co. (West End), Atlanta, Ga., for the stock held by these individuals. The offer of purchase expires December 31, 1968. As related heretofore West End owns 50 percent of the stock of Waycross and the five individuals[8] just referred to each own 10 percent. The purchase price under the offer is $50,000 to each individual. West End

[8] See par. 24, supra.

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has a loan commitment from an Atlanta, Ga., bank for $250,000 to cover the purchase price. The testimony of three of the witnesses, Messrs. Harkins, Thorniley, and Shepler indicate that the 50 percent interest in Waycross would be worth approximately twice the price offered by West End. The West End Theatre Co. balance sheet as of November 30, 1967, is as follows:

Assets:	
Cash	$50,307.10
Notes and accounts receivable	49,770.20
Investments	271,263.00
Fixed assets (less depreciation)	237,274.71
	608,615.01
Liabilities and net worth:	
Accounts payable	1,805.77
Purchase money mortgages	1,160.22
Capital stock and surplus	605,649.02
	608,615.01

38. Turning now briefly as indicated heretofore, and from the balance sheets referred to in paragraph 33, supra, Harkins testified at the hearing on March 21, 1968, that his checking account at that time was approximately $3,500, while he had a savings account of $35,000. He further testified that he had contacted the Chase Manhattan Bank with reference to a bank loan but had not had a firm commitment from the bank and would not have one until the construction permit had been authorized. Further, he would be willing to sell his 10 percent share in the Waycross CATV for the agreement price to the Georgia Theatre Co. The evidence is that with the exception of the liability under the Chase Manhattan Bank loans and the mortgage on his home, the only other liability he had was income tax payable which he testified was a liability in the amount of $6,736. He further testified that he had reduced the income tax liability from that reflected by a payment on January 15, 1968, which reduced it from the liability shown on the balance sheet referred to in paragraph 33, supra.

39. Ralph Shepler testified respecting the balance sheet referred in paragraph 33, supra, that he had no money in a savings account with approximately $1,000 in the checking account. His home is unencumbered and he now shows an income tax liability in the amount of approximately $25,000. These adjustments will be made on the balance sheet referred to in paragraph 33, supra, primarily because the Waycross Cable Corp. loan referred to on his balance sheet has been paid since the date of the balance sheet. Further his cash position is improved and his tax liability was paid at the date of the hearing. Shepler testified that he could raise additional funds through bank loans although he had no firm commitment. Also, if necessary he could sell his interest in the Waycross CATV, heretofore referred to. Additionally, Shepler testified that in order to raise his commitment that his home, which is now unencumbered, is valued at $75,000, and he could place a mortgage thereon for additional funds. Further the testimony

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of Shepler is that the Ohio Valley cable corporations of Ohio and West Virginia have in excess of $138,000 in undistributed income which could be distributed to the stockholders.

40. C. W. Thorniley, from his financial statement referred to in paragraph 33, supra, had assets of $1,386,638 with total liability of only $94,575. At the time of the hearing the testimony of Thorniley was that with the exception of the two loans which are coupled with the Chase Manhattan Bank loan, for which it is jointly and severally liable, he has no current liabilities. His checking account at the time of the hearing was approximately $5,000 and he had an $18,000 savings account. And Thorniley indicated his willingness to sell his interest in Waycross Cable, which has heretofore been discussed, to meet his financial obligation to the applicants.

41. J. D. Cutlip was unable to attend the hearing and testify due to his health. The parties agreed to take the testimony of Cutlip by written interrogatories upon the submission of a doctor's statement on his health which was presented at the evidentiary hearing on March 21, 1968. With the concurrence of all parties Cutlip was not called as a witness. From the balance sheet referred to in paragraph 33, supra, his net worth is $1,862,973. The evidence further is that with the exception of an income tax liability in the approximate amount of $15,000 plus the liability on the Chase Manhattan Bank loans, Cutlip has no other liabilities.

42. In summing up the financial positions of Cutlip, Harkins, Shepler, and Thorniley, the net worth of these four principals as of December 31, 1967, varies from $1,862,973 to $1,292,063. The substantial differences since December 31, 1967, in the respective net worth of the four individuals has been discussed briefly in the preceding paragraphs of this initial decision.

Section 1.65 Issue

43. The Review Board has directed that inquiry be made as to whether University City or its principals failed to provide accurate and complete information in its pending application; whether it failed to keep its application up to date; and if so, whether these deficiencies reflect adversely on the comparative qualification of the applicant.

44. In its application, University City listed Ralph Shepler as its vice president, when, in fact, he had resigned from that position and C. W. Thorniley had been elected in his place. It listed James Milliken as holding 24 shares of University City stock rather than the correct figure of 40 shares. In section IV–B of the application incorrectly listed was the percentage of airtime for news and other programs. It failed to list the business interests of C. W. Thorniley. It also failed to provide complete information as to the other business interests of Messrs. Cutlip, Shepler, Harkins, and Milliken. The precise information which was omitted from the application is set forth in an order of the hearing examiner (FCC 67M–1672) released October 9, 1967.

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45. University City witnesses explained principally that it did not have the benefit of legal counsel when its application was being prepared for filing with the Commission. Rather, the applicant relied, in part, upon the services of an engineer who had previously been a broadcaster in his own right, and also upon information it had acquired in the CATV field. Essentially, its position was that the discrepancies were inadvertent; that the omissions were caused by oversight; and that there was no intention to mislead or furnish false information to the Commission. This issue now is moot because of the order (FCC 67M–1672) referred to above.

Suburban Issue

46. The record demonstrates that University City made little effort to ascertain the community's needs, particularly as it relates to programing. Four of the University City stockholders holding 96 percent of the stock do not reside in Gainesville. Three of these stockholders live in West Virginia, while the fourth is a resident of Sarasota, Fla. These stockholders made no effort to determine the community's needs nor did they participate in any substantial degree in the preparation of the programing materials for the application of University City. None of the University City stockholders, including James Milliken, has had any prior experience in the ownership or management of a broadcast facility. Milliken, who is president and general manager of University City (cable system) has resided in Gainesville since July 1963, as heretofore indicated, when he was employed by University City to organize and construct cable systems in Gainesville, Fla., and Waycross, Ga. Outside of his experience with Hamburg Bros., Inc., as a sales representative, Milliken has been the manager of the CATV systems in Gainesville, Fla., and Waycross, Ga., and previously had experience as a manager of CATV systems for about 8 years.

47. In the preparation of the television application of University City, Milliken consulted with Messrs. Harkins and Odes Robinson, but for a background of the community needs Milliken relied on his general knowledge of the community, where he has lived since 1963. In its application University City only named three persons; namely, R. M. Coleman, president of the Gainesville Chamber of Commerce; R. W. Neville, president of the Gainesville Ministerial Association, and Mrs. Raymond Tassinari, president of the Gainesville Women's Club, who indicated their interest and desire to cooperate in bringing a local television station to Gainesville. University City's application shows also that undisclosed persons connected with the University of Florida and the county educational offices were contacted but the record does not identify these individuals or what their reactions were to the University City proposal. University City contends that if its application is granted it would form a Program Advisory Board to cooperate with the station in programs designed to meet the community needs. Milliken's testimony was that individuals, possibly five or six a day, would stop in the cable system's office and the proposed programing would be discussed with them.[9] In its original ap-

[9] See par. 51, infra.

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plication University City listed 17 local programs which it proposed to present of which 15 were briefly described.

48. Sometime after filing its application, upon Commission request, University City solicited program suggestions from nine individuals, including representatives of the Chamber of Commerce, League of Women Voters, Women's Club, University of Florida Student Government, and, lastly, a city commissioner who was also director of the Vocational Department, Santa Fe Junior College. The persons contacted were R. W. Coleman, Billy P. Mitchell, Ed Turlington, Mrs. John K. Mahone, a Mrs. Reeves, a Mrs. Dalton, Mrs. Raymond Tassinari, Clarence Sellin, John McVoy, and the Gainesville city manager. Significantly, notwithstanding the Commission's explicit request, University City did not set forth the specific efforts it had already made to ascertain the program needs of the Gainesville area and the manner in which its proposed programing would meet those needs. Moreover, although the persons subsequently contacted did provide several constructive suggestions concerning program needs, the applicant did not amend its program proposal to accommodate those suggestions.

49. Milliken testified on direct examination that he had contacts with Ed Turlington who was the only one outside the company except Odes Robinson who discussed with him the proposed program schedule. His testimony in that respect is as follows:

Q. Did you have any assistants besides Mr. Robinson on these contacts when you drew up your program schedule—from anyone else?

A. Not within the company.

Q. Outside the company?

A. Yes, one—Mr. Ed Turlington.

Q. Who is he?

A. He is the city commissioner and vocational——

PRESIDING EXAMINER. It is reflected on exhibit D.

The WITNESS. I believe his title is vocational director. Anyhow he is connected with the county education and Santa Fe Junior College. He wrote up a list of people he felt I should contact or should consider in contacting.

Q. Did you contact those and other people?

A. I did.

Q. In your application you made some reference to executive program committee. Was this committee ever formally organized?

A. Not formally. No. But these people, the League of Women Voters, the Chamber of Commerce, the Women's Club, and so forth, have all agreed to have someone from their organization serve on that committee in the event we had one.

Q. Why didn't you organize the committee at the time—at the time you had your application, preparing your application?

A. Other than to get ideas of programing, there was nothing concrete to get a hold of. We have a pretty high turnover of people in the city. It runs about 30 percent.

Q. What do you mean by that—high turnover?

A. By that people move in and out of town. It is a university town and we experience 30 percent turnover in the people. So it seemed to me that I might be plugged into somebody at that time who would be leaving town, probably. So I tried to maintain the contact with the organization more definitely than with the person involved.

Q. Did people you contacted in the various organizations, and I wish you would name a few of them for the record today, agree to have their organization act on this committee when the time came?

A. Yes.

Q. Could you name a few of these organizations that you contacted?

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A. The Chamber of Commerce, the Gainesville Women's Club, friends of the library, the director of the Florida Museum. He was also president of the Rotary at the time. Dr. Dickenson, Ed Turlington, city commissioner, Santa Fe Junior College, Mrs. Silverman of City Panhellenic, Reverend Shaw who happens to be the president of the Ministerial Association of Gainesville right now.

The WITNESS. Reverend Shaw—West Side Baptist Church.

PRESIDING EXAMINER. Do you know what his first name is?

The WITNESS. No, sir; I don't. Captain Roberts—he is captain of the city police force and very active in sportsmen affairs. Mrs. Man, League of Women Voters. These are all that I specifically have a commitment from. I am sure others, from talking to them, would.

By Mr. BARNES (counsel for University City):

Q. Did the head of any particular organization agree to serve on your committee when you contacted them?

A. Yes, they all agreed to serve. Most of them felt that their clubs, however, should appoint the person to serve.

Q. Did any of the clubs actually appoint any to serve?

A. No.

50. The substance of Milliken's testimony is that this applicant contacted 16 civic leaders in Gainesville for program suggestions of which only 10 [10] were contacted before the application was filed but only four [11] were mentioned in the original application. The remaining individuals were contacted after the application was filed. Milliken further testified that he only had informal notes of conversations with the few civic leaders that he contacted but he possessed no definite notes or memoranda which indicated the basis and results of the conversations. For instance, he testified:

Q. * * * We are talking about the earlier contacts, and you just have testified that the kind of notes which were made from the original notes were similar to these. Do you have any of the notes?

A. No, sir.

Q. Do you have anything in writing as to the way of memoranda, or contacts, program contacts which you made prior to the time the application was filed?

A. No, sir.

Q. How, exactly, did you use, let us say, a contact with, let us say, Mrs. Tassinari? Did you see her prior to the time the application was filed?

A. Yes.

Q. As I understand you, you have no notes whatsoever on your discussion with her?

A. No, sir.

Q. After your discussions with Mrs. Tassinari, [President, Gainesville Women's Club] did your discussion with Mrs. Tassinari reflect itself in the program proposal which appears in your application?

A. You are talking about exhibit 13 [of the application]?

Q. I am talking about your application.

A. Right. I kept notes, and again they were not so completely thorough that they would have meant much to anybody, possibly, other than me and perhaps Otis [Odes Robinson]. I kept notes on what, for example, Mrs. Tossinari suggested we might have. Everybody said local news, so everybody is in on that. So when we made up this exhibit——

Q. You are using the editorial "we." That loses me. Who is "we"?

A. Otis [Odes] Robinson.

Q. Did he make it up, or did you make it up?

A. He made it up, he wrote it himself, he wrote it, right.

Q. [You] tell me specifically what did you tell Otis [Odes], or give Otis [Odes] concerning your conversation with Mrs. Tassinari?

[10] These persons were not identified in the original application.
[11] The application only reflects three. See par. 47, supra.

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A. I read from the notes that she wanted news and whatever else it was that she thought she wanted. In her particular case I remember pretty well what it was.

Q. Do you have a specific independent recollection at this time as to what Mrs. Tassinari suggested during your conversation?

A. I know of two things that she was very emphatic about. There were other lesser emphasized things, but the two things she emphasized were local news and programs of interest to the women. She elaborated more on programs of interest to the women.

Q. After you told Otis [Odes] about that, what did he do?

A. He made up this exhibit that we turned in with our application, and we tried to cover, and I think we did cover, all of the desires that had been indicated by the people that I contacted. Then he put various headings that would cover those desires. One heading, for example, "Local News," would cover the desires of everybody. "Local Schools," we had only two people say anything about school programs.

Q. Let us stick to Mrs. Tassinari.

A. All right.

Q. Did you review what Otis [Odes] put down in this exhibit?

A. Yes.

Q. Would you please take a quick look at this exhibit, and indicate to me where, other than the local news which you say everybody asks for, any recommendation of Mrs. Tassinari appears?

A. As a recommendation of Mrs. Tassinari, as such? What page are we on here?

Q. I am looking at exhibit 13, paragraph 1–C, section IV–B.

PRESIDING EXAMINER. Of the application.

By Mr. GAGUINE:

Q. Yes, of the application.

A. To be specific, I am sure I know Mrs. Tassinari made a very strong issue of the news. She also made an issue of programs of local interest, particularly among women. Now that I read it, she was also mentioning that we should have something having to do with local musical groups.

Q. Looking at exhibit 13 [of the application] has refreshed your recollection on that, is that correct?

A. Yes, sir.

Q. Is it your testimony that the University of Florida Music Appreciation Hour flowed directly from the recommendation of Mrs. Tassinari?

A. I think she was probably the first one that made a point of it.

Q. Let us take a quick look at exhibit D. I see Mrs. Tassinari's name at two places, Local News and Sports, and I see her Women's Clubs, Women Voters, et cetera. There is no reference, am I correct, to the women's clubs programs in your original application?

A. Probably not as such, no.

Q. When did you first put down on a piece of paper the titles Women's Clubs, Garden Clubs, Women Voters at 7 p.m. Tuesday?

A. I think when Otis [Odes] and I were trying to come up with something to base a general outline on.

Q. Where is the general outline?

A. I call this exhibit 13 [of the application] a general outline, actually. In my judgment it was a general outline. It may not be as such.

Q. And will you and I agree that the general outline in exhibit 13 [of the application] doesn't have any programs Women's Clubs, Garden Clubs, and Women Voters?

A. Unless you want to take item 4, Day in Gainesville. I would say that would certainly probably be in the ball park. But there is nothing specific, you are correct, yes, sir.

Q. And again, to go back to my question, when did the titles Women's Clubs, Garden Clubs, League of Women Voters first come up as program titles?

A. I think those titles, which may have been revised to some extent, came up while we were preparing the overall program information which ended up in this. This is exhibit 13 of the application.

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Q. But again, as I understand it, whatever was that preliminary material, you didn't keep it?
A. That is correct.

Milliken testified that the rough draft originally prepared for the application was changed in part.

51. After the filing of the application by University City, Milliken prepared a simple survey form for which residents could make program suggestions and left them on the counter of the offices of the cable system in the Gainesville office. Additionally, this applicant had local college students filling out forms on the basis of interviews made on the streets but the record does not disclose any analyses of these surveys made by this applicant and likewise the record is void of any testimony that reflects that University City checked the responses of these surveys against its program schedules or changed its programs as the result of any survey. There has not been an analysis or description of the proposed programs offered in the record by University City and in at least two instances Milliken could not testify definitely that he had done the groundwork for the proposed programs.

52. University City exhibit C that was received in evidence at the evidentiary hearing on March 21, 1968, is the program schedule of University City which this applicant proposedly will follow if its application is granted. This exhibit was prepared on the night of March 20, 1968, the day before the exhibit was offered in evidence. The evening portion of the schedule was based primarily on the forthcoming ABC network season. Exhibit C, the current proposal for programing of this applicant, is at sharp variance with the programming proposed in the original application which was subsequently amended. For instance, on cross-examination Milliken testified as follows:

Q. One other item. At no time prior to the filing of this application was there a schedule prepared of the type reflected in exhibit C, with program titles and descriptions for each proposed hour of operation?
A. No, sir.

Actually at the hearing on March 21, 1968, Milliken further testified:

We didn't have the morning network shows, so we didn't know what to put down. *We got this other from ABC yesterday or day before yesterday, as the case may be.* [Emphasis supplied.]

53. Respecting exhibit C, which purports to be the ultimate programing to be presented by the new University City station, Milliken was asked the following question by the hearing examiner:

PRESIDING EXAMINER. That is not the question that was asked and answered. My question is, University City exhibit C that we have before us now, you did not have that before you at any time to present to anyone?
The WITNESS. No, no.

54. And finally, on re-cross-examination Milliken testified as follows:

Q. Let me invite your attention to University City exhibit C. Let me place my questions in a frame of reference. Let us take only contacts, program contacts prior to the time that the application was filed. With respect to those program contacts, how did you make an appointment?
A. I picked up the telephone and called them, or walked over to their office.
Q. Let us take a typical contact. What documents, if any, did you take when you went to see this person?

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A. Just notes, very loose notes, I must admit.
Q. Did you take notes with you, or did you make notes?
A. No, I made notes after I got there. I took a yellow sheet of paper there, like this.
Q. Did you make notes of your conversations after every so-called program contact conversation?
A. Not complete notes, no, sir. Some, but not complete.
Q. Do you have any of the notes which you made?
A. I am sorry, I don't.
Q. What did you do with the notes?
A. After putting the contents of the notes down on paper, like, you know, putting them down as to what they turned out to be, I threw them away.
Q. Do you have any of those so-called papers, on which you put the contents down?
A. None other than what we have here.

55. The entire record concerning community needs, particularly programing, is so fragmentary, incomplete, and inconsistent that it boils down to the simple fact that University City did not resolve what its programing schedule would be in finality until the night before the evidentiary hearing on March 21, 1968.

56. This applicant's exhibit D is of little, if any, value to support its position on the contacts and programing. For instance, Milliken testified respecting the program titles reflected on exhibit D:

* * * the program title in most cases was picked by me as a result of the desires these people over here pointed out.

However, Milliken also testified that at least six of the persons listed on University City exhibit D were not contacted until after the application was filed. Milliken further testified that among the contacts reflected on University City exhibit D, Joe Wilson of the Chamber of Commerce was not actually contacted. As to another alleged contact; namely, Mrs. Nathan Gammon, the witness testified:

I don't recall to have contacted her before. I know she was on the list to contact.

57. Milliken produced as an exhibit University City exhibit F consisting of four sheets with some dozen odd names of persons that he allegedly contacted relating to specific suggestions but the exhibit does not reflect what these suggestions were nor did the witness testify that any particular suggestions were incorporated in the original programing filed with the application. As a matter of fact, at least one page of exhibit F bears a date of September 12, 1967. This page contains seven names. Respecting this page Milliken testified as follows:

Q. Mr. Milliken, with respect to University City exhibit F for identification, the first page, I will ask you when did you make the hand-penned notes on that first page?
A. This was made as is dated September 12, 1967, immediately before a meeting I had with these people.
Q. When was the application filed, sir?
A. December 24, 1966. Isn't that the date we just gave?
Q. Yes, therefore, this first page of University City exhibit F—these notes were made on a date subsequent to the filing of the application—is that correct?
A. After this one here, yes.
Mr. EDMUNDSON. By this one he was referring to University City exhibit F, the first page.

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Then as to page 2 of University City exhibit F, the witness further testified:

Q. Mr. Milliken, I direct your attention to page 2 of University City exhibit F for identification and I ask you when the notes that appear thereon were made?

A. This was made September 8, 1967, in conjunction with a meeting I was having with these other people. In other words, one and two would go with W and H to do with the same thing. [The transcript is incoherent on this answer.]

Q. That, too, would be at a date subsequent to the date of the filing of the application, is that correct?

A. Yes.

Q. University City exhibit F for identification, page 3, when were the notes that appear on that page made?

A. I believe these were prior to the application. I remember talking to these two boys about student housing and sports and so forth, or were, I don't think they are at the University anymore now.

Q. You think these were made prior to the filing of the application—what is that based on?

A. Knowledge, just remembering. I feel certainly sure they were.

Q. How many times did you talk with Mr. Selin?

A. Twice. If I recall correctly, twice, and the same with Mr. McAvoy.

PRESIDING EXAMINER. The names of Clarence Selin and John McAvoy also appear on exhibit D.

The WITNESS. I don't know whether something should be corrected or not, but I think something should be understood by all, if I may.

PRESIDING EXAMINER. I will hear you.

The WITNESS. The notice here under contacts, Reverend Neville and Reverend Shaw, on exhibit D, Reverend Neville is no longer in Gainesville. Reverend Shaw was not contacted before the application was made for the main and simple reason that he was not the president of the Ministerial Association at that time. But he is now, and I put it on here. Maybe I should not have put it on here, but just for clarification, that is why it is on here.

Then, as to the fourth page of University City exhibit F, Milliken testified:

A. I don't recall exactly when these were made. I don't recall whether they were all even made at the same time. These again are people whose names I kept in my little file to be in contact with for my program advisory group.

Q. Therefore, you could not say whether they were made before or after the filing of the application, is that correct?

A. That is correct. That is correct.

Q. Directing your attention to University City exhibit F, page 3, for identification, can you tell me whether you are sure that those notes were made before you filed the application?

A. No, not this particular note. No.

Thus, it is patently clear that grave doubt is cast as to the contacts made relative to programing prior to the filing of the University City application. It is, of course, clear that the four stockholders that own 96 percent of the stock made no contacts in Gainesville to determine the community needs and interests.

58. From the evidence adduced on behalf of University City it is evident that this applicant made little, if any, effort to ascertain the community needs and interests of the area to be served by its proposed facility. The evidence in this respect deals only in generalities and those generalities relate primarily to the fact that Milliken had acquired some knowledge and acquaintances through his management of the University City Cable System in Gainesville in recent years. As

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previously pointed out, outside the time and weather, no local programs are presented on the Gainesville CATV system owned by University City.

CONCLUSIONS

1. The two applicants here are seeking a construction permit for a new UHF television station to operate on channel 20 in Gainesville, Fla. Both applicants propose to construct their antennas about 5 miles northwest of the center of Gainesville at sites approximately 0.2 mile apart. Minshall Broadcasting would operate with an effective radiated power of 137 kilowatts and an antenna height of 690 feet above average terrain, while University City proposes to operate its station with an effective radiated power of 17 kilowatts and an antenna height of 680 feet above average terrain.

2. Gainesville, Fla. is located about 60 miles northwest of Jacksonville, Fla., and nearly 90 miles northwest of Daytona Beach. The Commission's designation order, paragraph 6, found Minshall Broadcasting qualified to construct, own and operate its proposed new television broadcast station, but added certain issues respecting University City relating to its qualifications which are found in issues 1 (a) and (b). Subsequently, the Review Board added an issue known as the section 1.65 issue directed to University City, and still later, the Commission enlarged the issues by the addition of a suburban issue also directed to University City. Gainesville has a population of 29,701 persons, while the county in which it is situated, Alachua, has a total population of 74,074 persons. Gainesville is the county seat of this county. The only operating television facility in Gainesville is WUFT on channel 5 which is a noncommercial educational station. The channel here sought by both applicants is the only assigned commercial channel in the city. Gainesville is within the grade B contours of stations WJXT, channel 4 and WFGA–TV, channel 12, located in Jacksonville and is in the predicted grade A contour of WOTG–TV (CP) now scheduled for completion in September 1968. The city of Gainesville has one daily and one weekly newspaper in addition to the non-commercial educational station WUFT on channel 5. There is published a daily student newspaper by the University of Florida which is located in Gainesville. The applicant University City operates a cable system in Gainesville but carries no locally originated programs other than time and weather. The cable system franchise prohibits it from selling advertising on its system.

Minshall Broadcasting's Coverage Advantage

3. As a result of the higher effective radiated power employed, Minshall Broadcasting's predicted grade B contour will envelop all the area within University City's grade B contour. University City's grade B contour encompasses 100,383 persons in 2,085 square miles. Minshall Broadcasting's grade B contour not only includes all of this population and area but also an additional 60,519 persons in 2,746 square miles so that total grade B coverage will extend to 160,902 persons in 4,831 square miles. In the grade B differential area that

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would be served by Minshall Broadcasting but not by University City, there are 3,239 persons in 466 square miles not within the grade B contour of any authorized commercial television station and 7,235 persons in 693 square miles within the grade B contour of one authorized commercial television station. Thus, only Minshall Broadcasting will furnish grade B coverage to a total of 10,474 persons and a 1,159-square-mile area that receives either no grade B coverage or coverage from only one station. Therefore, Minshall Broadcasting's proposal represents a more efficient use of the channel in terms of providing service and satisfying the need for service.

Experience of William E. Minshall

4. Although the Commission in its designation order found Minshall Broadcasting Co. qualified to construct, own and operate the proposed new television station, it is deemed significant at this juncture to relate something particular about this applicant and more especially about William E. Minshall who is president, a director and 100 percent stockholder of Minshall Broadcasting Co., Inc. He is a graduate of the University of Tulsa with a major in radio and television. He has had extensive experience in the industry. During his college career he served as an announcer for KWGS (FM), KOME, and KVOO, all in Tulsa. Following graduation from the University of Tulsa, after military service, he was employed for 13 years by radio station KRMG in Tulsa. As a matter of fact, he joined KRMG when it went on the air in 1949 and remained with that station until 1962. His employment there began as a salesman after which he was later promoted to sales manager and was involved in many management decisions concerning not only programing but the overall operation of the station. When he was at Tulsa he was active in civic affairs. In 1961 he, along with a partner, filed an application for a construction permit for a new radio station in Sapulpa, Okla. The Creek County Broadcasting Co. was organized after the merger with another applicant for the same frequency and William E. Minshall was named president. Creek County became permittee and licensee of KREK in Sapulpa, which went on the air in June 1962. Minshall designed and supervised construction of the offices and studios, purchased and supervised the installation of equipment and put the station on the air. Subsequently, Minshall disposed of his interests in Creek County and was appointed general manager of radio station WGGG in Gainesville, Fla. His residency was in Gainesville from sometime in 1962 until the latter part of 1964. For a short period in 1963 Minshall was with station WCPO in Cincinnati, as sales manager but returned to Florida in 1964. Since the filing of the instant application he has been in Gainesville about 18 times over a period of approximately 3 years and spent a total of 40 or more days in Gainesville during that period of time. When he was general manager of the Gainesville radio station he had virtually complete authority over program innovations and changes subject only to general policy.

5. With members of his family Minshall organized a corporation, the Indian River Television, Inc., which applied for a new UHF sta-

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tion in Fort Pierce, Fla. That corporation became the licensee of WTVX which went on the air in April 1966. It is a CBS affiliate and Minshall is general manager, chief executive officer, director and majority stockholder of the corporation. Fort Pierce has a population of approximately 40,000 persons and is located on the east coast of Florida.

6. In his capacity as chief officer of WTVX, Minshall has been responsible for the operation of the station and for the conception and execution of the locally produced programs carried by the station. WTVX competes via cable with larger televison stations in West Palm Beach and Miami, Fla. William E. Minshall contends that WTVX locally produced programs must be competitive with the West Palm Beach and Miami stations in order to attract local cable viewers. While the question of programing is not an issue in this proceeding as it relates to Minshall Broadcasting Co., Inc., a section IV analysis of the WTVX promise versus performance record, based on the 1967 composite week, reflects the following:

WTVX type analysis

	Proposed		Performance	
	Percent	Hours	Percent	Hours
(1) Entertainment	75.4	65:44	76.3	87:44
(2) Religious	2.5	2:10	2.6	2:58
(3) Agricultural	1.0	0:52	1.2	1:22
(4) Educational	3.5	3:03	2.9	3:19
(5) News	7.1	6:37	7.0	8:00
(6) Discussions (panel, forums, etc.)	2.0	1:44	2.6	2:58
(7) Talks (included here all conversation programs which do not fall under points (2), (3), (4), (5), or (6), above, including sports	8.5	7:24	7.4	8:28
Total	100.0	87:+	100.0	114:+

The WTVX 1967 composite week also analyzed according to the requirements of the new section IV–B television reporting form is as follows:

1967 composite week type and source analysis

Category	Hours	Minutes	Percent of total time on air
News	6	59	6.1
Public affairs	4	04	3.5
All other programs, exclusive of entertainment and sports	11	31	10.1

Source category

Time	Local	Network	Recorded
8 a.m. to 6 p.m.	0:30	51:16	10:58
6 p.m. to 11 p.m.	5:03	27:47	6:39
All other hours	2:24	2:11	10:09

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7. William E. Minshall has been active in civic affairs at Fort Pierce and if the instant Minshall Broadcasting application is granted, he will move to Gainesville with his family to supervise and participate personally in the construction of the new station. He will spend full time in the day-to-day operation of the proposed facility in Gainesville and estimates that in the beginning he will spend in excess of 48 hours per week at the new station. As to the affairs of the Fort Pierce station, Minshall expects to only exercise nominal supervision over its operation, but, as mentioned, will pursue the day-to-day duties at the new Gainesville station. Outside of the Fort Pierce station, Minshall apparently has no other broadcast interests. As to local ownership and management, a decided preference must be accorded Minshall Broadcasting Co., Inc.

The Section 1.65 Issue

8. The Review Board added the so-called 1.65 issue which actually relates to certain errors, discrepancies, and omissions in the original application of University City. On September 20, 1967, University City filed a petition for leave to amend its application and on September 28, 1967, the Broadcast Bureau filed its comments interposing no objection to a grant of the requested relief. By order released October 9, 1967 (67M–1672), the hearing examiner granted the petition for leave to amend the application of University City and accepted the tendered amendment. The result of this action rendered moot the section 1.65 issue. Notwithstanding the action of the hearing examiner in the order just referred to, there was evidence introduced in the proceeding which briefly sums up the fact that the errors, discrepancies, or omissions involved in the original application of University City were inadvertent and in some cases an oversight as this applicant did not have the advice of legal counsel in the preparation of its original application. Rather the applicant relied in part upon the services of an engineer and on possible information that it had acquired through its cable system operations. The conclusion is that there was no intention or effort on the part of University City and its principals to mislead or to furnish false information to the Commission.

University City Television Cable Co., Inc., Financial Issue

9. The financial issue directed to the University City application reads as follows:

> 1. To determine, with respect to the application of University City Television Cable Co., Inc.—
>
> (*a*) Whether Ralph Shepler, Harry H. Harkins, and C. W. Thornley have liquid and current assets (as defined in sec. III, par. 4(d), FCC form 301) in excess of current liabilities in sufficient amounts to meet their respective commitments to loan $70,000 each to the applicant.
>
> (*b*) Whether, in the light of the evidence adduced pursuant to the foregoing, University City Television Cable Co., Inc., is financially qualified.

The Review Board by an order released November 16, 1967 (FCC 67R–479), amended issue 1(a) to the extent that in addition to Messrs.

106–522—69——9

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Shepler, Harkins, and Thorniley it added another individual; namely, J. D. Cutlip.

10. The stockholders, officers, and directors of University City are Thorniley, Harkins, Shepler, Cutlip, and James L. Milliken. The financial qualifications of James L. Milliken are not at issue in this proceeding. Messrs. Thorniley, Harkins, Shepler, and Cutlip jointly own 96 percent of the stock of the corporation. There are 1,000 shares of stock issued and these four gentlemen together hold an aggregate of 960 shares with the remaining 40 shares being owned by Milliken.

11. The record demonstrates that the net worth as of December 31, 1967, of Cutlip was $1,862,973; Harkins $1,347,419; Shepler $1,296,513; and Thorniley $1,292,063. University City will require $273,562 to cover its construction and first-year operating cost without reliance upon revenue. To obtain this amount of financing University City by necessity will have to rely upon the availability of approximately $70,000 each from its four principal stockholders holding 96 percent of the stock outstanding. At the present time these four stockholders are jointly and severally liable on two loans from the Chase Manhattan Bank. These are coupled together in a single loan totaling $1,200,000. Of this amount $750,000 to University City is carried on the books of the corporation as a liability and is being paid off by the corporation. The December 31, 1967, balance sheet shows a long-term liability to Chase Manhattan Bank in the amount of $414,062.50. This loan is secured by the stock of University City and the stock of the several other cable companies owned by the individuals which is referred to in paragraph 30 of the "Findings of Fact." The liability of Messrs. Harkins, Shepler, Thorniley, and Cutlip on the $750,000 loan is in the form of additional guarantee of payment thereof. Respecting the loan of $450,000 it was made directly to the four individuals and is not carried on the books of any of the cable companies listed in paragraph 29 of the "Findings of Fact." This loan, as is the $750,000 loan, is secured by the stock of cable companies held by the four individuals or their interests therein, with the exception of the stock of the Waycross Cable Co., of Waycross, Ga. The Ohio Valley cable corporations, owned 100 percent by Messrs. Cutlip, Harkins, Shepler, and Thorniley, had to the date of the hearing made all of the payments on the $450,000 loan and as indicated by the December 31, 1967, balance sheets, the undistributed income of the Ohio Valley Cable Corp. of Ohio and the Ohio Cable Co. of West Virginia was $138,722.16.

12. Without reviewing in detail the finances of Messrs. Harkins, Shepler, Thorniley, and Cutlip, it is sufficient to say that the record is replete with evidence that these four gentlemen, individually and severally, could raise sufficient funds to meet the $70,000 loan commitments of each to this applicant. Three of the witnesses which did not include Cutlip, testified in detail as to how they would raise their commitments and in the case of Cutlip, the undisputed evidence is his net worth is $1,862,973 and he has no liabilities except an income tax liability in the approximate amount of $15,000, besides his liability on the Chase Manhattan Bank loans which have been heretofore discussed in detail. For instance, the Cutlip balance sheet as of December

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31, 1967, shows a savings account of over $85,000. The evidence is abundantly clear that University City has sustained the burden of proof in meeting the financial issue directed to it.

Management and Integration of Ownership

13. William E. Minshall is president, a director, and 100-percent stockholder of Minshall Broadcasting Co., Inc., which is seeking a construction permit for a new UHF station on channel 20 at Gainesville, Fla. If this application is granted, Minshall will move to Gainesville and serve on a full-time basis as president and general manager of the station and be completely responsible for the day-to-day operation of the station. He has had experience with both radio and television stations and, as indicated by the record, is at the present time general manager, chief executive director, and majority stockholder of the corporation which is the licensee of station WTVX in Fort Pierce, Fla. This station went on the air in 1966 and as part of his background, Minshall lived and operated a radio station (WGGG) in Gainesville from 1962 until late 1964 except for a short period of time in 1963 when he was sales manager of a radio station in Cincinnati.

14. The four principal stockholders, Messrs. Cutlip, Shepler, Thorniley, and Harkins of University City do not reside in Gainesville. The first three-named gentlemen live in West Virginia, while Harkins lives in Sarasota, Fla. Neither Cutlip, Shepler, nor Thorniley will participate in the day-to-day management of the University City station and Harkins' participation will be only to a limited degree. Cutlip, Shepler, Thorniley, and Harkins who own 96 percent of the stock of this corporation along with Milliken, who owns the remaining 4 percent, have had no experience in the operation, ownership, or management of either a radio or television station.

15. Milliken, who now resides in Gainesville and is the manager of the University City CATV systems in Gainesville, Fla., and Waycross, Ga., testified that if the University City application is granted he will employ as general manager an experienced television broadcaster who will be directly under Milliken's supervision. Milliken is president of University City. The general manager will serve under Milliken's direction but the record does not show how much time Milliken will devote to the University City television facility nor to the Gainesville, Fla., or Waycross, Ga., cable systems. Likewise, the record is silent as to the names or qualifications of any individuals that University City proposes as general manager of its proposed UHF station.

The Suburban Issue

16. The suburban issue was directed to University City in an order released February 28, 1968. The record is sketchy, incomplete, and conflicting as to the efforts, if any, generally made by University City to ascertain the community needs and interests of the area to be served and the means by which the applicant proposed to meet those needs. Milliken testified that Odes Robinson, an engineering consultant from Fort Lauderdale, actually prepared the original application.

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It appears from the evidence that Harkins discussed with Robinson primarily the legal and financial qualifications of University City stockholders. The other three stockholders, along with Harkins, who own 96 percent of the stock, did not participate in the preparation of the University City application and neither Cutlip, Shepler, nor Thorniley will participate in the day-to-day operation if the University City application is granted. Neither Cutlip, Shepler, Thorniley, Harkins, nor Milliken have had any experience in the operation, ownership, or management of a radio or television station. As to the original application Milliken, on direct examination, testified that he contacted only one individual outside of the stockholders; namely, Ed Turlington besides Odes Robinson of Fort Lauderdale relative to the proposed program schedule. The original application named only three individuals in Gainesville who indicated and expressed a desire to cooperate in bringing a local television station to Gainesville. The original application did reflect that certain undisclosed persons connected with the University of Florida and the city educational offices were contacted but the record does not identify any of these individuals. Likewise, the record is silent as to what the reactions to the University City proposal were of these unidentified persons. Sometime after filing its application, upon Commission request, University City solicited programs from nine individuals including representatives of the Chamber of Commerce, League of Women Voters, Women's Club of Florida, Student Government, and a city commissioner who also was director of the Vocational Department of the Sante Fe Junior College. These persons contacted included at least two individuals named in the original application and another person; namely, Ed Turlington, who is the individual that Milliken referred to as having talked to previously. However, it is pointedly obvious that this applicant did not set forth by amendment or otherwise any useful suggestions concerning programing needs that were received from the individuals that it contacted. Milliken's testimony as observed in the "Findings of Fact" is so hazy and inconclusive that it leads to the inescapable conclusion that this applicant has not sustained the burden of proof as to the suburban issue. Without being repetitious, it is sufficient to say that Milliken kept very few notes, if any, of contacts that he had made relative to the community needs and interests of the persons that he allegedly interviewed. What University City generally relies upon is that since it was operating a CATV system in Gainesville, Milliken became familiar with the needs of the community through his position with the CATV. Yet the record is void of any evidence suggesting programs which were proposed as a result of Milliken's familiarity with the cable system contacts. The applicant simply failed on this issue.

17. After the filing of the application Milliken prepared a survey form for customers containing program suggestions which were left on the counters of the office of the cable system and a second thing that was done after the filing of the application was that this applicant employed local college students to fill out forms by interviewing individuals on the streets but the evidence does not reflect that University City or its stockholders checked the responses of these surveys

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and molded any program schedule or changed any program schedule as a result of the survey conducted by college students or the completed forms left on the counters of the cable system.

18. The real fallacy, however, of its programing was University City exhibit C, which was received at the evidentiary hearing on March 21, 1968. This is the program schedule that University City proposes to follow if the application is granted. This exhibit, without any backup whatsoever, was prepared on the night of March 20, 1968, the day before the exhibit was offered in evidence. The evening portion of University City exhibit C was that it contained the forthcoming ABC network season schedule, as well as listing network programing in the morning schedule of exhibit C. There is nothing in the record to indicate that University City or its principals had any commitment, contract, or negotiations with any network respecting network programing. Exhibit C is at sharp variance with the original program schedule in the application. The program schedule in the original application was amended and that does not conform in the slightest degree with exhibit C. The fallacy of the program planning by University City can easily be determined by Milliken's testimony which is:

> Q. One other item. At no time prior to the filing of this application was there a schedule prepared of the type reflected in exhibit C, with program titles and descriptions for each proposed hour of operation?
> A. No, sir.

Actually at the hearing on March 21, 1968, Milliken further testified:

> We didn't have the morning network shows, so we didn't know what to put down. *We got this other from ABC yesterday or day before yesterday, as the case may be.* (Emphasis supplied.)

19. And then further compounding the weakness in the programing proposal, when Milliken was asked whether he had presented exhibit C to anyone for consideration, his answer was "No, no." Finally, when asked if he had any notes that would reflect the preparation of exhibit C, his answer was "I'm sorry, I don't." The inescapable conclusion is that University City has not met the burden of proof as it relates to the suburban issue because it has failed to demonstrate that its programing proposal (exhibit C) would satisfy the needs and interests of the community. Its showing with respect to its contacts with citizens of the community is so sketchy, remote, and vague that very little, if any, reliance can be placed thereon.

20. There is one matter that is not clear from the record and that is the option heretofore referred to in which it is alleged that Milliken has an option to purchase 240 shares in the University City corporation. In the first place, Milliken's financial qualifications are not at issue in this proceeding, and second, from whom he is to buy the 240 shares, and lastly how he arranges to finance them is not shown in the record. His option to acquire these additional shares, which option was exercised on January 15, 1964, expires on January 15, 1972.

21. It is to be observed that the Commission in its order of designation (FCC 67–853) released August 1, 1967, provided that in the event of a grant of the application of Minshall Broadcasting this applicant's request pursuant to section 73.613(b) of the Commission's rules to

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locate its main studios outside the corporate limits of Gainesville, Fla., shall be granted.

22. In view of the foregoing "Findings of Fact" and "Conclusions of Law" and upon consideration of the entire record in this proceeding, it is concluded that a grant of the application of Minshall Broadcasting Co., Inc., Gainesville, Fla., would serve the public interest, convenience, and necessity.

Accordingly, *It is ordered*, That unless an appeal to the Commission from this initial decision is taken by any of the parties or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.276 of the rules, the application of Minshall Broadcasting Co., Inc., for a construction permit for a new UHF station on channel 20 in Gainesville, Fla., *Is granted* and the application of University City Television Cable Co., Inc., for the same facilities at Gainesville, Fla., *Is denied.*

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FCC 69R-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of NORRISTOWN BROADCASTING CO., INC. (WNAR), NORRISTOWN, PA. For Construction Permit	Docket No. 14952 File No. BP-12902

MEMORANDUM OPINION AND ORDER

(Adopted January 14, 1969)

BY THE REVIEW BOARD:

1. Norristown Broadcasting Co., Inc. (Norristown), requests leave to amend its application and substitute WNAR, Inc., as the applicant in place of Norristown.[1]

2. This proceeding involves the application of Norristown for authority to make proposed changes in the facilities of station WNAR at Norristown, Pa. The application was designated for hearing by memorandum opinion and order, FCC 67-186, 6 FCC 2d 718, under areas and populations, and section 307(b) suburban community issues. On May 13, 1968, after hearing and close of the record, an initial decision (FCC 68D-35) was released proposing to grant the application.[2] On November 19, 1968, the Commission approved the assignment of the license of station WNAR from Norristown to WNAR, Inc., and the assignment was consummated on December 2, 1968. The sole purpose of the proposed amendment is to substitute the new owner of station WNAR as the applicant in this proceeding.

3. The petition for leave to amend and substitute parties was not accompanied by a showing as to WNAR, Inc.'s financial qualifications and its proposed programing, although petitioner states that it is in the process of preparing an amendment to reflect these matters. The Review Board therefore cannot evaluate the merits of the petition for leave to amend, and we will afford the applicant 15 days additional time from the release date of this memorandum opinion and order in which to supply information as to WNAR, Inc.'s financial qualifications and proposed programing. Opposition and reply pleadings may be filed within the period specified by rule 1.294(b). Cf. *Northland Broadcasting Corp.* (*KWEB*), FCC 64R-488, 3 R.R. 2d 793.

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[1] The petition for leave to amend and substitute parties was filed on Dec. 26, 1968. No responsive pleadings have been filed.

[2] By order, FCC 68R-520, released Dec. 17, 1968, the Review Board ordered that exceptions to the initial decision shall be filed on or before Jan. 16, 1968.

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4. Accordingly, *It is ordered*, That action on the petition for leave to amend, filed December 26, 1968, by Norristown Broadcasting Co., Inc., *Is held in abeyance* for 15 days from the release date of this document pending the receipt of additional pleadings.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH AMERICAN BROADCASTING CO., INC., BOYNTON BEACH, FLA.	Docket No. 18310 File No. BP-17843
RADIO BOYNTON BEACH, INC., BOYNTON BEACH, FLA.	Docket No. 18311 File No. BP-17999
BOYNTON BEACH COMMUNITY SERVICES, INC., BOYNTON BEACH, FLA.	Docket No. 18312 File No. BP-18000
J. STEWART BRINSFIELD, Sr., J. STEWART BRINSFIELD, Jr., J. LUTHER CARROLL, AND MAX R. CARROLL, DOING BUSINESS AS RADIO VOICE OF NAPLES, NAPLES, FLA.	Docket No. 18313 File No. BP-17991
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1969)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the mutually exclusive applications of North American Broadcasting Co., Inc. (North American), Radio Boynton Beach, Inc. (Radio Boynton), and Boynton Beach Community Services, Inc. (Community), each requesting an authorization to construct a standard broadcast station at Boynton Beach, Fla.; and the mutually exclusive application of J. Stewart Brinsfield, Sr., J. Stewart Brinsfield, Jr., J. Luther Carroll, and Max R. Carroll, doing business as Radio Voice of Naples (Naples), seeking a construction permit for a new standard broadcast station at Naples, Fla. By memorandum opinion and order, FCC 68-904, released September 11, 1968, these applications were designated for consolidated hearing on various issues, including section 307(b) and contingent comparative issues. Presently before the Review Board is a petition to enlarge issues, filed October 2, 1968, by Naples which seeks the addition of a character qualifications issue against Community; financial qualification issues against North American; a legal qualifications issue against Radio Boynton; and suburban community issues against each of the Boynton Beach applicants.[1]

The Suburban Community Issues

2. In support of the addition of suburban community issues against each of the Boynton Beach applicants, Naples alleges that each of

[1] Also under Board consideration are: (*a*) Opposition, filed Oct. 15, 1968, by North American; (*b*) opposition, filed Oct. 16, 1968, by Radio Boynton; (*c*) opposition, filed Oct. 16, 1968, by Community; (*d*) comments, filed Oct. 16, 1968, by the Broadcast Bureau; and (*e*) supplement to opposition, filed Oct. 23, 1968, by Radio Boynton. A search of Commission files fails to disclose a reply pleading filed by Naples.

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these applicants propose sites within the geographic boundaries of Palm Beach County, Fla.; that, according to an engineering affidavit submitted with the petition, their 5-mv/m contours penetrate the corporate limits of West Palm Beach, Fla.; and that populations of Boynton Beach and West Palm Beach are 10,467 and 56,208, respectively. Petitioner contends that this showing warrants the addition of the requested issues under the suburban community policy statement.[2] In opposition, the Boynton Beach applicants argue that the facilities requested are essentially the same as those previously occupied by station WZZZ, Boynton Beach;[3] that their applications were accepted by the Commission for expedited consideration in an effort to restore the deleted service at Boynton Beach; and that the Commission, having reviewed the respective engineering proposals, recognized that the new station could not conform to current Commission rules and therefore waived the provisions of rules 1.571(c) and 73.37(a),[4] and did not specify suburban community issues against any of the applicants in the instant designation order.

3. The Broadcast Bureau, in opposing the addition of the requested suburban community issues, submits that petitioner has used theoretical, figure M–3 calculations in its engineering exhibit. The Bureau contends that a review of the license file of deleted station WZZZ reveals (*a*) that the field intensity measurement taken on that station in a direction of 10° true places its 5 mv/m at a distance of 3.7 miles north of the transmitter site; and (*b*) that West Palm Beach, Fla., is located 7.9 miles north of the transmitter site of station WZZZ. Accordingly, the Bureau avers that the 5-mv/m contour of station WZZZ fell 4.2 miles short of West Palm Beach; and inasmuch as the three Boynton Beach applications specify antenna and site proposals substantially similar to those of former station WZZZ, the Bureau argues that the 5-mv/m contours of the three proposals will also fail to penetrate the boundaries of West Palm Beach. The Bureau's allegations and supporting measurement data, which are uncontested, have been reviewed by the Board and found to be substantially accurate. Since the Bureau's determinations are based on actual measured performance which takes precedence over theoretical determinations, we find that the 5-mv/m contours of the Boynton Beach applicants will not penetrate West Palm Beach, and petitioner's allegations must be deemed inadequate to support the addition of these issues.

The Character Qualifications Issue

4. Naples requests issues to determine: (*a*) Whether Community and its president, Joseph De Marco, have made misrepresentations to the

[2] Policy statement on sec. 307(b) *Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 R.R. 2d 1908. Therein, the Commission called for an examination to determine "whether the applicant's proposed 5-mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community." If such circumstances exist, a presumption arises that the applicant realistically proposes to serve the larger community.

[3] Station WZZZ had been silent since September 1965. On May 4, 1967, the Commission returned its renewal application; reconsideration of this action was subsequently denied.

[4] Opponents cite public notice, FCC 67–1176, released Oct. 27, 1967, wherein the Commission waived rules 73.37 and 1.571(c) to permit acceptance and expeditious consideration of applications to reestablish to deleted station WZZZ service.

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Commission regarding a May 1965 judgment obtained against Joseph De Marco by one Josephine Sperry; (*b*) whether Joseph De Marco's failure to file a personal balance sheet was done with intent to conceal certain assets or liabilities which might reflect upon the character or financial qualifications of Community; and (*c*) in light of the evidence adduced under (*a*) and (*b*), whether this applicant has the requisite qualifications to be a Commission licensee. Petitioner avers that, contrary to Community's representation in its application that the judgment obtained by Sperry in May 1965 was "satisfied and settled in full on November 24, 1967," an affidavit from a clerk of the circuit court in Palm Beach County indicates that, as of September 25, 1968, the judgment remained unsatisfied.[5] Petitioner also notes that Joseph De Marco failed to file a personal balance sheet and instead submitted a balance sheet of the De Marco Tractor & Implement Co. Naples argues that by this act of omission, "it is apparent that the applicant is attempting to conceal his personal financial standing—and perhaps—to conceal other outstanding judgments against him."

5. Attached to Community's opposition is an executed "satisfaction of judgment" in which Josephine T. Sperry acknowledges full payment and satisfaction of the Joseph De Marco judgment. The satisfaction is dated July 19, 1965. Community explains that, due to an error not of De Marco's making, the satisfaction was recorded in the official record book but not in the judgment book. It nonetheless appears that the judgment was satisfied less than 2 months after final judgment in that proceeding, and almost 2½ years prior to the filing of the instant application. Under these circumstances, no further inquiry will be required. Furthermore, Community submits that Joseph De Marco is the sole proprietor of the De Marco Tractor & Implement Co., and although the balance sheet submitted by Joseph De Marco is headed "Dealer's Financial Statement," it is a personal financial statement of the subject principal. The Board is satisfied by these representations. On the basis of these representations, the Board further believes that the allegation that perhaps other outstanding judgments have been concealed by the filing of the financial statement in this form is entirely speculative and conjectural. The request for issues against Community will be denied.

The Financial Issue

6. Petitioner avers that North American proposes to finance its construction and operation with a $60,000 bank loan and three $5,000 stock subscriptions. Naples argues that the commitment letter from the Commerce Union Bank of Nashville, Tenn., does not contain the terms of repayment of the $60,000 loan, and fails to state the security required. Petitioner questions the ability of the applicant to satisfy any collateral demands of the bank and requests issues to determine whether such collateral will be required, and the terms of repayment

[5] Petitioner also argues that if, in fact, the judgment was satisfied on Nov. 24, 1967, such satisfaction came only 6 days before the filing of the instant application; and a question as to De Marco's character is thereby raised by his "deliberately flaunting the order of the Court by refusing to pay until faced with the necessity of filing his application requiring a disclosure of the judgment." An issue broad enough to permit an investigation as to all judgments cited in the Community application is requested.

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of the loan. In addition, Naples submits that the balance sheet of Richard D. Huneycutt (one of the three stock subscribers) shows liquid assets of only $510.10 and a note payable to GMAC of $1,246.50. An issue to determine the amount of liquid assets available to this applicant is requested. In opposition, North American argues that Noel Ball, a stock subscriber, and not the Commerce Union Bank, has agreed to lend the corporation $60,000, as needed. According to North American, the bank has agreed to lend Ball $60,000. It is the applicant's contention that Ball is financially qualified to lend $60,000 to the corporation "whether he borrows the money from the Commerce Union Bank or not." Furthermore, North American avers that Richard Huneycutt's ability to fulfill his $5,000 stock commitment is immaterial to a determination of whether North American is financially qualified. Thus, the applicant argues that the corporation would be financially qualified even without the Huneycutt contribution and therefore a financial qualifications issue should not be added. The Broadcast Bureau supports the addition of an issue regarding the bank loan. According to the Bureau, a resolution of this issue will determine the applicant's financial qualifications, and an issue as to Huneycutt's ability to meet his stock commitment is therefore unnecessary.

7. North American's revised financial plan [6] reflects that it will require a minimum of $41,472 to construct and operate its station for 1 year,[7] and that such sums will be met by $15,000 in stock subscriptions and a $60,000 loan from Noel Ball. Although North American contends that Ball's loan commitment can be effectuated without reliance on the bank loan, a review of Ball's personal balance sheet does not reveal readily identifiable liquid assets in an amount sufficient to meet his stock and loan commitments to the applicant. While Ball reports approximately $8,000 in cash on hand, the liquidity of his remaining assets has not been demonstrated and the various property valuations have not been substantiated. Thus, it appears that Ball will be required to rely on the bank loan in order to meet his corporate obligations. However, contrary to the position of the petitioner and the Bureau, the July 17, 1967, letter from the Commerce Union Bank does represent a satisfactory commitment to lend the funds required. The letter clearly indicates the bank's willingness to extend a $60,000 loan to Ball and specifies that the bank is "holding for [Ball's] account collateral far in excess of what would be needed to extend this credit." Finally, it should be noted that the repayment obligation on the loan will be on Ball personally, rather than on the corporate applicant.[8] Under these circumstances, reasonable assurance of the availability of the loan has been established.

8. Having determined that no substantial question has been raised regarding the availability of the $60,000 bank loan, it is unnecessary to resolve the problem of whether Richard D. Huneycutt has sufficient

[6] An amendment to the North American application specifying changes in its financial proposal was filed prior to designation on May 21, 1968.

[7] In sec. III of the revised application, North American indicates that $3,000 will be required to acquire land and it is unclear whether this amount is included with the total expenses indicated above.

[8] However, even in circumstances where an applicant itself was the debtor, the absence of specific terms of repayment did not preclude a finding that the loan would be available. *Athens Broadcasting Company, Inc.*, FCC 67R-489, 10 FCC 2d 697.

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liquid assets to meet his $5,000 stock commitment to the applicant. As noted above, North American will require approximately $41,472 to construct and operate its station for one year; the applicant has demonstrated the availability of over $70,000 (bank loan of $60,000 and two $5,000 stock commitments), with which to meet these expenses. North American would therefore appear to be financially qualified, even without the Huneycutt contribution. An issue with respect to the matter is unjustified.

The Legal Qualifications Issue

9. Naples requests an issue to determine whether Radio Boynton is legally qualified to be a Commission licensee in light of the laws of the State of Florida which provide that the president of a corporation may not be the secretary of that corporation. Petitioner submits that, in contravention of section 608.40 of the Florida Statutes Annotated,[9] Radio Boynton's president, Ed H. Bunce, is also the secretary of the applicant. Naples contends that this violation could cause every act of the corporation to be void. In opposition, Radio Boynton has submitted a letter from Florida counsel which states that no cases have been found in which corporate acts were deemed void or voidable in the circumstances described by petitioner; and the law which requires that the secretary and president not be the same person is merely to insure that the secretary can attest to the signature of the president. Radio Boynton also points out that a petition for leave to amend has been filed which seeks authority to change its application to reflect the resignation of Ed H. Bunce as secretary, and the election of Mrs. Ed H. Bunce to that position.

10. On December 3, 1968, the examiner granted Radio Boynton's petition for leave to amend and accepted an amendment specifying the change in the corporate officers noted above. (FCC 68M–1607, released Dec. 3, 1968.) This action would seemingly moot any question concerning the prospective corporate activity of Radio Boynton. With regard to the status of any previous corporate action, the Commission has traditionally declined to interfere in questions of alleged State law violations where no challenge has been made in the State courts and the determination is one that is more appropriately a matter of State resolution. *Farragut Television Corporation*, FCC 65R–309, 6 R.R. 2d 219. No such challenge has been made in the instant case; petitioner has failed to demonstrate that the subject statute has been previously interpreted; and, having failed to file reply comments, Naples has not shown that the new corporate structure would, in any way, adversely affect Radio Boynton's qualifications to be a responsible licensee. The issue will therefore not be added.

11. Accordingly, *It is ordered*, That the petition to enlarge issues, filed October 2, 1968, by Radio Voice of Naples, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[9] Petitioner states that sec. 608.40 reads in part:
"Every corporation shall have a president, who shall be a director, a secretary, and a treasurer * * *. Any person may hold two or more offices, except that the president may not also be the secretary or assistant secretary."

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FCC 6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH AMERICAN BROADCASTING CO., INC., BOYNTON BEACH, FLA.	Docket No. 18 File No. BP-1
RADIO BOYNTON BEACH, INC., BOYNTON BEACH, FLA.	Docket No. 18 File No. BP-1
BOYNTON BEACH COMMUNITY SERVICES, INC., BOYNTON BEACH, FLA.	Docket No. 18 File No. BP-1
J. STEWART BRINSFIELD, SR., J. STEWART BRINSFIELD, JR., J. LUTHER CARROLL, AND MAX R. CARROLL, DOING BUSINESS AS RADIO VOICE OF NAPLES, NAPLES, FLA.	Docket No. 183 File No. BP-17991
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1969)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the above-captioned, mutually exclusive Boynton Beach applications, each requesting an authorization to construct a new standard broadcast station utilizing the deleted facilities (1510 kHz, 1 kw, Day) of former station WZZZ at Boynton Beach, Fla.; and the mutually exclusive application of J. Stewart Brinsfield, Sr., J. Stewart Brinsfield, Jr., J. Luther Carroll and Max R. Carroll, doing business as Radio Voice of Naples (Voice)[1] seeking a construction permit for a new standard broadcast station at Naples, Fla. By memorandum opinion and order, FCC 68-904, released September 11, 1968, these applications were designated for consolidated hearing on various issues, including areas and populations, financial, suburban, transmitter site and air hazard issues against Voice, and section 307(b) and contingent standard comparative issues. Presently before the Review Board is a motion to enlarge issues, filed October 2, 1968, by Radio Naples, Inc. (Naples),[2] which seeks the addition of rule 1.526.

[1] The Voice application was originally tendered on Dec. 4, 1967 (which was the cutoff date for the Boynton Beach applications), but was returned as not acceptable because of the prohibited overlap which would result from a grant of its proposal. The application was resubmitted on Feb. 1, 1968, with appropriate engineering modification and, in the designation order of this proceeding, was accepted for filing nunc pro tunc the original tender date.

[2] Naples, licensee of station WNOG, and FM station WNFM, Naples, Fla., was made a party to this proceeding by the examiner. Memorandum opinion and order, FCC 68M-1484 released Nov. 5, 1968.

[3] Rule 1.526 requires, in part, that—

"Every applicant for a construction permit for a new station in the broadcast service shall maintain for public inspection a file for such station containing * * * (1) a copy of every application tendered for filing by the applicant for such station. * * * (d) The file shall be maintained at the main studio of the station, or at any accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed, and shall be available for public inspection at any time during regular business hours."

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rule 1.65, lack of candor, ineptness, trafficking, site availability, and suitability issues and an additional financial inquiry, against Voice.[4]

The Rule 1.526 Issue

2. Petitioner contends that, in contravention of rule 1.526, Voice has failed to make its application available for local public inspection. Affidavits submitted with the petition state that the alleged depository, 305 Wedge Drive, Naples, Fla., is the private residence of one Orion L. Parker, Jr.; that subsequent to the designation of this proceeding for hearing, three unsuccessful attempts were made to inspect the application at said residence; and that said residence appears to have been unoccupied for the summer. In response, Voice argues that rule 1.526 (a) applies only to pending applications and that its application was not accepted for filing by the Commission prior to designation. In any event, Voice contends, subsequent to designation, its application has at all times been on file at 305 Webb Drive, Naples, Fla.; that the brief lapse in the time when the file was unavailable "occurred solely because the owner of the residence was on vacation"; that a new filing location has since been selected; and that petitioner was not prejudiced by its failure to see the file as evidenced by its ability to prepare the instant petition.

3. As noted by the Broadcast Bureau in its argument in support of the requested issue,[5] there is an inconsistency between the address specified as the filing location (305 Webb Drive),[6] and the residence visited by petitioner's affiant (305 Wedge Drive). While petitioner's allegations would therefore ordinarily be rendered inadequate, Voice concedes in its opposition that its actual file location was unoccupied for at least a portion of the critical period after its application had been accepted for filing.[7] A substantial question is therefore raised, and an appropriate issue will be specified to determine whether Voice's application was, in fact, available for public inspection as required by rule 1.526. Neither the allegation that a new filing site has been selected nor that petitioner has not been prejudiced obviates the need for the specified inquiry.

Brinsfield Broadcast Interests

4. A clear understanding of the Board's disposition of the requested 1.65, lack of candor, ineptness, and trafficking issues, will be facilitated by a brief review of the broadcast activities of J. Stewart Brinsfield, Sr., and Jr., as described by Naples in its petition.[8]

Catonsville, Md.—Christian Broadcasting Co. (of which the Brinsfields are principals) received a construction permit for

[4] Also before the Review Board are: (*a*) Opposition, filed Nov. 21, 1968, by Voice; (*b*) comments, filed Nov. 22, 1968, by the Broadcast Bureau; (*c*) reply to opposition, filed Oct. 31, 1968, by Naples; and (*d*) reply to comments, filed Dec. 2, 1968, by Naples.

[5] The Broadcast Bureau supports the addition of a rule 1.526 issue and opposes the remaining requests in their entirety. Concluding par. 19 of the Bureau's pleading is not in accord with the remainder of the pleading and has been disregarded.

[6] In the public notice submitted with Voice's affidavit of publication (filed Oct. 10, 1968), 305 Webb Dr., Naples, Fla., is designated as the file location.

[7] With respect to Voice's argument that rule 1.526 applies only to "pending" applications, see footnote 11, infra.

[8] The data submitted by petitioner was allegedly obtained from Commission files and its substantial accuracy has not been challenged by Voice.

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WCBC–FM on January 10, 1962, and program test authorization was granted on November 15, 1963. On December 19, 1967, a contract for sale of this station to Key Broadcasting Corp. was signed, and consent to the assignment was granted by the Commission on March 1, 1968. On February 15, 1965, the application of Catonsville Broadcasting Co. (owned by the Brinsfields) for a standard broadcast station in Catonsville was designated for hearing. Said application was ultimately dismissed for failure to prosecute on January 1, 1967.

Beckley, W. Va.—A construction permit was granted on July 13, 1966, to Christian Broadcasting Corp. (in which the Brinsfields have a 45-percent interest) for a standard broadcast station and a license ultimately issued on January 1, 1967.

Herndon, Va.—Christian Broadcasting Corp. has acquired 100 percent ownership of Three Towers, Inc., licensee of station WHRN. The assignment of license was granted by the Commission on August 31, 1967.

Oil City and Corry, Pa.—Assignment of the licenses of stations WKRZ and WDJR, Oil City, Pa., and WOTR, Corry, Pa., to J. Stewart Brinsfield, Sr., and J. Stewart Brinsfield, Jr., doing business as Brinsfield Broadcasting Co., were conditionally granted by the Commission on July 26, 1968. By letter dated September 17, 1968, counsel for Brinsfield Broadcasting Co. advised the Commission that the assignors of these stations had refused to consummate the transfers, and that it was the intention of the Brinsfields to file mutually exclusive applications for these facilities while their renewal applications are pending.

Raytown, Mo.—On June 3, 1968, Brinsfield Broadcasting Co. filed an application for a construction permit for a new FM broadcast station at Raytown, which application is still pending.

La Plata, Md.—On September 16, 1968, an application was filed with the Commission for assignment of station WSMD–FM to B&M Broadcasters (in which the Brinsfields are principals). The agreement to purchase WSMD–FM is dated June 27, 1968, and is conditioned on Commission approval of a change in location of the station. An application for a construction permit to change and move the facility was accepted for filing on September 26, 1968.

Peoria, Ill.—On October 29, 1968, an application was tendered by the Brinsfields for an FM broadcast station in Peoria.

The Rule 1.65 and Misrepresentation Issues

5. Naples submits that despite Voice's obligation to insure that its application is substantially accurate and complete, the Voice application continues to reflect a Brinsfield interest in WCBC–FM, Catonsville, Md., and in a pending application for a new Catonsville standard broadcast station, although, as indicated above, the license of WCBC–FM has been transferred and its standard broadcast station application has been dismissed. In addition, Naples notes that the Voice application fails to mention the Brinsfield activities in Oil City and Corry, Pa.; Raytown, Mo.; or La Plata, Md. Petitioner argues that a disclosure of all of the Brinsfield interests is critical to a resolu-

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tion of the financial qualifications issue designated against Voice. In opposition, Voice argues that rule 1.65 only applies to pending applications; that its subject application was not pending until it was accepted for filing by the Commission's designation order of September 11, 1968;[9] and that supplemental information concerning Brinsfield interests was timely filed on October 7, 1968.[10]

6. Substantial questions have been raised as to Voice's compliance with rule 1.65 and the accuracy of the representations contained in the Voice application. Thus, the resubmitted application, filed by Voice on February 1, 1968, fails to indicate that on December 20, 1967, an application was filed with the Commission requesting approval of an assignment of its Catonsville FM station. In addition, although consent to such assignment was granted by the Commission on March 1, 1968, an amendment reflecting the transfer was not filed until October 7, 1968.[11] Furthermore, the application states that Catonsville Broadcasting Co. (in which the Brinsfields are directors, officers, and stockholders) is an applicant for a new standard broadcast station at Catonsville, although that application was dismissed for failure to prosecute 1 month prior to the refiling of the instant application. Finally, as noted above, current information concerning Brinsfield ventures in Oil City and Corry, Pa., Raytown, Mo., and La Plata, Md., was not furnished for more than 7 months after the Voice application had been resubmitted. For these reasons both rule 1.65 and nondisclosure issues will be specified against this applicant.

Fitness To Be Licensee

7. Petitioner seeks an issue to determine the fitness of Voice to be a licensee or, in the alternative, an issue to determine whether this applicant is so inept and careless that it should not be entrusted with a license. In support of these requests, petitioner avers that (*a*) a rule 1.65 issue has previously been sought against Catonsville Broadcasting Co. (in which the Brinsfields are principals) in the *Lebanon Valley Radio* proceeding; (*b*) petitions for approval of agreement filed by Catonsville Broadcasting Co. were twice denied by the Board primarily because of a failure to comply with the 5-day requirement of section 1.525(a) of the Commission's rules; (*c*) in October 1966, Christian Broadcasting Co. (in which the Brinsfields are principals), was ordered to forfeit $250 for various rule violations; and (*d*) contrary to

[9] Voice notes that rule 1.65 states that:
"For the purposes of this section [rule 1.65], an application is pending before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."

[10] Current information regarding Brinsfield interests in facilities located in Catonsville, Md.; Herndon, Va.; Beckley, W. Va.; Oil City and Corry, Pa.; Raytown, Mo.; and La Plata, Md., is contained in an amendment informally tendered to the examiner on Oct. 7, 1968, and formally filed Oct. 21, 1968. On Nov. 14, 1968, an additional amendment was filed indicating that applications have been filed by Brinsfield Broadcasting Co. for new standard broadcast stations in Corry and Oil City, Pa., and for a new FM broadcast station in Peoria, Ill. Both amendments have been accepted by the examiner.

[11] In the Board's view, Voice may not successfully argue that rule 1.65 was not applicable prior to Sept. 11, 1968 (the date of the instant designation order), having previously contended in its petition for reconsideration, filed Feb. 1, 1968, that its application was "both complete and meritorious as originally filed" and should therefore be accepted nunc pro tunc as of the original date. The Commission's subsequent grant of the requested relief and nunc pro tunc acceptance of the application conferred upon this applicant various rights and responsibilities as of the original filing date; including a continuing responsibility to maintain the accuracy of its application pursuant to rule 1.65.

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the representations made by the applicant in the instant application. the station ownership file for station WCIR, Beckley, W. Va., reveals that the Brinsfields hold subscribed but not issued stock in that corporate licensee. Petitioner argues that this conduct, considered together with that described in support of the other requested issues. warrants the addition of the fitness issues.

8. Initially, it should be recognized that the petition which sought the addition of a rule 1.65 issue against Catonsville Broadcasting Co. in the *Lebanon Valley Radio* proceeding was dismissed by the Review Board (*Lebanon Valley Radio*, 9 FCC 2d 762, 11 R.R. 2d 64 (1967)), and the merits of the allegations in that petition were never considered. As such, that petition can have no bearing on the disposition of the instant request.[12] With respect to the status of the stock held by the Brinsfields in station WCIR, Beckley, W. Va., it appears that the representations of ownership contained in the Voice application are consistent with the Brinsfields' actual stock interest in that company; and a corrected ownership report has been filed for station WCIR reflecting such interest. Petitioner's remaining allegations. viewed jointly or severally, are not sufficient to warrant the addition of either disqualifying fitness or ineptness issues against Voice. The violations cited by petitioner are not, of themselves, so serious as to warrant the disqualification of this applicant and fail to evidence a pattern of misconduct which would warrant such a result.[13] These issues will therefore not be added.

Trafficking

9. Contrary to petitioner's contention, the above-described broadcast activity of the Brinsfields' fails to justify the addition of a trafficking issue against this applicant. "Trafficking in broadcast operations occurs when a licensee (or its principals) acquires and/or operates a station for the primary purpose of selling or otherwise disposing of it for profit rather than for the primary purpose of serving the public interest * * *." *Harriman Broadcasting Company (WXXL)*, FCC 67-925, 9 FCC 2d 731. While, as petitioner notes, "the Brinsfields have engaged in numerous transactions in broadcast authorizations," such activity alone does not constitute proscribed conduct. Thus, petitioner has not alleged that the Brinsfields have concealed their intentions to request the relocation of the La Plata station. Cf. *J. W. Furr (WMBC)*, 10 FCC 2d 354, 11 R.R. 2d 407 (1967). Nor is there any indication that the Brinsfields have or had any improper speculative intent with regard to any of its station licenses or applications. Cf. *Edina Corp.*, 4 FCC 2d 36, 7 R.R. 2d 767 (1966).[14] A trafficking issue is therefore not justified.

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[12] Naples does not profess to have personal knowledge of the facts alleged in support of the earlier petition, and does not adopt the allegations contained therein in the instant motion.

[13] However, with respect to the forfeiture ordered in *Christian Broadcasting Company*, FCC 66-938, 5 FCC 2d 352, adopted Oct. 20, 1966, if petitioner is able to make a prima facie showing that this violation is indicative of an usually poor Brinsfield broadcast record, these violations may be considered under the contingent comparative issue previously specified. Such a showing, however, must be presented initially to the examiner.

[14] As noted by Voice, station WCBC is the only broadcast station or broadcast interest which has ever been sold or otherwise disposed of by the Brinsfields, and such sale occurred only after the station had been operated for more than 4 years.

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Financial Issue

10. Naples requests that the financial issue specified against Voice be modified and expanded to include an inquiry into the basis used by Naples in estimating its allocation for other costs. Petitioner submits that Naples' original application estimated an amount of $2,500 for other costs which included fees, furnishing and fixtures, miscellaneous, and contingencies; and although Voice's refiled application contains a new engineering showing for a newly designed directional radiation pattern, no change in the estimate for other costs has been offered. Petitioner argues that Voice's estimate thus fails to reflect the double engineering and additional legal expenses which will be incurred by this applicant due to the revision of its engineering proposal and the forthcoming comparative hearing. In opposition, Voice argues that professional fees are not a normal part of the cost of construction of a radio station. The applicant alleges that its principals are all employed and can be expected to continue to pay these fees out of their income, without reliance on capital assets.

11. Contrary to Voice's contention, sums expended for professional, legal, and engineering fees have traditionally been included within an applicant's construction cost estimates. Thus, section III, paragraph 1(a), indicates that "costs of items such as professional fees * * * should be included under 'Other Items' below." While Voice's application does indicate that its fees are included within other costs, its instant opposition suggests that such fees are not included within its estimated costs and are satisfied, on a continuing basis, by the personal assets of its principals. Inasmuch as an issue has already been specified against this applicant to determine whether its principals will have the necessary net available current liquid assets to meet their respective commitments, and in light of the ambiguity in the applicant's provision for fees discussed above, an additional financial issue will be specified.

Site Availability and Sufficiency Issues

12. Arguing in favor of the addition of these issues, Naples submits the affidavit of its president, who states that the owner of the site told him that Voice has no binding contract or agreement to purchase the land specified as its proposed site. In addition, petitioner avers that the available property, which was originally 660 feet wide, has a present width of only 340 feet available for use, due to a sale of a portion of the property and the existence of a high power line on the site. In opposition, Voice indicates that it has filed a petition for leave to amend to change slightly the configuration of its ground system so that the directional antenna system can be accommodated on the portion of the site which is available. Subsequent to the filing and acceptance of said amendment (memorandum opinion and order, FCC 68M–1491, released November 5, 1968), Naples filed a reply in which it argues that Voice has not shown that the property will be available at the conclusion of this proceeding [15] or that the proximity of the powerline will permit the proposed operation.[16]

[15] In an affidavit attached to the reply, Naples' president states that on or about Oct. 10, 1968, a principal of Voice secured a 90-day option on the land specified in its revised application.

[16] The latter allegation lacks the specific allegations of fact required by sec. 1.229(c) of the rules.

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13. Petitioner's allegations are insufficient. The revised engineering data submitted by Voice contemplates an available site with a width of approximately 338 feet. Even according to petitioner's computations, such an area is still available for purchase. Thus, Naples indicates that of the original 660 feet available, approximately 212 feet have been sold and 110 feet are occupied by a high tension line. According to petitioner's calculations then, "a width of 339 feet remains available for use;" and it therefore appears that applicant's site, as amended, is available and is dimensionally suitable to accommodate the directional antenna system. In addition, the Commission has repeatedly held that absolute assurance of site availability is not required but only that there be a showing of reasonable assurance of site availability made in good faith. *Lorenzo W. Milam & Jeremy D. Lansman*, 4 FCC 2d 610, 7 R.R. 2d 765 (1966). Petitioner's affidavits of October 23 and October 2, 1968, indicate respectively that the principals of Voice have secured a 90-day option on the specified property and that the land is "now available for sale to any prospective purchaser." Aside from the fact that petitioner relies entirely on hearsay and no affidavit from persons with personal knowledge has been submitted, no allegation has been made that the property will not be available to this applicant as represented. The requested issues will therefore be denied.

14. Accordingly, *It is ordered*, That the motion to enlarge issues, filed October 2, 1968, by Radio Naples, Inc., *Is granted* to the extent indicated below and *Is denied* in all other respects; and

15. *It is further ordered*, That the issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine whether Radio Voice of Naples has maintained a copy of its application available for public inspection as required by section 1.526(a)(1) of the rules.

(2) To determine whether Radio Voice of Naples submitted complete and accurate information in response to the Commission's application form, form 301, and has continued to keep the Commission advised of "substantial and significant changes" as required by section 1.65 of the Commission's rules.

(3) To determine, in light of the evidence adduced under the foregoing issues, whether Radio Voice of Naples possesses the comparative and/or requisite qualifications to be a Commission licensee.

16. *It is further ordered*, That designated issue 3, *Is modified* to read as follows:

3. To determine, with respect to the application of Radio Voice of Naples—

(*a*) Whether the individual partners will have the necessary net available current liquid assets to meet their respective loan and contribution commitments.

(*b*) Whether the Gates equipment agreement line of credit is available to the applicant.

(*c*) The basis for its estimated other costs described in section III, paragraph 1, FCC form 301.

(*d*) The manner in which the applicant will obtain additional funds to construct and operate the proposed station for 1 year.

(*e*) Whether, in light of the evidence adduced pursuant to (*a*), (*b*), (*c*), and (*d*) above, the applicant is financially qualified.

17. *It is further ordered*, That the burden of proceeding with the introduction of evidence *Shall be* on Radio Naples, Inc., and burden of proof under the issues added herein *Shall be* on Radio Voice of Naples.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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FCC 69R-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ORANGE COUNTY BROADCASTING, INC., MONTE E. LIVINGSTONE, EDWARD D. TISCH, FRANK L. BRET, THOMAS WALKER, AND RICHARD S. STEVENS, DOING BUSINESS AS ORANGE COUNTY BROADCASTING CO., ANAHEIM, CALIF., ET AL. For Construction Permit for New Television Broadcast Station	Docket No. 18295 Files Nos. BPCT-4018, 18296, 18297, 18298, 18299, 18300.

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE REVIEW BOARD:

1. This proceeding involves six applications, each seeking a construction permit for a new television broadcast station at Anaheim, Calif. By order, FCC 68-856, 14 FCC 2d 389, released August 30, 1968, the Commission designated the applications for hearing. Now before the Review Board is a petition to enlarge issues, filed September 30, 1968, by Golden Orange Broadcasting Co., Inc. (Golden Orange), requesting the addition of the following issues: (1) To determine whether Harry Goldberger is financially qualified to meet his commitment to Orange County Communications (Orange County); (2) to determine whether Orange County is financially qualified; (3) to determine whether Orange County has complied with section 1.65 of the Commission's rules; (4) to determine whether Harry Goldberger has displayed a lack of candor with respect to his financial status, and (5) to determine whether Orange County possesses the requisite character qualifications to be a Commission licensee.[1]

2. In its application, Orange County estimates total construction and first year operating costs of $1,631,400. The applicant proposes to finance these expenses with a credit from the General Electric Co. of $417,385 and a loan of $1,300,000 from Harry Goldberger, a 79.5 percent stockholder. Petitioner points out that Orange County submitted a list of real property in which Goldberger allegedly has an equity interest of $2,875,000; and that, to show the liquidity of the property, Orange County submitted a letter from a real estate broker stating that he has a client willing to buy the properties for $1,500,000. Golden Orange alleges that the schedule of real property holdings fails to

[1] Other related pleadings before the Board are: (*a*) Verified statement, filed on Oct. 16, 1968, by Golden Orange; (*b*) Broadcast Bureau's comments, filed Oct. 17, 1968; (*c*) reply (properly an opposition), filed Nov. 7, 1968, by Orange County; and (*d*) reply, filed Dec. 16, 1968, by Golden Orange.

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reflect the existence of numerous encumbrances against the property. Petitioner relates the amounts of various mortgages against the property, and states that the existence of these encumbrances was discovered through its investigations of the records in the office of the assessor of Orange County. Taking these encumbrances into account, Golden Orange estimates Mr. Goldberger's equity interest to be substantially less than the value represented in Orange County's application. Petitioner also alleges that the letter from the real estate broker does not give assurance of the liquidity of the property since there is no indication that the client is aware of the existence or extent of the encumbrances against the properties. Additionally, Golden Orange requests the addition of issues concerning lack of candor by Harry Goldberger, Orange County's compliance with section 1.65 of the Commission's rules and character qualifications. The basis for these requests is Orange County's failure to reflect the existing encumbrances in Goldberger's balance sheet, which was submitted to the Commission.

3. In opposition, Orange County contends that the petitioner has underestimated the value of Goldberger's property. In support, Orange County submits an affidavit from a real estate appraiser, in which the affiant states that the practice of the county tax assessor in Orange and Riverside Counties (upon which its estimate in its application is based) is to assess real property for tax purposes at 25 percent of its market value. Based upon this calculation, Orange County estimates that Mr. Goldberger's properties are actually worth $5,201,278, after taking the trust deeds and interest into account, and asserts that Goldberger has therefore demonstrated in excess of the amount necessary to finance the proposed facility. Moreover, Orange County argues that in view of the value of the properties involved, the knowledge of the broker's client is immaterial since "* * * it is a bargain either way at $1.5 million." Finally, Orange County notes that Golden Orange has failed to support its allegations with substantiating affidavits in compliance with section 1.229(c) of the Commission's rules. The Broadcast Bureau, in its comments, also notes that although the allegations raise substantial questions, the petition is improperly substantiated. In its reply, Golden Orange submits verified copies of deeds of trust and verified copies of documents identified at "1967–68 Extended Assessment Roll of Property in the County of Orange California," which reflect both the full cash value and the total net tangible taxable value of the Goldberger properties. Total net tangible value, petitioner avers, is the sum resulting from the assessment of the property at 25 percent of its full cash value. Golden Orange indicates that the figures it utilized in its petition represented the full cash value, and concludes, therefore, that the affidavit filed by Orange County, although accurate concerning tax procedures, does not cast doubt on the values set forth in the Golden Orange petition.

4. Although Golden Orange's allegations were not adequately substantiated in the petition, Orange County does not deny the existence of the outstanding encumbrances and Golden Orange submitted ample substantiation with its reply pleading. Under these circumstances and in view of the serious questions raised in the petition, the Board

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will consider the merits of the allegations. The pleadings present conflicting allegations as to the meaning and use of terms of valuation in the tax records. The Review Board is unable to determine the actual value of the properties on the basis of the pleadings. Moreover, Orange County did not clarify the position of the real estate broker or his client and since there is no way of ascertaining from the pleadings herein whether or not the prospective buyer is aware of the encumbrances, an evidentiary inquiry is warranted. It is not disputed that Orange County failed to report the encumbrances which all bear Goldberger's signature, to the Commission. Since we cannot determine the actual value and liquidity of this property, we are also unable to determine the significance of this omission. No adequate explanation is given as to why the encumbrances were not reported to the Commission in the application or in subsequent filings.[2] In light of these circumstances an issue concerning submission of complete and accurate information to the Commission, and compliance with section 1.65 of the Commission's rules will be added.

5. Accordingly, *It is ordered*, That the petition to enlarge issues, filed September 20, 1968, by Golden Orange Broadcasting Co., Inc., *Is granted*, and that issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine whether Harry Goldberger has sufficient cash and/or liquid assets to meet his commitment to Orange County Communications, and in light thereof, whether Orange County Communications is financially qualified.

(2) To determine whether Orange County Communications submitted complete and accurate information in response to the Commission's application form, FCC 301, and has continued to keep the Commission advised of substantial and significant changes as required by section 1.65 of the Commission's rules.

(3) To determine in light of the evidence adduced under issue 2 whether Orange County Communications possesses the requisite and/or comparative qualifications to be a licensee of the Federal Communications Commission.

6. *It is further ordered*, That the burden of proceeding with the introduction of evidence and burden of proof under issue (1) shall be upon Orange County Communications; the burden of proceeding with the introduction of evidence under issue (2) will be on Golden Orange Broadcasting Co., Inc.; and the burden of proof under issue (2) will be on Orange County Communications.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] Petitioner points out that at least one of the deeds of trust was executed on the same date as the most recent balance sheet for Goldberger contained in Orange County's application.

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FCC 69-37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of DOUGLAS LYSTRA CRADDOCK AND LACY PHIL WICKER, DOING BUSINESS AS OUTER BANKS RADIO CO., WANCHESE, N.C.	Docket No. 17886 File No. BP-16917
J. M. FARLOW AND WILLIAM D. MILLS, DOING BUSINESS AS ONSLOW COUNTY BROADCASTERS, MIDWAY PARK, N.C.	Docket No. 17887 File No. BP-17272
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 15, 1969)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER WADSWORTH DISSENTING.

1. The present matter involves the applications of two intervenors, Seaboard Broadcasting Co.[1] and Onslow Broadcasting Corp.,[2] for review of the Review Board's memorandum opinion and order, released June 11, 1968, 13 FCC 2d 385, which denied their petitions to add a suburban community issue against the application for Midway Park, N.C., of Onslow County Broadcasters (hereinafter Onslow).[3]

2. The Review Board found that the intervenors had failed to show: That a city-suburb relationship exists between the larger city, Jacksonville, and Midway Park; that there is an economic relationship to and dependence upon Jacksonville by Midway Park; or that Onslow's proposal would be inconsistent with the *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 R.R. 2d 1901 (1965), as reflected in *V.W.B., Inc.*, 8 FCC 2d 744, 10 R.R. 2d 563 (1967), and *Babcom, Inc.*, 12 FCC 2d 306, 12 R.R. 2d 998 (Rev. Bd. 1968).[4] In a concurring statement, Board members Kessler and Slone stated that they would have added a suburban broadcasters programing issue[5] on the Board's own motion. However, the remaining members of the Board[6] concluded that Onslow's showing had obviated any need for such an issue.

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[1] Licensee of WLAS, Jacksonville, N.C.

[2] Licensee of WJNC, Jacksonville, N.C.

[3] Applications for review were filed on June 24, 1968, by both WLAS and WJNC. An opposition was filed on July 1, 1968, by Onslow; comments were filed on July 19, 1968, by the Broadcast Bureau; a reply was filed on July 31, 1968, by WLAS; and a reply was filed on Aug. 5, 1968, by WJNC.

[4] This holding was based on the Board's findings that Onslow could have applied for Jacksonville originally without causing prohibited overlap and that Jacksonville was only three times the size of Midway Park rather than 10 to 12 times larger as the populatios figures submitted by the intervenors assert.

[5] See *Suburban Broadcasters*, 30 FCC 1021, 20 R.R. 951 (1961).

[6] Board member Nelson not participating.

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3. The intervenors contend, however that the Review Board erred in its determination that no question exists as to whether Onslow realistically intends to serve Midway Park or Jacksonville, N.C. In support of this contention, the intervenors argue: (*a*) That Onslow's proposed 1,000 w of power and its antenna height will project its 5-mv/m daytime contour over 79 percent of Jacksonville while 250 w of power would be sufficient to serve Midway Park; (*b*) that Onslow could not have applied for Jacksonville without prejudicing its position in this hearing's section 307(b) comparison with the application of Outer Banks Radio Co.[7] and rendering its own application mutually exclusive with that of 1530 Radio, Inc., BP-17270, for Chapel Hill, N.C.;[8] and (*c*) that Jacksonville is now 10 to 12 times larger than Midway Park, which is only a military housing area for Camp Lejeune without civic or service organizations, schools, banks, newspapers, or police and fire departments.[9]

4. The intervenors also contend that a city-suburb relationship is not a prerequisite for the designation of a surburban community issue but is merely one factor to consider in determining whether a sufficient threshold showing has been made. The intervenors further assert that, contrary to the Board's findings, they have shown that a Midway Park station will have a rely in great part upon Jacksonville for its advertising revenues.[10] The intervenors assert finally that Onslow's programing survey [11] was not sufficient under the standards set forth in *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968), and thus that a programing issue should also be designated against Onslow.

5. Onslow, in opposition, argues that the threshold showing required to raise a suburban community issue was not met by the intervenors. It urges that a failure to designate a surburban community issue in this instance is not inconsistent with the interpretation of the 307(b) policy statement as reflected in V.W.B., Inc., and Babcom, Inc., because these two cases are clearly distinguishable on their facts. In both of those cases, the applicant specified a small community and proposed power capable of serving a nearby community many times the size of its specified community, while here Jacksonville is only three times the size of Midway Park,[12] Onslow's 5-mv/m daytime contour will cover only 79 percent of Jacksonville, and its transmitter is located on the east side of Midway Park away from Jacksonville.

6. Onslow also asserts that not only is Midway Park not economi-

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[7] Onslow's application is mutually exclusive with that of Outer Banks Radio Co., which proposes a first service for Wanchese, N.C., whereas a number of broadcast stations have already been allocated to Jacksonville.

[8] An application for Jacksonville would not be entitled to the benefit of the provisions of sec. 73.37(b) of the rules, and the scope of this sec. 307(b) hearing would have been necessarily expanded to include the Chapel Hill application. See the order designating this proceeding for hearing, FCC 67-1291, released Dec. 19, 1967.

[9] The intervenors claim that Midway Park's population has been reduced to 1,700 persons based on estimates supplied by the housing officer of Camp Lejeune. These estimates were rejected by the Review Board, citing *Babcom, Inc., supra*, on grounds that unofficial population data should not be considered.

[10] The intervenors claim that Midway Park contains only one small business, that there is very little commercial development in the area around Midway Park other than Jacksonville Township, and that Onslow's advertising commitments are unverified.

[11] The intervenors point out that Onslow claims to have interviewed 50 local residents, but that it has identified only eight, of whom only one lives in Midway Park.

[12] This assertion is based on the 1960 census report which showed Jacksonville's population as 13,491 persons and Midway Park's population as 4,164 persons.

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cally dependent upon Jacksonville but that both of these communities are dependent upon Camp Lejeune, which is the most important entity in the area and that there are many businesses that maintain offices outside of Jacksonville. Finally, Onslow contends that the Board was correct in not designating a suburban broadcasters programing issue since its showing on this point was sufficient to meet the Commission's requirements.

7. In its comments, the Broadcast Bureau notes that Jacksonville and Jacksonville Township grew 300 percent and 400 percent, respectively, from 1950 to 1960, while White Oak Township, which includes Midway Park, grew only 10 percent during this period. The Bureau agrees with the intervenors that a city-suburb relationship is not necessary for the specification of a suburban community issue, since other factors such as the amount of proposed power, the proposed programing, use of a directional antenna, and the location of the transmitter may justify the designation of this issue. Nevertheless, the Bureau concludes that an issue should not be added merely because a 5-mv/m signal is placed over a larger community and that the facts of this case do not warrant the addition of a suburban community issue.[13]

8. We agree with the Bureau that a suburban community issue should not be specified merely because a 5-mv/m signal is projected over a more populous city, but this is not to say that the request for such an issue should be denied simply because it does not appear that the smaller community is an ordinary suburb of the larger city. The relationship of the communities is merely one of the many factors to be considered, and a sufficient showing may be made to warrant an issue even though the smaller community is not a suburb. See, for example, *Babcom, Inc.*, 12 FCC 2d 306, 12 R.R. 2d 998 (1968), where the Review Board added a suburban community issue in spite of the facts that the specified community was located 20 miles from the larger city and that it was claimed to be an entity unto itself. In this proceeding the facts that Midway Park is removed from Jacksonville and that it is a housing development for a military base support the Review Board's conclusion that Midway Park is not a suburb of Jacksonville.

9. Nevertheless, the intervenors have made substantial allegations that Midway Park has no independent existence and that it is dependent upon Jacksonville for civic, social, and business activities. In view of the undisputed assertions that there is only one small business within Midway Park, that there is very little commercial development in the area around Midway Park, other than in Jacksonville Township, and that Onslow's advertising commitments are unverified, there is a serious question as to whether there are sufficient advertising revenues to support Onslow's proposed station without reliance upon advertising revenues from Jacksonville. It must also be noted that

[13] Although the Bureau also urges that review should be deferred on this interlocutory matter, citing *Bay Broadcasting Co.*, 10 FCC 2d 331, 11 R.R. 2d 429 (1967), we are persuaded that the arguments raised by the intervenors are fundamental and that they affect the conduct of the entire proceeding as required by the note to sec. 1.115(e) of the rules, since the arguments relate to Onslow's basic qualifications and since a further hearing would be required if the Board's refusal to add a suburban community issue were reversed after the final decision. Accordingly, review at this time is consistent with the desire expressed in *Bay Broadcasting* to promote orderly and efficient hearing procedures.

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there was substantial motivation for Onslow to specify a community without a local transmission service when its application was filed in light of the competing application specifying a first local transmission service for Wanchese, N.C., and the pending application for the same frequency in Chapel Hill, N.C. Under these circumstances, it is entirely unrealistic to assume that Onslow has no interest in serving Jacksonville merely because the application did not specify that city,[14] and, thus, this situation is not unlike the substandard central city proposals which the 307(b) policy statement is designed to uncover.

10. In view of the further facts that Onslow proposes to serve at least 79 percent of Jacksonville with its 5-mv/m contour, that there are substantial questions of fact concerning Midway Park's present population [15] and its existence as an independent entity, and that Onslow's programing showing does not give any indication that it was designed to serve the distinct needs of Midway Park, we are convinced that a sufficient threshold showing [16] has been made to warrant a full evidentiary hearing to determine whether Onslow will provide a realistic local transmission service for Midway Park or merely an additional service for Jacksonville. In light of Onslow's minimal showing that its programing proposal is responsive to the needs and interests of the area to be served, we are also persuaded that Onslow has not complied with the standards set forth in Minshall and that a suburban broadcasters programing issue should be specified in this proceeding so that Onslow can demonstrate its efforts to ascertain the community needs and interests of the Midway Park area and the manner in which it proposes to meet those needs and interests.

11. Accordingly, *It is ordered*,

A. That the applications for review filed June 24, 1968, by Seaboard Broadcasting Co. and by Onslow Broadcasting Corp. *Are granted* to the extent indicated herein and *Are denied* in all other respects; and

B. That the issues in this proceeding *Are enlarged* as follows:

(i) To determine whether the proposal of Onslow County Broadcasters will realististically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to—

(*a*) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programing needs;

(*b*) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(*c*) The extent to which the applicant's program proposal will meet the specific, unsatisfied programing needs of the specified station location; and

[14] While it may be technically true that Onslow could have applied for Jacksonville, there has been no showing that such an application could have been filed without causing prohibited overlap.

[15] The Review Board cited *Babcom, Inc., supra,* in rejecting the intervenors' estimates of Midway Park's present population. *Babcom* involved a claim that the larger community had an actual population in excess of 50,000 persons and that the presumption of the 307(b) policy statement should be invoked automatically, but the Review Board refused to consider such speculative data for that purpose. While we agree with the Board that census data is the most objective measurement in determining the application of the policy statement, we are persuaded that the estimates in this proceeding, which were made by the military housing officer, are sufficient to raise a question of fact as to the present population of Midway Park and to the disparity between its population and that of Jacksonville.

[16] In the 307(b) policy statement, we stated that the presumption of service to a larger city could be invoked, even though the larger community, as here, lacks the required population, if a sufficient threshold showing were made. See also *V.W.B., Inc.,* 8 FCC 2d 744, 10 R.R. 2d 563.

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(*d*) The extent to which the projected sources of the applicant's advertising revenues within the specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(ii) To determine the efforts made by Onslow County Broadcasters to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER ROBERT E. LEE DISSENTING IN PART AND CONCURRING IN PART

I dissent to the addition of the suburban programing issue and concur in adding the suburban community issue. This proceeding concerns conflicting applications for new stations at Wanchese (1960 population, 600) and Midway Park (1960 population, 4,164) both in North Carolina.[1] This is not a case where we are required to consider the comparative qualifications of two applicants for the same community and accordingly programing evidence would not be admissible *FCC* v. *Allentown Broadcasting Corp.*; 349 U.S. 358 (1955). Thus, the Commission set these applications for hearing on the standard section 307(b) issue, which issue would not permit evidence on programing. This was the posture of the case until the two intervenors entered the proceeding who, as you might suspect, are the licensees of the only broadcasting facilities at Jacksonville, N.C., WJNC (AM-FM) and WLAS. Jacksonville had a 1960 population of 13,491 and is approximately 5 airline miles from Midway Park.

The intervenors have presented facts which raise a question in my mind whether the Midway Park application might not actually be the third AM facility at Jacksonville rather than the first at Midway Park. Since important and perhaps decisional consequences flow from the actual location of this station, I concur in the majority decision insofar as it adds the suburban community issue. The measure of proof required to meet the suburban community issue must be governed by the *Policy Statement on Suburban Communities;* 2 FCC 2d 190, 6 R.R. 2d 1901 as this policy has been implemented by *WWB, Inc.;* 8 FCC 2d 744, 10 R.R. 2d 563 (1965); and *Babcom, Inc.*, 12 FCC 2d 306, 12 R.R. 2d 998 (Rev. Bd. 1968).

The suburban programing issue requires a higher degree of proof than the suburban community issue in that here a specific showing of needs and interests to be fulfilled is required. This policy has been interpreted in a number of recent cases and a public notice for example: *Chapman Radio and Television Co.*, 7 FCC 2d 213, 9 R.R. 2d 635 (1967), *Azalea Corp.*, FCC 67-756, 10 R.R. 2d 717 (1967), *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968), *Andy Valley Broadcasting Systems, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691, and the *Commission's Public Notice on Ascertainment of Community Needs by Broadcast Applicants*, FCC 68-847, 13 R.R. 2d 1903.[2] Each

[1] Originally a third application was involved for Maysville, N.C. This application (docket No. 17,888) was dismissed by memorandum opinion and order of the Review Board released Sept. 12, 1968 (FCC 68 R-373).

[2] See my dissent to this public notice at 13 R.R. 2d 1905.

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of the cases listed above deals with conflicting applications for the same city or within the same urbanized area—*Chapman*, three applicants for Birmingham, Ala., and one for Homewood, Ala.;[3] *Azalea*, four applications for Mobile, Ala.; *Minshall*, two applications for Gainesville, Fla.; and *Andy Valley*, a single applicant for Auburn, Maine.

In the instant case, the majority is seeking to apply the *Minshall* doctrine to one of two competing applicants proposing to serve two entirely different markets. This produces an incongruous result here in that the main thrust of the proceeding will be changed from a 307(b) issue to a programing issue. Further, I have reviewed the applications at issue here, as contained in the hearing file, and I find that Midway Park has submitted responsive answers, including the results of surveys on public need, to section IV–A of the application form whereas the Wanchese applicant has submitted only the former section IV of the application and has included no information on surveys or any other information which would suggest that this applicant has made any check of public need.[4] Yet we now require the applicant who has at least prima facie fulfilled the requirement of our new programing form to meet the added proof required under a programing issue. At this point, it appears we have lost the original reason for this hearing, injected a one-sided programing issue into a proceeding involving separate communities and are, in fact, entertaining a backdoor type of resolution of the *Carroll*[5] issue where the proof is on the applicant and not the protestant.

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[3] Homewood is in the Birmingham urbanized area. See p. 2–19 PC(1) 2 A Ala. "U.S. Census of 1960 Population."

[4] A programing issue is not appropriate since this would convert this hearing from a comparison of the two respective towns involved to a comparison of applicants.

[5] 17 R.R. 2066.

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FCC 69-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of SHOW LOW AREA TV SERVICE, SHOW LOW, ARIZ. For Construction Permit for New Television Broadcast Translator Station	File No. BPTTV-3458

MEMORANDUM OPINION AND ORDER

(Adopted January 8, 1969)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application of Show Low Area TV Service, a nonprofit community organization, requesting a construction permit for a new 1-w VHF television broadcast translator station to serve the Show Low, Ariz., area by rebroadcasting station KGUN-TV, channel 9, Tucson, Ariz. (ABC), on output channel 6; informal objections, filed pursuant to section 1.587 of the Commission's rules, by Vumore Co., on August 14, 1968, and an opposition thereto, filed September 11, 1968, by the applicant.

2. Vumore Co. owns and operates three low-band five-channel community antenna television (CATV) systems in the same area proposed to be served by the translator.[1] The CATV provides service to approximately 1,080 subscribers on cable channels 2 to 5 with the programing of the following television stations:

KTVK-TV (ABC), channel 3, Phoenix, Ariz.
KOOL-TV (CBS), channel 10, Phoenix, Ariz.
KTAR-TV (NBC), channel 12, Phoenix, Ariz.
KPHO-TV (Ind.), channel 5, Phoenix, Ariz.

Vumore proposes to inaugurate service on cable channel 6 with the programing of noncommercial educational television station KAET-TV, channel *8, Phoenix, and alleges that operation of the proposed translator on output channel 6 would cause interference to reception by the subscribers on cable channel 6.

3. It appears that there are no VHF channels available for the translator's use which would not cause similar problems with respect to the CATV system or cause interference to reception of a television broadcast service. The applicant cannot use channel 7 or 8 because translator station K07FP, Show Low, Ariz., operates on channel 7 rebroadcasting station KVOA-TV, channel 4, Tucson, Ariz. (NBC): channel 9 cannot be used because it is cochannel to the proposed trans-

[1] Vumore receives its input signals via point-to-point microwave relay.

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lator's input channel and channel 10 is precluded because it is adjacent; channel 11 is cochannel to the applicant's recently granted [2] translator station K11JA, Show Low Area, Ariz., which rebroadcasts station KOLD–TV, channel 13, Tucson (CBS); channel 12 is adjacent to both the output and input signals of station K11JA; and channel 13 is cochannel to station K11JA's input. If the translator is to be operated at all, therefore, it must be on a channel between 2 and 6.

4. The CATV system provides service to the homes of approximately 1,080 subscribers; the proposed translator would provide off-the-air television service to approximately 1,320 homes. It would bring to the area a television service which is not now received and would constitute the third off-the-air network television service. The area is not within the predicted grade B contour of any television broadcast station and, for the most part, the populace depends on translators for their television broadcast service. Contrary to the objector's contentions, grant of this application need not preclude the CATV system's offering of a noncommercial educational television service. By the objector's own admission, the system can be re-engineered to change the cable channels on which the various stations' signals are carried. Furthermore, the objector states that it is in the process of replacing its lines with high quality heavily shielded cable and we believe that, with the cooperation of the applicant, effective measures can be taken to mimimize, if not eliminate, the expected interference.

5. In view of the foregoing, we believe that the public interest would be served by our grant of the application, notwithstanding the potential interference to subscribers' reception on the CATV's cable. *Prescott T.V. Booster Club, Inc.*, FCC 68–1220, released December 26, 1968. We expect the applicant to cooperate with Vumore, to the extent possible, in minimizing objectionable interference so that the two systems can exist in the area harmoniously. *Whitesburg Television Translator, Inc.*, 11 FCC 2d 275, 11 R.R. 2d 1262.

6. We find that no substantial or material questions of fact have been raised by the pleadings. We further find that the applicant is qualified to construct, own, and operate the proposed new translator station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, *It is ordered*, That the informal objections filed herein by Vumore Co., *Are denied*, and the above-captioned application of Show Low Area TV Service *Is granted* in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[2] Show Low's application (BPTTV–8459) for a new VHF translator to operate on output channel 11 was unopposed and was granted Nov. 7, 1968. It has not yet commenced operation.

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FCC 69R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SUNDIAL BROADCASTING CO., INC., PARMA, OHIO	Docket No. 18368 File No. BP-17121
HOWARD L. BURRIS, WARREN, OHIO For Construction Permits	Docket No. 18369 File No. BP-17574

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1969)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The above-captioned mutually exclusive applications for new standard broadcast stations were designated for hearing by Commission order (FCC 68-1082, released Nov. 6, 1968) which specified, inter alia, suburban issues against both applicants. Now before the Review Board is a petition to delete issues, filed November 25, 1968, by Howard L. Burris (Burris) seeking deletion of the suburban issue as it relates to his application.[1]

2. In support of his request, Burris contends that the designation of a suburban issue against him resulted from the Commission's "failure to consider and properly evaluate" exhibits 3-5 of the original application and the supplement thereto contained in an amendment filed August 5, 1968. Arguing that *Minshall Broadcasting Company*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968) and the subsequent Commission policy statement have "significantly altered" the showing required under form 301, part IV-A, petitioner contends that his submission compares favorably with the showing deemed acceptable in *Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691 (1968). Petitioner states that, in his original application, he proposed to maintain contact with the community to be served; that the comprehensive amendment of August 5, 1968, prepared in response to such commitment contains the suggestions actually received and petitioner's evaluation thereof, as well as alterations in program proposals responsive thereto; and that, therefore, the application, as amended, satisfies every facet of the Commission's requirements. Claiming that the survey contained in the August 5, 1968 amendment encompassed 40 persons including the mayor of Warren, the director of the local YMCA, a bank president, and a judge, and that programs were developed in response to suggestions received, petitioner contends that the Commission's action in designating the issue is incapable of being substantiated and that, therefore, the issue should be deleted.

[1] Also before the Board are: (a) Broadcast Bureau opposition, filed Dec. 9, 1968; (b) opposition, filed Dec. 10, 1968, by Sundial Broadcasting Co., Inc. (Sundial); and (c) reply, filed Dec. 20, 1968, by Burris.

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3. The Review Board agrees with the Broadcast Bureau and Sundial that the issue should not be deleted. The Board has repeatedly held that it will not delete specified issues in the absence of unusual or extenuating circumstances, such as where the Commission failed to consider information before it. Petitioner's contention that the Commission overlooked material in his application as originally filed and in the August 5, 1968, amendment appears to be based on no more than his own evaluation of his application; as such, the contention must be rejected. Indeed, the Commission, in the designation order, made specific reference to the survey material in the application and the amendment, evaluated such material, and found it lacking.[2] Therefore, not only have no unusual circumstances been established to warrant deletion of the issue, see, e.g., *Orange-Nine, Inc.*, 8 FCC 2d 637, 10 R.R. 2d 489 (1967) but to do so would be contrary to the well-established principle that where the Commission has specifically considered and passed upon a particular matter, the Review Board cannot and should not undo what the Commission has already done, *Atlantic Broadcasting Company*, 5 FCC 2d 717, 721, 8 R.R. 2d 991, 996 (1966); *Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 R.R. 2d 140 (1965).

4. Accordingly, *It is ordered*, That the petition to delete issue, filed November 25, 1968, by Howard L. Burris, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] See designation order, FCC 68-1082, par. 5.

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FCC 69R-35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KENNETH S. BRADBY AND GILBERT L. GRANGER, DOING BUSINESS AS VIRGINIA BROADCASTERS, WILLIAMSBURG, VA.	Docket No. 17605 File No. BP-16829
ROSA MAE SPRINGER, DOING BUSINESS AS SUFFOLK BROADCASTERS, SUFFOLK, VA.	Docket No. 17606 File No. BP-17274
JAMES RIVER BROADCASTING CORP., NORFOLK, VA.	Docket No. 18375 File No. BP-17268
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 21, 1969)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Kenneth S. Bradby and Gilbert L. Granger doing business as Virginia Broadcasters (Virginia), Rosa Mae Springer, doing business as Suffolk Broadcasters (Suffolk),[1] and James River Broadcasting Corp. (James River), seeking construction permits for a new standard broadcast station at Williamsburg, Suffolk, and Norfolk, Va., respectively. These applications were designated for consolidated hearing on a financial issue against Virginia; financial and suburban issues against James River; and areas and populations, section 307(b) and contingent comparative issues.[2] Presently before the Review Board is a petition to enlarge issues, filed on December 2, 1968, by James River, which seeks the addition of financial and rule 1.65 issues against Suffolk, and suburban issues against both of the competing applicants.[3]

The Suburban Issues

2. James River contends that its program showing is infinitely better than that of either Virginia or Suffolk; and since a suburban issue was specified against James River, similar issues must perforce be

[1] Suffolk was originally a partnership consisting of Charles and Rosa Mae Springer. This partnership was dissolved upon the death of Charles E. Springer, leaving Rosa Mae Springer as the sole surviving partner of the applicant. An amendment reflecting this change in ownership was accepted by the examiner in an order, FCC 67M-1613, released Sept. 28, 1967.

[2] By memorandum opinion and order, FCC 67-850, released July 31, 1967, the Commission designated the Suffolk and Virginia applications for hearing, and returned the James River application as unacceptable for filing. Subsequently, the James River application was accepted for filing and was designated for hearing in this consolidated proceeding. (Memorandum opinion and order, FCC 68-1097, released Nov. 15, 1968.)

[3] Also under Board consideration are: (*a*) Comments, filed Dec. 16, 1968, by the Broadcast Bureau; (*b*) opposition, filed Dec. 17, 1968, by Suffolk; (*c*) partial opposition (Virginia supports the request for issues against Suffolk), filed Dec. 23, 1968, by Virginia; (*d*) reply, filed Dec. 26, 1968, by James River; and (*e*) supplement to opposition, filed Jan. 7, 1969, by Suffolk.

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added against the other two applicants. Petitioner argues that Virginia's application, originally filed July 21, 1965, on unrevised form 301, contains no information which indicates that the applicant conducted a program survey of any kind. With respect to the Suffolk application, James River submits that the persons allegedly contacted by this applicant are, for the most part, unidentified, and that the application does not contain any indication of the information derived from these contacts or the method by which such information was evaluated. The Broadcast Bureau supports the addition of the requested issues on the basis of the argument outlined above.

3. In opposition, Virginia avers that the instant petition does not contain adequate allegations of fact or controlling case precedent which would require the addition of the requested issue. Virginia contends that its application was filed when the old programing form, section IV, FCC form 301 was in use and that it therefore has no obligation to furnish the data required by the *Commission's Policy Statement on Ascertainment of Community Needs*, FCC 68–847, 13 R.R. 2d 1903, and *Minshall Broadcasting Company*, 11 FCC 2d 796, 12 R.R. 2d 502 (1968). Nevertheless, Virginia submits with its opposition an affidavit designed to amplify the program exhibit in its application. In this supplementary data, Virginia alleges that the programing needs and tastes of its specified station location were ascertained (1) through personal contacts with various community leaders and residents during the normal course of its principals' business and personal lives, and (2) through the personal knowledge and observations of its principals, who are longtime residents of the area. Virginia submits a list of 27 persons allegedly contacted during the last 4 years; however, due to the lapse of time, Virginia explains that it is difficult "to decipher just what suggestions and comments were offered by a particular person from the records that remain." The applicant also lists the community activities in which its principals have been involved and the various awards which they have received during their residence.

4. In its opposition, Suffolk concedes that its present programing showing is based on earlier Commission programing criteria. In an effort to update its application, Suffolk avers that it has recently reassessed the needs and interests of the Suffolk area. A copy of an amendment which reflects such reassessment is submitted with the opposition, and the applicant argues that acceptance of this amendment would moot the instant request for a suburban issue. The amendment lists six community leaders allegedly contacted by Suffolk, their suggestions, the applicant's evaluation of such suggestions, and the programs proposed to satisfy these expressed programing needs and interests. In reply, James River argues that Suffolk's survey data is inadequate (in that only six community leaders were contacted) and fails to identify the specific proponent of any of the suggestions received.

5. A suburban issue will be specified against Virginia. Initially, the Board rejects Virginia's contention that it should not be held to the Minshall standard because it filed its application on the unrevised form. In *Risner Broadcasting, Inc.*, 13 FCC 2d 781, 13 R.R. 2d 912

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(1968), the Board specified a suburban issue against an applicant who failed to meet the requirements set forth in the *Minshall* case, supra, even though that applicant initially utilized the unrevised form.[4] Virginia's affidavit, designed to amplify the programing exhibit filed with its application,[5] does not obviate the need for the requested issue. Thus, further information regarding the local residence of the Virginia principals and their involvement in community activities does not constitute a satisfactory suburban showing. In *Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 12 R.R. 2d 691 (1968), the Commission stated that "applicants, despite long residence in the area, may no longer be considered, ipso facto, familiar with the programing needs and interests of the community." In addition, although the applicant lists 27 individuals allegedly contacted during the preceding 4 years, Virginia concedes that these contacts were not part of any specific program survey, and that Virginia is presently unable to determine what suggestions and comments were specifically offered by particular persons. Finally, the affidavit submitted with the opposition concedes that this applicant is unable to describe the "mental processes * * * which went into formulating the program proposal submitted with the application." Under these circumstances, Virginia has failed to demonstrate that it has complied with the requisite Commission standards enunciated in *Minshall Broadcasting Company, Inc., supra*, and *Public Notice*, FCC 68-847, 13 R.R. 2d 1903, released August 22, 1968, entitled "Ascertainment of Community Needs by Broadcast Applicants." A suburban issue will therefore be specified.

6. Suffolk properly recognizes that the programing portion of its application is based on earlier Commission criteria, and that it therefore suffers from many of the same infirmities previously described with respect to the Virginia showing; i.e., although a list of community leaders is submitted, Suffolk has not reported the specific suggestions offered by these individuals, the applicant's evaluation of these suggestions, and the specific programs designed to satisfy these expressed community needs. In an effort to conform to present standards, the applicant on December 17, 1968, filed an amendment to its application reflecting a reassessment of community needs and interests. The petition for leave to amend has not been acted upon by the examiner. However, even if that amendment is ultimately accepted, the questions raised by the instant petition would remain substantially unresolved. Suffolk's new survey consists of interviews with six community leaders, each of whom appears to be either a government

[4] Cf. *North American Broadcasting Company, Inc.*, FCC 68R-531, —— FCC 2d ——, released Dec. 23, 1968, where the Board held that it would not delete a suburban issue because the petitioner's application was filed several months before the Minshall opinion was adopted.

[5] Exhibit No. 7 of Virginia's application is a four-sentence, general statement apparently designed to explain the manner in which its program schedule was formulated. After briefly indicating the residence and professional experience of its two principals, the remainder of Virginia's statement reads:

"The programing plans and proposals are based upon their [the Virginia principals] knowledge of the needs of the area acquired as the result of their being residents of the area and having been in constant contact with the people in the area by virtue of their respective professions."

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official or government employee.[6] While Suffolk evaluated their suggestions, and the programs proposed seem responsive to their suggestions, the individuals contacted do not, in the Board's view, represent the cross section of community leadership contemplated by the Commission's public notice, FCC 68–847, supra. Therein, the Commission stated that the revised requirements call for "consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community." Inasmuch as the 1960 population of Suffolk, Va., was 12,609, and Suffolk's application reveals the existence of various commercial, social, educational and religious institutions in the area, the Board is not persuaded that Suffolk has adequately demonstrated that the six individuals contacted represent the full spectrum of Suffolk community life. Cf. *Sundial Broadcasting Co., Inc.*, FCC 68–1082, 15 FCC 2d 58. Therefore, a suburban issue will be also added against this applicant.

The Financial Issue

7. While James River does not challenge Suffolk's cost estimates, petitioner avers that this applicant will require $81,373 in order to construct and operate the proposed station for 1 year; that the balance sheet submitted by the late Charles Springer shows current assets of only $80,000, or $1,373 less than required to meet the station's expenses; and that no balance sheet for Rosa Mae Springer has been furnished which establishes her ability to meet the expenses of the Suffolk proposal. A financial issue is therefore requested by petitioner and recommended by the Broadcast Bureau. In opposition, Suffolk relies on a January 2, 1969, balance sheet of Rosa Mae Springer which is contained in a supplement to the December 17 petition for leave to amend. Suffolk argues that this data demonstrates that the applicant is financially qualified to construct and operate the proposed station.

8. It is clear that, absent the financial amendment filed by Suffolk, it would not be possible to determine whether this applicant is financially qualified inasmuch as no data had been furnished regarding the financial competence of the sole surviving Suffolk partner—Rosa Mae Springer. However, even if the amendment is accepted, it would not resolve all questions as to this applicant's financial qualifications. While Mrs. Springer's January 1969, balance sheet reflects readily identifiable liquid assets of $80,000 (cash on deposit), the liquidity of her remaining assets has not been demonstrated and the various stock and property valuations have not been substantiated.[7] Mrs. Springer's liquid assets would therefore be inadequate to meet Suffolk cost estimates. Furthermore, Suffolk has neither identified Mrs. Springer's current liabilities nor is there any balance sheet reference to Mrs. Springer's financial obligation to station WEEW, Washington, N.C. (see par. 9, infra.). A limited financial issue will therefore be specified.

[6] The individuals allegedly contacted were: the city manager; captain, rescue squad; chief, police department; chief, fire department; chief, probation and parole officer; and superintendent, welfare department.

[7] The January 1969 balance sheet fails to itemize and identify the shares of stock presently owned by Mrs. Springer. The Board is therefore unable to verify the valuation submitted.

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Rule 1.65 Issue

9. James River requests an issue to determine whether Suffolk has complied with the provisions of rule 1.65, which requires an applicant to amend its application within 30 days when the information contained therein is no longer substantially accurate and complete in all significant respects. James River avers that on October 8, 1968, Mrs. Springer filed an application to acquire a 49.7 percent stock interest in standard broadcast station WEEW, Washington, N.C.; [8] and that the application to date, has not been amended. Petitioner argues that this new broadcast obligation bears on the applicant's financial qualifications in the instant proceeding,[9] and the failure to report such interest requires the addition of a rule 1.65 issue. In opposition, Suffolk recognizes that this interest should have been reported, but argues that on October 23, 1968, the Commission advised Mrs. Springer that her short form application was unacceptable and that it would be necessary to submit form 315 for said transfer. Suffolk alleges that this long form application is in preparation and will be filed shortly, and that therefore James River's request is premature. In Reply, James River argues that Mrs. Springer's original application is on file and has not been returned, and that she has failed to update this application as required. The Bureau supports the addition of an issue.

10. As noted above, on October 8, 1968, an application was filed with the Commission requesting approval of Mrs. Springer's acquisition of a controlling stock interest in station WEEW, Washington, N.C. The executed agreement which contemplates the transfer of said interest was submitted with the application, and is dated September 11, 1968. Contrary to Suffolk's implications, this transfer application was not returned by the Commission as unacceptable for filing. The Commission's letter of October 23, 1968, indicated that "in order to process the application * * *" additional information, required by FCC form 315, would be necessary; the Commission requested that the filing of the additional information be given the applicant's prompt attention. To date, further information has not been submitted, and an amendment reflecting the station WEEW transaction was not submitted until December 17, 1968. Inasmuch as Mrs. Springer's monetary obligation to station WEEW could potentially affect Suffolk's financial qualifications herein, the applicant's failure to inform the Commission of these transactions becomes increasingly significant, and a rule 1.65 issue, relevant to this applicant's requisite and comparative qualifications, will therefore be specified. *Radio Stations KNND and KRKT*, 11 FCC 2d 364, 12 R.R. 2d 91 (1968).

11. Accordingly, *It is ordered*, That the petition to enlarge issues, filed December 2, 1968, by James River Broadcasting Corp., *Is granted;* and

[8] Mrs. Springer already owns 49.7 percent of the licensee of station WEEW, and therefore would own 99.4 percent of the stock if the application is granted.

[9] The agreement to purchase the stock of WEEW provides that Mrs. Springer will pay a total of $10,000 for this stock interest.

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12. *It is further ordered*, That the issues in this proceeding *Are enlarged* by the addition of the following issues:

(1) To determine the efforts made by Kenneth S. Bradby and Gilbert L. Granger, doing business as Virginia Broadcasters and Rosa Mae Springer, doing business as Suffolk Broadcasters to ascertain the community needs and interests of the areas to be served by such applicants and the means by which such applicants propose to meet those needs and interests;

(2) To determine, with respect to the application of Rosa Mae Springer, doing business as Suffolk Broadcasters—

(*a*) Whether Rosa Mae Springer will have the necessary net available current liquid assets to meet her obligations to the applicant;

(*b*) Whether, in light of the evidence adduced, pursuant to subpart (*a*) of this issue, the applicant is financially qualified;

(3) (*a*) To determine whether Rosa Mae Springer, doing business as Suffolk Broadcasters, failed to amend or attempted to amend her application within 30 days after substantial changes were made, as required by rule 1.65;

(*b*) To determine the effect of the facts adduced pursuant to subpart (*a*) of this issue on this applicant's requisite and comparative qualifications to receive a grant of its application.

13. *It is further ordered*, That the burden of proceeding with the introduction of evidence and the burden of proof on the issues added herein shall be upon Kenneth S. Bradby and Gilbert L. Granger, doing business as Virginia Broadcasters and Rosa Mae Springer, doing business as Suffolk Broadcasters, respectively.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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FCC 69R-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WARWICK BROADCASTING CORP., WARWICK, N.Y.	Docket No. 18274 File No. BP-16957
BLUE RIBBON BROADCASTING, INC., PITTSFIELD, MASS.	Docket No. 18275 File No. BP-17054
EVERETTE BROADCASTING CO., INC., WALDEN, N.Y.	Docket No. 18276 File No. BP-17480
ROBERT K. MCCONNELL AND EDWARD H. PEENE, JR., DOING BUSINESS AS TACONIC BROADCASTERS, PITTSFIELD, MASS.	Docket No. 18277 File No. BP-17499
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1969)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSTAINING. BOARD MEMBER NELSON ABSENT.

1. This proceeding involves four applications for new standard broadcast stations which were consolidated and designated for hearing by order (FCC 68-792, 33 F.R. 11371, released Aug. 6, 1968). In the designation order, the Commission stated that the Warwick Broadcasting Corp. (Warwick) application is mutually exclusive with the application of Everette Broadcasting Co., Inc. (Everette), due to reciprocal overlap of the 0.05-mv/m and 1-mv/m contours, that the Everette proposal is mutually exclusive with the two applications for Pittsfield due to overlap of the 0.5-mv/m Pittsfield contours with the 0.025-mv/m Everette contour, but that the Warwick proposal is not mutually exclusive with either of the Pittsfield applications. The Commission specified, inter alia, a limited financial issue as to Warwick, a 307(b) issue and a contingent comparative issue. Now before the Review Board is a joint petition for approval of merger agreement, filed October 29, 1968, by Warwick and Everette,[1] looking toward dismissal of the Everette application, acquisition by Everette's two stockholders of an interest in the Warwick application, and severance and grant of that application.

2. The Review Board is faced with a threshold question[2] as to

[1] Also before the Board are: (a) Broadcast Bureau opposition, filed Nov. 20, 1968; (b) joint reply, filed Dec. 16, 1968. Warwick also has submitted a petition for leave to amend which, if the merger agreement is approved, will provide for the consequent changes in the Warwick application.

[2] Petitioners make a preliminary showing that good cause exists for the failure to file the petition within the 5 days allotted pursuant to rule 1.525(b); the Bureau concedes the existence of good cause for such delay. We will, therefore, consider the petition on its merits.

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whether the agreement sets forth a bona fide merger or is no more than a vehicle for indirect excessive reimbursement of the Everette principals in consideration for the dimissal of that application. With regard to this question, petitioners note that there are but two Everette stockholders (Everette principals); that, under the merger agreement, the Everette principals will receive no cash reimbursement for expenses previously incurred, but will acquire an aggregate of 200 shares of Warwick stock (representing 20 percent of the issued and outstanding stock) at $1 per share.[3] In addition, one of the Everette principals is granted an option, exercisable within 1 year after the grant of the Warwick application, to acquire 60 additional Warwick shares at $100 per share, and the agreement expressly provides that one of the Everette principals shall become vice president and musical director, and the other shall become vice president and technical director of Warwick. Petitioners contend that the projected value of the 20 percent interest to be acquired by the Everette principals is more than offset by the expenses incurred by such applicants in the prosecution of the Everette application. Petitioners submit a balance sheet for Warwick dated October 20, 1968, and note that, according to such balance sheet, the company has net assets (capital contributions and cash less accounts payable) of $17,946 and, if preoperating expenses are added, a net worth (exclusive of goodwill) of approximately $32,000. Petitioners, therefore, value the Everette principals' 200 shares at $3,600 if measured by net assets, and $6,400 if measured by net worth. Submitted with the joint petition is an itemization of expenses incurred by Everette totaling $5,254.51; such itemization, according to petitioners, does not include the value of services rendered by the Everette principals. One of the Everette principals performed engineering functions for Everette, conservatively valued by petitioners at approximately $4,500; the other principal's contribution cannot be satisfactorily reduced to a dollar value, but is estimated by petitioners to be worth more than $10,000. Distinguishing *Central Broadcasting Corporation*, FCC 65R–177, 5 R.R. 2d 729 on the bases that in the instant case (*a*) there is no cash reimbursement involved; (*b*) the value of the stock interest does not exceed the legitimate expenses incurred; and (*c*) the Everette principals will take an active part in the affairs of the surviving applicant, petitioners urge that the totality of the proposal be considered and conclude that the merger is bona fide and not violative of the proscription of section 311(c).

3. The Broadcast Bureau, in its opposition, contends that the merger will result in the Everette principals obtaining a profit for the dismissal of their application. It notes that, among the expenses itemized by Everette, are certain costs incurred for office equipment, and contends that these items have a resale or salvage value and that the entire cost cannot, therefore, be justified as out-of-pocket expenses. The Bureau also claims that a $500 payment to one of the Everette principals for out-of-pocket expenses should be itemized in greater detail.

[3] Petitioners acknowledge that the existing majority Warwick stockholders paid $0.10 per share for their present interests, and that the existing minority Warwick stockholders paid $100 per share.

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The Bureau contends that the book value of the 200 shares to be acquired by the Everette principals will exceed the cost thereof plus the allowable expenses incurred. The Bureau computes the net worth of Warwick, based on the October 20, 1968, balance sheet, at $32,052, after acquisition by the Everette principals of their 200 shares. Thus, according to the Bureau, the Everette principals' 200 shares would be worth approximately $6,200 in excess of the purchase price; since, even if out-of-pocket costs were allowed in full, the worth of the 200 shares would exceed the allowable expenses,[4] the Bureau concludes that the merger represents a windfall to the Everette principals, and is therefore contrary to the mandate of section 311(c). The Bureau notes, however, that if that stock option to acquire 60 additional shares at $100 per share, granted to one of the Everette principals, were exercised immediately, the merger would be bona fide. The net worth of the company would then be $38,062, and the 260 shares owned by the Everette principals would have an aggregate book value of $9,893, and a value in excess of purchase price of $3,693.[5] Since, according to the Bureau, there are allowable expenses of at least approximately $3,900, the merger in these circumstances, would not result in a profit to the Everette principals. Finally, the Bureau observes that both of the Everette principals are to be employed by Warwick, but that no details as to the terms of employment are provided, and argues that, therefore, the employment arrangements may be objectionable, citing *Sunset Broadcasting Co.*, 8 FCC 2d 642, 10 R.R. 2d 464 (1967).

4. In reply, petitioners submit an affidavit from Warwick's president reciting, in essence, that precise details of the employment arrangements between Warwick and the Everette principals have not yet been worked out, but that any compensation paid would be commensurate with services rendered and consistent with the prevailing financial condition of the company. Petitioners thus urge that the employment arrangements do not detract from a finding that the merger is bona fide. Petitioners also contend that the use of the book value analysis by the Bureau is restrictive and not proper in these circumstances; that, because the situation is not of the ordinary reimbursement type, consideration should be given by the Board to the substantial time and money expended by the Everette principals, as

[4] Claimed out-of-pocket expenses, $5,254.51; book value of 20 percent interest, $6,200.

[5] Computed as follows:

(a) Net worth shown on Oct. 20, 1968, balance sheet	$32,052
Plus $6,000 paid on exercise of option	6,000
Total net worth	38,052
(b) *Book value per share.*—1,000 shares issued and outstanding equals $38.05 per share. Thus the 260 shares held by the Everette principals would have an aggregate book value of $9,893.	
(c) Excess of book value over purchase price of Everette interest—	
Purchase price:	
200 at $1	200
60 at $100	6,000
Total	6,200
Aggregate book value	9,893
Aggregate purchase price	6,200
Total	3,693

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well as the itemized expenses shown, and that serious consideration of the surrounding circumstances support petitioners claim that the merger does not represent an indirect payoff to the Everette principals. Alternatively, petitioners attempt to satisfy the book value analysis urged by the Bureau. An affidavit by the Everette principal who holds the stock option on the 60 shares is submitted with the reply. The option holder states in the affidavit that he "intend[s] to exercise my stock option * * * after the grant of the Warwick application has become final * * *," and the affidavit further describes the funds which he intends to utilize for this purpose. Based upon this affidavit, the petitioners contend that the Board may adopt the book value analysis and nonetheless find the merger to be bona fide, since if the option is considered, the book value of the 260 shares would be exceeded by the sum of allowable expenses plus the cost of the shares.

5. Although the matter is not without difficulty, we conclude that the agreement does not provide for a bona fide merger and that, therefore, the petition must be denied. Initially, to give consideration to the time and energy expended by the Everette principals, as petitioners ask would be inconsistent with the congressional mandate expressed in section 311(c); the section, by its terms, confines permissible reimbursement, whether direct or as here indirect, to sums actually expended. See S.R. Doc. No. 1857, 86th Cong. second sess. 3 (1960); cf. *Notice of Proposed Rule Making on Assignment and Transfer of Construction Permits*, 33 F.R. 12678 (published September 4, 1968). Nor are we persuaded to depart from this well-established doctrine, see e.g., *Robert J. Martin*, 65R–77, 4 R.R. 2d 647, simply because the Everette principals would take an active part in the affairs of the nondismissing applicant. For such services, the Everette principals would, according to petitioners themselves, be compensated.[6] Thus, in assessing the value of the Everette interests, we will not include the ascribed value of the time and energy of the principals, certain sums expended for general educational purposes, those items of expense having salvage or resale value, and the $500 item of out-of-pocket costs, which as the Bureau notes, has not been sufficiently detailed.[7] Accordingly, we fix the Everette expenses at approximately $3,800.

6. Against this expense value of $3,800 we must measure the value of the interest in Warwick to be received by the Everette principals. To the extent that the value of the interest to be received (in excess of the purchase price) would exceed the value of the expenses incurred, the agreement represents prohibited reimbursement to the Everette principals. We think that in the circumstances here, the interest to be received can only be measured by its book value. There is manifestly no public market value for the Warwick stock; petitioner's surrounding circumstances approach is too vague to warrant serious considera-

[6] Petitioners have attempted to meet the Bureau's objection that this employment arrangement might, of itself, provide a means of indirect payoff. While the terms of employment have still not been precisely fixed, we do not find that the employment arrangement, of itself, warrants a denial of the petition in light of the affidavits supplied with petitioners' reply pleading. We recognize the difficulty of fixing compensation and employment terms at such an early stage in the corporation's existence.

[7] Because petitioner has failed to detail the $500 item, it is impossible to determine Everette's allowable expenses with precision. Although a precise computation would be far preferable, it is not essential to our resolution of the question.

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tion; and the net asset approach urged in the petition is, in essence, a liquidation valuation of the interest to be received by the Everette principals, hence at odds with the basic concept that the Warwick application would be granted and the station would become operative. We believe that the book value approach is extremely favorable to petitioners here since, as computed from the October 20, 1968, balance sheet, it excludes entirely any allocation for goodwill or the ongoing value of the broadcast license; cf. *Central Broadcasting*, *supra*. Petitioners have not attempted to show that the stock is, in fact, worth less than its book value.[8] The book value of the Everette principals' 200 shares is, as the Bureau and petitioners agree, $6,200 in excess of the purchase price. Thus, the value to be received by the Everette principals is $2,400 in excess of the substantiated expenses incurred in the prosecution of the Everette application, and the agreement therefore provides for a prohibited reimbursement to the Everette principals.

7. At the Bureau's suggestion, petitioners seek to eliminate this profit element by assurances that the stock option will be exercised and that, with the inclusion of the shares under option, the substantitated expenses of prosecuting the Everette application plus the purchase price to the Everette principals of the shares exceed the value of such shares. We are of the view, however, that the option cannot be considered in the determination of whether the merger is bona fide. Initially, inclusion of the option entails a projected valuation of the Everette interests at some indeterminable future time[9] and assumes a static position in Warwick's financial condition. We have no way of determining what assets (or their value) the corporation will hold when and if the option is exercised, or what the book value of the shares will then be, and we have no reason to assume that the net worth of the company will remain unchanged. Secondly, notwithstanding the option holder's affidavit submitted with the reply, the stock option remains just that: the affidavit does not convert the option into a legally enforceable stock subscription; and neither the corporation nor the Commission can compel the holder to exercise the option. Thus, any attempt to include the value of the option in assessing the bona fides of the agreement involves projection upon information patently insufficient to support a rational result. Because, therefore, the stock option cannot be considered, and because the book value of the 200 shares to be acquired by the Everette principals exceeds the expense value of the Everette application plus the cost of such stock, we conclude that the petition must be denied. It is, accordingly, unnecessary for us to consider the additional issues raised by the pleadings.

8. *It is ordered*, That the joint petition for approval of agreement, filed October 28, 1968, by Warwick Broadcasting Corp. and Everette Broadcasting Co., Inc., *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[8] Resale of Warwick stock is to be restricted, as between existing stockholders and third persons, under a provision in the bylaws of the corporation which will give a repurchase refusal option first to the company and then to the existing shareholders. This repurchase option is, however, exercisable at the same price and on the same terms as would govern a sale to a person not a stockholder. The restriction thus affords no basis for measuring the value of the stock.

[9] By the terms of the agreement, the option is exercisable within 1 year after the grant of the application; the affidavit states that the option holder intends to exercise it after such grant, therefore at, presumably, some indefinable point within the 1-year period.

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FCC 69R-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WARWICK BROADCASTING CORP., WARWICK, N.Y.	Docket No. 18274 File No. BP-16957
BLUE RIBBON BROADCASTING CO., INC., PITTSFIELD, MASS.	Docket No. 18275 File No. BP-17054
EVERETTE BROADCASTING CO., INC., WALDEN, N.Y.	Docket No. 18276 File No. BP-17480
ROBERT K. MCCONNELL AND EDWARD H. PEENE, JR., DOING BUSINESS AS TACONIC BROADCASTERS, PITTSFIELD, MASS.	Docket No. 18277 File No. BP-17499
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 14, 1969)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Taconic Broadcasters (Taconic) and Blue Ribbon Broadcasting Co., Inc. (Blue Ribbon), are mutually exclusive applicants for a new standard broadcast station at Pittsfield, Mass.; the applications were designated for hearing [1] by Commission order (FCC 68-792, released Aug. 6, 1968) which specified, inter alia, a limited financial issue as to the ability of Blue Ribbon's majority stockholders to meet their respective commitments under the proposal. Now before the Review Board is a petition to enlarge issues, filed August 26, 1968, by Taconic,[2] seeking addition of the following issues:

(*a*) Whether each of Blue Ribbon's stockholders has sufficient liquid assets to meet his or her commitment to the applicant;
(*b*) The basis of Blue Ribbon's estimates of construction and first-year operating costs;
(*c*) Whether, in light of issues (*a*) and (*b*), Blue Ribbon is financially qualified;
(*d*) To determine the employment status and residence of Herbert M. Levin [Blue Ribbon's president and single largest stockholder] and whether he has entered into any contractual obligations which may bear on Blue Ribbon's proposal; and
(*e*) Whether Blue Ribbon's application has been kept current as required by rule 1.65.

The requests will be considered seriatum.

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[1] Also consolidated and designated were mutually exclusive applications for Walden and Warwick, N.Y., of which the Walden application is also mutually exclusive with these Pittsfield applications because of prohibited overlap of contours.
[2] Also before the Board are: (*a*) Broadcast Bureau comments filed Oct. 18, 1968; (*b*) opposition, filed Oct. 18, 1968, by Blue Ribbon; and (*c*) reply, filed Dec. 6, 1968, by Taconic.

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Availability of Funds

2. Taconic notes that the Commission specified a limited financial issue because Blue Ribbon's three controlling stockholders failed to establish that they had sufficient liquid assets to meet their financial commitments to the applicant; it contends that the balance sheets of Blue Ribbon's other four stockholders, who have in the aggregate committed $10,250 to the company, fail to show that such stockholders have sufficient liquid assets to honor their commitments. In response, Blue Ribbon relies on an amendment to its application containing, among other things, updated balance sheets for all of its stockholders. The amendment was accepted by the hearing examiner by order FCC 68M–1479, released November 1, 1968. Blue Ribbon argues that the updated balance sheets establish the liquidity of the Blue Ribbon stockholders to provide the company with the needed funds. Taconic, however, presses the attack in its reply, claiming that the amendment does not resolve the question presented. It contends that the balance sheets do not disclose noncurrent obligations of the stockholders as required by form 301, and also do not disclose the nature of the outstanding obligations. Taconic also points out that the updated balance sheets indicate certain discrepancies in the financial position of the Blue Ribbon stockholders, which, of themselves, mandate enlargement of the issues. Thus, one minority stockholder showed $10,500 in assets as of May 15, 1968, but $33,630 in assets as of October 15, 1968, when the amendment was filed. Similarly, another minority stockholder showed an increase of $16,000 in liquid assets in a 6-month period. Taconic therefore urges inclusion of the issue.[3]

3. The requested issue will be added. The balance sheets submitted with the amendment are not adequately detailed to afford us a basis for determining whether the Blue Ribbon stockholders have sufficient liquidity to meet their commitments. Form 301 requires the disclosure of all liabilities and a description of the nature of such obligations. Such a description may often be critical in the assessment of the extent of a principal's ability to meet his commitment, see *Louis Vander Plate*, FCC 68R–390, 14 R.R. 2d 309, released September 20, 1968. Here, each of the balance sheets contains a statement that it does not include liabilities secured by unlisted assets. However, without details as to the nature and value of the unlisted assets and liabilities, it cannot be determined what, if any, effect such liabilities have on the abilities of the principals to meet their respective commitments. In addition, Blue Ribbon has not explained the dramatic changes in the financial condition of certain of its stockholders as evidenced by the successive balance sheets which have been submitted; in the absence of such explanations, we think that the inclusion of the issue is called for. Although, as both Blue Ribbon and the Bureau point out, the funds to be put up by Blue Ribbon's controlling stockholders would be more than sufficient to meet its estimated construction and first-year operating costs, we note that the ability of the controlling stockholders to meet this obligation has already been called into question. A broader inquiry into Blue Ribbon's ability to finance its proposal is therefore warranted and issue 3 designated herein will be amended accordingly.

[3] The Bureau, in comments filed before the Blue Ribbon amendment was submitted, supports Taconic's request.

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Estimated Construction and Operating Costs

4. Taconic, in support of its second requested issue, asserts that Blue Ribbon's estimate of construction costs and first-year operating expenses is unreasonably low and that the basis for this estimate is not adequately shown. It argues that there is no rational explanation for Blue Ribbon's estimate of $35,184 of first-year operating costs, when Taconic itself has projected its own costs at $66,000. Taconic submits an affidavit by Edward H. Peene, a Taconic partner, who is also general manager of a radio station in the Pittsfield area. Peene recites that his estimates were developed from his experience as general manager. Taconic points out that, based upon Peene's projection, Blue Ribbon's first-year operating expenses, before consideration of salary and personnel costs, will, at the very minimum, approach $21,000. Peene contends that Blue Ribbon's staffing cost will aggregate approximately $42,000, assuming eight employees as Blue Ribbon proposes, at an average of $100 per week. Taconic also assails the accuracy of Blue Ribbon's estimated construction costs. Based on Peene's statement that construction costs (exclusive of special wiring and soundproofing) average $20 per square foot. Taconic claims that Blue Ribbon's allocation of $2,450 for building construction will be barely sufficient to house its transmitter, much less its studio. Also understated, according to Taconic, is Blue Ribbon's estimate of miscellaneous expenses, including professional fees, nontechnical studio furnishings, etc., which Blue Ribbon has fixed at $3,000 (increased to $4,000 by the amendment).

5. In opposition, Blue Ribbon claims that it has $77,000 available to meet construction and first-year operating costs and that it is axiomatic that a 1-kw station, as proposed, can be built and operated for that amount. Blue Ribbon points out that the major difference between Peene's estimate of first-year costs and Blue Ribbon's estimate turns on the question of staffing costs. Peene assumes eight full-time employees; Blue Ribbon, however, claims that it can use a contract engineer and some part-time personnel because of its proposed nondirectional antenna, and that its general manager (the principal stockholder) and bookkeeper will serve without compensation until revenues are sufficient to permit payment. With respect to construction costs, Blue Ribbon points out that it proposes remote-control operation; that studio space will be obtained under a trade-out arrangement in exchange for advertising time; and that, therefore, the proposal, as amended, only contemplates the construction of transmitter housing, at $1,879 (reduced from $2,450 by the amendment). Blue Ribbon notes that this amount is conceded by Taconic to be sufficient to cover such construction cost. As to the claimed deficiency in miscellaneous costs, Blue Ribbon contends that professional fees are to be deferred and that, in any event, there is an ample cushion to cover any unforeseen or underestimated expense.

6. Taconic replies that, even as explained, Blue Ribbon's estimates are unrealistic. Taconic argues that it strains credulity to assume that the general manager can forgo compensation for any length of time, given his present financial obligations and circumstances; that the low staffing cost estimate is inconsistent with Blue Ribbon's ambitious

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program proposal; and that the staffing cost is at odds with published NAB figures showing average payrolls of $50,300 for markets comparable in size to Pittsfield. Taconic also claims that the construction costs still have been shoehorned to fit available funds by overlooking such expenses as site clearance and office furniture and equipment. Similarly, Taconic claims that the deferral of professional fees distorts the true picture and is impermissible under Commission precedent. It concludes that the issue should be added.

7. We do not think that the second requested issue has been shown to be warranted. We cannot require applicants to project costs and expenses with computerlike precision, and we are here impressed by the fact that both the Blue Ribbon and Peene estimates of Blue Ribbon's costs and expenses were prepared by experienced broadcasters, and except for adequately explained differences, are remarkably close. Thus, regarding first-year expenses, Peene projects salary requirements at approximately $18,000 higher than Blue Ribbon's estimate, but Blue Ribbon explains that, because of the nature of its proposal, its staffing demands will not be as extensive as Peene projects.[4] The explanation appears eminently reasonable.[5] Another difference between the two estimates relates to music license fees but, as Blue Ribbon points out, these fees depend on the adjusted gross income of the station; similarly, property taxes will depend upon the amount of land owned, and Taconic has not shown that Blue Ribbon's estimate is without factual basis. The few remaining differences, which are not great, are explained by differences in operation between Blue Ribbon's proposed station and the station with which Peene is connected.[6] As to construction costs, Blue Ribbon has shown that it has allocated more than enough money to construct its transmitter housing, and Taconic has not shown that the $4,000 for other items will not be sufficient to cover such other additional expenses (site clearance, foundation, wiring) which, may or may not be incurred.[7] In sum, based upon the information before us, we find no substantial question as to whether the Blue Ribbon estimates of construction costs and first-year expenses are unreasonably low, and, therefore, the issue has not been shown to be warranted.

Legal Qualifications

8. The last two issues requested by Taconic derive from the fact that Herbert Levin, Blue Ribbon's principal stockholder, president

[4] We are not shown that the proposal cannot be fully effectuated using part-time and contract personnel as proposed. In addition, as Blue Ribbon notes, the general manager and bookkeeper will be compensated only as income is generated. While Blue Ribbon does not rely on first-year revenue to finance the station, it is axiomatic that some income will be produced, and that, therefore, these persons will not be entirely without a source of income during the first year.

[5] The NAB figures, while indicative of generally prevailing salary requirements, do not, of themselves, establish a benchmark with regard to the requirements of a particular station in its first year of operation.

[6] For example, Blue Ribbon explains the difference between Peene's estimate of $2,179 for electricity and its estimate of $1,500 by noting that it takes far less electricity to operate a 1-kw station, as it proposes, than the 5-kw station upon which Peene based his estimate.

[7] The deferral of the professional fees does not warrant the addition of an issue. The Commission has expressed disapproval of the deferral of substantial fixed charges (*A–C Broadcasters*, 10 FCC 2d 256, 11 R.R. 2d 359 (1967)) because of the distortive effect such deferral has on the projection of costs and expenses. The deferral of professional fees, a not uncommon practice among applicants, does not seriously distort the projections here. cf. *Radio Nevada*, FCC 68R–496, par. 11.

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and general manager, formerly lived and was employed in Providence, R.I. Taconic claims that he now resides, and is employed by a radio station in Florida, but that this change has not been reported to the Commission. Taconic contends that these circumstances raise questions as to whether Levin has entered contractual employment commitments having impact on the Blue Ribbon proposal, and whether there has been a violation of rule 1.65. Blue Ribbon, in opposition, submits an affidavit by Levin stating that he was transferred to Florida by his employer as a part of a promotion, that the employer knows of the Blue Ribbon application, and that he is under no obligation to remain with his present employer. An affidavit by Blue Ribbon's counsel is submitted stating that counsel was promptly informed of the change in circumstances, and claiming that the change is not substantial so as to warrant reporting under rule 1.65. In reply, Taconic contends that the Levin's residence and employment arrangements may have significant effects on Blue Ribbon's ability to survey the program needs of the community since Levin is the only principal with broadcasting experience. Noting that Levin and his wife own 64 percent of Blue Ribbon's stock and are, respectively, president-treasurer and assistant treasurer, Taconic argues that their residence will also be of decisional importance in the consideration of such comparative factors as integration of ownership and management.

9. The Review Board stated in *Sumiton Broadcasting Co., Inc.*, 14 FCC 2d 208, 13 R.R. 2d 1086 (1968) that in certain circumstances changes of employment might be of decisional significance, hence reportable under rule 1.65, but we find nothing in the facts presented to conclude that such circumstances exist here. The move to Florida, in the Board's view, does not, of itself, detract from Blue Ribbon's representation in its application that Levin will serve as full-time general manager when and if the application is granted, and Levin's uncontroverted affidavit that he is under no obligation to remain in Florida affirmatively establishes that such representation can be fulfilled. Thus, Taconic's assertion about the significance of the move in terms of the comparative factors of the proceeding is mere speculation. Similarly, we see no necessary connection between Levin's present residence and Blue Ribbon's representation that it will continue to survey the program needs of the community. In short, the mere fact that Levin has moved, and that this move was not reported to the Commission, is not of itself sufficient to warrant the inclusion of the requested issues.

10. Accordingly, *It is ordered*, That the petition to enlarge issues, filed August 26, 1968, by Taconic Broadcasters *Is granted* to the extent hereinafter indicated, and *Is denied* in all other respects; and that issue 3 in this proceeding, as specified in the designation order, *Is amended* to read, in full, as follows:

To determine, with respect to the application of Blue Ribbon Broadcasting Co., Inc., whether each of the stockholders has the necessary net available current assets to meet his or her commitment to such applicant; and to determine, on the basis of the foregoing, whether the applicant is financially qualified.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

106-522—69——12

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FCC 69R-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
JOHN WEIGEL ASSOCIATES (A JOINT VENTURE), RACINE, WIS.	Docket No. 18323 File No. BPCT-3759
UNITED BROADCASTING CORP., RACINE, WIS.	Docket No. 18324
For Construction Permit for New Television Broadcast Station	File No. BPCT-3846

MEMORANDUM OPINION AND ORDER

(Adopted January 16, 1969)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. John Weigel Associates (a joint venture) (hereinafter Weigel) and United Broadcasting Corp. (hereinafter United) are mutually exclusive applicants seeking authorization to construct a new television broadcast station to operate on channel 49 at Racine, Wis. By order, FCC 68-951, released September 24, 1968, the applications were designated for consolidated hearing on financial and suburban issues with regard to the Weigel application and suburban and concentration of control issues with regard to the United application. On December 3, 1968, the applicants filed a joint petition for approval of agreement,[1] which contemplates dismissal of the Weigel application in return for compensation of expenses incurred in the prosecution of its application.[2]

2. The joint petition includes the affidavits of both parties to the agreement setting forth the exact nature of the consideration involved, the details of the initiation and history of the negotiations, and the reasons why the agreement is considered to be in the public interest: i.e., it would simplify the proceeding by eliminating various issues, thereby expediting the inauguration of a first television broadcast service to Racine in the event that United's application is granted. Thus, except to the extent indicated below, petitioners have complied in all respects with section 1.525 of the rules.

3. The agreement states that Weigel will be reimbursed in the amount of $7,500 or such smaller sum as may be approved by the Commission. The Broadcast Bureau, in its comments, points out that among the listed expenditures is an item of $810 for legal expenses and that there is no substantiation for this item. In reply Weigel

[1] Other pleadings before the Review Board for consideration are: (*a*) Broadcast Bureau's comments, filed Dec. 17, 1968, and (*b*) reply, filed Dec. 30, 1968, by Weigel. On Jan. 10, 1969, United submitted a statement pursuant to rule 1.65 which reflects an agreement to transfer control of the Journal-Times Co., one of its principal stockholders.

[2] The joint petitioners request waiver of the 5-day provision of sec. 1.525 of the Commission's rules. Petitioners have adequately explained the slight delay which has occurred and the Review Board will consider the petition as if timely filed.

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submits a letter from the lawyer, who states that he is unable to specify the exact sum incurred in the prosecution of this application, but gives the sum incurred for various legal services, including the instant one, over a 2-year period. Absent more detailed and accurate substantiation, this sum must be disallowed. Also listed as claimed expenditures are $125 for trips to Muskegon, Detroit, and Jackson, Mich., to study operations, and $250 for various trips to and from Racine and Lake Forest, Ill., in connection with the proposed operations. Weigel has failed to show the relationship of these trips to the preparation and prosecution of its application. Consequently, these sums must also be disallowed.[3] The remaining expenditures have been adequately substantiated, and therefore reimbursement in an amount of $5,943.83 will be allowed.

4. Accordingly, *It is ordered*, That the joint petition for approval of agreement, filed December 3, 1968, by John Weigel Associates (a joint venture) and United Broadcasting Corp., *Is granted*; that the agreement *Is approved* to the extent indicated herein; that the application (BPCT–3759) of John Weigel Associates (a joint venture) *Is dismissed*, with prejudice; and that the application (BPCT–3846) of United Broadcasting Corp. *Is retained* in hearing status.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[3] Cf. *Western Broadcasting Co.*, FCC 67R–409, 10 FCC 2d 180 (1967).

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FCC 69-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WFTL BROADCASTING CO., LICENSEE OF STATION WFTL, FORT LAUDERDALE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 22, 1969)

BY THE COMMISSION: COMMISSIONERS WADSWORTH AND H. REX LEE ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated May 24, 1968, addressed to WFTL, Fort Lauderdale, Fla., and (2) licensee's response to the notice of apparent liability dated July 2, 1968.

2. The notice of apparent liability in this proceeding was issued because of the licensee's apparent willful or repeated failure to observe the provisions of section 73.47(b) of the Commission's rules in that the results of WFTL's equipment performance measurements were not on file and available for examination as required between July 29, 1967, and October 31, 1967. The notice provided that, pursuant to section 503(b) of the Communications Act of 1934, as amended, the licensee was subject to an apparent forfeiture liability in the amount of $200.

3. In response to the notice of apparent liability the licensee asserts that it did not violate section 73.47(a) of the Commission's rules and, therefore, requests that it be relieved of liability. Licensee maintains that even though WFTL's equipment performance measurements were not made at intervals of no less than 365 days, such measurements were made within a reasonable period of time; that the Commission's rules do not require that measurements be made every 365 days; that the Commission has imposed forfeitures "* * * only when substantially more than 1 year has elapsed since the preceding proof," and that "* * * the 3-month alleged delinquency here involved is the shortest period which * * * [licensee was] able to find in reported Commission decisions." Alternatively, licensee maintains that "* * * even assuming that a violation of section 73.47(b) of the rules took place, that violation was neither willful nor repeated." Licensee states in this respect that it did not knowingly commit the violation and that "* * * there was, at most, [only] a failure to perform a yearly duty * * *".

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4. We have carefully considered licensee's response and the circumstances surrounding the violations in this proceeding, but we are not persuaded by licensee's arguments either to remit or reduce the amount of its apparent liability for forfeiture. Section 73.47(a) of the rules, as worded at the time of the Commission's inspection of WFTL, required that equipment performance measurements be made at least at yearly intervals. As we stated in *Mt. Sterling Broadcasting Co.*, 12 FCC 2d 571 (1968), "[t]he simple construction of this rule requires such measurements to be made once a year at dates no more than 12 months apart." Even under the later amendment to section 73.47(a), the licensee here would have been in violation of the rule, since its measurements were made more than 14 months apart. See *Amendment of Part 73 of the Commission's Rules and Regulations*, 14 FCC 2d 230 (1968). Section 73.47(b) of the rules requires that the data required by section 73.47(a) shall be kept on file at the transmitter, retained for a period of 2 years, and on request shall be made available during that time to any duly authorized representative of the Commission. When WFTL was inspected on September 29, 1967, the only equipment performance measurements on file and available for examination were dated July 28, 1966, and the licensee did not complete new measurements until October 31, 1967. It is evident, therefore, that the licensee was in violation of section 73.47(b) each day from July 29, 1967, the date new equipment performance measurements should have been completed and made available for inspection, to October 31, 1967, the date new measurements were completed and made available, and that the violation was repeated. *Friendly Broadcasting Co.*, 23 R.R. 375 (1962).

In view of the foregoing, *It is ordered*, that WFTL Broadcasting Co. *Forfeit* to the United States the sum of $200 for repeated failure to observe the provisions of section 73.47(b) of the rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act of 1934, as amended, and section 1.621 of Commission rules, an application for mitigation or remission of forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

It is further ordered, That the Secretary of the Commission send a copy of this memorandum opinion and order by certified mail—return receipt requested to WFTL Broadcasting Co. licensee of station WFTL, Fort Lauderdale, Fla.

FEDERAL COMMUNICATIONS COMMISSION.
REN F. WAPLE, *Secretary*.

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FCC 69-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Cease and Desist Order To Be Directed Against the Following CATV Operator WILLMAR VIDEO, INC., OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT WILLMAR, MINN.	Docket No. 17604

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. Before the Commission for consideration are its memorandum opinion and order, FCC 68-1090, released November 8, 1968, a petition for reconsideration and a motion for stay filed by Willmar Video, Inc., on December 9, 1968.[1]

2. In its petition for reconsideration, Willmar alleges that the Commission has imposed upon it obligations not contemplated by section 74.1103 of the rules, and that the Commission has directed Willmar to comply with an order which exceeds the scope of section 74.1103(f) of the rules. Alternatively Willmar requests that the Commission clarify its order to delete any apparent requirement that Willmar continue to afford KCMT nonduplication protection on programs erroneously specified by KCMT. In its motion for stay, Willmar incorporates its petition for reconsideration, and alleges irreparable injury if the Commission's memorandum opinion and order, which was released on November 8, 1968, is enforced.

3. We do not believe that any extended discussion of this matter is called for. Willmar Video makes the assertion that the Commission's order directs it "* * * to delete programs in accordance with KCMT's erroneous request, despite the fact that it would result in deletion of whichever program appeared in the time slot specified by the station whether or not it is a duplicating program within the meaning of section 74.1103" (Pet. for Rec., p. 4). Our order does nothing of the kind. The order is perfectly clear in setting out (1) that KCMT's notification procedure did not meet the rule, "since it frequently simply specified the network program to be protected and the time it was being presented on KCMT, without specification of the time distant stations were also carrying the program" (par. 6); (2) that KCMT's most recent method of notification described in paragraph 6, does meet the rule requirements; (3) that KCMT is to make its notification requests in that form "and to strive conscientiously to avoid errors"

[1] Central Minnesota Television Co., Inc. (KCMT), filed an opposition to the motion for stay on Dec. 16, 1968. Central stated that it would respond to the merits of the petition for reconsideration in a subsequent pleading. In view of the Commission's disposition of both of Willmar's submissions, it is not necessary to await any further pleading by Central.

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(par. 7); and (4) "upon receipt of such notifications, Willmar Video is to afford immediate same-day nonduplication requests" (par. 7). We went on to state: "If an occasional error occurs on KCMT's part, which Willmar Video itself recognizes as a normal possibility, Willmar Video is not to cease affording nonduplication protection. We expect such errors to be rare; if they occur with any significant frequency, the CATV system may bring the matter to the attention of the Commission, and we shall take appropriate remedial action to deal with any unjustifiable inconveniencing of the viewing public" (par. 7).

4. The clear thrust of the above-quoted material is that frequent errors by KCMT must cease but that a rare error does not mean that Willmar Video is to cease affording general nonduplication protection to KCMT. Of course it need not afford nonduplication protection to a particular specification which it finds to be in error. But the overall determination of whether nonduplication protection generally is to be afforded KCMT because of errors by KCMT is no longer to be made by Willmar Video. If such errors occur other than on a rare basis—and we do not believe that they will in view of our clear admonition to KCMT and the fact that in these circumstances such a careless way of proceeding, to the detriment of the viewing public, would reflect seriously upon KCMT's qualifications—the Commission should be promptly notified and the Commission stands ready to take appropriate remedial action to deal with any such wholly "unjustifiable inconveniencing of the viewing public" (par. 7).

5. Finally, we stress again, in view of this latest round of pleadings, that what is called for—and immediately—is "the good faith, reasonable cooperation of the broadcaster and the CATV operator, for the common good of the parties and of the viewing public in their communities" (par. 9). Our order thus did not exceed our rules, require any unreasonable action by Willmar Video, or create any irreparable injury.

6. Accordingly, *It is ordered*, That Willmar's motion for stay *Is denied* and that its petition for reconsideration *Is granted* to the extent reflected herein and specifically our order is clarified as follows:

(*a*) Willmar must afford nonduplication for any programs where properly requested (see par. 6, Nov. 8 memorandum opinion and order), but if there are erroneous requests for nonduplication, Willmar need not provide protection in those specific instances of error. However, the fact of such error(s) shall not be a basis for cessation by Willmar of its responsibility to afford nonduplication protection for all other programs as to which there is no erroneous request.

(*b*) In those instances where erroneous requests are made Willmar should immediately notify KCMT and send a copy of the notification to the Commission.

(*c*) KCMT is to make every effort to be sure that its requests are error free. If documented errors are brought to the Commission's attention indicating that KCMT is not acting in a responsible fashion, appropriate remedial action will be taken by this Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in granting the petition to the extent that it clarifies the November 8 order (but see my dissent to adoption of the said order, 15 FCC 2d 113, 116).

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FCC 69R-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WSTE-TV, INC. (WSTE), FAJARDO, P.R. For Extension of Time Within Which To Construct WSTE-TV, INC. (WSTE), FAJARDO, P.R. For Modification of Construction Permit	Docket No. 18048 File No. BMPCT-5777 Docket No. 18049 File No. BMPCT-6029

MEMORANDUM OPINION AND ORDER

(Adopted January 14, 1969)

BY THE REVIEW BOARD:

1. Presently before the Review Board is an appeal from a series of examiner's rulings[1] restricting the scope of cross-examination in a proceeding involving the applications of WSTE-TV, Inc. (WSTE), Fajardo, P.R., for extension of time within which to construct its station and for modification of its construction permit. The applications were designated for hearing by the Commission (FCC 68-277, released Mar. 11, 1968, 11 FCC 2d 1013, 12 R.R. 2d 605) on several issues including, inter alia, a UHF impact issue. WAPA-TV Broadcasting Corp. (WAPA), licensee of VHF television station WAPA-TV, San Juan, P.R.: Telemundo, Inc., licensee of VHF television station WKAQ-TV, San Juan; and Telesanjuan, Inc. (Telesanjuan), licensee of UHF television station WTSJ, San Juan, oppose a grant of WSTE's applications and were made parties respondent in the designation order.

2. WSTE appeals from several evidentiary rulings, all relating to the scope of WSTE's cross-examination, made by the examiner at a hearing conference held on November 14, 1968. On that day, Telesanjuan presented evidence under the UHF impact issue,[2] showing among other things, that its expenses exceeded its revenues during 1966, 1967, and the first 9 months of 1968. On cross-examination, WSTE's counsel asked Telesanjuan's witness, Joseph P. Cooney, comptroller for Telesanjuan, to identify the advertisers who had sup-

[1] The pleadings before the Review Board are: (1) Appeal from adverse rulings of presiding officer, filed Nov. 20, 1968, by WSTE; (2) opposition, filed Nov. 29, 1968, by WAPA-TV Broadcasting Corp.; (3) opposition, filed Dec. 2, 1968, by Telesanjuan, Inc.; (4) opposition, filed Dec. 10, 1968, by the Broadcast Bureau; and (5) reply, filed Dec. 20, 1968, by WSTE.

[2] The UHF impact issue (issue 4) reads as follows: "To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part the continuation of existing UHF television service." Telesanjuan, Telemundo, Inc., and WAPA bear the burden of proceeding and the burden of proof under this issue.

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plied the broadcast revenues about which he had testified.[3] Objections to these questions were sustained by the examiner on the ground that WSTE had not shown the necessity at the time of disclosing what the examiner characterized as inherently confidential information.[4] However, the rulings were made without prejudice to the question being reasked, if it seems appropriate after we have seen more of [Telesanjuan's] direct case. In its instant appeal filed pursuant to section 1.301 of the Commission's rules, WSTE maintains that the examiner erred in restricting WSTE's cross-examination of Telesanjuan's witness, that it is necessary to ascertain the sources of the revenues in order to test the significance of the revenues figures, and that, under the circumstances of this case, the matter is fundamental and affects the conduct of the entire case. WSTE requests the Board to reverse the examiner's adverse rulings and to direct Telesanjuan to furnish to WSTE the names of the advertisers and advertising agencies from whom broadcast revenues were obtained in 1967 and the first 9 months of 1968. WAPA, Telesanjuan and the Broadcast Bureau oppose the appeal.

3. WSTE's appeal will be denied. In a note to rule 1.301, the Commission has specified that, "unless the ruling complained of is fundamental and affects the conduct of the entire case, appeals should be deferred and raised as exceptions." Stated otherwise, "interlocutory appeals are not favored by the Commission and * * * will be entertained only if the interlocutory ruling is one which is fundamental and affects the conduct of the entire proceeding * * *." "*What the Bible Says, Inc.*," 12 FCC 2d 610, 611, 12 R.R. 2d 1210, 1211 (1968). The Review Board is of the view that WSTE has not shown that the rulings complained of are fundamental and affect the conduct of the entire case. The assertions that the information sought to be elicited is relevant to the issues, and that the rulings complained of have frustrated the preparation of a rebuttal case do not persuade us otherwise. The test under the note to rule 301 is not whether the disputed testimony is relevant; and, as pointed out by the Broadcast Bureau, in its oppposition, there appear to be other sources of information available to WSTE (e.g., advertising agencies in San Juan) from which WSTE could test the significance of the revenues figures.[5] Moreover, appellant has not specifically alleged, and we find no basis for concluding, that the examiner's restriction of the scope of WSTE's cross-examination was unauthorized or a manifest abuse of discretion. See *Bay*

[3] During his direct examination, Cooney gave the broadcast revenues and expenses of station WTSJ for the period in question. Through him, the station's form 324's (Annual Financial Report of Broadcast Station Licensees) for 1966 and 1967 were offered in evidence.

[4] At an Apr. 18, 1968, prehearing conference, the examiner denied deposition and discovery requests made by WSTE which, among other things, sought documents relating to the broadcast operations of the respondents' television stations, including advertising rate cards and individual advertising contracts. The examiner, in denying the requests, noted that such documents are traditionally regarded as sensitive business material, of particular value to competitors. The examiner's ruling was affirmed by the Review Board. FCC 68R-270, released June 27, 1968, 13 FCC 2d 848, 13 R.R. 2d 593.

[5] WSTE does not question the reliability of Telesanjuan's revenue figures.

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Broadcasting Co., 10 FCC 2d 331, 11 R.R. 2d 429 (1967).[6] *See also Chapman Radio and Television Co.*, 6 FCC 2d 768, 769, 9 R.R. 2d 595, 597 (1967). Thus, the examiner's rulings that he would not permit cross-examination to elicit the names of specific advertisers were made without prejudice to a renewed request for such information if subsequent events revealed the necessity for this information. Thereafter, by memorandum opinion and order, FCC 68M–1703, released December 27, 1968, the examiner granted WSTE's request for the production of program logs, noting that "the logs are wanted as an indirect method of identifying the advertisers on WTSJ." Under these circumstances, we find no adequate basis for overturning the examiner's rulings, and the appeal will be denied.

4. Accordingly, *It Is ordered*, That the appeal from adverse rulings of presiding officer, filed November 20, 1968, by WSTE–TV, Inc. (WSTE), is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[6] In *Bay Broadcasting*, the Commission pointed out that if it "is to have any kind of orderly and efficient hearing process, pleadings essentially interlocutory in nature must be considered and ruled upon by the hearing examiner, and, except where there is manifest abuse of discretion or clearly unauthorized action, should not be reviewed by the Commission or Review Board until the hearing has been completed and a report or decision made or the record transferred to the Review Board or Commission" (10 FCC 2d 331, 332, 11 R.R. 2d 429, 430).

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The following are notations of Commission actions which are not printed in full.

AMENDMENT OF RULES

Amendment of sec. 43.42 concerning reports on pensions and benefits, adopted, Nov. 20, 1968.

American Radio Relay League, Inc., petition to suspend the amendment of part 97, denied, Nov. 26, 1968.

Mid-Columbia Radio Club, petition for rulemaking to amend part 95 to reserve a citizens radio frequency for emergency communications, denied, Nov. 26, 1968.

Marshall, Joseph, petition to amend Amateur Radio Service Rules to reserve frequencies for experimentation, denied, Nov. 26, 1968.

Thomas, Earl R., petition to amend Amateur Rules to measure the output of power of amateur stations, denied, Dec. 5, 1968.

Amendment of Part 97 concerning Novice Class amateur radio license, denied, Dec. 12, 1968.

Amendment of sec. 73.253(a) and 73.553(a) (note 2), effective date of requirement concerning SCA modulation monitors, adopted, Dec. 12, 1968.

Amendment of sec. 74.951(a)(1), Instructional TV fixed Service, adopted, Dec. 12, 1968.

Amendment of sec. 73.202, FM table of assignments, adopted, Dec. 12, 1968.

APPARENT LIABILITY FOR FORFEITURE

Western Oklahoma B/cing Co., KWDE, Clinton, Okla., violation of pre-sunrise conditions of license, amount of $500. Dec. 12, 1968.

WSJM, Inc., WSJM(FM), St. Joseph, Mich., violation of sec. 73.281(a), amount of $500, Dec. 18, 1968.

Northeast Wyoming B/cers, Inc., KASL, Newcastle, Wyo., violation of sec. 73.93(e), amount of $1,000, Dec. 23, 1968.

WPAR, Inc., WPAR, Parkersburg, W. Va., violation of sec. 73.67(a)(4), amount of $1,000, Jan. 15, 1969.

McAlester B/cing Co., Inc., KTMC, McAlester, Okla., violation of sec. 73.93(b), amount of $500, Jan. 15, 1969.

Basin B/cing Corp. KRSC, Othello, Wash., violation of sec. 73.47(a), 73.111(a), 73.39(d)(1)(vii), amount of $650, Jan. 15, 1969.

Henryetta Radio Co., KHEN, Henryetta, Okla., violation of sec. 73.93(b), 73.56, 73.40(b)(3)(iv), 73.113(a)(6), amount of $1,000, Jan. 22, 1969.

Sandia B/cing Corp., KABQ, Albuquerque, N. Mex., violation of sec. 73.93(b), amount of $500, Jan. 22, 1969.

Logan Cnty. B/cing Co., KCCL, Paris, Ark., violation of sec. 73.87 and 73.99, amount of $1,000, Feb. 5, 1969.

Quincy Valley B/cers, KPOR, Quincy, Wash., violation of sec. 73.87, amount of $500, Feb. 5, 1969.

Holland B/cing Co., WHTC-AM-FM, Holland, Mich., violation of sec. 73.57(a) and 73.267(b)(1), amount of $750, Feb. 5, 1969.

Faulkner Radio, Inc., WBTR-FM, Carrollton, Ga., violation of sec. 73.299, amount of $3,000, Feb. 5, 1969.

APPLICATIONS ACCEPTED FOR FILING

KZUN, Inc., KZUN, Opportunity, Wash., Nov. 20, 1968.

Town and County Radio, Inc., WYFE, Nov. 20, 1968.

Indian Nation B/cing Co., Poteau, Okla., Nov. 20, 1968.

Brinsfield B/cing Co., Oil City, Pa., Nov. 26, 1968.

Joellen B/cing Corp., KOTN-FM, Pine Bluff, Ark., Dec. 5, 1968.

Citrus B/cing Co., WYSE, Inverness, Fla., Dec. 5, 1968.

Jackson, Phil D., Eureka, Calif., Dec. 12, 1968.

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ASSIGNMENT OF LICENSE & TRANSFER OF CONTROL

License of WNNR–AM–FM & CP for WJMR–TV, New Orleans, La., from Supreme B/cing Co., Inc., to Summit B/cing Co., Inc., granted, Nov. 20, 1968.

License of KXKX–FM, San Francisco, Calif., and SCA, from San Francisco Theological Seminary to Bay Area Educational TV Association, granted, Nov. 20, 1968.

Capital City TV Corp., KBLL & KBLL–TV, Helena, Mont., from McAdam, Paul, and Scribner, A. W., to Babcock, Tim, granted, Dec. 18, 1968.

Station WEIV–FM, WJIV–FM, WMIV–FM, WBIV–FM, and CP for WBIV–FM, from C&U B/cing Corp., to Christian B/cing Network, Inc., granted. Dec. 18, 1968.

Station KISW(FM), Seattle, Wash., from Lippencott, Ellwood W., to Seattle, Portland, and Spokane Radio. granted, Dec. 19, 1968.

Air Capitol, Inc., WMAD, Madison. Wis., from Searles, Neil K., to Hudson B/cing Corp., Dec. 20, 1968.

Station WMCR, Oneida, N.Y., from C&U B/cing Corp., to Warren B/cing Co., Inc., granted, Dec. 19, 1968.

Station KTHI–TV, Spokane, Wash., from Pembina B/cing Co., Inc., to Spokane TV, Inc., granted, Jan. 22, 1969.

Bigham, Allen C., Jr., KCTY, Salinas. Calif., to Jeco, Inc., Jan. 22, 1969.

AUTHORIZATION

Comsat, authorization to participate in granting the manager authority to proceed with procurement of long lead items, granted, Dec. 13, 1968.

Cosmopolitan B/cing Corp., WHBI–FM. Newark, N.J., authorization to move transmitter site, granted, Jan. 9, 1969.

Cosmopolitan B/cing Corp., WHBI–FM, Newark, N.J., remote control authority, granted, Jan. 9, 1964.

Mineral King B/cers, Tulare, Calif., interim authority to operate facilities previously operated by station KDFR (FM), granted, Jan. 9, 1969.

Staff authorized to grant individual requests for extension of time to comply with ±5Kc/s frequency deviation. Jan. 13, 1969.

Midwest TV, Inc., KFMB–TV, San Diego, Calif., parties authorized to file replies, Jan. 29, 1969.

University of Arizona, application in experimental service, Chief Engineer given authority to grant application and subsequent similar applications. Feb. 5, 1969.

CATV

Midwest TV, Inc., KFMB–TV, San Diego, Calif., request for postponement of reporting date, partially granted, Dec. 5, 1968.

Buckeye Cablevision, Inc., Toledo, Ohio. prohibited from providing signals of Detroit-Windsor TV station to additional subscribers, Dec. 23, 1968.

CEASE AND DESIST ORDER

New York Telephone Co., New York, N.Y., additional information requested, Dec. 18, 1968.

CONCENTRATION OF CONTROL

New B/cing Corp., Charlevoix, Mich., data required on concentration of control question, Jan. 8, 1969.

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CONSTRUCTION PERMIT

Borgen, Obed S., Wisconsin Dells, Wis., granted, Nov. 20, 1968.
Fritts B/cing, Inc., Indianola, Miss., granted, Nov. 20, 1968.
Garryowen Butte T.V., Inc., KXLF–TV, Helena, Mont., granted, Nov. 26, 1968.
California Enterprises, Inc., San Francisco, Calif., granted, Nov. 20, 1968.
New B/cing Corp., Charlevoix, Mich., granted, Nov. 20, 1968.
State Mutual B/cing Corp., Worcester, Mass., granted, Dec. 5, 1968.
KHEY B/cing, Inc., KHEY, El Paso, Tex., granted, Dec. 18, 1968.
Cranje B/cing Co., Inc., Catskill, N.Y., granted, Dec. 18, 1968.
Percypeny Radio, Parsippany — Troy Hills, N.J., granted, Dec. 18, 1968.
Trans-Florida Radio, Inc., Bartow, Fla., granted, Jan. 8, 1969.
TMF Comm., Inc., New Prague, Minn., granted, Jan. 8, 1969.
Custer B/cing Corp., Miles City, Mont., granted, Jan. 8, 1969.
Bd. of Ed., Jefferson Cnty., Ky., WFPK–TV, Louisville, Ky., granted, Jan. 8, 1969.
WKAP, Inc., Bethlehem, Pa., granted, Jan. 15, 1969.
Williston Enterprises, Inc., Williston, N. Dak., granted, Feb. 5, 1969.

DENIAL OF WAIVER

Antelope B/cing Co., Lancaster, Calif., waiver of 73.207(a), denied, Nov. 20, 1968.
Richardson, J. Ned., Chico, Calif., waiver of 73.315(a), denied, Nov. 20, 1968.
Maizels, Albert D., Vienna, Va., waiver of 1.569(b)(2)(i), denied, Nov. 26, 1968.
Pacific B/cing Corp., Honolulu, Hawaii, waiver of 74.602(h), 74.631(c), 74.632(a), and 74.637(a), denied, Nov. 26, 1968.
Western Telestations, Inc., Honolulu, Hawaii, waiver of 74.735(d), denied, Nov. 26, 1968.
Pacific & Southern B/cing Co., Inc., Honolulu, Hawaii, waiver of 74.602(h), 74.631(c), 74.632(a), and 74.637(a), denied, Nov. 26, 1968.
Metropolitan Atlanta Radio, Atlanta, Ga., waiver of 1.569, denied, Dec. 12, 1968.
Kernersville B/cing Co., Inc., Kernersville, N.C., waiver of 1.569(b)(2)(i), denied, Dec. 12, 1968.
McLendon Pacific Corp., KABL–AM & FM, Oakland—San Francisco, Calif., waiver of 73.30(a), denied, Dec. 18, 1968.
Plough B/cing Co., Inc., WMPS, Memphis, Tenn., waiver of 73.37, denied, Jan. 8, 1969.

DESIGNATION FOR HEARING

Snake River Valley TV, Inc., Wampa, Idaho, Nov. 20, 1968.
KZNG B/cing Co., Hot Springs, Ark., Nov. 26, 1968.
Chaconas, Nick J., WHMC, Gaithersburg, Md., Dec. 5, 1968.
McBee, Howard M., Lawton, Okla., Dec. 5, 1968.
Atlantic Video Corp., WRTV, Newark, N.J., Dec. 12, 1968.
Gale B/cing Co., Inc., WFMT, Chicago, Ill., Jan. 9, 1969.
Mineral King B/cers, Tulane, Calif., Jan. 9, 1969.

EXTENSION OF TIME

Time for filing comments and reply comments in rulemaking proceeding, docket No. 18261 and 18262, extended, Nov. 20, 1968.
Midwest TV, Inc. KFMB–TV, San Diego, Calif., date of filing progress reports postponed, Jan. 13, 1969.
National Cable TV Assn., Inc., time for filing in re amend. of part 73, extended, Jan. 22, 1969.

FAIRNESS DOCTRINE

Letter to Zapple, Nicholas, Communications Counsel, U.S. Senate Committee on Commerce, concerning application of fairness doctrine to CATV, Nov. 20, 1968.

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NOTICE OF INQUIRY

Third Notice of Inquiry relating to preparation for a World Administrative Radio Conference of the ITU on matters of radio astronomy and space services, adopted, Nov. 14, 1968.

NOTICE OF PROPOSED RULE MAKING

Amendment of part 21 concerning applications in the Domestic Public Point-to-Point Microwave Radio Service involving TV relay service to CATV systems, adopted, Nov. 20, 1968.

Amendment of Sec. 21.101 concerning transmitter frequency tolerance requirements, Nov. 26, 1968.

Amendment of sec. 73.202, FM table of assignments, Nov. 26, 1968.

Amendment of sec. 73.606(b), TV table of assignments, Nov. 26, 1968.

Amendment of parts 73 and 74, retention of records kept by stations, Nov. 26, 1968.

Amendment of part 87, Civil Air Patrol participation in search and rescue operations, Dec. 12, 1968.

Amendment of parts 81 and 83, ITU manual, Jan. 8, 1969.

Amendment of sec. 74.1031(c) and 74.1105 (a) and (b), Jan. 8, 1969.

Amendment of part 74, low power FM translator and booster stations, Jan. 9, 1969.

Amendment of sec. 73.81, hours of operation, Jan. 15, 1969.

Amendment of part 73, subpart E, remote control of TV B/c operation, Jan. 15, 1969.

Amendment of sec. 73.606, Flagstaff, Ariz., Jan. 15, 1969.

Amendment of sec. 73.202, Chesapeake—Virginia Beach, Va., Jan. 15, 1969.

Amendment of sec. 73.202, Albion, Battle Creek, Fremont, and Zeiland, Mich. Jan. 15, 1969.

Amendment of part 2, sale, import, shipment of devices causing interference, Jan. 15, 1969.

Amendment of sec. 73.606, Annapolis, Md., and Seaford, Del., Jan. 22, 1969.

Amendment of sec. 73.606(b), Williamsport, Pa., Jan. 22, 1969.

Amendment of part 2, 1435—1537 MHz, withdrawn, Feb. 5, 1969.

ORAL ARGUMENT

Oral argument scheduled for Nov. 18, in the matter of amendment of sec. 0.457, cancelled, Nov. 14, 1968.

Star Stations of Indiana, Inc., WIFE AM–FM, argument scheduled, Dec. 18, 1968.

Roach, John C., Calhoun, Ga., argument scheduled, Dec. 18, 1968.

Amendment of Part 74 relative to CATV, argument scheduled, Jan. 8, 1969.

Star Stations of Indiana, Inc., WIFE additional time granted, Jan. 9, 1969.

Columbia B/cing System, Inc., oral argument in WBBM–TV inquiry scheduled for March 3, 1969, Jan. 9, 1969.

Amendment of part 74 relative to CATV, allocation of time clarified, Jan. 15, 1969.

PROPOSED RULE MAKING

Amendment of sec. 73.606, Waukegan and Danville, Ill., denied, Jan. 15, 1969.

Amendment of part 74, TV Camera Synchronizing Signals, denied, Jan. 15, 1969.

Amendment of Sec. 73.202, Panama City, Fla., denied, Jan. 22, 1969.

RECONSIDERATION PETITION

National Ed. Foundation, Inc., Washington, D.C., denied, Nov. 26, 1968.

Cedar Valley Radio, Cedartown, Ga., denied, Nov. 26, 1968.

Florida-Georgia TV Co., Inc., Jacksonville, Fla., dismissed, Jan. 8, 1969.

Raybin, George Nims, denied, Jan. 8, 1969.

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RENEWALS

Radio Enterprises of Ohio, WREO, Ashtabula, Ohio, granted, Nov. 26, 1968.
Bigham, Allen C., Jr., KCTY, Salinas, Calif., short-term license renewed, Jan. 22, 1969.

REPORT AND ORDER

First Report and Order, amendment of sec. 73.202, FM table of assignments, adopted, Dec. 12, 1968.
Report and Order, amendment of sec. 73.606(b), TV table of assignments, adopted, Jan. 8, 1969.

REVIEW

Cornbelt B/cing Corp., Lincoln, Nebr., denied, Nov. 26, 1968.
Moline TV Corp., WQAD–TV, Moline, Ill., denied, Dec. 5, 1968.
Kentucky Central TV, Inc., WKYT–TV, Lexington, Ky., denied, Dec. 2, 1968.
Akron Telerama, Inc., Akron, Ohio, motion for review, dismissed, Dec. 18, 1968.
Orange Nine, Inc., Orlando, Fla., denied, Jan. 8, 1969.

RULES, WAIVER OF

KZUN, Inc., KZUN, Opportunity, Wash., waiver of 1.569(b)(2)(i), Nov. 20, 1968.
Town and Country Radio, Inc., WYFE, waiver of 1.569, Nov. 20, 1968.
Indian Nation B/cing Co., Poteau, Okla., waiver of 73.207(a), Nov. 20, 1968.
Garryowen Butte T.V., Inc., KXLF–TV, Helena, Mont., waiver of 74.732(e)(2), Nov. 20, 1968.
California Enterprises, Inc., San Francisco, Calif., waiver of 73.685(e), Nov. 20, 1968.
Northern States Power Co., St. Paul, Minn., waiver of 91.254(b)(30), Dec. 5, 1968.
Joellen B/cing Corp., KOTN–FM, Pine Bluff, Ark., waiver of 73.211(d), Dec. 5, 1968.
Citrus B/cing Co., WYSE, Inverness, Fla., waiver of 1.571, Dec. 5, 1968.
Alaska Aviation Radio, Inc., waiver of 87.297(d), Dec. 12, 1968.
Jackson, Phil D., Eureka, Calif., waiver of 1.569(b)(2)(i), and 73.37(a), Dec. 12, 1968.
Cosmopolitan B/cing Corp., WHBI–FM, Newark, N.J., waiver of 73.210(a)(2), Jan. 9, 1969.
Board of Education, Jefferson County, Ky., WFPK–TV, Louisville, Ky., waiver of 73.610(d) and 73.698, Jan. 8, 1969.
Station KTHI–TV, Fargo-Grand Forks, N. Dak., waiver of 1.597., Jan. 22, 1969.
Sangre de Cristo B/cing Corp., KOAA–TV, Pueblo, Colo., waiver of 73.652(a), Feb. 1969.

SHOW CAUSE ORDER

Ashtabula Telephone Co., Ashtabula, Ohio, Withdrawn, Feb. 5, 1969.

STAY

Sunset B/cing Corp., Yakima, Wash. stay vacated, Nov. 26, 1968.
Cornbelt B/cing Corp., Lincoln, Nebr., petition dismissed, Nov. 26, 1968.

TELEPHONE RATES

American Telephone & Telegraph, petition by Western Union Telegraph Co. requesting Commission to pressure A.T. & T. to withdraw certain tariff revisions, denied, Jan. 29, 1969.

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MISCELLANEOUS

Staff instructed to make recommendations concerning improvement of the frequency assignment record-keeping system, Nov. 20, 1968.

Existence of unauthorized FM translator operating in Helena, Mont., noted, Nov. 20, 1968.

Ohio Bell Telephone Co., Cleveland, Ohio, depreciation rates modified, Nov. 20, 1968.

Extension of cut-off date in 150.8—162 Mc/s band allocation proceeding, Nov. 20, 1968.

New York Telephone Co., New York, N.Y., depreciation rates modified, Nov. 26, 1968.

Northwestern Bell Telephone Co., Omaha, Nebr., depreciation rates modified, Nov. 26, 1968.

Columbia B/cing System, Inc., request that a staff memorandum be made public, denied, Nov. 26, 1968.

Report of mail in Broadcast Bureau for Oct. 1968, noted, Nov. 26, 1968.

RCA Global Comm., Inc., authority to close point-to-point high frequency radio telegraph station at San Juan, P.R., granted, Nov. 29, 1968.

Southwestern Bell Telephone Co., St. Louis, Mo., depreciation rates modified, Dec. 12, 1968.

New B/cing Corp., Charlevoix, Mich., motion to reconsider and set aside previous order granting application, Dec. 12, 1968.

Director of Telecommunications Management, comments on extracts from report of the Federal-State Telecommunications Advisory Committee, Dec. 18, 1968.

WPOW, Inc., WPOW, New York, N.Y., informal objection, dismissed, Dec. 18, 1968.

Emergency Action Notification System, Third Method Test procedures, revised, Dec. 18, 1968.

Report of Mail in Broadcast Bureau for Nov. 1968, noted, Dec. 18, 1968.

Period for filing comments in response to Third Notice of Inquiry relating to preparation for a World Administrative Radio Conference of the ITU, extended, Dec. 13, 1968.

Proceeding concerning preparation for the fifth session of IMCO, terminated. Jan. 8, 1968.

Radio Columbia, Inc., Boston, Mass., notification that a trafficking issue is required, Jan. 8, 1968.

H. & D. Drywall Co., Charlotte, N.C., Moore, James G., Northport, Ala., Jones, Toy Bernard, Danville, Va., applications in Citizens Radio Service, granted, Jan. 15, 1969.

Amendment of sec. 19.735—206. Ethical Conduct Regulations, Jan. 15, 1969.

Strahan, Dwight, petition requesting assignment of channel 17 to Robstown, Tex., denied, Jan. 22, 1969.

Report of Mail in Broadcast Bureau during December 1968, noted, Jan. 22. 1969.

Report of Subcommittee No. 5 of the House Select Committee on Small Business entitled, "The Allocation of Radio Frequecy and Its Effect on Small Business," noted, Jan. 29, 1969.

Comments on draft of a proposed Administrative Inspection Warrant Act, adopted, Jan. 29, 1969.

Legislative proposal and explanation for a proposed amendment to sec. 4 of the Comunications Act, adopted, Jan. 29. 1969.

Microwave Communications, Inc., motion for official notice and special relief, denied, Feb. 5, 1969.

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SUBJECT DIGEST

ADJUDICATION

CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC. 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557). ***MIDWEST TV, INC.*** 84

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A REIMBURSEMENT AGREEMENT WAS APPROVED SINCE SEC. 1.525 HAS BEEN COMPLIED WITH AND A NEW UHF SERVICE WILL BE EXPEDITED. ***LEWIS B/CING CORP.*** 36

APPROVAL OF A REIMBURSEMENT AGREEMENT DENIED ON GROUNDS THAT THE WITHDRAWING APPLICANT FAILED TO SUBMIT SUPPORTING AFFIDAVITS TO SUBSTANTIATE ITS LEGAL AND ENGINEERING EXPENSES. ***JEFF. DAVIS B/CING SERVICE*** 259

A REIMBURSEMENT AND DISMISSAL AGREEMENT WAS APPROVED WHEREBY ONE OF THREE APPLICANTS WITHDREW. PUBLICATION (SEC. 1.525(B)) IS REQUIRED SINCE THE WITHDRAWING PARTY IS THE ONLY APPLICANT FOR ONE OF THE COMMUNITIES. ***ALMARDON, INC. OF FLA.*** 299

A JOINT PETITION FOR GRANT OF ONE APPLICATION AND DISMISSAL OF THE OTHER, HELD IN ABEYANCE PENDING PUBLICATION PURSUANT TO SEC. 1.525. ***BERWICK B/CING CORP.*** 624

JOINT AGREEMENT FOR REIMBURSEMENT AND DISMISSAL OF ONE OF APPLICANTS, GRANTED, SINCE THE REQUIREMENTS OF SEC. 1.525(A) HAVE BEEN MET AND PUBLICATION UNDER SEC. 1.525(B) NOT REQUIRED. ***H-B-K ENTERPRISES*** 683

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REIMBURSEMENT AGREEMENT APPROVED AFTER CERTAIN SUMS WERE DISALLOWED SINCE PETITIONERS HAVE COMPLIED WITH SEC. 1.525 AND HAVE SUBSTANTIATED THE REMAINING EXPENSES. ***JOHN WEIGEL ASSOCIATES*** 1020

AIR HAZARDS - ISSUES

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APPLICATION DESIGNATED FOR HEARING ON ISSUES DIRECTED TO UHF IMPACT, DE FACTO REALLOCATION OF A CHANNEL, WAIVER OF SEC. 73.610, ANTENNA HEIGHT, FINANCIAL QUALIFICATIONS, AND EFFORTS MADE TO ASCERTAIN COMMUNITY NEEDS AND INTERESTS. ***WLVA, INC.*** 757

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A PETITION, IN THE AT&T RATE HEARING, REQUESTING A SEPARATION OF THE COMMON CARRIER BUREAU FROM THE DECISIONAL PROCESS BY REQUIRING THE BUREAU TO SUBMIT TESTIMONY STATING ITS POSITION, IS DENIED. ***AMER. TEL. & TEL.*** 29

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AN ISSUE WAS ADDED TO DETERMINE WHETHER APPLICANTS PROPOSAL WOULD VIOLATE SEC. 73.211(B), MAXIMUM ANTENNA HEIGHT. ***GEORGIA RADIO, INC.*** 789

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APPEAL FROM EXAMINERS ADVERSE RULING

APPEAL FROM EXAMINERS RULING SETTING A DATE FOR HEARING, DENIED SINCE NO EVIDENCE WAS PRESENTED INDICATING THAT EXAMINER WAS ARBITRARY OR CAPRICIOUS, OR THAT HE EXCEEDED HIS AUTHORITY. ***ORANGE NINE, INC.*** 38

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ISSUES WERE ENLARGED TO CONSIDER APPLICANTS ESTIMATE OF COSTS, AVAILABILITY OF A LOAN, FAILURE TO AMEND ITS APPLICATION (1.65) AND ADEQUACY OF ITS STAFF. ***CHRISTIAN VOICE OF CENT. OHIO*** 303

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE. ***STEPHENSON, HARRY D.*** 335

AN APPLICATION WAS AMENDED TO REFLECT THE ASSIGNMENT OF A LICENSE. ***CENTRAL COAST TV*** 771

AMENDMENT OF APPLICATION TO REFLECT CHANGES IN THE BOARD OF DIRECTORS AND CORPORATE OFFICERS OF APPLICANT, ACCEPTED. ***AMERICANA B/CING CORP.*** 843

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IN A DECISION DENYING THE APPLICATION, THE BOARD HELD THAT IF THE APPLICANT ELECTS TO AMEND ITS APPLICATION TO SPECIFY THE LARGER COMMUNITY, THE APPLICATION WILL BE RETURNED TO THE PROCESSING LINE. OTHERWISE, THE APPLICATION WILL BE DENIED. ***CAVALLARO, AUGUSTINE L., JR.*** 863

PETITION TO AMEND AN APPLICATION TO SUBSTITUTE ANOTHER PARTY AS APPLICANT HELD IN ABEYANCE PENDING RECEIPT OF THE NEW PARTYS FINANCIAL QUALIFICATIONS AND PROPOSED PROGRAMMING. ***NORRISTOWN B/CING CO., INC.*** 977

AN ISSUE WAS ADDED TO DETERMINE WHETHER APPLICANT HAS COMPLIED WITH SEC. 1.65 BY FAILURE TO AMEND TO SHOW AN APPLICATION BY ONE OF ITS PRINCIPALS TO ACQUIRE A 49.70 STOCK INTEREST IN ANOTHER STANDARD BROADCAST STATION. ***VIRGINIA B/CERS*** 1004

APPLICATION GRANTED

A CONSTRUCTION PERMIT FOR A NEW TV BROADCAST STATION WAS GRANTED WITH CONDITIONS CONCERNING MEDIA OWNERSHIP. ***STATE MUTUAL B/CING CORP.*** 736

APPLICATION RENEWAL OF

RENEWAL APPLICATION DENIED, INTER ALIA, WHERE LICENSEE WAS HELD RESPONSIBLE FOR THE GROSS MISCONDUCT (INCLUDING FRAUDULENT MISREPRESENTATIONS) OF ITS STATION MANAGER, WHO CONSTITUTED A PRINCIPAL OF LICENSEE, WHERE IT WAS SHOWN THAT THE LICENSEE FAILED TO EXERCISE ADEQUATE CONTROL AND SUPERVISION OVER THE STATION OPERATOR. ***CONTINENTAL B/CING, INC.*** 120

RENEWAL OF LICENSE DENIED INTER ALIA ON THE GROUNDS THAT LICENSEE FAILED TO MAINTAIN ACCURATE PROGRAM LOGS (73.111 & 73.112) WAS GENERALLY INATTENTIVE TO THE STATION AND ITS OPERATION. ***CONTINENTAL B/CING, INC.*** 120

THE COMMISSION FOUND THAT APPLICANT HAD VIOLATED SEC. 317(A) (1) AND SEC 73.119 IN THAT IT FAILED TO ANNOUNCE AN INDIVIDUAL OR AGENCY PURCHASING BROADCAST TIME AS SPONSOR, A REQUIREMENT REGARDLESS OF BENEFIT DERIVED BY PURCHASER. ***CONTINENTAL B/CING, INC.*** 120

APPLICATION SUBSTANTIAL CHANGE

APPLICATION DESIGNATED FOR HEARING ON SEC. 1.65 (SUBSTANTIAL CHANGES), TRAFFICKING, FAILURE TO CONSTRUCT, AND EXTENSION OF TIME (SEC. 1.534) ISSUES. ***GROSS B/CING CO.*** 76

AREA OF COVERAGE

PETITIONERS ALLEGATION OF CONCENTRATION OF CONTROL, IN THE ABSENCE OF GRADE B OVERLAP, WAS REJECTED ON THE GROUNDS THAT IT WAS BASED ON APPLICANTS ADVERTISING BROCHURE AND NOT FIELD INTENSITY CONTOURS (73.683(B)(2)) ***SUNSET B/CING CORP.*** 276

ASSIGNMENT INVOLUNTARY

RENEWAL AND INVOLUNTARY ASSIGNMENT OF LICENSE TO TRUSTEE IN BANKRUPTCY GRANTED WHERE LICENSEE HAD BEEN ADJUDICATED A BANKRUPT. CHARACTER QUALIFICATIONS OF LICENSEE PRINCIPALS HAD BEEN DESIGNATED, BUT SINCE BANKRUPTCY THE BANKRUPT LICENSEE IS DISASSOCIATED FROM THE STATION AND WILL RECEIVE NO BENEFIT FROM THE TRANSFER. VOLUNTARY ASSIGNMENT TO NEW ASSIGNEE APPROVED ***IMAGE RADIO, INC.*** 317

AUTHORITY DELEGATION OF

SEC. 0.371 WAS AMENDED TO AUTHORIZE THE CHIEF, OFFICE OF OPINIONS AND REVIEW TO ACT ON REQUESTS TO FILE PLEADINGS IN EXCESS OF THE RULE REQUIREMENTS WHEN SUCH REQUESTS RELATE TO PLEADINGS TO BE FILED IN HEARING PROCEEDINGS PENDING BEFORE THE COMMISSION EN BANC. ***AMENDMENT OF SEC. 0.371*** 678

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BANK LOAN

APPLICATIONS DESIGNATED FOR HEARING ON ISSUES OF AVAILABILITY OF A BANK LOAN AND THE STANDARD COMPARATIVE ISSUE. ***HUBBARD, SEABORN RUDOLPH*** 690

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RENEWAL AND INVOLUNTARY ASSIGNMENT OF LICENSE TO TRUSTEE IN BANKRUPTCY GRANTED WHERE LICENSEE HAD BEEN ADJUDICATED A BANKRUPT. CHARACTER QUALIFICATIONS OF LICENSEE PRINCIPALS HAD BEEN DESIGNATED, BUT SINCE BANKRUPTCY THE BANKRUPT LICENSEE IS DISASSOCIATED FROM THE STATION AND WILL RECEIVE NO BENEFIT FROM THE TRANSFER. VOLUNTARY ASSIGNMENT TO NEW ASSIGNEE APPROVED. ***IMAGE RADIO, INC.*** 317

A FINANCIAL ISSUE WAS ADDED SINCE IT APPEARED THAT APPLICANT HAD FILED A PETITION IN BANKRUPTCY SUBSEQUENT TO THE FILING OF ITS APPLICATION. ***HEART OF GEORGIA B/CING CO., INC.*** 905

BILLING PRACTICES, FRAUDULENT

MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780

BURDEN OF PROOF, FAILURE TO MEET

PETITION FOR RECONSIDERATION OF DECISION DENYING APPLICATION, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO REBUT THE SUBURBAN COMMUNITY 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY AND NO EVIDENCE NOT PREVIOUSLY BEFORE THE BOARD WAS SUBMITTED. ***NORTHERN INDIANA B/CERS, INC.*** 264

BURDEN OF PROOF, ON SPECIFIC FACTS

MOTION TO CHANGE ISSUES AND SHIFT THE BURDENS OF PROOF FROM THE CATV OPERATOR TO THE TV LICENSEE IN A PROCEEDING CONCERNING CATV CARRIAGE, IS DENIED SINCE THE PRESENT ALLOCATION OF BURDENS (74.1109) AFFORDS THE MOST ORDERLY METHOD OF RESOLVING THE MAJOR MARKET OVERLAP CASE QUESTIONS. ***DELAWARE COUNTY CABLE TV CO.*** 69

SINCE A GRANT OF A PETITION TO CHANGE ISSUES AND SHIFT BURDEN OF PROOF WOULD THWART THE COMMISSIONS PURPOSE IN CONSOLIDATING THE PROCEEDING BY CREATING SUBISSUES CONCERNING A SPECIAL MARKET AND A PARTICULAR APPLICANT, THE PETITION WAS DENIED. ***DELAWARE COUNTY CABLE TV CO.*** 69

BUSINESS RADIO SERVICE

RULEMAKING PROCEEDINGS WERE INSTITUTED TO CONSIDER FREQUENCY COORDINATION FOR THE AIR TERMINAL AND CONTROL PROTECTION INDUSTRIES (SEC. 91.8(A)(1)(III)). ***BUSINESS RADIO SERVICE FREQ. COORD.*** 627

CATV ECONOMIC IMPACT

PETITION FOR WAIVER OF HEARING PROVISIONS OF SEC. 74.1107 FOR IMPORTATION OF DISTANT SIGNALS DENIED, AND HEARING ORDERED ON ISSUES CONCERNING PENETRATION OF MARKET AND EFFECTS OF CATV SERVICE ON PROPOSED AND POTENTIAL TV STATIONS. ***TOP VISION CABLE COMPANY*** 413

CATV EXTENSION OF DISTANT SIGNALS BY SYSTEM

PETITIONER FOUND TO HAVE VIOLATED SEC. 74.1105, BY FAILING TO NOTIFY SCHOOL AUTHORITIES AND STATE EDUC. TV AGENCIES OF PROPOSAL TO IMPORT DISTANT EDUCATIONAL SIGNALS. ***FIRST ILLINOIS CABLE TV, INC.*** 256

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PETITION FOR WAIVER OF HEARING PROVISIONS OF SEC. 74.1107 FOR IMPORTATION OF DISTANT SIGNALS DENIED, AND HEARING ORDERED ON ISSUES CONCERNING PENETRATION OF MARKET AND EFFECTS OF CATV SERVICE ON PROPOSED AND POTENTIAL TV STATIONS. ***TOP VISION CABLE COMPANY*** 413

PROPOSED RULES CONCERN CATV PROGRAM ORIGINATION, TECHNICAL STANDARDS, REPORTING REQUIREMENTS, AND IMPORTATION OF DISTANT SIGNALS IN MAJOR AND SMALLER MARKETS. ***CATV*** 417

CATV NOTIFICATION OF INTENT TO COMMENCE OPERATION

PETITIONER FOUND TO HAVE VIOLATED SEC. 74.1105, BY FAILING TO NOTIFY SCHOOL AUTHORITIES AND STATE EDUC. TV AGENCIES OF PROPOSAL TO IMPORT DISTANT EDUCATIONAL SIGNALS. ***FIRST ILLINOIS CABLE TV, INC.*** 256

CATV OPERATION IN TOP 100 MARKETS

A REQUEST BY A CATV SYSTEM TO CLARIFY ISSUES CONCERNING DELINEATION OF GEOGRAPHIC BOUNDARIES OF THE MARKET, CERTIFIED TO THE COMMISSION BECAUSE OF THE NOVEL POLICY CONSIDERATIONS INVOLVED, TO WIT, THE EXTENT OF THE AREA AFFORDED PROTECTION TO UHF FROM CATV DEVELOPMENT. ***CLEAR VISION TV CO.*** 633

CATV PENETRATION OF MARKET

PETITION FOR WAIVER OF HEARING PROVISIONS OF SEC. 74.1107 FOR IMPORTATION OF DISTANT SIGNALS DENIED, AND HEARING ORDERED ON ISSUES CONCERNING PENETRATION OF MARKET AND EFFECTS OF CATV SERVICE ON PROPOSED AND POTENTIAL TV STATIONS. ***TOP VISION CABLE COMPANY*** 413

CATV PROGRAM EXCLUSIVITY

PREVIOUS ORDER CLARIFIED TO SPECIFY THAT THE CATV SYSTEM MUST PROVIDE NONDUPLICATION PROTECTION UPON PROPER NOTIFICATION BY THE TV STATION EVEN IF ERRORS IN SPECIFICATION OCCUR ON RARE OCCASIONS. ***WILLMAR VIDEO, INC.***1024

CATV PROGRAM EXCLUSIVITY, SAME DAY

A CATV OPERATOR WAS DIRECTED TO AFFORD SAME DAY NONDUPLICATION PROTECTION AND TO COMPLY WITH THE REQUIREMENT THAT THE LOCAL SIGNAL MUST BE CARRIED WITHOUT MATERIAL DEGRADATION, AND TO INFORM THE COMMISSION OF ITS REMEDIAL ACTIONS. ***WILLMAR VIDEO, INC.*** 113

THE COMMISSION CLARIFIED THE OBLIGATIONS OF THE BROADCASTER AND THE CATV OPERATOR WITH RESPECT TO PROVIDING SAME-DAY PROGRAM EXCLUSIVITY PROTECTION. BROADCASTER REQUIRED TO SPECIFY PROGRAMS TO BE PROTECTED 8 DAYS IN ADVANCE AND THE TIME OF PRESENTATION BY DISTANT STATIONS. ***WILLMAR VIDEO, INC.*** 113

CATV PROGRAM ORIGINATION

PROPOSED RULES CONCERN CATV PROGRAM ORIGINATION, TECHNICAL STANDARDS, REPORTING REQUIREMENTS, AND IMPORTATION OF DISTANT SIGNALS IN MAJOR AND SMALLER MARKETS. ***CATV*** 417

CATV PROGRAM ORIGINATION, ADVERTISING

THE COMMISSIONS PROHIBITION OF TV B/C SIGNAL CARRIAGE IF THE CATV SYSTEM ORIGINATES ADVERTISING, DID NOT VIOLATE THE FIRST AMENDMENT, SINCE THE PROHIBITION WAS REASONABLY RELATED TO THE PUBLIC INTEREST AND THE COMMISSIONS STATUTORY RESPONSIBILITIES. ***MIDWEST TV, INC.*** 84

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CATV REQUEST FOR WAIVER OF DISTANT SIGNAL RULE

RECONSIDERATION OF DECISION DENYING CARRIAGE OF DISTANT SIGNALS DENIED ON THE GROUNDS THAT PETITIONERS WERE NOT ENTITLED TO SAME EXEMPTIONS AS THOSE GRANTED TO GRANDFATHERED SYSTEMS THEY ARE NOT IN AN ISOLATED COMMUNITY, AND REQUESTS WERE NOT UNOPPOSED (13 FCC 2D AT 502). ***MIDWEST TV, INC.*** 84

RECONSIDERATION OF ORDER, WHICH DENIED A SEC. 74.1107 WAIVER PETITION, WAS DENIED ON THE GROUNDS THAT THE COMMISSION WAS UNABLE TO DETERMINE FROM THE RECORD WHETHER THE IMPORTATION OF DISTANT SIGNALS WOULD HAVE AN ADVERSE EFFECT ON UHF DEVELOPMENT. ***FIRST ILL. CABLE TV, INC.*** 256

PETITION FOR WAIVER OF HEARING PROVISIONS OF SEC. 74.1107 FOR IMPORTATION OF DISTANT SIGNALS DENIED, AND HEARING ORDERED ON ISSUES CONCERNING PENETRATION OF MARKET AND EFFECTS OF CATV SERVICE ON PROPOSED AND POTENTIAL TV STATIONS. ***TOP VISION CABLE COMPANY*** 413

CATV CARRIAGE REQUIREMENTS

RULES WERE PROPOSED TO REQUIRE CATV SYSTEMS LOCATED WITHIN THE GRADE B CONTOURS OF TELEVISION STATIONS AUTHORIZED TO BROADCAST SUBSCRIPTION PROGRAMS, TO CARRY THE SUBSCRIPTION SIGNALS OF THOSE STATIONS. ***SUBSCRIPTION TELEVISION*** 601

CATV GRANDFATHERING RIGHTS

RECONSIDERATION OF DECISION DENYING CARRIAGE OF DISTANT SIGNALS DENIED ON THE GROUNDS THAT PETITIONERS WERE NOT ENTITLED TO SAME EXEMPTIONS AS THOSE GRANTED TO GRANDFATHERED SYSTEMS THEY ARE NOT IN AN ISOLATED COMMUNITY, AND REQUESTS WERE NOT UNOPPOSED (13 FCC 2D AT 502). ***MIDWEST TV, INC.*** 84

CATV

IN A NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY THE COMMISSION SUGGESTED VARIOUS POSSIBLE NEW AND REVISED REGULATIONS IN PART 74, SUBPART K, FOR CATV, NECESSITATED BY TECHNOLOGICAL ADVANCEMENTS AND NEW USES. ***CATV, REGULATORY POLICY*** 417

PROCEEDINGS IN DOCKET NO. 15971 ARE TERMINATED, SINCE ANY UNRESOLVED QUESTIONS WOULD BE MORE APPROPRIATELY RESOLVED IN THE NEWLY INSTITUTED PROCEEDING (15 FCC 2D 0417). ***CATV, DISTRIBUTION OF TV SIGNALS*** 465

CATV AND TELEVISION RELATIONSHIP

THE COMMISSION CLARIFIED THE OBLIGATIONS OF THE BROADCASTER AND THE CATV OPERATOR WITH RESPECT TO PROVIDING SAME-DAY PROGRAM EXCLUSIVITY PROTECTION. BROADCASTER REQUIRED TO SPECIFY PROGRAMS TO BE PROTECTED 8 DAYS IN ADVANCE AND THE TIME OF PRESENTATION BY DISTANT STATIONS. ***WILLMAR VIDEO, INC.*** 113

CATV NONDUPLICATION REQUIREMENTS

A CATV OPERATOR WAS DIRECTED TO AFFORD SAME DAY NONDUPLICATION PROTECTION AND TO COMPLY WITH THE REQUIREMENT THAT THE LOCAL SIGNAL MUST BE CARRIED WITHOUT MATERIAL DEGRADATION, AND TO INFORM THE COMMISSION OF ITS REMEDIAL ACTIONS. ***WILLMAR VIDEO, INC.*** 113

PREVIOUS ORDER CLARIFIED TO SPECIFY THAT THE CATV SYSTEM MUST PROVIDE NONDUPLICATION PROTECTION UPON PROPER NOTIFICATION BY THE TV STATION EVEN IF ERRORS IN SPECIFICATION OCCUR ON RARE OCCASIONS. ***WILLMAR VIDEO, INC.***1024

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CATV OPERATION WITHIN VHF-TV STA PREDICTED GRADE B CONTOUR

MOTION TO CHANGE ISSUES AND SHIFT THE BURDENS OF PROOF FROM THE CATV OPERATOR TO THE TV LICENSEE IN A PROCEEDING CONCERNING CATV CARRIAGE, IS DENIED SINCE THE PRESENT ALLOCATION OF BURDENS (74.1109) AFFORDS THE MOST ORDERLY METHOD OF RESOLVING THE MAJOR MARKET OVERLAP CASE QUESTIONS. ***DELAWARE COUNTY CABLE TV CO.*** 69

SINCE A CATV SYSTEM PROPOSED TO OPERATE IN A MAJOR MARKET WHOSE GRADE B CONTOUR OVERLAPS THAT OF ANOTHER MAJOR MARKET, A HEARING WAS ORDERED PURSUANT TO SEC. 74.1109 (FOOTNOTE 69, SECOND REPORT). ***DELAWARE COUNTY CABLE TV CO.*** 902

CATV REPORTS REQUIRED BY COMMISSION

PROPOSED RULES CONCERN CATV PROGRAM ORIGINATION, TECHNICAL STANDARDS, REPORTING REQUIREMENTS, AND IMPORTATION OF DISTANT SIGNALS IN MAJOR AND SMALLER MARKETS. ***CATV*** 417

CATV INTERFERENCE TO

APPLICATION FOR A VHF TRANSLATOR STATION GRANTED EVEN THOUGH IT WILL CAUSE INTERFERENCE TO A CATV SYSTEMS SUBSCRIBERS. WHERE NO OTHER VHF CHANNEL IS AVAILABLE, A CATV SYSTEM IS NOT ENTITLED TO PROTECTION. ***PRESCOTT TV BOOSTER CLUB, INC.*** 733

APPLICATION FOR A VHF TRANSLATOR STATION, GRANTED, SINCE OBJECTING PETITIONER CATV SYSTEM CAN OVERCOME OBJECTIONABLE INTERFERENCE CAUSED BY THE TRANSLATOR. THE TRANSLATOR WILL PROVIDE A NEW SERVICE AND A THIRD NETWORK TO THE AREA. ***SHOW LOW AREA TV SERVICE*** 1000

CEASE AND DESIST ORDER

ISSUANCE OF A CEASE AND DESIST ORDER TO PREVENT LICENSEE FROM BROADCASTING EDITORIALS ADVERSE TO PETITIONERS CAMPAIGN, DENIED. AN ORDER TO COMPLY WITH THE FAIRNESS DOCTRINE IS NOT INTENDED TO PREVENT BROADCAST OF A STATIONS EDITORIAL ENDORSEMENTS. ***KING B/CING CO.*** 828

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

AN ORDER TO SHOW CAUSE WAS ISSUED TO A TELEPHONE COMPANY CONSTRUCTING CATV DISTRIBUTION FACILITIES WITHOUT FIRST HAVING OBTAINED A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO SEC. 214(A). ***ASHTABULA CABLE TV, INC.*** 813

CERTIFICATION OF QUESTIONS

A REQUEST BY A CATV SYSTEM TO CLARIFY ISSUES CONCERNING DELINEATION OF GEOGRAPHIC BOUNDARIES OF THE MARKET, CERTIFIED TO THE COMMISSION BECAUSE OF THE NOVEL POLICY CONSIDERATIONS INVOLVED, TO WIT, THE EXTENT OF THE AREA AFFORDED PROTECTION TO UHF FROM CATV DEVELOPMENT. ***CLEAR VISION TV CO.*** 633

CHANNEL PROTECTION

APPLICATION BY A CLASS II STATION LICENSEE FOR A CHANGE FROM A 1-KW NIGHTTIME NON-DIRECTIONAL FACILITY TO A 50 KW DIRECTIONALIZED FACILITY IS PRECLUDED BY SEC. 73.25(A)(5) SINCE THE IMPACT ON POTENTIAL USES OF THE CHANNEL WOULD BE SUBSTANTIAL EVEN THOUGH INTERFERENCE TO THE DOMINANT CLASS 1-A FACILITY WOULD NOT BE INCREASED. ***ARGONAUT B/CING CO.*** 847

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CHARACTER QUALIFICATIONS

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

PETITION TO ENLARGE ISSUES DENIED ON GROUNDS THAT PETITIONER FAILED TO SHOW VIOLATION OF FRAUD PROVISIONS OF THE INTERNAL REVENUE CODE IN THAT THE COMMISSION IS NOT THE PROPER FORUM FOR SUCH DETERMINATION. ***SUMITON B/CING CO., INC.*** 411

ISSUES WERE ENLARGED TO INCLUDE UNAUTHORIZED TRANSFER OF CONTROL OR TRANSFER OF A LICENSE, EFFICIENT UTILIZATION OF THE STATION, AND CHARACTER QUALIFICATIONS ISSUES. ***COMMUNICATIONS TECH SALES, INC.*** 776

PETITION TO ADD A CHARACTER QUALIFICATIONS ISSUE, A FINANCIAL ISSUE, A LEGAL QUALIFICATIONS ISSUE, AND A SUBURBAN COMMUNITY 307(B) ISSUE WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 979

CIVIL AIR PATROL STATIONS

PART 87 AMENDED TO PERMIT CIVIL AIR PATROL (CAP) STATIONS TO COMMUNICATE WITH AIR FORCE STATIONS PARTICIPATING OR INVOLVED IN CAP ACTIVITIES ON CAP FREQUENCIES. ***CIVIL AIR PATROL*** 899

CLASS 2-A ASSIGNMENT

APPLICATION GRANTED SINCE PROPOSAL IS CONSISTENT WITH CLASS II-A ALLOCATION PRINCIPLES AND WOULD NOT CAUSE OBJECTIONABLE INTERFERENCE. APPLICANT FOUND TO BE FINANCIALLY QUALIFIED SINCE IT DEMONSTRATED ABILITY TO MEET CONSTRUCTION AND FIRST YEAR OPERATION COSTS. ***RADIO NEVADA*** 324

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF APPLICATION AND WAIVER OF SEC. 1.569(B)(2)(I) TO SHOW THAT APPLICANTS PROPOSAL WOULD PRECLUDE THE ASSIGNMENT OF A NEW CLASS II-A FACILITY. ***STEPHENSON, HARRY D.*** 335

CLASS 4 POWER INCREASE POLICY

WHERE APPLICANT FAILED TO FOLLOW THE TWO STEP PROCESS FOR A CLASS IV STATION INCREASE OF POWER TO 1 KW., PETITIONER IS NOT PRECLUDED BY SEC. 73.24(B)(2) AND 73.37(D) FROM RAISING OBJECTION TO PROPOSED INTERFERENCE AND ISSUE ON THIS SUBJECT WILL BE INCLUDED. ***STONE, WILLIAM D.*** 53

CLEAR CHANNEL STATIONS

APPLICATIONS AND PETITIONS BY THREE CLASS II STATIONS FOR PRESUNRISE AUTHORITY BEYOND PERMISSIBLE AUTHORITY UNDER SEC. 73.99(B)(1) DENIED, SINCE THEY WOULD CAUSE MASSIVE SKYWAVE INTERFERENCE WITH THE RESPECTIVE CLASS I-B CLEAR CHANNEL STATIONS. ***MEREDITH B/CING CO.*** 927

COAST STATIONS

PART 81 WAS AMENDED TO PROVIDE ADDITIONAL CATEGORIES OF PERSONS ELIGIBLE FOR LIMITED COAST AND MARINE UTILITY RADIO STATION LICENSES, (1) MOVABLE BRIDGE OPERATORS (2) SHIPPING AGENTS WHO DOCK OR DIRECT VESSELS IN PORT (3) PERSONS WHO PROVIDE MARITIME SERVICE TO VESSELS. ***ELIGIBILITY IN MARITIME MOB. SER.*** 253

COMMON CARRIER BUREAU

A PETITION, IN THE AT&T RATE HEARING, REQUESTING A SEPARATION OF THE COMMON CARRIER BUREAU FROM THE DECISIONAL PROCESS BY REQUIRING THE BUREAU TO SUBMIT TESTIMONY STATING ITS POSITION, IS DENIED. ***AMER. TEL. & TEL.*** 29

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COMMUNITY NEEDS

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

AN ISSUE CONCERNING COMPARATIVE EFFORTS OF APPLICANTS WAS ADDED WHERE THERE WAS A SIGNIFICANT DISPARITY IN EFFORTS TO ASCERTAIN COMMUNITY NEEDS ***ORANGE COUNTY B/CING, INC.*** 802

APPLICATION FOR A UHF CP DENIED, ON GROUNDS OF AN INADEQUATE SHOWING ON THE SUBURBAN ISSUE BY FAILING TO SUMMARIZE STEPS TAKEN TO BECOME INFORMED OF LOCAL NEEDS, THE SUGGESTIONS IT HAD RECEIVED AND EVALUATION THEREOF, AND PROGRAMS PROPOSED TO MEET THOSE NEEDS. ***MINSHALL B/CING CO., INC.*** 931

COMMUNITY SURVEY

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE ***STEPHENSON, HARRY D.*** 335

THE APPROPRIATENESS OF AN ESTATE ACQUIRING BROADCAST LICENSES AND QUESTIONS OF FACT CONCERNING A COMMUNITY SURVEY NECESSITATE DESIGNATING FOR HEARING THE APPLICATIONS FOR (A) TRANSFER OF CONTROL, AND (B) ASSIGNMENT OF LICENSE. ***CRAWFORD, PERCY B., ESTATE OF*** 677

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON FINANCIAL ISSUES AND WHETHER ONE APPLICANT HAS MADE AN EFFORT TO DETERMINE THE COMMUNITYS NEEDS AND INTERESTS. ***KBLI, INC.*** 709

APPLICATION DESIGNATED FOR HEARING ON ISSUES DIRECTED TO UHF IMPACT, DE FACTO REALLOCATION OF A CHANNEL, WAIVER OF SEC. 73.610, ANTENNA HEIGHT, FINANCIAL QUALIFICATIONS, AND EFFORTS MADE TO ASCERTAIN COMMUNITY NEEDS AND INTERESTS. ***WLVA, INC.*** 757

MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780

A SUBURBAN COMMUNITY 307(B) ISSUE WAS ADDED WHERE THE PROPOSAL WILL SERVE AT LEAST 79 PERCENT OF THE LARGER COMMUNITY, WHERE THERE ARE QUESTIONS CONCERNING THE EXISTENCE OF THE SMALLER COMMUNITY AND PROGRAMMING FOR THE SMALLER COMMUNITY, QUESTIONS. ***OUTER BANKS RADIO CO.*** 994

A SUBURBAN ISSUE WAS ADDED SINCE APPLICANT HAS NOT MET THE MINIMUM STANDARDS SET FORTH IN MINSHALL B/CING CO., INC. (11 FCC 2D 796). ***OUTER BANKS RADIO CO.*** 994

SUBURBAN ISSUES WERE ADDED AGAINST TWO APPLICANTS SINCE THEY ARE TO BE HELD TO THE MINSHALL STANDARD EVEN THOUGH THE APPLICATIONS WERE FILED ON UNREVISED FORM 301. ***VIRGINIA B/CERS*** 1004

COMPARATIVE CONSIDERATIONS

A CP WAS GRANTED TO THE APPLICANT HAVING A PREFERENCE FOR INTEGRATION OF OWNERSHIP AND MANAGEMENT, FOR PROPOSING A MORE EFFICIENT UTILIZATION OF THE CHANNEL, AND FOR HAVING FEWER OWNERSHIP INTERESTS IN MEDIA OF MASS COMMUNICATIONS. ***MINSHALL B/CING CO., INC.*** 931

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COMPARATIVE CRITERIA

A STANDARD BROADCAST CP WAS GRANTED TO ONE OF TWO MUTUALLY EXCLUSIVE APPLICANTS ON GROUNDS THAT THE PROPOSED DIRECTIONAL ANTENNA OF THE SUCCESSFUL APPLICANT COULD BE ADJUSTED AND MAINTAINED TO ELIMINATE INTERFERENCE AND A 307(B) PREFERENCE. ***COSMOPOLITAN ENTERPRISES, INC.*** 650

AN ISSUE CONCERNING COMPARATIVE EFFORTS OF APPLICANTS WAS ADDED WHERE THERE WAS A SIGNIFICANT DISPARITY IN EFFORTS TO ASCERTAIN COMMUNITY NEEDS. ***ORANGE COUNTY B/CING, INC.*** 802

COMPETITION

FM APPLICATION DESIGNATED FOR HEARING ON CONCENTRATION OF LOCAL MEDIA CONTROL ISSUE AND WHETHER APPLICANTS CROSS INTERESTS IN THE LOCAL NEWSPAPER DIMINISH FREEDOM OF THE STATION TO COMPETE COMMERCIALLY OR TAKE DIFFERING EDITORIAL OPINIONS. ***WHBL, INC.*** 111

COMSAT TERMINAL STATIONS

COMSAT AUTHORIZED TO PARTICIPATE IN PROPOSED LAUNCH AND TESTING OF THE SECOND FLIGHT MODEL OF THE INTELSAT III SERIES OF SATELLITES THROUGH OPERATION OF THE ETAM, W.VA. AND CAYEY, P.R., EARTH STATIONS. ***COMSAT*** 774

COMSAT AUTHORIZATION

REQUEST FOR AUTHORITY TO OPERATE THE TRANSPORTABLE EARTH STATION FACILITY AT ANDOVER, ME. IN EMERGENCIES, TO PROVIDE AND MAINTAIN CONTINUITY OF AUTHORIZED COMMERCIAL SERVICE, WAS GRANTED. ***COMSAT*** 380

APPLICATION TO TRANSFER AND ASSIGN A TRANSPORTABLE EARTH STATION CP FROM JOINT OWNERS TO COMSAT AT PAUMALU, HAWAII GRANTED. ***COMSAT*** 382

COMSAT AUTHORIZED TO PARTICIPATE IN PROPOSED LAUNCH AND TESTING OF THE SECOND FLIGHT MODEL OF THE INTELSAT III SERIES OF SATELLITES THROUGH OPERATION OF THE ETAM, W.VA. AND CAYEY, P.R., EARTH STATIONS. ***COMSAT*** 774

COMSAT TRANSPORTABLE EARTH STATION

APPLICATION FOR TRANSFER OF THE OUTSTANDING CP AND THE OWNERSHIP INTEREST OF THE ANDOVER TRANSPORTABLE EARTH STATION FROM JOINT GRANTEES TO COMSAT, GRANTED TO PROVIDE TELEMETRY, COMMAND & CONTROL, MONITORING AND TRACKING SERVICES TO THE INTELSTAT III SERIES SATELLITES. ***COMSAT*** 65

REQUEST FOR AUTHORITY TO OPERATE THE TRANSPORTABLE EARTH STATION FACILITY AT ANDOVER, ME. IN EMERGENCIES, TO PROVIDE AND MAINTAIN CONTINUITY OF AUTHORIZED COMMERCIAL SERVICE, WAS GRANTED. ***COMSAT*** 380

APPLICATION TO TRANSFER AND ASSIGN A TRANSPORTABLE EARTH STATION CP FROM JOINT OWNERS TO COMSAT AT PAUMALU, HAWAII GRANTED. ***COMSAT*** 382

CONCENTRATION OF CONTROL

FM APPLICATION DESIGNATED FOR HEARING ON CONCENTRATION OF LOCAL MEDIA CONTROL ISSUE AND WHETHER APPLICANTS CROSS INTERESTS IN THE LOCAL NEWSPAPER DIMINISH FREEDOM OF THE STATION TO COMPETE COMMERCIALLY OR TAKE DIFFERING EDITORIAL OPINIONS. ***WHBL, INC.*** 111

ADDITION OF A CONCENTRATION OF CONTROL ISSUE, DENIED, WHERE SECOND APPLICATION, WHICH MAY RAISE AN OVERLAP ISSUE, HAS NOT REACHED HEARING STATUS, THERE IS AN ABUNDANCE OF COMPETITIVE MEDIA, AND NO GRADE B OVERLAP EXISTS, THIS ASPECT HAVING BEEN DISPOSED OF IN THE DESIGNATION ORDER. ***SUNSET B/CING CORP.*** 276

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PETITIONERS ALLEGATION OF CONCENTRATION OF CONTROL, IN THE ABSENCE OF GRADE B OVERLAP, WAS REJECTED ON THE GROUNDS THAT IT WAS BASED ON APPLICANTS ADVERTISING BROCHURE AND NOT FIELD INTENSITY CONTOURS (73.683(B)(2)) ***SUNSET B/CING CORP.*** 276

CONSTRUCTION ADDITIONAL TIME

APPLICATION DESIGNATED FOR HEARING ON SEC. 1.65 (SUBSTANTIAL CHANGES), TRAFFICKING, FAILURE TO CONSTRUCT, AND EXTENSION OF TIME (SEC. 1.534) ISSUES. ***GROSS B/CING CO.*** 76

UNDER SEC. 309(D)(1), 309(B), AND 309(C)(2)(D), A PETITION TO DENY DOES NOT LIE AGAINST AN APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO COMPLETE CONSTRUCTION. HOWEVER, PETITIONERS PLEADINGS WERE CONSIDERED AS INFORMAL OBJECTIONS UNDER SEC. 1.587. ***CHANNEL 16 OF R.I., INC.*** 893

APPLICATION FOR EXTENSION OF TIME TO COMPLETE CONSTRUCTION DESIGNATED FOR ORAL AUGUMENT TO DETERMINE WHETHER FAILURE TO COMPLETE CONSTRUCTION WAS DUE TO CAUSES BEYOND THE CONTROL OF PERMITTEE AND WHETHER FURTHER EXTENSION UNDER SEC. 319(B) AND 1.534(A) IS WARRANTED. ***CHANNEL 16 OF R.I., INC.*** 893

CONSTRUCTION PERMIT TRANSFER

APPLICATION FOR TRANSFER OF THE OUTSTANDING CP AND THE OWNERSHIP INTEREST OF THE ANDOVER TRANSPORTABLE EARTH STATION FROM JOINT GRANTEES TO COMSAT, GRANTED TO PROVIDE TELEMETRY, COMMAND & CONTROL, MONITORING AND TRACKING SERVICES TO THE INTELSTAT III SERIES SATELLITES. ***COMSAT*** 65

CONTROL ASSIGNMENT UNLAWFUL

A SHORT TERM AUTHORIZATION WAS GRANTED WHERE AN UNAUTHORIZED ASSIGNMENT OF A DOMESTIC PUBLIC RADIO SERVICE LICENSE WAS MADE IN VIOLATION OF SEC. 310(B) SINCE THE ASSIGNMENT DID NOT INVOLVE A SUBSTANTIAL CHANGE IN OWNERSHIP AND THE PUBLIC INTEREST REQUIRED THE SERVICE. ***LIMA TELEPHONE CO.*** 792

CONTROL ISSUE

RENEWAL APPLICATION DENIED, INTER ALIA, WHERE LICENSEE WAS HELD RESPONSIBLE FOR THE GROSS MISCONDUCT (INCLUDING FRAUDULENT MISREPRESENTATIONS) OF ITS STATION MANAGER, WHO CONSTITUTED A PRINCIPAL OF LICENSEE, WHERE IT WAS SHOWN THAT THE LICENSEE FAILED TO EXERCISE ADEQUATE CONTROL AND SUPERVISION OVER THE STATION OPERATOR. ***CONTINENTAL B/CING, INC.*** 120

LATE FILED PLEADING WAS ACCEPTED AND AN ISSUE WAS ADDED TO CONSIDER QUESTION OF DE FACTO CONTROL RESULTING FROM FINANCIAL INTERESTS NEWLY ACQUIRED BY ONE OF THE STOCKHOLDERS CONTRARY TO SEC. 310(B). ***CORNBELT B/CING CORP.*** 315

REQUESTED ISSUES WERE ADDED CONCERNING WHETHER THE FILING OF AMENDMENTS CONSTITUTED CORPORATE CHANGE, NEW PRINCIPALS, AND TO DETERMINE WHETHER A FINANCIAL INTEREST CONSTITUTES DE FACTO CONTROL OF THE APPLICANT. THE REASONABLENESS OF CONSTRUCTION COSTS WAS PUT IN ISSUE. ***VANDER PLATE, LOUIS*** 747

CONTROL TRANSFER OF

APPLICATION DESIGNATED FOR HEARING TO DETERMINE WHETHER THE LICENSEE IS ENGAGED IN TRAFFICKING OF WHETHER A WAIVER OF THE 3-YEAR RULE (SEC. 1.507) IS WARRANTED. ***VALLEY B/CING CO.*** 840

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CORPORATE ARTICLES, INTERPRETATION OF

REQUEST TO ADD A LEGAL QUALIFICATIONS ISSUE WAS DENIED, SINCE PETITIONER FAILED TO SHOW THAT APPLICANTS QUALIFICATION TO DO BUSINESS IN ANOTHER STATE IS MORE THAN A PROCEDURAL (MINISTERIAL) REQUIREMENT. ***NORTH AMERICAN B/CING CO., INC.*** 261

COST CONSTRUCTION

APPLICATION DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, CONSTRUCTION AND FIRST YEAR OPERATING COSTS, DEPENDENCE ON AND ESTIMATE OF FIRST YEAR REVENUES, STAFF ADEQUACY, AND AVAILIBITY OF FUNDS. ***DEARBORN CNTY B/CERS*** 247

REQUESTED ISSUES WERE ADDED CONCERNING WHETHER THE FILING OF AMENDMENTS CONSTITUTED CORPORATE CHANGE, NEW PRINCIPALS, AND TO DETERMINE WHETHER A FINANCIAL INTEREST CONSTITUTES DE FACTO CONTROL OF THE APPLICANT. THE REASONABLENESS OF CONSTRUCTION COSTS WAS PUT IN ISSUE. ***VANDER PLATE, LOUIS*** 747

ISSUES WERE ENLARGED TO DETERMINE AVAILABILITY OF APPLICATION FOR PUBLIC INSPECTION SEC. 1.526(A)(1), WHETHER SEC. 1.65 HAS BEEN COMPLIED WITH, AND WHETHER APPLICANT HAS INCLUDED PROFESSIONAL FEES IN ITS ESTIMATE OF CONSTRUCTION COSTS. ***NORTH AMERICAN B/CING CO., INC.*** 984

A CHANGE OF RESIDENCE OF AN APPLICANTS PRINCIPAL STOCKHOLDER IS NOT OF DECISIONAL SIGNIFICANCE AND DOES NOT HAVE TO BE REPORTED UNDER RULE 1.65. REQUEST FOR AN ISSUE CONCERNING ESTIMATED CONSTRUCTION AND OPERATING COSTS WAS HELD TO BE UNWARRANTED. ***WARWICK B/CING CORP.***1015

COVERAGE ISSUE

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

COVERAGE PRINCIPAL CITY

IN A JOINT REIMBURSEMENT AGREEMENT THE REIMBURSING PARTYS APPLICATION IS RETAINED IN HEARING STATUS SINCE A QUESTION COMPLIANCE WITH THE COVERAGE REQUIREMENTS OF SEC. 73.188(B)(2) REMAINS. ***H-B-K ENTERPRISES*** 683

SEC. 73.315(A) WAIVED SINCE NEITHER APPLICANT WILL BE ABLE TO PROVIDE A 3.16-MV-/M SIGNAL OVER THE ENTIRE PRINCIPAL CITY DUE TO THE SHAPE OF THE COMMUNITY. ***ALLEN, LESTER H.*** 767

CROSS INTEREST

FM APPLICATION DESIGNATED FOR HEARING ON CONCENTRATION OF LOCAL MEDIA CONTROL ISSUE AND WHETHER APPLICANTS CROSS INTERESTS IN THE LOCAL NEWSPAPER DIMINISH FREEDOM OF THE STATION TO COMPETE COMMERCIALLY OR TAKE DIFFERING EDITORIAL OPINIONS. ***WHBL, INC.*** 111

PETITION FOR RECONSIDERATION OF ORDER DENYING REQUEST TO REOPEN THE RECORD DISMISSED SINCE PETITIONER DID NOT HAVE STANDING AND APPLICANT WAS NOT IN VIOLATION OF COMMISSIONS MULTIPLE OWNERSHIP AND CROSS INTEREST POLICY, NOR DID IT VIOLATE SEC. 1.65. ***CLEVELAND B/CING, INC.*** 311

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CUT-OFF RULES

THE COMMISSION EXTENDED THE CUT-OFF DATE IN ORDER TO ACCOMODATE APPLICATIONS FOR PRESENTLY UNASSIGNABLE SPECTRUM TO THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE. ***ALLOC. OF FREQ. ®150. 8-162 MC/SØ*** 117

DECISION EFFECTIVE DATE

EFFECT OF COMMISSIONS DECISION VOIDING INVALID TARIFF PROVISIONS, STAYED AS TO REQUIREMENT THAT TARIFF FCC NO. 263 BE VACATED, EXCEPT AS TO INTERCONNECTION OF CUSTOMER PROVIDED MOBILE RADIO TELEPHONE SYSTEMS. ***CARTERFONE*** 31

DECISION MODIFICATION

PETITIONERS REQUEST FOR A NEW SET OF FINDINGS, BASED ON THE BOARDS FAILURE TO INCLUDE IN ITS DECISION EXAMINERS FINDINGS OF FACT ON ENGINEERING ISSUES, WAS DENIED, BUT THE BOARD AMENDED ITS DECISION BY ADOPTING, IN THIS DOCUMENT, THE EXAMINERS ENGINEERING FINDINGS. ***NORTHERN INDIANA B/CERS, INC.*** 264

DEGRADATION OF SERVICE

A CATV OPERATOR WAS DIRECTED TO AFFORD SAME DAY NONDUPLICATION PROTECTION AND TO COMPLY WITH THE REQUIREMENT THAT THE LOCAL SIGNAL MUST BE CARRIED WITHOUT MATERIAL DEGRADATION, AND TO INFORM THE COMMISSION OF ITS REMEDIAL ACTIONS. ***WILLMAR VIDEO, INC.*** 113

DISCLOSURE FULL

PETITION FOR ADDITION OF A FULL DISCLOSURE ISSUE, DENIED IN LIGHT OF APPLICANTS PROMPT AMENDMENT AND EXPLANATION OF ITS INADVERTENCE IN FAILING TO INCLUDE PAST BROADCAST INTEREST IN ITS APPLICATION. ***SUNSET B/CING CORP.*** 276

ISSUES WERE ENLARGED TO DETERMINE AVAILABILITY OF APPLICATION FOR PUBLIC INSPECTION SEC. 1.526(A)(1), WHETHER SEC. 1.65 HAS BEEN COMPLIED WITH, AND WHETHER APPLICANT HAS INCLUDED PROFESSIONAL FEES IN ITS ESTIMATE OF CONSTRUCTION COSTS. ***NORTH AMERICAN B/CING CO., INC.*** 984

AN ISSUE WAS ADDED TO DETERMINE WHETHER APPLICANT HAS COMPLIED WITH SEC. 1.65 BY FAILURE TO AMEND TO SHOW AN APPLICATION BY ONE OF ITS PRINCIPALS TO ACQUIRE A 49.70 STOCK INTEREST IN ANOTHER STANDARD BROADCAST STATION. ***VIRGINIA B/CERS*** 1004

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE

THE COMMISSION EXTENDED THE CUT-OFF DATE IN ORDER TO ACCOMODATE APPLICATIONS FOR PRESENTLY UNASSIGNABLE SPECTRUM TO THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE. ***ALLOC. OF FREQ. ®150. 8-162 MC/SØ*** 117

ISSUES WERE ENLARGED TO INCLUDE UNAUTHORIZED TRANSFER OF CONTROL OR TRANSFER OF A LICENSE, EFFICIENT UTILIZATION OF THE STATION, AND CHARACTER QUALIFICATIONS ISSUES. ***COMMUNICATIONS TECH SALES, INC.*** 776

DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE

ONE OF TWO MUTUALLY EXCLUSIVE APPLICATIONS FOR A MICROWAVE LINK WAS GRANTED SINCE ITS OPERATING COSTS AND REVENUE REQUIREMENTS ARE LOWER COSTS TO CARRIERS USING THE SYSTEM WILL BE LOWER, MAINTENANCE WILL BE MORE EFFICIENT, AND SINCE THE APPLICANT WILL BE A PRIMARY USER OF THE SYSTEM. ***ALL AMERICA CABLES & RADIO, INC.*** 1

IN GENERAL, COMMON CARRIERS SHOULD OWN THE FACILITIES THEY USE TO SERVE THE PUBLIC UNLESS THERE IS SOME ADVANTAGE IN UTILIZING THE FACILITIES OF ANOTHER CARRIER OR OTHER ENTITY. ***ALL AMERICA CABLES & RADIO, INC.*** 1

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RULE 21.15(C)(4) REQUIRING A MICROWAVE APPLICANT TO SUBMIT PROOF OF FRANCHISE OR OTHER LOCAL AUTHORIZATION WAS TEMPORARILY WAIVED TO PERMIT BOTH APPLICATIONS TO BE CONSIDERED IN A HEARING. ***COMMUNICATIONS ENGINEERING, INC.*** 644

APPLICANTS FOR MICROWAVE FACILITIES IN ALASKA PURSUANT TO PART 21 ARE NOT REQUIRED TO COMPLY WITH PART 85 (SHOWING GOVERNMENT/NON-GOVERNMENT USE OF FREQUENCIES). ***COMMUNICATIONS ENGINEERING, INC.*** 644

DOMESTIC PUBLIC RADIO SERVICE

A SHORT TERM AUTHORIZATION WAS GRANTED WHERE AN UNAUTHORIZED ASSIGNMENT OF A DOMESTIC PUBLIC RADIO SERVICE LICENSE WAS MADE IN VIOLATION OF SEC. 310(B) SINCE THE ASSIGNMENT DID NOT INVOLVE A SUBSTANTIAL CHANGE IN OWNERSHIP AND THE PUBLIC INTEREST REQUIRED THE SERVICE. ***LIMA TELEPHONE CO.*** 792

DUAL CITY IDENTIFICATION

RECONSIDERATION OF GRANT OF A WAIVER OF SEC. 73.652(A) DENIED SINCE A TRI-CITY IDENTIFICATION WILL MAKE POSSIBLE THE GRANT OF A NEW UHF STATION AND AID ITS ECONOMIC VIABILITY. ***LOOK TV CORP.*** 718

EFFICIENT USE OF STATION

ISSUES WERE ENLARGED TO INCLUDE UNAUTHORIZED TRANSFER OF CONTROL OR TRANSFER OF A LICENSE, EFFICIENT UTILIZATION OF THE STATION, AND CHARACTER QUALIFICATIONS ISSUES. ***COMMUNICATIONS TECH SALES, INC.*** 776

EQUIPMENT PERFORMANCE MEASUREMENTS

FORFEITURE OF 500 ORDERED FOR REPEATED VIOLATION OF SEC. 73.93(B) (IMPROPERLY LICENSED OPERATOR) AND 73.47(A) AND (B) (EQUIPMENT PERFORMANCE MEASUREMENTS). ***O FALLON-O CONNOR B/CING CO., INC.*** 729

FORFEITURE OF 1000 ORDERED FOR REPEATED VIOLATIONS OF SEC. 73.93(A) AND 73.47. ***CENTENNIAL RADIO CORP.*** 817

FORFEITURE OF 200 ORDERED FOR REPORTED VIOLATIONS OF SEC. 73.47(A) AND 73.116(B) CONCERNING AVAILABILITY OF EQUIPMENT PERFORMANCE MEASUREMENTS. ***INTERSTATE B/CING CO.*** 908

FORFEITURE OF 200 ORDERED FOR REPEATED VIOLATION OF SEC. 73.47(B) CONCERNING AVAILABILITY OF EQUIPMENT PERFORMANCE MEASUREMENTS. ***WFTL B/CING CO.***1022

EQUITABLE DISTRIBUTION OF BROADCAST FACILITIES

A STANDARD BROADCAST CP WAS GRANTED TO ONE OF TWO MUTUALLY EXCLUSIVE APPLICANTS ON GROUNDS THAT THE PROPOSED DIRECTIONAL ANTENNA OF THE SUCCESSFUL APPLICANT COULD BE ADJUSTED AND MAINTAINED TO ELIMINATE INTERFERENCE AND A 307(B) PREFERENCE. ***COSMOPOLITAN ENTERPRISES, INC.*** 650

EVIDENCE ADDITIONAL

THE RECORD WAS REOPENED AND A SUPPLEMENTAL ENGINEERING STATEMENT WAS RECEIVED INTO EVIDENCE SINCE NO CONTENTION WAS MADE THAT THE EVIDENCE WAS INACCURATE OR THAT IT WOULD NECESSITATE FURTHER HEARING. ***GEORGIA RADIO, INC.*** 791

EVIDENCE NEWLY DISCOVERED

RECONSIDERATION OF DECISION DENYING CARRIAGE OF DISTANT SIGNALS, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO PARTICIPATE IN THE EARLY STAGES OF THE PROCEEDING (1.106(B)) AND FAILED TO PRESENT NEWLY DISCOVERED EVIDENCE (1.106(C) & 405). ***MIDWEST TV, INC.*** 84

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EXPENSES PRELIMINARY

REQUEST FOR APPROVAL OF MERGER AGREEMENT, DENIED, SINCE THE BOOK VALUE OF THE SHARES TO BE ACQUIRED BY MERGED APPLICANT EXCEEDS THE EXPENSES INCURRED BY THAT APPLICANT AND THUS REPRESENTS A WINDFALL CONTRARY TO SEC. 311(C). ***WARWICK B/CING CORP.*** 1010

FAIRNESS DOCTRINE

PENDING A SUPREME COURT DECISION REGARDING THE PERSONAL ATTACK AND EDITORIALIZING RULES (SEC. 73.123, 73.300, & 73.679); LICENSEES WILL BE EXPECTED TO COMPLY WITH THE RULES AND THE COMMISSION WILL ENTERTAIN AND RULE UPON COMPLAINTS, SUBJECT TO JUDICIAL REVIEW AND ENFORCEMENT. ***PERSONAL ATTACK RULES*** 32

FAIRNESS DOCTRINE CONTRASTING VIEWPOINT DUTY TO ENCOURAGE

LICENSEE HELD NOT TO HAVE VIOLATED THE FAIRNESS DOCTRINE, SINCE IT HAD DEVOTED A SUBSTANTIAL AMOUNT OF B/CING TIME TO PRESENTATION OF THE OPPOSING VIEWPOINTS AND HAD REPRIMANDED AN ANNOUNCER FOR MAKING A REMARK SUBSEQUENT TO A PAID ANNOUNCEMENT AS WELL AS PROMISING TO BROADCAST A MAKE-GOOD ANNOUNCEMENT. ***LERNER, HARRY*** 75

A BROADCASTER HAS A DUTY TO MAINTAIN A STANDARD OF FAIRNESS TO MAKE AN AFFIRMATIVE REASONABLE EFFORT TO PRESENT CONTRASTING VIEWPOINTS ON CONTROVERSIAL ISSUES, BUT THIS DOES NOT MEAN AN ABSOLUTE EQUALITY IN THE ALLOCATION OF TIME. ***CHAMBERS, PAUL*** 386

FAIRNESS DOCTRINE CONTROVERSIAL ISSUE

A BROADCASTER HAS A DUTY TO MAINTAIN A STANDARD OF FAIRNESS TO MAKE AN AFFIRMATIVE REASONABLE EFFORT TO PRESENT CONTRASTING VIEWPOINTS ON CONTROVERSIAL ISSUES, BUT THIS DOES NOT MEAN AN ABSOLUTE EQUALITY IN THE ALLOCATION OF TIME. ***CHAMBERS, PAUL*** 386

FAIRNESS DOCTRINE EDITORIALIZING BY LICENSEE

REVIEW OF RULING FINDING NON-COMPLIANCE WITH FAIRNESS DOCTRINE DENIED WHERE STATION BROADCAST TWENTY-FOUR 20-SECOND EDITORIALS ADVERSE TO COMPLAINANT AND ALLOWED ONLY SIX 20-SECOND SPOTS FOR REPLY. NO BASIS FOR DETERMINING THE REASONABLENESS OF THIS RESTRICTION WAS PRESENTED BY THE STATION. ***KING B/CING CO.*** 828

ISSUANCE OF A CEASE AND DESIST ORDER TO PREVENT LICENSEE FROM BROADCASTING EDITORIALS ADVERSE TO PETITIONERS CAMPAIGN, DENIED. AN ORDER TO COMPLY WITH THE FAIRNESS DOCTRINE IS NOT INTENDED TO PREVENT BROADCAST OF A STATIONS EDITORIAL ENDORSEMENTS. ***KING B/CING CO.*** 828

PENDING A SUPREME COURT DECISION REGARDING THE PERSONAL ATTACK AND EDITORIALIZING RULES (SEC. 73.123, 73.300, & 73.679), LICENSEES WILL BE EXPECTED TO COMPLY WITH THE RULES AND THE COMMISSION WILL ENTERTAIN AND RULE UPON COMPLAINTS, SUBJECT TO JUDICIAL REVIEW AND ENFORCEMENT. ***PERSONAL ATTACK RULES*** 32

FAIRNESS DOCTRINE LICENSEE DISCRETION AREA OF

A BROADCASTER HAS A DUTY TO MAINTAIN A STANDARD OF FAIRNESS TO MAKE AN AFFIRMATIVE REASONABLE EFFORT TO PRESENT CONTRASTING VIEWPOINTS ON CONTROVERSIAL ISSUES, BUT THIS DOES NOT MEAN AN ABSOLUTE EQUALITY IN THE ALLOCATION OF TIME. ***CHAMBERS, PAUL*** 386

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FAIRNESS DOCTRINE LICENSEE OBLIGATION

REVIEW OF RULING FINDING NON-COMPLIANCE WITH FAIRNESS DOCTRINE DENIED WHERE STATION BROADCAST TWENTY-FOUR 20-SECOND EDITORIALS ADVERSE TO COMPLAINANT AND ALLOWED ONLY SIX 20-SECOND SPOTS FOR REPLY. NO BASIS FOR DETERMINING THE REASONABLENESS OF THIS RESTRICTION WAS PRESENTED BY THE STATION. ***KING B/CING CO.*** 828

FAIRNESS DOCTRINE OVERALL PERFORMANCE STANDARD

LICENSEE HELD NOT TO HAVE VIOLATED THE FAIRNESS DOCTRINE, SINCE IT HAD DEVOTED A SUBSTANTIAL AMOUNT OF B/CING TIME TO PRESENTATION OF THE OPPOSING VIEWPOINTS AND HAD REPRIMANDED AN ANNOUNCER FOR MAKING A REMARK SUBSEQUENT TO A PAID ANNOUNCEMENT AS WELL AS PROMISING TO BROADCAST A MAKEGOOD ANNOUNCEMENT. ***LERNER, HARRY*** 75

FAIRNESS DOCTRINE PRESENTATION OF POINT OF VIEW

LICENSEE HELD NOT TO HAVE VIOLATED THE FAIRNESS DOCTRINE, SINCE IT HAD DEVOTED A SUBSTANTIAL AMOUNT OF B/CING TIME TO PRESENTATION OF THE OPPOSING VIEWPOINTS AND HAD REPRIMANDED AN ANNOUNCER FOR MAKING A REMARK SUBSEQUENT TO A PAID ANNOUNCEMENT AS WELL AS PROMISING TO BROADCAST A MAKEGOOD ANNOUNCEMENT. ***LERNER, HARRY*** 75

FCC FORMS

A FINANCIAL ISSUE WAS SPECIFIED WHERE APPLICANT FAILED TO COMPLETE PARAGRAPH 1, SECTION III OF FCC FORM 301. ***STONE, WILLIAM D.*** 53

FIELD INTENSITY REQUIREMENTS

APPLICATION DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, 73.685 (A), (MINIMUM FIELD INTENSITY), DE FACTO REALLOCATION TO A DIFFERENT CITY, ZONING VARIANCE, UHF IMPACT, AND AIR HAZARD ISSUES. ***WATR., INC.*** 103

FILING FAILURE TO

FORFEITURE OF 200 ORDERED FOR VIOLATION OF SEC. 1.539(A), (FILING OF RENEWAL APPLICATION.) AND SEC. 1.0621(B), FAILURE TO REPLY. ***PAYNE, JACK LEE*** 731

FINANCIAL DATA

A FINANCIAL ISSUE WAS AMENDED TO BROADEN ITS SCOPE SINCE APPLICANTS AMENDED BALANCE SHEETS DO NOT DISCLOSE ITS NON- CURRENT ASSETS OR THEIR NATURE AS REQUIRED BY FORM 301. ***WARWICK B/CING CORP.***1015

FINANCIAL ISSUE

A FINANCIAL ISSUE WAS SPECIFIED WHERE APPLICANT FAILED TO COMPLETE PARAGRAPH 1, SECTION III OF FCC FORM 301. ***STONE, WILLIAM D.*** 53

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES, INTERFERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58

APPLICATION DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, CONSTRUCTION AND FIRST YEAR OPERATING COSTS, DEPENDENCE ON AND ESTIMATE OF FIRST YEAR REVENUES, STAFF ADEQUACY, AND AVAILIBITY OF FUNDS. ***DEARBORN CNTY B/CERS*** 247

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MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON FINANCIAL AND SUBURBAN ISSUES. ***VIKING TV, INC.*** 288

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON FINANCIAL ISSUES AND WHETHER ONE APPLICANT HAS MADE AN EFFORT TO DETERMINE THE COMMUNITYS NEEDS AND INTERESTS. ***KBLI, INC.*** 709

A JOINT AGREEMENT PROVIDING FOR A MERGER OF TWO MUTUALLY EXCLUSIVE APPLICANTS INTO A NEW CORPORATION ADOPTING ONE OF THE APPLICANTS PROPOSALS, GRANTED. A FINANCIAL ISSUE WAS ADDED AGAINST THE MERGED APPLICANT. ***SUNBURY B/CING CORP.*** 742

REQUESTED ISSUES WERE ADDED CONCERNING WHETHER THE FILING OF AMENDMENTS CONSTITUTED CORPORATE CHANGE, NEW PRINCIPALS, AND TO DETERMINE WHETHER A FINANCIAL INTEREST CONSTITUTES DE FACTO CONTROL OF THE APPLICANT. THE REASONABLENESS OF CONSTRUCTION COSTS WAS PUT IN ISSUE. ***VANDER PLATE, LOUIS*** 747

A FINANCIAL ISSUE WAS ADDED SINCE IT APPEARED THAT APPLICANT HAD FILED A PETITION IN BANKRUPTCY SUBSEQUENT TO THE FILING OF ITS APPLICATION. ***HEART OF GEORGIA B/CING CO., INC.*** 905

A FINANCIAL ISSUE WAS ADDED SINCE APPLICANTS PROPOSED FINANCIAL AMENDMENT DOES NOT INDICATE SUFFICIENT LIQUID ASSETS TO MEET COST ESTIMATES. ***VIRGINIA B/CERS***1004

A FINANCIAL ISSUE WAS AMENDED TO BROADEN ITS SCOPE SINCE APPLICANTS AMENDED BALANCE SHEETS DO NOT DISCLOSE ITS NON- CURRENT ASSETS OR THEIR NATURE AS REQUIRED BY FORM 301. ***WARWICK B/CING CORP.***1015

FINANCIAL QUALIFICATIONS

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

PETITION TO ENLARGE ISSUES GRANTED TO INCLUDE ON ISSUES AS TO WHETHER APPLICATION WAS FILED TO OBSTRUCT OR DELAY. REQUEST FOR ISSUES AS TO REAL PARTY IN INTEREST, FINANCIAL QUALIFICATIONS AND MISREPRESENTATION DENIED. ***SUMITON B/CING CO., INC.*** 400

APPLICATION DESIGNATED FOR HEARING ON ISSUES DIRECTED TO UHF IMPACT, DE FACTO REALLOCATION OF A CHANNEL, WAIVER OF SEC. 73.610, ANTENNA HEIGHT, FINANCIAL QUALIFICATIONS, AND EFFORTS MADE TO ASCERTAIN COMMUNITY NEEDS AND INTERESTS. ***WLVA, INC.*** 757

PETITION TO ADD A CHARACTER QUALIFICATIONS ISSUE, A FINANCIAL ISSUE, A LEGAL QUALIFICATIONS ISSUE, AND A SUBURBAN COMMUNITY 307(B) ISSUE WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 979

FINANCIAL QUALIFICATIONS-ULTRAVISION

APPLICATION GRANTED SINCE PROPOSAL IS CONSISTENT WITH CLASS II-A ALLOCATION PRINCIPLES AND WOULD NOT CAUSE OBJECTIONABLE INTERFERENCE. APPLICANT FOUND TO BE FINANCIALLY QUALIFIED SINCE IT DEMONSTRATED ABILITY TO MEET CONSTRUCTION AND FIRST YEAR OPERATION COSTS. ***RADIO NEVADA*** 324

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE. ***STEPHENSON, HARRY D.*** 335

PETITION TO DENY UHF APPLICATION WAS DISMISSED AS UNTIMELY FILED (SEC. 1.580 (L)(I)). HOWEVER, THE PETITION WAS CONSIDERED ON ITS MERITS AS INFORMAL OBJEC-

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TIONS (SEC. 1.587) AND APPLICATION GRANTED UPON FINDING THAT ULTRAVISION REQUIREMENTS HAVE BEEN MET. ***MIDWESTERN B/CING CO., INC.*** 720

CONSTRUCTION PERMIT GRANTED WHERE THE ONLY REMAINING ISSUE WAS FINANCIAL SINCE APPLICANT WAS FOUND FINANCIALLY QUALIFIED TO CONSTRUCT AND OPERATE A STATION FOR ONE YEAR. ***LITTLE DIXIE RADIO, INC.*** 794

FINDINGS

PETITIONERS REQUEST FOR A NEW SET OF FINDINGS, BASED ON THE BOARDS FAILURE TO INCLUDE IN ITS DECISION EXAMINERS FINDINGS OF FACT ON ENGINEERING ISSUES, WAS DENIED, BUT THE BOARD AMENDED ITS DECISION BY ADOPTING, IN THIS DOCUMENT, THE EXAMINERS ENGINEERING FINDINGS. ***NORTHERN INDIANA B/CERS, INC.*** 264

FOOTNOTE 69, SECOND REPORT

SINCE A CATV SYSTEM PROPOSED TO OPERATE IN A MAJOR MARKET WHOSE GRADE B CONTOUR OVERLAPS THAT OF ANOTHER MAJOR MARKET, A HEARING WAS ORDERED PURSUANT TO SEC. 74.1109 (FOOTNOTE 69, SECOND REPORT). ***DELAWARE COUNTY CABLE TV CO.*** 902

FORFEITURE

LICENSEE ORDERED TO FORFEIT 200 FOR VIOLATION OF SEC. 1.539(A) AND FAILURE TO REPLY TO THE NOTICE OF APPARENT LIABILITY (1.621). ***ANDERSON B/CING SERVICE*** 618

LICENSEE ORDERED TO FORFEIT 200 FOR VIOLATION OF SEC. 73.114 AND FAILURE TO REPLY TO THE NOTICE OF APPARENT LIABILITY (1.621). ***ARMAK B/CERS, INC.*** 620

LICENSEE ORDERED TO FORFEIT 200 FOR VIOLATION OF SEC. 73.47(B) AND FAILURE TO REPLY TO THE NOTICE OF APPARENT LIABILITY (1.621). ***ALVIN, INC.*** 622

VIOLATION OF SEC. 1.539 (FILING RENEWAL APPLICATION) AND FAILURE TO REPLY (SEC. 1.621) RESULTED IN A FORFEITURE OF 400. ***KEAN RADIO, INC.*** 712

VIOLATION OF SEC. 73.93(B), OPERATION OF TRANSMITTER BY AN UNLICENSED OPERATOR, RESULTED IN A FORFEITURE OF 500. ***KOKE, INC.*** 714

FORFEITURE OF 500 ORDERED FOR REPEATED VIOLATION OF SEC. 73.93(B) (IMPROPERLY LICENSED OPERATOR) AND 73.47(A) AND (B) (EQUIPMENT PERFORMANCE MEASUREMENTS). ***O FALLON-O CONNOR B/CING CO., INC.*** 729

FORFEITURE OF 200 ORDERED FOR VIOLATION OF SEC. 1.539(A), (FILING OF RENEWAL APPLICATION.) AND SEC. 1.0621(B), FAILURE TO REPLY. ***PAYNE, JACK LEE*** 731

FORFEITURE OF 1000 ORDERED FOR REPEATED VIOLATIONS OF SEC. 73.93(A) AND 73.47. ***CENTENNIAL RADIO CORP.*** 817

FORFEITURE OF 500 ORDERED FOR REPEATED VIOLATION OF SEC. 73.93, HAVING AN IMPROPERLY LICENSED OPERATOR IN CHARGE OF THE TRANSMITTER. ***PRAIRIE STATES B/CING CO., INC.*** 838

FORFEITURE OF 1000 ORDERED FOR VIOLATION OF THE TERMS OF THE STATIONS LICENSE AND FOR VIOLATIONS OF SEC. 73.922, 73.112(A)(4), AND 73.47(A). ***ANDERSON B/CING SERVICE*** 844

FORFEITURE OF 200 ORDERED FOR REPORTED VIOLATIONS OF SEC. 73.47(A) AND 73.116(B) CONCERNING AVAILABILITY OF EQUIPMENT PERFORMANCE MEASUREMENTS. ***INTERSTATE B/CING CO.*** 908

FORFEITURE OF 200 ORDERED FOR REPEATED VIOLATION OF SEC. 73.47(B) CONCERNING AVAILABILITY OF EQUIPMENT PERFORMANCE MEASUREMENTS. ***WFTL B/CING CO.***1022

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FORFEITURE NINETY DAY RULE

FORFEITURE OF 50 WAS ORDERED FOR VIOLATION OF SEC. 1.539(A), FAILURE TO FILE FOR RENEWAL WITHIN THE SPECIFIED TIME, AND FAILURE TO REPLY PURSUANT TO SEC. 1.621. ***HASTINGS B/CING, INC.*** 881

FRAUD

PETITION TO ENLARGE ISSUES DENIED ON GROUNDS THAT PETITIONER FAILED TO SHOW VIOLATION OF FRAUD PROVISIONS OF THE INTERNAL REVENUE CODE IN THAT THE COMMISSION IS NOT THE PROPER FORUM FOR SUCH DETERMINATION. ***SUMITON B/CING CO., INC.*** 411

FREE SPEECH, RIGHT OF

THE COMMISSIONS PROHIBITION OF TV B/C SIGNAL CARRIAGE IF THE CATV SYSTEM ORIGINATES ADVERTISING, DID NOT VIOLATE THE FIRST AMENDMENT, SINCE THE PROHIBITION WAS REASONABLY RELATED TO THE PUBLIC INTEREST AND THE COMMISSIONS STATUTORY RESPONSIBILITIES. ***MIDWEST TV, INC.*** 84

FREQUENCY COORDINATION

RULEMAKING PROCEEDINGS WERE INSTITUTED TO CONSIDER FREQUENCY COORDINATION FOR THE AIR TERMINAL AND CONTROL PROTECTION INDUSTRIES (SEC. 91.8(A)(1)(III)). ***BUSINESS RADIO SERVICE FREQ. COORD.*** 627

PART 87 OF THE RULES WAS AMENDED TO MAKE PROVISION FOR THE ESTABLISHMENT OF AN INDUSTRY FREQUENCY ADVISORY COMMITTEE FOR COORDINATION OF FREQUENCIES IN THE 1435-1535 MC/S BAND. ***FREQUENCY COORD., 1435-1535 MC/S*** 831

FREQUENCY CHANGE OF

APPROVAL OF A JOINT AGREEMENT WHEREBY ONE APPLICANT WOULD AMEND TO A NEW FREQUENCY WAS GRANTED NUNC-PRO TUNC WHERE ALL THE REQUIREMENTS OF SEC. 1.525(A) EXCEPT PRIOR APPROVAL HAVE BEEN COMPLIED WITH. ***K&R B/CING CORP.*** 706

PARTS 2, 81, AND 83 CONCERNING STATIONS IN THE MARITIME SERVICES WERE AMENDED TO PROVIDE FOR THE ORDERLY TRANSITION OF SHIP AND COAST RADIOTELEGRAPH STATIONS FROM PRESENT FREQUENCY ASSIGNMENTS TO THOSE WITHIN ALLOTMENTS AND/OR FREQUENCY USAGE AS ADOPTED BY THE ITU WORLD ADMINISTRATIVE RADIO CONFERENCE. ***MARITIME SERVICE REGULATIONS*** 915

GRANT CONDITIONAL

REQUEST BY THE PARTIES TO A COMPARATIVE PROCEEDING FOR INTERIM AUTHORITY TO OPERATE THE FACILITIES OF AN EXISTING STATION UNDER A CONDITIONAL GRANT PURSUANT TO SEC. 1.592(B), GRANTED. ***COMMUNITY FIRST CORP.*** 822

APPLICATION FOR INTERIM AUTHORITY TO OPERATE THE FACILITIES OF AN EXISTING STATION UNDER A CONDITIONAL GRANT PURSUANT TO SEC. 1.592(B) GRANTED. ***CONSOLIDATED NINE, INC.*** 825

HEARING CONSOLIDATION OF

SINCE A GRANT OF A PETITION TO CHANGE ISSUES AND SHIFT BURDEN OF PROOF WOULD THWART THE COMMISSIONS PURPOSE IN CONSOLIDATING THE PROCEEDING BY CREATING SUBISSUES CONCERNING A SPECIAL MARKET AND A PARTICULAR APPLICANT, THE PETITION WAS DENIED. ***DELAWARE COUNTY CABLE TV CO.*** 69

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

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HEARING DESIGNATION FOR

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

APPLICATION DESIGNATED FOR HEARING ON SEC. 1.65 (SUBSTANTIAL CHANGES), TRAFFICKING, FAILURE TO CONSTRUCT, AND EXTENSION OF TIME (SEC. 1.534) ISSUES. ***GROSS B/CING CO.*** 76

FM APPLICATION DESIGNATED FOR HEARING ON CONCENTRATION OF LOCAL MEDIA CONTROL ISSUE AND WHETHER APPLICANTS CROSS INTERESTS IN THE LOCAL NEWSPAPER DIMINISH FREEDOM OF THE STATION TO COMPETE COMMERCIALLY OR TAKE DIFFERING EDITORIAL OPINIONS. ***WHBL, INC.*** 111

HEARING EXAMINER, AUTHORITY

SINCE THE HEARING EXAMINER HAS INITIAL JURISDICTION OVER PETITIONS FOR LEAVE TO AMEND, A RULING BY THE REVIEW BOARD ON THE PROPRIETY OF AMENDMENTS DESIGNED TO MEET SUBURBAN ISSUES WOULD BE PREMATURE. ***NORTH AMERICAN B/CING CO., INC.*** 727

HEARING NECESSITY FOR

SINCE APPLICANT HAS RECENTLY BEEN INVOLVED IN MISLEADING PROGRAMMING AND SINCE IT APPEARS THAT A TRAFFICKING ISSUE WOULD BE REQUIRED, AN ASSIGNMENT OF LICENSE CANNOT BE MADE WITHOUT A HEARING. ***WHUT B/CING CO., INC.*** 811

HEARING PROCEDURE

A PETITION, IN THE AT&T RATE HEARING, REQUESTING A SEPARATION OF THE COMMON CARRIER BUREAU FROM THE DECISIONAL PROCESS BY REQUIRING THE BUREAU TO SUBMIT TESTIMONY STATING ITS POSITION, IS DENIED. ***AMER. TEL. & TEL.*** 29

REQUEST FOR AN EXPEDITED HEARING IN A PROCEEDING CONCERNING FAILURE TO CONSTRUCT STATION DENIED IN VIEW OF THE DESIGNATED ISSUES (SEC. 1.534(A)) AND INSUFFICIENT REASONS ADVANCED TO JUSTIFY DEPARTURE FROM THE NORMAL HEARING PROCEDURE. ***BAY VIDEO, INC.*** 118

REVIEW OF EXAMINERS RULING DENYING REQUEST FOR FURTHER EVIDENCE (SEC. 11.353), DENIED SINCE THE INQUIRY CONCERNING CONDUCT INVOLVED IN A NLRB HEARING WAS AUTHORIZED IN THE HEARING ORDER UNDER THE STANDARD COMPARATIVE ISSUE WHICH HAS NOT YET BEEN REACHED IN THE HEARING PROCEDURE. ***KITTYHAWK B/CING CORP.*** 322

HEARING REOPENING OF

PETITION TO REOPEN THE RECORD AND ENLARGE ISSUES DENIED WHERE THE PROCEEDING IS PENDING BEFORE THE EXAMINER. THE EXAMINER SHOULD CONSIDER SUCH A PETITION IN THE FIRST INSTANCE. ***LIBERTY TV*** 716

HEARING EXPEDITED

REQUEST FOR AN EXPEDITED HEARING IN A PROCEEDING CONCERNING FAILURE TO CONSTRUCT STATION DENIED IN VIEW OF THE DESIGNATED ISSUES (SEC. 1.534(A)) AND INSUFFICIENT REASONS ADVANCED TO JUSTIFY DEPARTURE FROM THE NORMAL HEARING PROCEDURE. ***BAY VIDEO, INC.*** 118

HOURS OF OPERATION

APPLICATION BY A CLASS IV STATION TO INCREASE HOURS WAS ACCEPTED FOR FILING SINCE THE AM FREEZE WAS NOT INTENDED TO BAR THIS TYPE OF APPLICATION. NOTE 2 OF SEC. 1.571 WAS WAIVED. ***HICKORY HILL B/CING CO.*** 907

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INFORMATION FILING OF

ISSUES WERE ADDED TO DETERMINE WHETHER ONE OF THE PRINCIPALS CAN MEET HIS LOAN COMMITMENT AND WHETHER THE APPLICANT HAS SUBMITTED ALL RELEVANT INFORMATION REQUIRED BY SEC. 1.65. ***ORANGE COUNTY B/CING CO.*** 991

INTELSAT

APPLICATION FOR TRANSFER OF THE OUTSTANDING CP AND THE OWNERSHIP INTEREST OF THE ANDOVER TRANSPORTABLE EARTH STATION FROM JOINT GRANTEES TO COMSAT. GRANTED TO PROVIDE TELEMETRY, COMMAND & CONTROL, MONITORING AND TRACKING SERVICES TO THE INTELSTAT III SERIES SATELLITES. ***COMSAT*** 65

INTERFERENCE

WHERE APPLICANT FAILED TO FOLLOW THE TWO STEP PROCESS FOR A CLASS IV STATION INCREASE OF POWER TO 1 KW., PETITIONER IS NOT PRECLUDED BY SEC. 73.24(B)(2) AND 73.37(D) FROM RAISING OBJECTION TO PROPOSED INTERFERENCE AND ISSUE ON THIS SUBJECT WILL BE INCLUDED. ***STONE, WILLIAM D.*** 53

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES, INTERFERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58

INTERFERENCE OBJECTIONABLE

APPLICATION GRANTED SINCE PROPOSAL IS CONSISTENT WITH CLASS II-A ALLOCATION PRINCIPLES AND WOULD NOT CAUSE OBJECTIONABLE INTERFERENCE. APPLICANT FOUND TO BE FINANCIALLY QUALIFIED SINCE IT DEMONSTRATED ABILITY TO MEET CONSTRUCTION AND FIRST YEAR OPERATION COSTS. ***RADIO NEVADA*** 324

LICENSEE IN THE SPECIAL INDUSTRIAL RADIO SERVICE ORDERED TO EITHER DISMANTLE OR DETUNE AN ABANDONED TOWER WHICH IT HAD CONSTRUCTED WITHOUT AUTHORIZATION SINCE THE TOWER IS CAUSING INTERFERENCE TO A RADIO STATION 1000 YARDS AWAY. ***B & W TRUCK SERVICE*** 769

WHERE PETITIONER HAD FORMERLY RECEIVED INTERFERENCE FROM A STATION NOW SILENT AND WHERE THE OVERLAP RULE (73.37) HAD BEEN WAIVED TO EXPEDITE REESTABLISHMENT OF THE DELETED STATION, AN ISSUE TO DETERMINE WHETHER OBJECTIONABLE INTERFERENCE WOULD RESULT WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 799

INTERFERENCE NIGHTTIME

APPLICATIONS AND PETITIONS BY THREE CLASS II STATIONS FOR PRESUNRISE AUTHORITY BEYOND PERMISSIBLE AUTHORITY UNDER SEC. 73.99(B)(1) DENIED, SINCE THEY WOULD CAUSE MASSIVE SKYWAVE INTERFERENCE WITH THE RESPECTIVE CLASS I-B CLEAR CHANNEL STATIONS. ***MEREDITH B/CING CO.*** 927

INTERFERENCE WILLFUL

UNAUTHORIZED USE OF A STATIONS FACILITIES BY EMPLOYEE TO BROADCAST A PRIVATE DISPUTE AND CLOSING DOWN THE STATION PRIOR TO THE END OF ITS BROADCAST DAY CONSTITUTES INTERFERENCE AS PROVIDED IN SEC. 13.69. RECONSIDERATION DENIED. ***WICHROWSKI, STEPHEN A., JR.*** 754

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INTERIM OPERATION

REQUEST BY THE PARTIES TO A COMPARATIVE PROCEEDING FOR INTERIM AUTHORITY TO OPERATE THE FACILITIES OF AN EXISTING STATION UNDER A CONDITIONAL GRANT PURSUANT TO SEC. 1.592(B), GRANTED. ***COMMUNITY FIRST CORP.*** 822

APPLICATION FOR INTERIM AUTHORITY TO OPERATE THE FACILITIES OF AN EXISTING STATION UNDER A CONDITIONAL GRANT PURSUANT TO SEC. 1.592(B) GRANTED. ***CONSOLIDATED NINE, INC.*** 825

INTERIM AUTHORITY GRANTED TO ONE OF TWO COMPETING APPLICANTS TO OPERATE A STATION WHICH HAS LOST ITS LICENSE SINCE ONLY ONE APPLICANT REQUESTED AUTHORIZATION. ORDER TO BE EFFECTIVE ONLY IF A STAY ISSUED BY THE COURT OF APPEALS IS DISSOLVED. ***MINERAL KING B/CERS*** 835

INTERLOCUTORY RULING, APPEAL FROM

APPEAL FROM EXAMINERS ADVERSE RULING PURSUANT TO SEC. 1.301, DENIED, SINCE INTERLOCUTORY APPEALS ARE NOT FAVORED UNLESS THE RULING COMPLAINED OF IS FUNDAMENTAL AND AFFECTS THE CONDUCT OF THE ENTIRE CASE. ***WSTE-TV, INC.*** 1026

INTERLOCUTORY ORDER, RECONSIDERATION OF

REQUEST FOR WAIVER OF RULE 1.106(A) (RECONSIDERATION OF INTERLOCUTORY ORDERS), GRANTED, SINCE THE CITED ORDER WAS INITIATED ON THE BASIS OF A LETTER REQUEST ON WHICH PETITIONERS HAD NO OPPORTUNITY TO ADDRESS THEMSELVES. ***AMER. TEL. & TEL.*** 29

INVESTIGATION

AN INVESTIGATION WAS INSTITUTED INTO THE LAWFULNESS OF NEW MATTER CONTAINED IN TARIFF REVISIONS OFFERING 48-KHZ, LEASED-CHANNEL SERVICE. ***ITT WORLD COMM.*** 694

INVESTIGATION, BY FCC

AN INVESTIGATION WAS ORDERED INTO THE LAWFULNESS OF TARIFF REVISIONS FOR PICKUP AND DELIVERY OF INTERNATIONAL MESSAGES AND CUSTOMER TIELINES WITHIN METROPOLITAN AREAS RATHER THAN CORPORATE LIMITS (201(B) AND 202(A)). ***TROPICAL RADIO TELEGRAPH CO.*** 100

ISSUE CHANGE OF

MOTION TO CHANGE ISSUES AND SHIFT THE BURDENS OF PROOF FROM THE CATV OPERATOR TO THE TV LICENSEE IN A PROCEEDING CONCERNING CATV CARRIAGE, IS DENIED SINCE THE PRESENT ALLOCATION OF BURDENS (74.1109) AFFORDS THE MOST ORDERLY METHOD OF RESOLVING THE MAJOR MARKET OVERLAP CASE QUESTIONS. ***DELAWARE COUNTY CABLE TV CO.*** 69

SINCE A GRANT OF A PETITION TO CHANGE ISSUES AND SHIFT BURDEN OF PROOF WOULD THWART THE COMMISSIONS PURPOSE IN CONSOLIDATING THE PROCEEDING BY CREATING SUBISSUES CONCERNING A SPECIAL MARKET AND A PARTICULAR APPLICANT, THE PETITION WAS DENIED. ***DELAWARE COUNTY CABLE TV CO.*** 69

ISSUE CLARIFICATION OF

A REQUEST BY A CATV SYSTEM TO CLARIFY ISSUES CONCERNING DELINEATION OF GEOGRAPHIC BOUNDARIES OF THE MARKET, CERTIFIED TO THE COMMISSION BECAUSE OF THE NOVEL POLICY CONSIDERATIONS INVOLVED, TO WIT, THE EXTENT OF THE AREA AFFORDED PROTECTION TO UHF FROM CATV DEVELOPMENT. ***CLEAR VISION TV CO.*** 633

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ISSUE DELETION OF

PETITION TO DELETE A SUBURBAN ISSUE DENIED SINCE NO EXTENUATING CIRCUMSTANCES WERE PRESENT. THE REQUIREMENTS SET FORTH IN THE MINSHALL CASE (11 FCC 2D 796) WERE ADOPTED MORE THAN 6 MONTHS PRIOR TO DESIGNATION FOR HEARING. ***NORTH AMERICAN B/CING CO., INC.*** 727

REQUEST FOR DELETION OF A SUBURBAN ISSUE WHERE APPLICANT HAD SUBMITTED AN AMENDMENT WAS DENIED SINCE THE AMENDMENT FAILED TO MAKE A MEANINGFUL EVALUATION OF THE COMMUNITY SURVEY. ***STONE, WILLIAM D.*** 808

PETITION FOR DELETION OF A SUBURBAN ISSUE DENIED, SINCE NO UNUSUAL CIRCUMSTANCES HAVE BEEN ESTABLISHED. ***SUNDIAL B/CING CO., INC.*** 1002

ISSUE ENLARGEMENT OF

ENLARGEMENT OF ISSUES TO INCLUDE A COMPARATIVE PROGRAMMING ISSUE, DENIED, SINCE PETITIONER FAILED TO MAKE A PRIMA FACIE SHOWING THAT THERE ARE SIGNIFICANT DIFFERENCES IN THE PROPOSED PROGRAMMING. ***PORT JERVIS B/CING CO., INC.*** 44

REQUEST TO ADD A LEGAL QUALIFICATIONS ISSUE WAS DENIED, SINCE PETITIONER FAILED TO SHOW THAT APPLICANTS QUALIFICATION TO DO BUSINESS IN ANOTHER STATE IS MORE THAN A PROCEDURAL (MINISTERIAL) REQUIREMENT. ***NORTH AMERICAN B/CING CO., INC.*** 261

ADDITION OF AN ISSUE TO DETERMINE WHETHER A PENDING MERGER AGREEMENT SERVES THE PUBLIC INTEREST WAS DENIED ON GROUNDS THAT THE BOARD LACKED JURISDICTION TO CONSIDER MORE THAN THE BONA FIDES OF THE AGREEMENT AS TO REIMBURSEMENT FOR DISMISSAL, NOT WHETHER IT WILL SERVE THE PUBLIC INTEREST. ***SUNSET B/CING CORP.*** 276

SINCE APPLICATION WAS UNAVAILABLE FOR INSPECTION AT THE PUBLISHED REFERENCE POINT A SEC. 1.594 (APPLICATION TO BE MADE AVAILABLE FOR PUBLIC INSPECTION) ISSUE AND AN ISSUE TO DETERMINE WHETHER APPLICATION SHOULD BE DISMISSED OR A COMPARATIVE DEMERIT ASSESSED WERE DESIGNATED. ***VANDER PLATE, LOUIS*** 285

JURISDICTION

PETITION FOR RECONSIDERATION OR FOR REHEARING OF MEMORANDUM OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION, DENIED ON GROUNDS THAT THE PETITION WAS FILED LATE, AND THE STATUTORY PERIOD OF JURISDICTION HAVING EXPIRED THE REVIEW BOARD IS WITHOUT AUTHORITY TO ACT. ***LORAIN COMMUNITY B/CING CO.*** 388

LEGAL QUALIFICATIONS

REQUEST TO ADD A LEGAL QUALIFICATIONS ISSUE WAS DENIED, SINCE PETITIONER FAILED TO SHOW THAT APPLICANTS QUALIFICATION TO DO BUSINESS IN ANOTHER STATE IS MORE THAN A PROCEDURAL (MINISTERIAL) REQUIREMENT. ***NORTH AMERICAN B/CING CO., INC.*** 261

ADDITION OF AN ISSUE CONCERNING COMPLIANCE WITH SEC. 1.65 HELD NOT WARRANTED SINCE THE CHANGE IN BROADCAST INTERESTS WAS A REALINEMENT OF OWNERSHIP INTERESTS BETWEEN TWO STOCKHOLDERS OF APPLICANT. ***LAWRENCE CNTY. B/CING CORP.*** 910

PETITION TO ADD A CHARACTER QUALIFICATIONS ISSUE, A FINANCIAL ISSUE, A LEGAL QUALIFICATIONS ISSUE, AND A SUBURBAN COMMUNITY 307(B) ISSUE WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 979

A CHANGE OF RESIDENCE OF AN APPLICANTS PRINCIPAL STOCKHOLDER IS NOT OF DECISIONAL SIGNIFICANCE AND DOES NOT HAVE TO BE REPORTED UNDER RULE 1.65 REQUEST FOR AN ISSUE CONCERNING ESTIMATED CONSTRUCTION AND OPERATING COSTS WAS HELD TO BE UNWARRANTED. ***WARWICK B/CING CORP.*** 1015

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LICENSE ASSIGNMENT OF

THE APPROPRIATENESS OF AN ESTATE ACQUIRING BROADCAST LICENSES AND QUESTIONS OF FACT CONCERNING A COMMUNITY SURVEY NECESSITATE DESIGNATING FOR HEARING THE APPLICATIONS FOR (A) TRANSFER OF CONTROL, AND (B) ASSIGNMENT OF LICENSE. ***CRAWFORD, PERCY B., ESTATE OF*** 677

SINCE APPLICANT HAS RECENTLY BEEN INVOLVED IN MISLEADING PROGRAMMING AND SINCE IT APPEARS THAT A TRAFFICKING ISSUE WOULD BE REQUIRED, AN ASSIGNMENT OF LICENSE CANNOT BE MADE WITHOUT A HEARING. ***WHUT B/CING CO., INC.*** 811

AN APPLICATION WAS AMENDED TO REFLECT THE ASSIGNMENT OF A LICENSE. ***CENTRAL COAST TV*** 771

LICENSE RENEWAL OF

RENEWAL AND INVOLUNTARY ASSIGNMENT OF LICENSE TO TRUSTEE IN BANKRUPTCY GRANTED WHERE LICENSEE HAD BEEN ADJUDICATED A BANKRUPT. CHARACTER QUALIFICATIONS OF LICENSEE PRINCIPALS HAD BEEN DESIGNATED, BUT SINCE BANKRUPTCY THE BANKRUPT LICENSEE IS DISASSOCIATED FROM THE STATION AND WILL RECEIVE NO BENEFIT FROM THE TRANSFER. VOLUNTARY ASSIGNMENT TO NEW ASSIGNEE APPROVED. ***IMAGE RADIO, INC.*** 317

RENEWAL WITHOUT HEARING DENIED SINCE THE DEPARTURE OF THOSE PERSONS CHARGED WITH MISCONDUCT DOES NOT RELIEVE THE LICENSEE OF RESPONSIBILITY FOR THEIR MISCONDUCT. ***IMAGE RADIO, INC.*** 317

APPLICATION FOR RENEWAL OF LICENSE FOR SHIP RADIO STATION DISMISSED ON GROUNDS THAT COMMISSION POLICY IS TO ELIMINATE SHIP RADIO STATIONS LOCATED ON PERMANENTLY MOORED VESSELS OPERATING AS COAST STATIONS BY HANDLING SHIP-TO-SHORE MESSAGE TRAFFIC. ***MONTI, JOSEPH, AND MARINO, JOSEPH*** 390

LICENSE SHORT TERM

A SHORT TERM AUTHORIZATION WAS GRANTED WHERE AN UNAUTHORIZED ASSIGNMENT OF A DOMESTIC PUBLIC RADIO SERVICE LICENSE WAS MADE IN VIOLATION OF SEC. 310(B) SINCE THE ASSIGNMENT DID NOT INVOLVE A SUBSTANTIAL CHANGE IN OWNERSHIP AND THE PUBLIC INTEREST REQUIRED THE SERVICE. ***LIMA TELEPHONE CO.*** 792

LICENSE SUSPENSION OF

THE LICENSE OF AN AMATEUR RADIO OPERATOR WAS SUSPENDED FOR 3 MONTHS FOR VIOLATION OF SEC. 97.67 (OPERATING AT AN INPUT POWER MORE THAN ONE-THIRD ABOVE THE AUTHORIZED MAXIMUM). ***CAMP, RONNIE J.*** 365

LICENSE TRAFFICKING IN

THE GRANT OF A TV CONSTRUCTION PERMIT WAS REINSTATED AFTER AN INITIAL DECISION LIMITED TO A TRAFFICKING ISSUE, UPON A CONCLUSION THAT THE PRINCIPAL CHARGED HAD NOT ENGAGED IN TRAFFICKING. THE COMMISSION CONCURRED AND THE INITIAL DECISION WAS PERMITTED TO BECOME EFFECTIVE. ***SUNSET B/CING CORP.*** 347

LICENSEE ELIGIBILITY

THE APPROPRIATENESS OF AN ESTATE ACQUIRING BROADCAST LICENSES AND QUESTIONS OF FACT CONCERNING A COMMUNITY SURVEY NECESSITATE DESIGNATING FOR HEARING THE APPLICATIONS FOR (A) TRANSFER OF CONTROL, AND (B) ASSIGNMENT OF LICENSE. ***CRAWFORD, PERCY B., ESTATE OF*** 677

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LICENSEE MISCONDUCT

RENEWAL APPLICATION DENIED, INTER ALIA, WHERE LICENSEE WAS HELD RESPONSIBLE FOR THE GROSS MISCONDUCT (INCLUDING FRAUDULENT MISREPRESENTATIONS) OF ITS STATION MANAGER, WHO CONSTITUTED A PRINCIPAL OF LICENSEE, WHERE IT WAS SHOWN THAT THE LICENSEE FAILED TO EXERCISE ADEQUATE CONTROL AND SUPERVISION OVER THE STATION OPERATOR. ***CONTINENTAL B/CING, INC.*** 120

RENEWAL AND INVOLUNTARY ASSIGNMENT OF LICENSE TO TRUSTEE IN BANKRUPTCY GRANTED WHERE LICENSEE HAD BEEN ADJUDICATED A BANKRUPT. CHARACTER QUALIFICATIONS OF LICENSEE PRINCIPALS HAD BEEN DESIGNATED, BUT SINCE BANKRUPTCY THE BANKRUPT LICENSEE IS DISASSOCIATED FROM THE STATION AND WILL RECEIVE NO BENEFIT FROM THE TRANSFER. VOLUNTARY ASSIGNMENT TO NEW ASSIGNEE APPROVED. ***IMAGE RADIO, INC.*** 317

RENEWAL WITHOUT HEARING DENIED SINCE THE DEPARTURE OF THOSE PERSONS CHARGED WITH MISCONDUCT DOES NOT RELIEVE THE LICENSEE OF RESPONSIBILITY FOR THEIR MISCONDUCT. ***IMAGE RADIO, INC.*** 317

LICENSED OPERATOR, FAILURE TO EMPLOY

VIOLATION OF SEC. 73.93(B), OPERATION OF TRANSMITTER BY AN UNLICENSED OPERATOR, RESULTED IN A FORFEITURE OF 500. ***KOKE, INC.*** 714

LICENSEE RESPONSIBILITY

RENEWAL APPLICATION DENIED, INTER ALIA, WHERE LICENSEE WAS HELD RESPONSIBLE FOR THE GROSS MISCONDUCT (INCLUDING FRAUDULENT MISREPRESENTATIONS) OF ITS STATION MANAGER, WHO CONSTITUTED A PRINCIPAL OF LICENSEE, WHERE IT WAS SHOWN THAT THE LICENSEE FAILED TO EXERCISE ADEQUATE CONTROL AND SUPERVISION OVER THE STATION OPERATOR. ***CONTINENTAL B/CING, INC.*** 120

RENEWAL OF LICENSE DENIED INTER ALIA ON THE GROUNDS THAT LICENSEE FAILED TO MAINTAIN ACCURATE PROGRAM LOGS (73.111 & 73.112) WAS GENERALLY INATTENTIVE TO THE STATION AND ITS OPERATION. ***CONTINENTAL B/CING, INC.*** 120

RENEWAL WITHOUT HEARING DENIED SINCE THE DEPARTURE OF THOSE PERSONS CHARGED WITH MISCONDUCT DOES NOT RELIEVE THE LICENSEE OF RESPONSIBILITY FOR THEIR MISCONDUCT. ***IMAGE RADIO, INC.*** 317

LOAN COMMITMENT, ABILITY TO MEET

ISSUES WERE ADDED TO DETERMINE WHETHER ONE OF THE PRINCIPALS CAN MEET HIS LOAN COMMITMENT AND WHETHER THE APPLICANT HAS SUBMITTED ALL RELEVANT INFORMATION REQUIRED BY SEC. 1.65. ***ORANGE COUNTY B/CING CO.*** 991

LOAN COMMITMENT, TERMS OF

ISSUES WERE ENLARGED TO CONSIDER APPLICANTS ESTIMATE OF COSTS, AVAILABILITY OF A LOAN, FAILURE TO AMEND ITS APPLICATION (1.65) AND ADEQUACY OF ITS STAFF ***CHRISTIAN VOICE OF CENT. OHIO*** 303

LOGS MAINTENANCE OF

REQUEST TO DELETE THE REQUIREMENTS FOR MAINTAINING STATION RECORDS (74.481) FOR REMOTE PICKUP STATIONS WAS DENIED. ***LOGGING REQS-REMOTE PICKUP STATIONS*** 81

SEC. 74.481 WAS AMENDED TO CLARIFY THE REQUIREMENTS FOR MAINTAINING STATION RECORDS FOR REMOTE BROADCAST PICKUP STATIONS. ***LOGGING REQS-REMOTE PICKUP STATIONS*** 81

RENEWAL OF LICENSE DENIED INTER ALIA ON THE GROUNDS THAT LICENSEE FAILED TO MAINTAIN ACCURATE PROGRAM LOGS (73.111 & 73.112) WAS GENERALLY INATTENTIVE TO THE STATION AND ITS OPERATION. ***CONTINENTAL B/CING, INC.*** 120

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LOGS PROGRAM

FORFEITURE OF 1000 ORDERED FOR VIOLATION OF THE TERMS OF THE STATIONS LICENSE AND FOR VIOLATIONS OF SEC 73.922, 73.112(A)(4), AND 73.47(A). ***ANDERSON B/CING SERVICE*** 844

MARINE UTILITY STATIONS, LAND

PART 81 WAS AMENDED TO PROVIDE ADDITIONAL CATEGORIES OF PERSONS ELIGIBLE FOR LIMITED COAST AND MARINE UTILITY RADIO STATION LICENSES. (1) MOVABLE BRIDGE OPERATORS (2) SHIPPING AGENTS WHO DOCK OR DIRECT VESSELS IN PORT (3) PERSONS WHO PROVIDE MARITIME SERVICE TO VESSELS. ***ELIGIBILITY IN MARITIME MOB. SER.*** 253

MARITIME MOBILE SERVICE

PART 81 WAS AMENDED TO PROVIDE ADDITIONAL CATEGORIES OF PERSONS ELIGIBLE FOR LIMITED COAST AND MARINE UTILITY RADIO STATION LICENSES. (1) MOVABLE BRIDGE OPERATORS (2) SHIPPING AGENTS WHO DOCK OR DIRECT VESSELS IN PORT (3) PERSONS WHO PROVIDE MARITIME SERVICE TO VESSELS. ***ELIGIBILITY IN MARITIME MOB. SER.*** 253

MARITIME SERVICE

PARTS 2, 81, AND 83 CONCERNING STATIONS IN THE MARITIME SERVICES WERE AMENDED TO PROVIDE FOR THE ORDERLY TRANSITION OF SHIP AND COAST RADIOTELEGRAPH STATIONS FROM PRESENT FREQUENCY ASSIGNMENTS TO THOSE WITHIN ALLOTMENTS AND/OR FREQUENCY USAGE AS ADOPTED BY THE ITU WORLD ADMINISTRATIVE RADIO CONFERENCE. ***MARITIME SERVICE REGULATIONS*** 915

MASS MEDIA, CONTROL OF

FM APPLICATION DESIGNATED FOR HEARING ON CONCENTRATION OF LOCAL MEDIA CONTROL ISSUE AND WHETHER APPLICANTS CROSS INTERESTS IN THE LOCAL NEWSPAPER DIMINISH FREEDOM OF THE STATION TO COMPETE COMMERCIALLY OR TAKE DIFFERING EDITORIAL OPINIONS. ***WHBL, INC.*** 111

A CONSTRUCTION PERMIT FOR A NEW TV BROADCAST STATION WAS GRANTED WITH CONDITIONS CONCERNING MEDIA OWNERSHIP. ***STATE MUTUAL B/CING CORP.*** 736

A CP WAS GRANTED TO THE APPLICANT HAVING A PREFERENCE FOR INTEGRATION OF OWNERSHIP AND MANAGEMENT, FOR PROPOSING A MORE EFFICIENT UTILIZATION OF THE CHANNEL, AND FOR HAVING FEWER OWNERSHIP INTERESTS IN MEDIA OF MASS COMMUNICATIONS. ***MINSHALL B/CING CO., INC.*** 931

MERGER

A JOINT AGREEMENT PROVIDING FOR A MERGER OF TWO MUTUALLY EXCLUSIVE APPLICANTS INTO A NEW CORPORATION ADOPTING ONE OF THE APPLICANTS PROPOSALS, GRANTED. A FINANCIAL ISSUE WAS ADDED AGAINST THE MERGED APPLICANT. ***SUNBURY B/CING CORP.*** 742

AS A RESULT OF THE MERGER OF TWO MUTUALLY EXCLUSIVE APPLICATIONS, A THIRD APPLICATION FOR A CHANGE OF DAYTIME OPERATIONS WAS SEVERED AND GRANTED SINCE THE INTERFERENCE QUESTION WAS REMOVED. ***SUNBURY B/CING CORP.*** 742

MERGER AND DROP OUT CASES

ADDITION OF AN ISSUE TO DETERMINE WHETHER A PENDING MERGER AGREEMENT SERVES THE PUBLIC INTEREST WAS DENIED ON GROUNDS THAT THE BOARD LACKED JURISDICTION TO CONSIDER MORE THAN THE BONA FIDES OF THE AGREEMENT AS TO REIMBURSEMENT FOR DISMISSAL, NOT WHETHER IT WILL SERVE THE PUBLIC INTEREST. ***SUNSET B/CING CORP.*** 276

REIMBURSEMENT AGREEMENT IN WHICH TWO APPLICANTS MERGE TO FORM A THIRD CORPORATION TO BE PARTLY OWNED BY A 3RD PARTY, GRANTED. APPLICATION OF NEW CORPORATION FOR CP, GRANTED. ***BALTIMORE B/CING CO.*** 857

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REQUEST FOR APPROVAL OF MERGER AGREEMENT, DENIED, SINCE THE BOOK VALUE OF THE SHARES TO BE ACQUIRED BY MERGED APPLICANT EXCEEDS THE EXPENSES INCURRED BY THAT APPLICANT AND THUS REPRESENTS A WINDFALL CONTRARY TO SEC. 311(C). ***WARWICK B/CING CORP.*** 1010

MICROWAVE RELAY FACILITIES

ONE OF TWO MUTUALLY EXCLUSIVE APPLICATIONS FOR A MICROWAVE LINK WAS GRANTED SINCE ITS OPERATING COSTS AND REVENUE REQUIREMENTS ARE LOWER, COSTS TO CARRIERS USING THE SYSTEM WILL BE LOWER, MAINTENANCE WILL BE MORE EFFICIENT, AND SINCE THE APPLICANT WILL BE A PRIMARY USER OF THE SYSTEM. ***ALL AMERICA CABLES & RADIO, INC.*** 1

IN GENERAL, COMMON CARRIERS SHOULD OWN THE FACILITIES THEY USE TO SERVE THE PUBLIC UNLESS THERE IS SOME ADVANTAGE IN UTILIZING THE FACILITIES OF ANOTHER CARRIER OR OTHER ENTITY. ***ALL AMERICA CABLES & RADIO, INC.*** 1

MISREPRESENTATION

RENEWAL APPLICATION DENIED, INTER ALIA, WHERE LICENSEE WAS HELD RESPONSIBLE FOR THE GROSS MISCONDUCT (INCLUDING FRAUDULENT MISREPRESENTATIONS) OF ITS STATION MANAGER, WHO CONSTITUTED A PRINCIPAL OF LICENSEE, WHERE IT WAS SHOWN THAT THE LICENSEE FAILED TO EXERCISE ADEQUATE CONTROL AND SUPERVISION OVER THE STATION OPERATOR. ***CONTINENTAL B/CING, INC.*** 120

PETITION TO ENLARGE ISSUES GRANTED TO INCLUDE ON ISSUES AS TO WHETHER APPLICATION WAS FILED TO OBSTRUCT OR DELAY. REQUEST FOR ISSUES AS TO REAL PARTY IN INTEREST, FINANCIAL QUALIFICATIONS AND MISREPRESENTATION DENIED. ***SUMITON B/CING CO., INC.*** 400

MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780

MULTIPLE OWNERSHIP

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

MULTIPLE OWNERSHIP RULES

PETITION FOR RECONSIDERATION OF ORDER DENYING REQUEST TO REOPEN THE RECORD DISMISSED SINCE PETITIONER DID NOT HAVE STANDING AND APPLICANT WAS NOT IN VIOLATION OF COMMISSIONS MULTIPLE OWNERSHIP AND CROSS INTEREST POLICY, NOR DID IT VIOLATE SEC. 1.65. ***CLEVELAND B/CING, INC.*** 311

NATIONAL LABOR RELATIONS BOARD

REVIEW OF EXAMINERS RULING DENYING REQUEST FOR FURTHER EVIDENCE (SEC. 11.353), DENIED SINCE THE INQUIRY CONCERNING CONDUCT INVOLVED IN A NLRB HEARING WAS AUTHORIZED IN THE HEARING ORDER UNDER THE STANDARD COMPARATIVE ISSUE WHICH HAS NOT YET BEEN REACHED IN THE HEARING PROCEDURE. ***KITTYHAWK B/CING CORP.*** 322

NETWORK INTEREST

COMMISSION EXPRESSED ITS CONTINUING CONCERN WITH PROBLEMS RAISED BY LACK OF COMPARABLE NETWORK FACILITIES IN VARIOUS TV MARKETS. ***AMERICAN B/CING COS.*** 19

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NIGHTTIME SERVICE

PETITION FOR RECONSIDERATION OF COMMISSION ACTION MAKING EDITORIAL CHANGES IN PARTS 73 AND 74 OF THE RULES REDEFINING NIGHTTIME (SEC. 73.7), DENIED SINCE THE RULE CHANGE MERELY REFLECTS SETTLED COMMISSION POLICY AND RULEMAKING WAS NOT NECESSARY. ***ARGONAUT B/CING CO.*** 847

APPLICATION BY A CLASS II STATION LICENSEE FOR A CHANGE FROM A 1-KW NIGHTTIME NON-DIRECTIONAL FACILITY TO A 50 KW DIRECTIONALIZED FACILITY IS PRECLUDED BY SEC. 73.25(A)(5) SINCE THE IMPACT ON POTENTIAL USES OF THE CHANNEL WOULD BE SUBSTANTIAL EVEN THOUGH INTERFERENCE TO THE DOMINANT CLASS 1-A FACILITY WOULD NOT BE INCREASED. ***ARGONAUT B/CING CO.*** 847

NONDUPLICATION CONDITIONS

APPLICATION FOR A COMMUNITY-OWNED NON-PROFIT UHF TRANSLATOR GRANTED WITHOUT NONDUPLICATION CONDITIONS SINCE THE PRINCIPAL COMMUNITY TO BE SERVED IS 25 MILES BEYOND PETITIONERS GRADE B CONTOUR AND SINCE NEW SIGNALS WILL BE RECEIVED BY 23,000 PERSONS. ***PEOPLES TV ASSN., INC.*** 41

APPLICATION FOR A UHF TRANSLATOR STATION GRANTED SINCE A NEED WAS ESTABLISHED AND SINCE IT HAD THE REQUIRED REBROADCAST CONSENT (325(A)). A NONDUPLICATION CONDITION IS INAPPROPRIATE FOR UHF TRANSLATOR STATIONS. ***LEE ENTERPRISES, INC.*** 912

NOTICE COMMISSION ACTIONS

SINCE APPLICATION WAS UNAVAILABLE FOR INSPECTION AT THE PUBLISHED REFERENCE POINT A SEC. 1.594 (APPLICATION TO BE MADE AVAILABLE FOR PUBLIC INSPECTION) ISSUE AND AN ISSUE TO DETERMINE WHETHER APPLICATION SHOULD BE DISMISSED OR A COMPARATIVE DEMERIT ASSESSED WERE DESIGNATED. ***VANDER PLATE, LOUIS*** 285

NOTICE OF INQUIRY

IN A NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY THE COMMISSION SUGGESTED VARIOUS POSSIBLE NEW AND REVISED REGULATIONS IN PART 74, SUBPART K, FOR CATV, NECESSITATED BY TECHNOLOGICAL ADVANCEMENTS AND NEW USES. ***CATV, REGULATORY POLICY*** 417

OBJECTION, INFORMAL

PETITION TO DENY DISMISSED AS PROCEDURALLY DEFECTIVE UNDER SEC. 1.580(I) (UNSUPPORTED ALLEGATION). HOWEVER, THE PETITION WAS CONSIDERED AS AN INFORMAL OBJECTION UNDER SEC. 1.587. ***STEPHENSON, HARRY D.*** 335

PETITION TO DENY UHF APPLICATION WAS DISMISSED AS UNTIMELY FILED (SEC. 1.580 (L)(I)). HOWEVER, THE PETITION WAS CONSIDERED ON ITS MERITS AS INFORMAL OBJECTIONS (SEC. 1.587) AND APPLICATION GRANTED UPON FINDING THAT ULTRAVISION REQUIREMENTS HAVE BEEN MET. ***MIDWESTERN B/CING CO., INC.*** 720

PETITIONERS OBJECTIONS WERE CONSIDERED ON THEIR MERITS AS AN INFORMAL OBJECTION DUE TO BELATED FILING (1.587). ***FAULKNER RADIO, INC.*** 780

UNDER SEC. 309(D)(1), 309(B), AND 309(C)(2)(D), A PETITION TO DENY DOES NOT LIE AGAINST AN APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO COMPLETE CONSTRUCTION. HOWEVER, PETITIONERS PLEADINGS WERE CONSIDERED AS INFORMAL OBJECTIONS UNDER SEC. 1.587. ***CHANNEL 16 OF R.I., INC.*** 893

OFFICE OF OPINIONS AND REVIEW

SEC. 0.371 WAS AMENDED TO AUTHORIZE THE CHIEF, OFFICE OF OPINIONS AND REVIEW TO ACT ON REQUESTS TO FILE PLEADINGS IN EXCESS OF THE RULE REQUIREMENTS

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WHEN SUCH REQUESTS RELATE TO PLEADINGS TO BE FILED IN HEARING PROCEEDINGS PENDING BEFORE THE COMMISSION EN BANC. ***AMENDMENT OF SEC. 0.371*** 678

OPERATOR LICENSE

FORFEITURE OF 1000 ORDERED FOR REPEATED VIOLATIONS OF SEC. 73.93(A) AND 73.47. ***CENTENNIAL RADIO CORP.*** 817

FORFEITURE OF 500 ORDERED FOR REPEATED VIOLATION OF SEC. 73.93, HAVING AN IMPROPERLY LICENSED OPERATOR IN CHARGE OF THE TRANSMITTER. ***PRAIRIE STATES B/CING CO., INC.*** 838

OPERATOR REQUIREMENTS

FORFEITURE OF 500 ORDERED FOR REPEATED VIOLATION OF SEC. 73.93(B) (IMPROPERLY LICENSED OPERATOR) AND 73.47(A) AND (B) (EQUIPMENT PERFORMANCE MEASUREMENTS). ***O FALLON-O CONNOR B/CING CO., INC.*** 729

ORDERS TO SHOW CAUSE

AN ORDER TO SHOW CAUSE WAS ISSUED TO A TELEPHONE COMPANY CONSTRUCTING CATV DISTRIBUTION FACILITIES WITHOUT FIRST HAVING OBTAINED A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO SEC. 214(A). ***ASHTABULA CABLE TV, INC.*** 813

OVERLAP

APPLICATION FOR STANDARD BROADCAST CP DISMISSED SINCE THE PROPOSED OPERATION INVOLVES PROHIBITED OVERLAP (SEC. 73.37) WITH AN EXISTING STATION. ***COASTAL FLORIDA RADIO B/CERS*** 642

OVERLAP RULE

ADDITION OF A CONCENTRATION OF CONTROL ISSUE, DENIED, WHERE SECOND APPLICATION, WHICH MAY RAISE AN OVERLAP ISSUE, HAS NOT REACHED HEARING STATUS, THERE IS AN ABUNDANCE OF COMPETITIVE MEDIA, AND NO GRADE B OVERLAP EXISTS, THIS ASPECT HAVING BEEN DISPOSED OF IN THE DESIGNATION ORDER. ***SUNSET B/CING CORP.*** 276

PETITIONERS ALLEGATION OF CONCENTRATION OF CONTROL, IN THE ABSENCE OF GRADE B OVERLAP, WAS REJECTED ON THE GROUNDS THAT IT WAS BASED ON APPLICANTS ADVERTISING BROCHURE AND NOT FIELD INTENSITY CONTOURS (73.683(B)(2)) ***SUNSET B/CING CORP.*** 276

WAIVER OF SEC. 73.37 DENIED SINCE AREAS OF OVERLAP CAUSED AND AREAS OF OVERLAP RECEIVED MUST BE CONSIDERED SEPARATELY. AN APPLICANT CANNOT OFFSET ONE AGAINST THE OTHER TO SHOW A NET DECREASE. ***KAFY, INC.*** 704

OWNERSHIP AND MANAGEMENT, INTEGRATION OF

A CP WAS GRANTED TO THE APPLICANT HAVING A PREFERENCE FOR INTEGRATION OF OWNERSHIP AND MANAGEMENT, FOR PROPOSING A MORE EFFICIENT UTILIZATION OF THE CHANNEL, AND FOR HAVING FEWER OWNERSHIP INTERESTS IN MEDIA OF MASS COMMUNICATIONS. ***MINSHALL B/CING CO., INC.*** 931

OWNERSHIP MULTIPLE, FACTOR IN APPLICATION

ADDITION OF AN ISSUE CONCERNING COMPLIANCE WITH SEC. 1.65 HELD NOT WARRANTED SINCE THE CHANGE IN BROADCAST INTERESTS WAS A REALINEMENT OF OWNERSHIP INTERESTS BETWEEN TWO STOCKHOLDERS OF APPLICANT. ***LAWRENCE CNTY. B/CING CORP.*** 910

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OWNERSHIP OF STATIONS, LIMITATIONS ON

THE INTERIM POLICY CONCERNING APPLICATIONS RESULTING IN COMMON OWNERSHIP OF MORE THAN ONE FULL-TIME STATION IN A SINGLE MARKET MODIFIED TO DESIGNATE THOSE APPLICATIONS FOR HEARING, AND IF PREFERRED, TO BE HELD IN HEARING STATUS PENDING THE OUTCOME OF THE RULEMAKING PROCEEDING. ***HUBBARD, SEABORN RUDOLPH*** 690

OWNERSHIP REPORTS

PETITION FOR ADDITION OF A FULL DISCLOSURE ISSUE, DENIED IN LIGHT OF APPLICANTS PROMPT AMENDMENT AND EXPLANATION OF ITS INADVERTENCE IN FAILING TO INCLUDE PAST BROADCAST INTEREST IN ITS APPLICATION. ***SUNSET B/CING CORP.*** 276

OWNERSHIP COMMON

THE INTERIM POLICY CONCERNING APPLICATIONS RESULTING IN COMMON OWNERSHIP OF MORE THAN ONE FULL-TIME STATION IN A SINGLE MARKET MODIFIED TO DESIGNATE THOSE APPLICATIONS FOR HEARING, AND IF PREFERRED, TO BE HELD IN HEARING STATUS PENDING THE OUTCOME OF THE RULEMAKING PROCEEDING. ***HUBBARD, SEABORN RUDOLPH*** 690

PARTICIPATION

INTERIM AUTHORITY GRANTED TO ONE OF TWO COMPETING APPLICANTS TO OPERATE A STATION WHICH HAS LOST ITS LICENSE SINCE ONLY ONE APPLICANT REQUESTED AUTHORIZATION. ORDER TO BE EFFECTIVE ONLY IF A STAY ISSUED BY THE COURT OF APPEALS IS DISSOLVED. ***MINERAL KING B/CERS*** 835

PARTICIPATION IN HEARING, RIGHT TO

RECONSIDERATION OF DECISION DENYING CARRIAGE OF DISTANT SIGNALS, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO PARTICIPATE IN THE EARLY STAGES OF THE PROCEEDING (1.106(B)) AND FAILED TO PRESENT NEWLY DISCOVERED EVIDENCE (1.106(C) & 405). ***MIDWEST TV, INC.*** 84

PETITION FOR RECONSIDERATION, TIME FOR

PETITION FOR RECONSIDERATION OR FOR REHEARING OF MEMORANDUM OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION, DENIED ON GROUNDS THAT THE PETITION WAS FILED LATE, AND THE STATUTORY PERIOD OF JURISDICTION HAVING EXPIRED THE REVIEW BOARD IS WITHOUT AUTHORITY TO ACT. ***LORAIN COMMUNITY B/CING CO.*** 388

PETITION TO DENY

PETITION TO DENY DISMISSED AS PROCEDURALLY DEFECTIVE UNDER SEC. 1.580(I) (UNSUPPORTED ALLEGATION). HOWEVER, THE PETITION WAS CONSIDERED AS AN INFORMAL OBJECTION UNDER SEC. 1.587. ***STEPHENSON, HARRY D.*** 335

UNDER SEC. 309(D)(1), 309(B), AND 309(C)(2)(D), A PETITION TO DENY DOES NOT LIE AGAINST AN APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO COMPLETE CONSTRUCTION. HOWEVER, PETITIONERS PLEADINGS WERE CONSIDERED AS INFORMAL OBJECTIONS UNDER SEC. 1.587. ***CHANNEL 16 OF R.I., INC.*** 893

PLEADING LENGTH

SEC. 0.371 WAS AMENDED TO AUTHORIZE THE CHIEF, OFFICE OF OPINIONS AND REVIEW TO ACT ON REQUESTS TO FILE PLEADINGS IN EXCESS OF THE RULE REQUIREMENTS WHEN SUCH REQUESTS RELATE TO PLEADINGS TO BE FILED IN HEARING PROCEEDINGS PENDING BEFORE THE COMMISSION EN BANC. ***AMENDMENT OF SEC. 0.371*** 678

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PLEADING TIME FOR

LATE FILED PLEADING WAS ACCEPTED AND AN ISSUE WAS ADDED TO CONSIDER QUESTION OF DE FACTO CONTROL RESULTING FROM FINANCIAL INTERESTS NEWLY ACQUIRED BY ONE OF THE STOCKHOLDERS CONTRARY TO SEC. 310(B). ***CORNBELT B/CING CORP.*** 315

POLICY STATEMENTS

A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264

THE INTERIM POLICY CONCERNING APPLICATIONS RESULTING IN COMMON OWNERSHIP OF MORE THAN ONE FULL-TIME STATION IN A SINGLE MARKET MODIFIED TO DESIGNATE THOSE APPLICATIONS FOR HEARING, AND IF PREFERRED, TO BE HELD IN HEARING STATUS PENDING THE OUTCOME OF THE RULEMAKING PROCEEDING. ***HUBBARD, SEABORN RUDOLPH*** 690

POLITICAL BROADCAST, EQUAL OPPORTUNITY, ELIGIBLE CLAIMANT

REFUSAL TO GRANT EQUAL TIME TO ONE CLAIMING TO BE A CANDIDATE FOR THE OFFICE OF GOVERNOR OF MARYLAND, TO BE ELECTED BY THE MARYLAND GENERAL ASSEMBLY IS NOT UNREASONABLE SINCE THIS IS NOT AN ELECTION BY THE VOTERS. ***POSNER, LESTER*** 607

POLITICAL BROADCAST, EQUAL OPPORTUNITY, EXEMPT NEWS INTVIEW

A CHALLENGED PROGRAM WAS HELD TO BE A BONA FIDE NEWS INTERVIEW ENTITLED TO THE SEC. 315 (9) (2) EXEMPTION. IN ADDITION, COMPLAINANTS CONGRESSIONAL DISTRICT LIES OUTSIDE OF THE STATIONS COVERAGE AREA. ***DICHTER, DAVID*** 95

A PRESS CONFERENCE WITH VICE PRESIDENT HUMPHREY, IN WHICH THE PROBLEMS OF A PARTICULAR CITY WERE DISCUSSED, WAS HELD NOT AN EXEMPT BONA FIDE NEWS INTERVIEW UNDER SEC. 315(9) SINCE IT WAS NOT A REGULARLY SCHEDULED PROGRAM. ***SOCIALIST LABOR PARTY*** 98

POLITICAL BROADCAST, LICENSEE RESPONSIBILITY

WHERE 2 MINUTES AND 50 SECONDS OF THE VIDEO PORTION OF A DEBATE WAS LOST DUE TO DEFECTIVE TAPING, THE LICENSEE SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF SEC. 315 BY BROADCASTING THE AUDIO PORTION. ***STATION WISH-TV*** 47

THE COMMISSION ISSUED A PUBLIC NOTICE TO INFORM LICENSEES OF THEIR RESPONSIBILITY TO MAKE THEIR FACILITIES AVAILABLE TO POLITICAL CANDIDATES, EVEN THOUGH IT REQUIRES MODIFICATION OF NORMAL STATION FORMAT. ***POLITICAL B/C, LICENSEE RESPONS.*** 94

POLITICAL BROADCAST, REQUEST FOR EQUAL OPPORTUNITY

A CANDIDATE WHO SUBMITTED ITS REQUEST 16 DAYS AFTER THE INITIAL USE OF THE STATION BY A CANDIDATE FOR THE SAME OFFICE, BUT 4 DAYS PRIOR TO APPEARANCE BY A THIRD CANDIDATE, WAS HELD ENTITLED TO EQUAL OPPORTUNITY UNDER SEC. 315 AND SEC. 73.657(E) (SEVEN DAY RULE). ***SOCIALIST WORKERS PARTY*** 96

POLITICAL BROADCAST, SEVEN DAY RULE

A CANDIDATE WHO SUBMITTED ITS REQUEST 16 DAYS AFTER THE INITIAL USE OF THE STATION BY A CANDIDATE FOR THE SAME OFFICE, BUT 4 DAYS PRIOR TO APPEARANCE BY A THIRD CANDIDATE, WAS HELD ENTITLED TO EQUAL OPPORTUNITY UNDER SEC. 315 AND SEC. 73.657(E) (SEVEN DAY RULE). ***SOCIALIST WORKERS PARTY*** 96

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POLITICAL BROADCAST, USE OF STATION BY CANDIDATE

THE COMMISSION ISSUED A PUBLIC NOTICE TO INFORM LICENSEES OF THEIR RESPONSIBILITY TO MAKE THEIR FACILITIES AVAILABLE TO POLITICAL CANDIDATES, EVEN THOUGH IT REQUIRES MODIFICATION OF NORMAL STATION FORMAT. ***POLITICAL B/C, LICENSEE RESPONS.*** 94

A CANDIDATE WHO SUBMITTED ITS REQUEST 16 DAYS AFTER THE INITIAL USE OF THE STATION BY A CANDIDATE FOR THE SAME OFFICE, BUT 4 DAYS PRIOR TO APPEARANCE BY A THIRD CANDIDATE, WAS HELD ENTITLED TO EQUAL OPPORTUNITY UNDER SEC. 315 AND SEC. 73.657(E) (SEVEN DAY RULE). ***SOCIALIST WORKERS PARTY*** 96

A PRESS CONFERENCE WITH VICE PRESIDENT HUMPHREY, IN WHICH THE PROBLEMS OF A PARTICULAR CITY WERE DISCUSSED, WAS HELD NOT AN EXEMPT BONA FIDE NEWS INTERVIEW UNDER SEC. 315(9) SINCE IT WAS NOT A REGULARLY SCHEDULED PROGRAM. ***SOCIALIST LABOR PARTY*** 98

POWER INCREASE OF

AN INCREASE IN POWER WAS GRANTED SINCE APPLICANT SUCCESSFULLY REBUTTED THE SUBURBAN COMMUNITY 307(B) PRESUMPTION AND WILL SERVE A RAPIDLY GROWING POPULATION IN ITS AREA OF SERVICE. ***KACY, INC.*** 33

POWER OPERATING

THE LICENSE OF AN AMATEUR RADIO OPERATOR WAS SUSPENDED FOR 3 MONTHS FOR VIOLATION OF SEC. 97.67 (OPERATING AT AN INPUT POWER MORE THAN ONE-THIRD ABOVE THE AUTHORIZED MAXIMUM). ***CAMP, RONNIE J.*** 365

PRESIDING OFFICER

A MOTION FOR CORRECTION OF RECORD (1.261) ADDRESSED TO THE HEARING EXAMINER IS MISPLACED SINCE HE IS NO LONGER THE PRESIDING OFFICER AFTER FILING HIS INITIAL DECISION. SINCE THE PROCEEDING IS BEFORE THE REVIEW BOARD IT WILL CONSIDER THE MATTER WITH EXCEPTIONS TO THE INITIAL DECISION. ***CHAPMAN RADIO & TV CO.*** 897

PREMATURE REQUEST

SINCE THE HEARING EXAMINER HAS INITIAL JURISDICTION OVER PETITIONS FOR LEAVE TO AMEND, A RULING BY THE REVIEW BOARD ON THE PROPRIETY OF AMENDMENTS DESIGNED TO MEET SUBURBAN ISSUES WOULD BE PREMATURE. ***NORTH AMERICAN B/CING CO., INC.*** 727

PRESUNRISE OPERATION

CLASS II STATION IS PERMITTED TO CONTINUE ITS 1-KW NIGHTTIME OPERATION AT THE SAME TIME AS THE CLASS I-A STATION ON THAT CHANNEL UNTIL 30 DAYS AFTER A DECISION IN THE RULEMAKING PROCEEDING IN DOCKET 18421 (SEC. 73.81). ***ARGONAUT B/CING CO.*** 847

APPLICATIONS AND PETITIONS BY THREE CLASS II STATIONS FOR PRESUNRISE AUTHORITY BEYOND PERMISSIBLE AUTHORITY UNDER SEC. 73.99(B)(1) DENIED, SINCE THEY WOULD CAUSE MASSIVE SKYWAVE INTERFERENCE WITH THE RESPECTIVE CLASS I-B CLEAR CHANNEL STATIONS. ***MEREDITH B/CING CO.*** 927

PROCEDURES

CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC. 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557). ***MIDWEST TV, INC.*** 84

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PROGRAMMING DUPLICATION, AM-FM

IN A COMPARATIVE PROCEEDING, A PROPONENT OF DUPLICATED AM-FM PROGRAMMING WILL BE PERMITTED TO SHOW ONLY THAT ITS PROPOSAL IS NOT INFERIOR TO INDEPENDENT PROGRAMMING. ***PORT JERVIS B/CING CO., INC.*** 44

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***CHARLES RIVER B/CING., INC.*** 48

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***KNOK B/CING CO.*** 49

WAIVER OF SEC. 73.242(A) GRANTED SINCE THE FM STATION WILL BE DUPLICATING ONLY 70 OVER THE AMOUNT PERMISSIBLE AND SINCE BOTH STATIONS FEATURE AN EXCLUSIVELY NEWS AND INFORMATION FORMAT. ***U.S. TRANSDYNAMICS CORP.*** 50

TEMPORARY WAIVER OF SEC. 73.242(A) GRANTED IN VIEW OF PENDING APPLICATIONS FOR ASSIGNMENT OF STATION LICENSES. ***UNIVERSITY ADVERTISING CO.*** 51

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***ZANESVILLE PUBLISHING CO.*** 52

ISSUES WERE ENLARGED TO CONSIDER THE PROPOSED DUPLICATION OF 370 OF ITS AM PROGRAMMING BY ONE OF THE APPLICANTS FOR AN FM LICENSE. ***GEORGIA RADIO, INC.*** 679

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS TO BE SERVED AND DUPLICATED PROGRAMMING. ***ALLEN, LESTER H.*** 767

PROGRAMMING ISSUES

ENLARGEMENT OF ISSUES TO INCLUDE A COMPARATIVE PROGRAMMING ISSUE, DENIED, SINCE PETITIONER FAILED TO MAKE A PRIMA FACIE SHOWING THAT THERE ARE SIGNIFICANT DIFFERENCES IN THE PROPOSED PROGRAMMING. ***PORT JERVIS B/CING CO., INC.*** 44

A COMPARATIVE PROGRAMMING ISSUE WAS ADDED SINCE ONE OF THE APPLICANTS PROPOSED SUBSTANTIALLY MORE TIME TO NEWS, PUBLIC AFFAIRS, AND ALL OTHER PROGRAMS EXCLUSIVE OF ENTERTAINMENT AND SPORTS. ***ORANGE COUNTY B/CING, INC.*** 802

PROGRAMMING LOCAL

APPLICATION FOR A UHF CP DENIED, ON GROUNDS OF AN INADEQUATE SHOWING ON THE SUBURBAN ISSUE BY FAILING TO SUMMARIZE STEPS TAKEN TO BECOME INFORMED OF LOCAL NEEDS, THE SUGGESTIONS IT HAD RECEIVED AND EVALUATION THEREOF, AND PROGRAMS PROPOSED TO MEET THOSE NEEDS. ***MINSHALL B/CING CO., INC.*** 931

PUBLIC INSPECTION OF LOCAL STATION FILES

ISSUES WERE ENLARGED TO DETERMINE AVAILABILITY OF APPLICATION FOR PUBLIC INSPECTION SEC. 1.526(A)(1), WHETHER SEC. 1.65 HAS BEEN COMPLIED WITH, AND WHETHER APPLICANT HAS INCLUDED PROFESSIONAL FEES IN ITS ESTIMATE OF CONSTRUCTION COSTS. ***NORTH AMERICAN B/CING CO., INC.*** 984

PUBLIC NOTICE

THE COMMISSION ISSUED A PUBLIC NOTICE TO INFORM LICENSEES OF THEIR RESPONSIBILITY TO MAKE THEIR FACILITIES AVAILABLE TO POLITICAL CANDIDATES, EVEN THOUGH IT REQUIRES MODIFICATION OF NORMAL STATION FORMAT. ***POLITICAL B/C, LICENSEE RESPONS.*** 94

PUBLICATION

RULE 1.580(C) (1) WAS WAIVED WHERE APPLICANT PUBLISHED IN A NON-LOCAL DAILY INSTEAD OF A LOCAL WEEKLY NEWSPAPER. ***HUBBARD, SEABORN RUDOLPH*** 690

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PUBLICATION IN DROP-OUT CASE

A REIMBURSEMENT AND DISMISSAL AGREEMENT WAS APPROVED WHEREBY ONE OF THREE APPLICANTS WITHDREW. PUBLICATION (SEC. 1.525(B)) IS REQUIRED SINCE THE WITHDRAWING PARTY IS THE ONLY APPLICANT FOR ONE OF THE COMMUNITIES. ***ALMARDON, INC. OF FLA.*** 299

A JOINT PETITION FOR GRANT OF ONE APPLICATION AND DISMISSAL OF THE OTHER, HELD IN ABEYANCE PENDING PUBLICATION PURSUANT TO SEC. 1.525. ***BERWICK B/CING CORP.*** 624

JOINT AGREEMENT FOR REIMBURSEMENT AND DISMISSAL OF ONE OF APPLICANTS, GRANTED, SINCE THE REQUIREMENTS OF SEC. 1.525(A) HAVE BEEN MET AND PUBLICATION UNDER SEC. 1.525(B) NOT REQUIRED. ***H-B-K ENTERPRISES*** 683

RADIO TELEGRAPH SERVICE

AN INVESTIGATION WAS ORDERED INTO THE LAWFULNESS OF TARIFF REVISIONS FOR PICKUP AND DELIVERY OF INTERNATIONAL MESSAGES AND CUSTOMER TIELINES WITHIN METROPOLITAN AREAS RATHER THAN CORPORATE LIMITS (201(B) AND 202(A)). ***TROPICAL RADIO TELEGRAPH CO.*** 100

PARTS 2, 81, AND 83 CONCERNING STATIONS IN THE MARITIME SERVICES WERE AMENDED TO PROVIDE FOR THE ORDERLY TRANSITION OF SHIP AND COAST RADIOTELEGRAPH STATIONS FROM PRESENT FREQUENCY ASSIGNMENTS TO THOSE WITHIN ALLOTMENTS AND/OR FREQUENCY USAGE AS ADOPTED BY THE ITU WORLD ADMINISTRATIVE RADIO CONFERENCE. ***MARITIME SERVICE REGULATIONS*** 915

RADIO TELEPHONE

EFFECT OF COMMISSIONS DECISION VOIDING INVALID TARIFF PROVISIONS, STAYED AS TO REQUIREMENT THAT TARIFF FCC NO. 263 BE VACATED, EXCEPT AS TO INTERCONNECTION OF CUSTOMER PROVIDED MOBILE RADIO TELEPHONE SYSTEMS. ***CARTERFONE*** 31

REAL PARTY IN INTEREST

PETITION TO ENLARGE ISSUES GRANTED TO INCLUDE ON ISSUES AS TO WHETHER APPLICATION WAS FILED TO OBSTRUCT OR DELAY. REQUEST FOR ISSUES AS TO REAL PARTY IN INTEREST, FINANCIAL QUALIFICATIONS AND MISREPRESENTATION DENIED. ***SUMITON B/CING CO., INC.*** 400

RECORD REOPENING OF

THE RECORD WAS REOPENED AND A SUPPLEMENTAL ENGINEERING STATEMENT WAS RECEIVED INTO EVIDENCE SINCE NO CONTENTION WAS MADE THAT THE EVIDENCE WAS INACCURATE OR THAT IT WOULD NECESSITATE FURTHER HEARING. ***GEORGIA RADIO, INC.*** 791

PETITION TO REOPEN THE RECORD AND ENLARGE ISSUES DENIED WHERE THE PROCEEDING IS PENDING BEFORE THE EXAMINER. THE EXAMINER SHOULD CONSIDER SUCH A PETITION IN THE FIRST INSTANCE. ***LIBERTY TV*** 716

REIMBURSEMENT FOR EXPENSES

REQUEST FOR APPROVAL OF MERGER AGREEMENT, DENIED, SINCE THE BOOK VALUE OF THE SHARES TO BE ACQUIRED BY MERGED APPLICANT EXCEEDS THE EXPENSES INCURRED BY THAT APPLICANT AND THUS REPRESENTS A WINDFALL CONTRARY TO SEC. 311(C). ***WARWICK B/CING CORP.***1010

REIMBURSEMENT AGREEMENT APPROVED AFTER CERTAIN SUMS WERE DISALLOWED SINCE PETITIONERS HAVE COMPLIED WITH SEC. 1.525 AND HAVE SUBSTANTIATED THE REMAINING EXPENSES. ***JOHN WEIGEL ASSOCIATES***1020

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REINSTATEMENT

THE GRANT OF A TV CONSTRUCTION PERMIT WAS REINSTATED AFTER AN INITIAL DECISION LIMITED TO A TRAFFICKING ISSUE, UPON A CONCLUSION THAT THE PRINCIPAL CHARGED HAD NOT ENGAGED IN TRAFFICKING. THE COMMISSION CONCURRED AND THE INITIAL DECISION WAS PERMITTED TO BECOME EFFECTIVE. ***SUNSET B/CING CORP.*** 347

RENEWALS

VIOLATION OF SEC. 1.539 (FILING RENEWAL APPLICATION) AND FAILURE TO REPLY (SEC. 1.621) RESULTED IN A FORFEITURE OF 400. ***KEAN RADIO, INC.*** 712

REVIEW

REVIEW OF RULING FINDING NON-COMPLIANCE WITH FAIRNESS DOCTRINE DENIED WHERE STATION BROADCAST TWENTY-FOUR 20-SECOND EDITORIALS ADVERSE TO COMPLAINANT AND ALLOWED ONLY SIX 20-SECOND SPOTS FOR REPLY. NO BASIS FOR DETERMINING THE REASONABLENESS OF THIS RESTRICTION WAS PRESENTED BY THE STATION. ***KING B/CING CO.*** 828

REVIEW BOARD, AUTHORITY

ADDITION OF AN ISSUE TO DETERMINE WHETHER A PENDING MERGER AGREEMENT SERVES THE PUBLIC INTEREST WAS DENIED ON GROUNDS THAT THE BOARD LACKED JURISDICTION TO CONSIDER MORE THAN THE BONA FIDES OF THE AGREEMENT AS TO REIMBURSEMENT FOR DISMISSAL, NOT WHETHER IT WILL SERVE THE PUBLIC INTEREST. ***SUNSET B/CING CORP.*** 276

REVIEW BOARD, DECISIONS OF

PETITIONERS REQUEST FOR A NEW SET OF FINDINGS, BASED ON THE BOARDS FAILURE TO INCLUDE IN ITS DECISION EXAMINERS FINDINGS OF FACT ON ENGINEERING ISSUES, WAS DENIED, BUT THE BOARD AMENDED ITS DECISION BY ADOPTING, IN THIS DOCUMENT, THE EXAMINERS ENGINEERING FINDINGS. ***NORTHERN INDIANA B/CERS, INC.*** 264

RULE MAKING

CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC. 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557). ***MIDWEST TV, INC.*** 84

RULE MAKING AUTHORITY, FCC

THE COMMISSION HELD THAT FAILURE TO PUBLISH THE ACTUAL TEXT OF PROPOSED RULES UNTIL PUBLICATION OF THE REPORT AND ORDER DOES NOT CONSTITUTE ERROR (SEC. 1.413) WHERE THE TERMS OR SUBSTANCE OF THE PROPOSED RULE ARE SET FORTH. ***MARITIME MOBILE SERVICE BAND*** 819

RULE MAKING FORM OF

A REQUEST TO WITHDRAW A REPORT AND ORDER OR TO CONSIDER IT AS A FURTHER NOTICE OF PROPOSED RULEMAKING, DENIED, SINCE THE ALLEGATION OF INEQUITIES WAS INSUFFICIENT TO WARRANT A GRANT OF THE REQUEST. ***MARITIME MOBILE SERVICE BAND*** 819

RULE MAKING PROPOSED

IN A NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY THE COMMISSION SUGGESTED VARIOUS POSSIBLE NEW AND REVISED REGULATIONS IN PART 74, SUBPART

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K, FOR CATV, NECESSITATED BY TECHNOLOGICAL ADVANCEMENTS AND NEW USES. ***CATV, REGULATORY POLICY*** 417

PROPOSED RULES CONCERN CATV PROGRAM ORIGINATION, TECHNICAL STANDARDS, REPORTING REQUIREMENTS, AND IMPORTATION OF DISTANT SIGNALS IN MAJOR AND SMALLER MARKETS. ***CATV*** 417

RULES WERE PROPOSED TO REQUIRE CATV SYSTEMS LOCATED WITHIN THE GRADE B CONTOURS OF TELEVISION STATIONS AUTHORIZED TO BROADCAST SUBSCRIPTION PROGRAMS, TO CARRY THE SUBSCRIPTION SIGNALS OF THOSE STATIONS. ***SUBSCRIPTION TELEVISION*** 601

RULEMAKING PROCEEDINGS WERE INSTITUTED TO CONSIDER FREQUENCY COORDINATION FOR THE AIR TERMINAL AND CONTROL PROTECTION INDUSTRIES (SEC. 91.8(A)(1)(III)). ***BUSINESS RADIO SERVICE FREQ. COORD.*** 627

THE COMMISSION HELD THAT FAILURE TO PUBLISH THE ACTUAL TEXT OF PROPOSED RULES UNTIL PUBLICATION OF THE REPORT AND ORDER DOES NOT CONSTITUTE ERROR (SEC. 1.413) WHERE THE TERMS OR SUBSTANCE OF THE PROPOSED RULE ARE SET FORTH. ***MARITIME MOBILE SERVICE BAND*** 819

RULES INTERPRETATION OF

REQUEST TO DELETE THE REQUIREMENTS FOR MAINTAINING STATION RECORDS (74.481) FOR REMOTE PICKUP STATIONS WAS DENIED. ***LOGGING REQS-REMOTE PICKUP STATIONS*** 81

THE COMMISSION CLARIFIED THE OBLIGATIONS OF THE BROADCASTER AND THE CATV OPERATOR WITH RESPECT TO PROVIDING SAME-DAY PROGRAM EXCLUSIVITY PROTECTION. BROADCASTER REQUIRED TO SPECIFY PROGRAMS TO BE PROTECTED 8 DAYS IN ADVANCE AND THE TIME OF PRESENTATION BY DISTANT STATIONS. ***WILLMAR VIDEO, INC.*** 113

GOOD CAUSE FOR AN UNTIMELY REQUEST FOR AMENDMENT OF APPLICATION SHOWN WHERE ISSUE WAS A DISQUALIFYING ONE, ONLY ONE APPLICANT WAS INVOLVED IN PROCEEDING, AND SLIGHT DELAY RESULTED FROM A MISUNDERSTANDING OF SEC. 1.4(G). ***WMID, INC.*** 295

RULES VIOLATION OF

RENEWAL OF LICENSE DENIED INTER ALIA ON THE GROUNDS THAT LICENSEE FAILED TO MAINTAIN ACCURATE PROGRAM LOGS (73.111 & 73.112) WAS GENERALLY INATTENTIVE TO THE STATION AND ITS OPERATION. ***CONTINENTAL B/CING, INC.*** 120

THE COMMISSION FOUND THAT APPLICANT HAD VIOLATED SEC. 317(A) (1) AND SEC. 73.119 IN THAT IT FAILED TO ANNOUNCE AN INDIVIDUAL OR AGENCY PURCHASING BROADCAST TIME AS SPONSOR, A REQUIREMENT REGARDLESS OF BENEFIT DERIVED BY PURCHASER. ***CONTINENTAL B/CING, INC.*** 120

RENEWAL DENIED INTER ALIA, WHERE APPLICANT FAILED TO FILE TIME BROKERAGE AGREEMENTS AS REQUIRED BY SEC. 1.613(C). ***CONTINENTAL B/CING, INC.*** 120

PETITIONER FOUND TO HAVE VIOLATED SEC. 74.1105, BY FAILING TO NOTIFY SCHOOL AUTHORITIES AND STATE EDUC. TV AGENCIES OF PROPOSAL TO IMPORT DISTANT EDUCATIONAL SIGNALS. ***FIRST ILLINOIS CABLE TV, INC.*** 256

THE LICENSE OF AN AMATEUR RADIO OPERATOR WAS SUSPENDED FOR 3 MONTHS FOR VIOLATION OF SEC. 97.67 (OPERATING AT AN INPUT POWER MORE THAN ONE-THIRD ABOVE THE AUTHORIZED MAXIMUM). ***CAMP, RONNIE J.*** 365

UNAUTHORIZED USE OF A STATIONS FACILITIES BY EMPLOYEE TO BROADCAST A PRIVATE DISPUTE AND CLOSING DOWN THE STATION PRIOR TO THE END OF ITS BROADCAST DAY CONSTITUTES INTERFERENCE AS PROVIDED IN SEC. 13.69. RECONSIDERATION DENIED. ***WICHROWSKI, STEPHEN A., JR.*** 754

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RULES WAIVER OF

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***CHARLES RIVER B/CING., INC.*** 48

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***KNOK B/CING CO.*** 49

WAIVER OF SEC. 73.242(A) GRANTED SINCE THE FM STATION WILL BE DUPLICATING ONLY 70 OVER THE AMOUNT PERMISSIBLE AND SINCE BOTH STATIONS FEATURE AN EXCLUSIVELY NEWS AND INFORMATION FORMAT. ***U.S. TRANSDYNAMICS CORP.*** 50

TEMPORARY WAIVER OF SEC. 73.242(A) GRANTED IN VIEW OF PENDING APPLICATIONS FOR ASSIGNMENT OF STATION LICENSES. ***UNIVERSITY ADVERTISING CO.*** 51

WAIVER OF SEC. 73.242(A) DENIED SINCE IT WOULD BE DISCRIMINATORY TO OTHER STATIONS IN THE AREA. ***ZANESVILLE PUBLISHING CO.*** 52

PETITION FOR RECONSIDERATION OF ACCEPTANCE OF APPLICATION AND WAIVER OF SEC. 1.569(B)(2)(I) TO SHOW THAT APPLICANTS PROPOSAL WOULD PRECLUDE THE ASSIGNMENT OF A NEW CLASS II-A FACILITY. ***STEPHENSON, HARRY D.*** 335

RULE 21.15(C)(4) REQUIRING A MICROWAVE APPLICANT TO SUBMIT PROOF OF FRANCHISE OR OTHER LOCAL AUTHORIZATION WAS TEMPORARILY WAIVED TO PERMIT BOTH APPLICATIONS TO BE CONSIDERED IN A HEARING. ***COMMUNICATIONS ENGINEERING, INC.*** 644

SEC. 73.315(A) WAIVED SINCE NEITHER APPLICANT WILL BE ABLE TO PROVIDE A 3.16-MV-/M SIGNAL OVER THE ENTIRE PRINCIPAL CITY DUE TO THE SHAPE OF THE COMMUNITY. ***ALLEN, LESTER H.*** 767

WAIVER OF SEC. 73.207(A), DENIED, SINCE THE PROPOSED 17-MILE SHORT SPACING IS EXCESSIVE, AND RULEMAKING TO DELETE THE ASSIGNMENT OF THE CHANNEL WILL BE ORDERED. ***BOONE BIBLICAL COLLEGE*** 861

RULES AMENDMENT OF

SEC. 74.481 WAS AMENDED TO CLARIFY THE REQUIREMENTS FOR MAINTAINING STATION RECORDS FOR REMOTE BROADCAST PICKUP STATIONS. ***LOGGING REQS-REMOTE PICKUP STATIONS*** 81

IN ITS FOURTH REPORT AND ORDER THE COMMISSION AMENDED ITS RULES TO PROVIDE FOR OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS. THE RULES INCLUDE DEFINITIONS (73.641) LICENSING POLICIES (73.642), GENERAL OPERATING REQUIREMENTS (73.643), AND EQUIPMENT AND SYSTEM PERFORMANCE REQUIREMENTS (73.644). ***SUBSCRIPTION TV-FOURTH R. & O.*** 466

SEC. 0.371 WAS AMENDED TO AUTHORIZE THE CHIEF, OFFICE OF OPINIONS AND REVIEW TO ACT ON REQUESTS TO FILE PLEADINGS IN EXCESS OF THE RULE REQUIREMENTS WHEN SUCH REQUESTS RELATE TO PLEADINGS TO BE FILED IN HEARING PROCEEDINGS PENDING BEFORE THE COMMISSION EN BANC. ***AMENDMENT OF SEC. 0.371*** 678

PART 87 OF THE RULES WAS AMENDED TO MAKE PROVISION FOR THE ESTABLISHMENT OF AN INDUSTRY FREQUENCY ADVISORY COMMITTEE FOR COORDINATION OF FREQUENCIES IN THE 1435-1535 MC/S BAND. ***FREQUENCY COORD., 1435-1535 MC/S*** 831

PETITION FOR RECONSIDERATION OF COMMISSION ACTION MAKING EDITORIAL CHANGES IN PARTS 73 AND 74 OF THE RULES REDEFINING NIGHTTIME (SEC. 73.7), DENIED SINCE THE RULE CHANGE MERELY REFLECTS SETTLED COMMISSION POLICY AND RULEMAKING WAS NOT NECESSARY. ***ARGONAUT B/CING CO.*** 847

SATELLITE COMMUNICATIONS

ITT AND RCA EACH GRANTED TEMPORARY AUTHORITY TO LEASE AND OPERATE TWO-WAY 48-KHZ SATELLITE CIRCUITS BETWEEN THE APPROPRIATE U.S. EAST COAST AND SPAIN AND THE WEST COAST AND HAWAII SATELLITE AND EARTH STATIONS. ***ITT WORLD COMM.*** 694

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SERVICE AREA

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS TO BE SERVED AND DUPLICATED PROGRAMMING. ***ALLEN, LESTER H.*** 767

SERVICE NEED FOR

A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264

SERVICE REDUCTION OF

REQUEST FOR AMENDMENT OF APPLICATION TO CHANGE TRANSMITTER SITE WAS DENIED ON GROUNDS THAT INITIAL SITE WAS AVAILABLE, PETITIONER HAS NOT PRESENTED JUSTIFICATION FOR ABANDONMENT OF THAT SITE, AND PROPOSED CHANGE WOULD DECREASE NIGHTTIME SERVICE. ***WILKES COUNTY RADIO*** 292

SERVICE FIRST LOCAL

A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264

SHIP RADIOTELEPHONE STATION

APPLICATION FOR RENEWAL OF LICENSE FOR SHIP RADIO STATION DISMISSED ON GROUNDS THAT COMMISSION POLICY IS TO ELIMINATE SHIP RADIO STATIONS LOCATED ON PERMANENTLY MOORED VESSELS OPERATING AS COAST STATIONS BY HANDLING SHIP-TO-SHORE MESSAGE TRAFFIC. ***MONTI, JOSEPH, AND MARINO, JOSEPH*** 390

SHORT SPACING

WAIVER OF SEC. 73.207(A), DENIED, SINCE THE PROPOSED 17-MILE SHORT SPACING IS EXCESSIVE, AND RULEMAKING TO DELETE THE ASSIGNMENT OF THE CHANNEL WILL BE ORDERED. ***BOONE BIBLICAL COLLEGE*** 861

SIGNAL REQUIREMENTS

SEC. 73.315(A) WAIVED SINCE NEITHER APPLICANT WILL BE ABLE TO PROVIDE A 3.16-MV-/M SIGNAL OVER THE ENTIRE PRINCIPAL CITY DUE TO THE SHAPE OF THE COMMUNITY. ***ALLEN, LESTER H.*** 767

SITE AVAILABILITY

REQUEST FOR AMENDMENT OF APPLICATION TO CHANGE TRANSMITTER SITE WAS DENIED ON GROUNDS THAT INITIAL SITE WAS AVAILABLE, PETITIONER HAS NOT PRESENTED JUSTIFICATION FOR ABANDONMENT OF THAT SITE, AND PROPOSED CHANGE WOULD DECREASE NIGHTTIME SERVICE. ***WILKES COUNTY RADIO*** 292

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE. ***STEPHENSON, HARRY D.*** 335

SPECIAL INDUSTRIAL RADIO SERVICE

LICENSEE IN THE SPECIAL INDUSTRIAL RADIO SERVICE ORDERED TO EITHER DISMANTLE OR DETUNE AN ABANDONED TOWER WHICH IT HAD CONSTRUCTED WITHOUT AUTHORIZATION SINCE THE TOWER IS CAUSING INTERFERENCE TO A RADIO STATION 1000 YARDS AWAY. ***B & W TRUCK SERVICE*** 769

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SPONSORSHIP IDENTIFICATION REQUIREMENTS

THE COMMISSION FOUND THAT APPLICANT HAD VIOLATED SEC. 317(A) (1) AND SEC. 73.119 IN THAT IT FAILED TO ANNOUNCE AN INDIVIDUAL OR AGENCY PURCHASING BROADCAST TIME AS SPONSOR, A REQUIREMENT REGARDLESS OF BENEFIT DERIVED BY PURCHASER. ***CONTINENTAL B/CING, INC.*** 120

STAFF ADEQUACY

APPLICATION DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, CONSTRUCTION AND FIRST YEAR OPERATING COSTS, DEPENDENCE ON AND ESTIMATE OF FIRST YEAR REVENUES, STAFF ADEQUACY, AND AVAILIBITY OF FUNDS. ***DEARBORN CNTY B/CERS*** 247

ISSUES WERE ENLARGED TO CONSIDER APPLICANTS ESTIMATE OF COSTS, AVAILABILITY OF A LOAN, FAILURE TO AMEND ITS APPLICATION (1.65) AND ADEQUACY OF ITS STAFF. ***CHRISTIAN VOICE OF CENT. OHIO*** 303

STANDARD BROADCAST STATIONS, CLASS I

APPLICATION BY A CLASS II STATION LICENSEE FOR A CHANGE FROM A 1-KW NIGHTTIME NON-DIRECTIONAL FACILITY TO A 50 KW DIRECTIONALIZED FACILITY IS PRECLUDED BY SEC. 73.25(A)(5) SINCE THE IMPACT ON POTENTIAL USES OF THE CHANNEL WOULD BE SUBSTANTIAL EVEN THOUGH INTERFERENCE TO THE DOMINANT CLASS 1-A FACILITY WOULD NOT BE INCREASED. ***ARGONAUT B/CING CO.*** 847

CLASS II STATION IS PERMITTED TO CONTINUE ITS 1-KW NIGHTTIME OPERATION AT THE SAME TIME AS THE CLASS I-A STATION ON THAT CHANNEL UNTIL 30 DAYS AFTER A DECISION IN THE RULEMAKING PROCEEDING IN DOCKET 18421 (SEC. 73.81). ***ARGONAUT B/CING CO.*** 847

STANDARD BROADCAST STATIONS, CLASS II

APPLICATION BY A CLASS II STATION LICENSEE FOR A CHANGE FROM A 1-KW NIGHTTIME NON-DIRECTIONAL FACILITY TO A 50 KW DIRECTIONALIZED FACILITY IS PRECLUDED BY SEC. 73.25(A)(5) SINCE THE IMPACT ON POTENTIAL USES OF THE CHANNEL WOULD BE SUBSTANTIAL EVEN THOUGH INTERFERENCE TO THE DOMINANT CLASS 1-A FACILITY WOULD NOT BE INCREASED. ***ARGONAUT B/CING CO.*** 847

STANDARD BROADCAST STATIONS, CLASS IV

APPLICATION BY A CLASS IV STATION TO INCREASE HOURS WAS ACCEPTED FOR FILING SINCE THE AM FREEZE WAS NOT INTENDED TO BAR THIS TYPE OF APPLICATION. NOTE 2 OF SEC. 1.571 WAS WAIVED. ***HICKORY HILL B/CING CO.*** 907

STANDING

PETITIONER HAS STANDING SINCE PROPOSED OPERATION WOULD CAUSE INTERFERENCE WITH PETITIONERS STATION (309(D)(1)). ***STONE, WILLIAM D.*** 53

PETITION FOR RECONSIDERATION OF ORDER DENYING REQUEST TO REOPEN THE RECORD DISMISSED SINCE PETITIONER DID NOT HAVE STANDING AND APPLICANT WAS NOT IN VIOLATION OF COMMISSIONS MULTIPLE OWNERSHIP AND CROSS INTEREST POLICY, NOR DID IT VIOLATE SEC. 1.65. ***CLEVELAND B/CING, INC.*** 311

STATION DISCONTINUANCE OF

WHERE PETITIONER HAD FORMERLY RECEIVED INTERFERENCE FROM A STATION NOW SILENT AND WHERE THE OVERLAP RULE (73.37) HAD BEEN WAIVED TO EXPEDITE REESTABLISHMENT OF THE DELETED STATION, AN ISSUE TO DETERMINE WHETHER OBJECTIONABLE INTERFERENCE WOULD RESULT WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 799

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STATION IDENTIFICATION

RECONSIDERATION OF GRANT OF A WAIVER OF SEC. 73.652(A) DENIED SINCE A TRI-CITY IDENTIFICATION WILL MAKE POSSIBLE THE GRANT OF A NEW UHF STATION AND AID ITS ECONOMIC VIABILITY. ***LOOK TV CORP.*** 718

STATUTORY INELIGIBILITY

PETITION FOR RECONSIDERATION OR FOR REHEARING OF MEMORANDUM OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION, DENIED ON GROUNDS THAT THE PETITION WAS FILED LATE, AND THE STATUTORY PERIOD OF JURISDICTION HAVING EXPIRED THE REVIEW BOARD IS WITHOUT AUTHORITY TO ACT. ***LORAIN COMMUNITY B/CING CO.*** 388

STAY

INTERIM AUTHORITY GRANTED TO ONE OF TWO COMPETING APPLICANTS TO OPERATE A STATION WHICH HAS LOST ITS LICENSE SINCE ONLY ONE APPLICANT REQUESTED AUTHORIZATION. ORDER TO BE EFFECTIVE ONLY IF A STAY ISSUED BY THE COURT OF APPEALS IS DISSOLVED. ***MINERAL KING B/CERS*** 835

STRIKE APPLICATION ISSUE

PETITION TO ENLARGE ISSUES GRANTED TO INCLUDE ON ISSUES AS TO WHETHER APPLICATION WAS FILED TO OBSTRUCT OR DELAY. REQUEST FOR ISSUES AS TO REAL PARTY IN INTEREST, FINANCIAL QUALIFICATIONS AND MISREPRESENTATION DENIED. ***SUMITON B/CING CO., INC.*** 400

SUBSCRIPTION TELEVISION

IN ITS FOURTH REPORT AND ORDER THE COMMISSION AMENDED ITS RULES TO PROVIDE FOR OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS. THE RULES INCLUDE DEFINITIONS (73.641) LICENSING POLICIES (73.642), GENERAL OPERATING REQUIREMENTS (73.643), AND EQUIPMENT AND SYSTEM PERFORMANCE REQUIREMENTS (73.644). ***SUBSCRIPTION TV-FOURTH R. & O.*** 466

RULES WERE PROPOSED TO REQUIRE CATV SYSTEMS LOCATED WITHIN THE GRADE B CONTOURS OF TELEVISION STATIONS AUTHORIZED TO BROADCAST SUBSCRIPTION PROGRAMS, TO CARRY THE SUBSCRIPTION SIGNALS OF THOSE STATIONS. ***SUBSCRIPTION TELEVISION*** 601

SUBURBAN ISSUE

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER AN INTERFERENCE ISSUE, A FINANCIAL ISSUE, A COVERAGE ISSUE, A CHARACTER ISSUE, AND A SUBURBAN ISSUE. ***STONE, WILLIAM D.*** 53

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES, INTERFERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58

MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON FINANCIAL AND SUBURBAN ISSUES. ***VIKING TV, INC.*** 288

PETITION TO DELETE A SUBURBAN ISSUE DENIED SINCE NO EXTENUATING CIRCUMSTANCES WERE PRESENT. THE REQUIREMENTS SET FORTH IN THE MINSHALL CASE (11 FCC 2D 796) WERE ADOPTED MORE THAN 6 MONTHS PRIOR TO DESIGNATION FOR HEARING. ***NORTH AMERICAN B/CING CO., INC.*** 727

A SUBURBAN ISSUE WAS ADDED SINCE A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THREE OF THE APPLICANTS HAVE COMPLIED WITH THE REQUIREMENTS SET FORTH IN THE MINSHALL CASE, 11 FCC 2D 796. ***ORANGE COUNTY B/CING, INC.*** 802

REQUEST FOR DELETION OF A SUBURBAN ISSUE WHERE APPLICANT HAD SUBMITTED AN AMENDMENT WAS DENIED SINCE THE AMENDMENT FAILED TO MAKE A MEANINGFUL EVALUATION OF THE COMMUNITY SURVEY. ***STONE, WILLIAM D.*** 808

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APPLICATION FOR A UHF CP DENIED, ON GROUNDS OF AN INADEQUATE SHOWING ON THE SUBURBAN ISSUE BY FAILING TO SUMMARIZE STEPS TAKEN TO BECOME INFORMED OF LOCAL NEEDS, THE SUGGESTIONS IT HAD RECEIVED AND EVALUATION THEREOF, AND PROGRAMS PROPOSED TO MEET THOSE NEEDS. ***MINSHALL B/CING CO., INC.*** 931

A SUBURBAN COMMUNITY 307(B) ISSUE WAS ADDED WHERE THE PROPOSAL WILL SERVE AT LEAST 790 OF THE LARGER COMMUNITY, WHERE THERE ARE QUESTIONS CONCERNING THE EXISTENCE OF THE SMALLER COMMUNITY AND PROGRAMMING FOR THE SMALLER COMMUNITY. QUESTIONS. ***OUTER BANKS RADIO CO.*** 994

A SUBURBAN ISSUE WAS ADDED SINCE APPLICANT HAS NOT MET THE MINIMUM STANDARDS SET FORTH IN MINSHALL B/CING CO., INC. (11 FCC 2D 796). ***OUTER BANKS RADIO CO.*** 994

PETITION FOR DELETION OF A SUBURBAN ISSUE DENIED, SINCE NO UNUSUAL CIRCUMSTANCES HAVE BEEN ESTABLISHED. ***SUNDIAL B/CING CO., INC.***1002

SUBURBAN ISSUES WERE ADDED AGAINST TWO APPLICANTS SINCE THEY ARE TO BE HELD TO THE MINSHALL STANDARD EVEN THOUGH THE APPLICATIONS WERE FILED ON UNREVISED FORM 301. ***VIRGINIA B/CERS***1004

SUBURBAN COMMUNITY 307(B) ISSUE

AN INCREASE IN POWER WAS GRANTED SINCE APPLICANT SUCCESSFULLY REBUTTED THE SUBURBAN COMMUNITY 307(B) PRESUMPTION AND WILL SERVE A RAPIDLY GROWING POPULATION IN ITS AREA OF SERVICE. ***KACY, INC.*** 33

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES, INTERFERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58

PETITION FOR RECONSIDERATION OF DECISION DENYING APPLICATION, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO REBUT THE SUBURBAN COMMUNITY 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY AND NO EVIDENCE NOT PREVIOUSLY BEFORE THE BOARD WAS SUBMITTED. ***NORTHERN INDIANA B/CERS, INC.*** 264

A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264

TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE. ***STEPHENSON, HARRY D.*** 335

A SUBURBAN COMMUNITY 307(B) ISSUE WAS DESIGNED BASED ON THE GREAT DISPARITY OF POPULATION BETWEEN THE TWO CITIES, EVEN THOUGH THE 5-MV/M, 50,000-POPULATION TEST WAS NOT MET. ***STEPHENSON, HARRY D.*** 335

A SUBURBAN COMMUNITY 307(B) ISSUE WAS ADDED SINCE APPLICANT CONCEDED THAT IT INTENDS TO SERVE THE LARGER CITY. ***CHRISTIAN VOICE OF CENT. OHIO*** 308

MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780

A LONE APPLICANT, ORIGINALLY PROPOSING TO SERVE A SMALLER COMMUNITY WHO FAILED TO REBUT THE PRESUMPTION OF SERVICE TO THE LARGER CITY, WAS REQUIRED TO INDICATE WITHIN 10 DAYS WHETHER IT WILL AMEND TO SPECIFY THE LARGER COMMUNITY. ***CAVALLARO, AUGUSTINE L., JR.*** 863

IN A DECISION DENYING THE APPLICATION, THE BOARD HELD THAT IF THE APPLICANT ELECTS TO AMEND ITS APPLICATION TO SPECIFY THE LARGER COMMUNITY, THE APPLICATION WILL BE RETURNED TO THE PROCESSING LINE. OTHERWISE, THE APPLICATION WILL BE DENIED. ***CAVALLARO, AUGUSTINE L., JR.*** 863

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REQUEST FOR SUBURBAN COMMUNITY 307(B) ISSUES DENIED SINCE THE 5-MV/M CONTOURS OF THE APPLICANTS, BASED ON ACTUAL MEASURED PERFORMANCE, WILL NOT PENETRATE THE LARGER COMMUNITY. ***NORTH AMERICAN B/CING CO., INC.*** 979

PETITION TO ADD A CHARACTER QUALIFICATIONS ISSUE, A FINANCIAL ISSUE, A LEGAL QUALIFICATIONS ISSUE, AND A SUBURBAN COMMUNITY 307(B) ISSUE WAS DENIED. ***NORTH AMERICAN B/CING CO., INC.*** 979

A SUBURBAN COMMUNITY 307(B) ISSUE WAS ADDED WHERE THE PROPOSAL WILL SERVE AT LEAST 790 OF THE LARGER COMMUNITY, WHERE THERE ARE QUESTIONS CONCERNING THE EXISTENCE OF THE SMALLER COMMUNITY AND PROGRAMMING FOR THE SMALLER COMMUNITY. QUESTIONS. ***OUTER BANKS RADIO CO.*** 994

SUNSET

FORFEITURE OF 1000 ORDERED FOR VIOLATION OF THE TERMS OF THE STATIONS LICENSE AND FOR VIOLATIONS OF SEC. 73.922, 73.112(A)(4), AND 73.47(A). ***ANDERSON B/CING SERVICE*** 844

TARIFF

COMMISSIONS ORDER RELEASED AUG. 2, 1968 (FCC 68-776) WAS AMENDED TO RELIEVE WESTERN UNION FROM KEEPING THE DETAILED RECORDS REQUIRED BY PARAGRAPH 6 THEREIN. WESTERN UNION WILL BE REQUIRED TO KEEP THE COMMISSION INFORMED AS TO CHANGES IN VOLUME AND COMPOSITION OF ALL INTRA-U.S. MESSAGE TRAFFIC. ***WESTERN UNION TELEGRAPH CO.*** 361

NEW OR REVISED TARIFFS CONCERNING THE CARTERFONE DECISION, DISTANCE-MESSAGE TELECOMMUNICATIONS SERVICE, PRIVATE LINE SERVICE, AND WIDE-AREA TELECOMMUNICATIONS SERVICE WERE PERMITTED TO TAKE EFFECT AS SCHEDULED. ***AMER. TEL. & TEL.*** 605

AN INVESTIGATION WAS INSTITUTED INTO THE LAWFULNESS OF NEW MATTER CONTAINED IN TARIFF REVISIONS OFFERING 48-KHZ, LEASED-CHANNEL SERVICE. ***ITT WORLD COMM.*** 694

TARIFF SUSPENSION

AN INVESTIGATION WAS ORDERED INTO THE LAWFULNESS OF TARIFF REVISIONS FOR PICKUP AND DELIVERY OF INTERNATIONAL MESSAGES AND CUSTOMER TIELINES WITHIN METROPOLITAN AREAS RATHER THAN CORPORATE LIMITS (201(B) AND 202(A)). ***TROPICAL RADIO TELEGRAPH CO.*** 100

TELECOMMUNICATIONS

NEW OR REVISED TARIFFS CONCERNING THE CARTERFONE DECISION, DISTANCE-MESSAGE TELECOMMUNICATIONS SERVICE, PRIVATE LINE SERVICE, AND WIDE-AREA TELECOMMUNICATIONS SERVICE WERE PERMITTED TO TAKE EFFECT AS SCHEDULED. ***AMER. TEL. & TEL.*** 605

TELEPHONE ATTACHMENT OF DEVICES

NEW OR REVISED TARIFFS CONCERNING THE CARTERFONE DECISION, DISTANCE-MESSAGE TELECOMMUNICATIONS SERVICE, PRIVATE LINE SERVICE, AND WIDE-AREA TELECOMMUNICATIONS SERVICE WERE PERMITTED TO TAKE EFFECT AS SCHEDULED. ***AMER. TEL. & TEL.*** 605

TELEVISION

COMMISSION EXPRESSED ITS CONTINUING CONCERN WITH PROBLEMS RAISED BY LACK OF COMPARABLE NETWORK FACILITIES IN VARIOUS TV MARKETS. ***AMERICAN B/CING COS.*** 19

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TELEVISION BROADCAST TRANSLATOR STATIONS

AGREEMENT BETWEEN APPLICANTS FOR A TV TRANSLATOR STATION, APPROVED. ***WLUC, INC.*** 63

APPLICATION FOR A UHF TRANSLATOR STATION GRANTED SINCE A NEED WAS ESTABLISHED AND SINCE IT HAD THE REQUIRED REBROADCAST CONSENT (325(A)). A NON-DUPLICATION CONDITION IS INAPPROPRIATE FOR UHF TRANSLATOR STATIONS. ***LEE ENTERPRISES, INC.*** 912

APPLICATION FOR A VHF TRANSLATOR STATION, GRANTED, SINCE OBJECTING PETITIONER CATV SYSTEM CAN OVERCOME OBJECTIONABLE INTERFERENCE CAUSED BY THE TRANSLATOR. THE TRANSLATOR WILL PROVIDE A NEW SERVICE AND A THIRD NETWORK TO THE AREA. ***SHOW LOW AREA TV SERVICE*** 1000

TELEVISION BROADCAST TRANSLATOR STATIONS, INTERFERENCE

APPLICATION FOR A VHF TRANSLATOR STATION GRANTED EVEN THOUGH IT WILL CAUSE INTERFERENCE TO A CATV SYSTEMS SUBSCRIBERS. WHERE NO OTHER VHF CHANNEL IS AVAILABLE, A CATV SYSTEM IS NOT ENTITLED TO PROTECTION. ***PRESCOTT TV BOOSTER CLUB, INC.*** 733

TELEVISION BROADCAST TRANSLATOR STATIONS, LIMITATIONS

RECONSIDERATION OF DENIAL OF VHF TRANSLATOR APPLICATION IN UHF MARKET DENIED SINCE TEMPORARY OPERATION OF A VHF TRANSLATOR WOULD HAVE AN ADVERSE EFFECT UPON UHF TELEVISION IN THE AREA, CONTRARY TO SEC. 74.732(D). ***COLUMBIA B/CING SYSTEM, INC.*** 900

TELEVISION BROADCAST TRANSLATOR STATIONS, OPERATION

APPLICATION FOR A COMMUNITY-OWNED NON-PROFIT UHF TRANSLATOR GRANTED WITHOUT NONDUPLICATION CONDITIONS SINCE THE PRINCIPAL COMMUNITY TO BE SERVED IS 25 MILES BEYOND PETITIONERS GRADE B CONTOUR AND SINCE NEW SIGNALS WILL BE RECEIVED BY 23,000 PERSONS. ***PEOPLES TV ASSN., INC.*** 41

TERMINATION OF PROCEEDING

PROCEEDINGS IN DOCKET NO. 15971 ARE TERMINATED, SINCE ANY UNRESOLVED QUESTIONS WOULD BE MORE APPROPRIATELY RESOLVED IN THE NEWLY INSTITUTED PROCEEDING (15 FCC 2D 0417). ***CATV, DISTRIBUTION OF TV SIGNALS*** 465

THREE YEAR RULE

APPLICATION DESIGNATED FOR HEARING TO DETERMINE WHETHER THE LICENSEE IS ENGAGED IN TRAFFICKING OF WHETHER A WAIVER OF THE 3-YEAR RULE (SEC. 1.507) IS WARRANTED. ***VALLEY B/CING CO.*** 840

TIME BROKERAGE

RENEWAL DENIED INTER ALIA, WHERE APPLICANT FAILED TO FILE TIME BROKERAGE AGREEMENTS AS REQUIRED BY SEC. 1.613(C). ***CONTINENTAL B/CING, INC.*** 120

TIME EXTENSION OF

APPLICATION FOR EXTENSION OF TIME TO COMPLETE CONSTRUCTION DESIGNATED FOR ORAL AUGUMENT TO DETERMINE WHETHER FAILURE TO COMPLETE CONSTRUCTION WAS DUE TO CAUSES BEYOND THE CONTROL OF PERMITTEE AND WHETHER FURTHER EXTENSION UNDER SEC. 319(B) AND 1.534(A) IS WARRANTED. ***CHANNEL 16 OF R.I., INC.*** 893

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TIMELINESS

GOOD CAUSE FOR AN UNTIMELY REQUEST FOR AMENDMENT OF APPLICATION SHOWN WHERE ISSUE WAS A DISQUALIFYING ONE, ONLY ONE APPLICANT WAS INVOLVED IN PROCEEDING, AND SLIGHT DELAY RESULTED FROM A MISUNDERSTANDING OF SEC. 1.4(G). ***WMID, INC.*** 295

PETITION TO DENY UHF APPLICATION WAS DISMISSED AS UNTIMELY FILED (SEC. 1.580 (L)(I)). HOWEVER, THE PETITION WAS CONSIDERED ON ITS MERITS AS INFORMAL OBJECTIONS (SEC. 1.587) AND APPLICATION GRANTED UPON FINDING THAT ULTRAVISION REQUIREMENTS HAVE BEEN MET. ***MIDWESTERN B/CING CO., INC.*** 720

TRAFFICKING

APPLICATION DESIGNATED FOR HEARING TO DETERMINE WHETHER THE LICENSEE IS ENGAGED IN TRAFFICKING OF WHETHER A WAIVER OF THE 3-YEAR RULE (SEC. 1.507) IS WARRANTED. ***VALLEY B/CING CO.*** 840

TRAFFICKING ISSUE

APPLICATION DESIGNATED FOR HEARING ON SEC. 1.65 (SUBSTANTIAL CHANGES), TRAFFICKING, FAILURE TO CONSTRUCT, AND EXTENSION OF TIME (SEC. 1.534) ISSUES. ***GROSS B/CING CO.*** 76

SINCE APPLICANT HAS RECENTLY BEEN INVOLVED IN MISLEADING PROGRAMMING AND SINCE IT APPEARS THAT A TRAFFICKING ISSUE WOULD BE REQUIRED, AN ASSIGNMENT OF LICENSE CANNOT BE MADE WITHOUT A HEARING. ***WHUT B/CING CO., INC.*** 811

TRANSFER OF CONTROL

THE APPROPRIATENESS OF AN ESTATE ACQUIRING BROADCAST LICENSES AND QUESTIONS OF FACT CONCERNING A COMMUNITY SURVEY NECESSITATE DESIGNATING FOR HEARING THE APPLICATIONS FOR (A) TRANSFER OF CONTROL, AND (B) ASSIGNMENT OF LICENSE. ***CRAWFORD, PERCY B., ESTATE OF*** 677

TRANSFER OF CONTROL, UNAUTHORIZED

ISSUES WERE ENLARGED TO INCLUDE UNAUTHORIZED TRANSFER OF CONTROL OR TRANSFER OF A LICENSE, EFFICIENT UTILIZATION OF THE STATION, AND CHARACTER QUALIFICATIONS ISSUES. ***COMMUNICATIONS TECH SALES, INC.*** 776

A SHORT TERM AUTHORIZATION WAS GRANTED WHERE AN UNAUTHORIZED ASSIGNMENT OF A DOMESTIC PUBLIC RADIO SERVICE LICENSE WAS MADE IN VIOLATION OF SEC. 310(B) SINCE THE ASSIGNMENT DID NOT INVOLVE A SUBSTANTIAL CHANGE IN OWNERSHIP AND THE PUBLIC INTEREST REQUIRED THE SERVICE. ***LIMA TELEPHONE CO.*** 792

TRANSLATOR UHF

APPLICATION FOR A UHF TRANSLATOR STATION GRANTED SINCE A NEED WAS ESTABLISHED AND SINCE IT HAD THE REQUIRED REBROADCAST CONSENT (325(A)). A NONDUPLICATION CONDITION IS INAPPROPRIATE FOR UHF TRANSLATOR STATIONS. ***LEE ENTERPRISES, INC.*** 912

TRANSLATOR VHF

RECONSIDERATION OF DENIAL OF VHF TRANSLATOR APPLICATION IN UHF MARKET DENIED SINCE TEMPORARY OPERATION OF A VHF TRANSLATOR WOULD HAVE AN ADVERSE EFFECT UPON UHF TELEVISION IN THE AREA, CONTRARY TO SEC. 74.732(D). ***COLUMBIA B/CING SYSTEM, INC.*** 900

APPLICATION FOR A VHF TRANSLATOR STATION, GRANTED, SINCE OBJECTING PETITIONER CATV SYSTEM CAN OVERCOME OBJECTIONABLE INTERFERENCE CAUSED BY THE TRANSLATOR. THE TRANSLATOR WILL PROVIDE A NEW SERVICE AND A THIRD NETWORK TO THE AREA. ***SHOW LOW AREA TV SERVICE*** 1000

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TRANSMITTER SITE

APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES, INTERFERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58

REQUEST FOR AMENDMENT OF APPLICATION TO CHANGE TRANSMITTER SITE WAS DENIED ON GROUNDS THAT INITIAL SITE WAS AVAILABLE, PETITIONER HAS NOT PRESENTED JUSTIFICATION FOR ABANDONMENT OF THAT SITE, AND PROPOSED CHANGE WOULD DECREASE NIGHTTIME SERVICE. ***WILKES COUNTY RADIO*** 292

APPLICATIONS, TWO OF WHICH ARE MUTUALLY EXCLUSIVE AND THE THIRD PRESENTING A QUESTION OF MULTIPLE OWNERSHIP (SEC. 73.35), ARE DESIGNATED FOR HEARING ON ISSUES AS TO AREAS AND POPULATIONS, UNDISCLOSED INTEREST, DUOPOLY, COMMUNITY NEEDS, FINANCIAL, TRANSMITTER SITE, AND 307(B). ***O QUINN, FARNELL*** 393

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APPLICATION DESIGNATED FOR HEARING ON ISSUES DIRECTED TO UHF IMPACT, DE FACTO REALLOCATION OF A CHANNEL, WAIVER OF SEC. 73.610, ANTENNA HEIGHT, FINANCIAL QUALIFICATIONS, AND EFFORTS MADE TO ASCERTAIN COMMUNITY NEEDS AND INTERESTS. ***WLVA, INC.*** 757

RECONSIDERATION OF DENIAL OF VHF TRANSLATOR APPLICATION IN UHF MARKET DENIED SINCE TEMPORARY OPERATION OF A VHF TRANSLATOR WOULD HAVE AN ADVERSE EFFECT UPON UHF TELEVISION IN THE AREA, CONTRARY TO SEC. 74.732(D). ***COLUMBIA B/CING SYSTEM, INC.*** 900

WAIVER OF RULES

RULE 21.15(C)(4) REQUIRING A MICROWAVE APPLICANT TO SUBMIT PROOF OF FRANCHISE OR OTHER LOCAL AUTHORIZATION WAS TEMPORARILY WAIVED TO PERMIT BOTH APPLICATIONS TO BE CONSIDERED IN A HEARING. ***COMMUNICATIONS ENGINEERING, INC.*** 644

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ADMINISTRATIVE PROCEDURES ACT		
554(A)	5USC 554(A)	CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557) ***MIDWEST TV, INC.*** 84
556	5USC 556	CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557) ***MIDWEST TV, INC.*** 84
557	5USC 557	CONTENTION THAT CASE WAS TREATED AS A RULEMAKING RATHER THAN AN ADJUDICATORY PROCEEDING WAS REJECTED SINCE IT WAS NOT AN ADJUDICATORY CASE REQUIRED BY STATUTE (APA SEC 554(A)), BUT REQUIRED A POLICY JUDGMENT TO BE MADE FROM EVIDENCE OF RECORD AND COMMISSION EXPERTISE (APA 556 AND 557) ***MIDWEST TV, INC.*** 84
COMMUNICATIONS ACT OF 1934 AS AMENDED		
201(B)	47USC 201(B)	AN INVESTIGATION WAS ORDERED INTO THE LAWFULNESS OF TARIFF REVISIONS FOR PICKUP AND DELIVERY OF INTERNATIONAL MESSAGES AND CUSTOMER TIELINES WITHIN METROPOLITAN AREAS RATHER THAN CORPORATE LIMITS (201(B) AND 202(A)) ***TROPICAL RADIO TELEGRAPH CO.*** 100
202(A)	47USC 202(A)	AN INVESTIGATION WAS ORDERED INTO THE LAWFULNESS OF TARIFF REVISIONS FOR PICKUP AND DELIVERY OF INTERNATIONAL MESSAGES AND CUSTOMER TIELINES WITHIN METROPOLITAN AREAS RATHER THAN CORPORATE LIMITS (201(B) AND 202(A)) ***TROPICAL RADIO TELEGRAPH CO.*** 100
214(A)	47USC 214(A)	AN ORDER TO SHOW CAUSE WAS ISSUED TO A TELEPHONE COMPANY CONSTRUCTING CATV DISTRIBUTION FACILITIES WITHOUT FIRST HAVING OBTAINED A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO SEC 214(A) ***ASHTABULA CABLE TV, INC.*** 813
307(B)	47USC 307(B)	AN INCREASE IN POWER WAS GRANTED SINCE APPLICANT SUCCESSFULLY REBUTTED THE SUBURBAN COMMUNITY 307(B) PRESUMPTION AND WILL SERVE A RAPIDLY GROWING POPULATION IN ITS AREA OF SERVICE ***KACY, INC.*** 33
		APPLICATIONS WERE DESIGNATED FOR HEARING TO CONSIDER THE FOLLOWING ISSUES. INTER-

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Section	United States Code	
		FERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CING CO., INC.*** 58
		PETITION FOR RECONSIDERATION OF DECISION DENYING APPLICATION, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO REBUT THE SUBURBAN COMMUNITY 307(B) PRESUMPTION OF SERVICE ,TO THE LARGER COMMUNITY AND NO EVIDENCE NOT PREVIOUSLY BEFORE THE BOARD WAS SUBMITTED. ***NORTHERN INDIANA B/CERS, INC.*** 264
		A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264
		A REIMBURSEMENT AND DISMISSAL AGREEMENT WAS APPROVED WHEREBY ONE OF THREE APPLICANTS WITHDREW. PUBLICATION (SEC. 1.525(B)) IS REQUIRED SINCE THE WITHDRAWING PARTY IS THE ONLY APPLICANT FOR ONE OF THE COMMUNITIES. ***ALMARDON, INC. OF FLA.*** 299
		A SUBURBAN COMMUNITY 307(B) ISSUE WAS ADDED SINCE APPLICANT CONCEDED THAT IT INTENDS TO SERVE THE LARGER CITY. ***CHRISTIAN VOICE OF CENT. OHIO*** 308
		TWO MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES, FINANCIAL QUALIFICATIONS (ULTRAVISION), AVAILABILITY OF ANTENNA SITE, FAILURE TO AMEND APPLICATIONS PURSUANT TO SEC. 1.65, ASCERTAINMENT OF COMMUNITY PROGRAMMING NEEDS, AND A SUBURBAN COMMUNITY 307(B) ISSUE. ***STEPHENSON, HARRY D.*** 335
		A SUBURBAN COMMUNITY 307(B) ISSUE WAS DESIGNED BASED ON THE GREAT DISPARITY OF POPULATION BETWEEN THE TWO CITIES, EVEN THOUGH THE 5-MV/M, 50,000-POPULATION TEST WAS NOT MET. ***STEPHENSON, HARRY D.*** 335
		MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780
		A LONE APPLICANT, ORIGINALLY PROPOSING TO SERVE A SMALLER COMMUNITY WHO FAILED TO REBUT THE PRESUMPTION OF SERVICE TO THE LARGER CITY, WAS REQUIRED TO INDICATE WITHIN 10 DAYS WHETHER IT WILL AMEND TO SPECIFY THE LARGER COMMUNITY. ***CAVALLARO, AUGUSTINE L., JR.*** 863
309	47USC 309	UNDER SEC. 309(D)(1), 309(B), AND 309(C)(2)(D), A PETITION TO DENY DOES NOT LIE AGAINST AN APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO COMPLETE CONSTRUCTION. HOWEVER, DPETITIONERS PLEADINGS WERE CONSIDERED AS INFORMAL OBJECTIONS UNDER SEC. 1.587. ***CHANNEL 16 OF R.I., INC.*** 893

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Section	United States Code	
309(D)(1)	47USC 309(D)(1)	PETITIONER HAS STANDING SINCE PROPOSED OPERATION WOULD CAUSE INTERFERENCE WITH PETITIONERS STATION (309(D)(1)). ***STONE, WILLIAM D.*** 53
309(F)	47USC 309(F)	INTERIM AUTHORITY GRANTED TO ONE OF TWO COMPETING APPLICANTS TO OPERATE A STATION WHICH HAS LOST ITS LICENSE SINCE ONLY ONE APPLICANT REQUESTED AUTHORIZATION ORDER TO BE EFFECTIVE ONLY IF A STAY ISSUED BY THE COURT OF APPEALS IS DISSOLVED. ***MINERAL KING B/CERS*** 835
310(B)	47USC 310(B)	LATE FILED PLEADING WAS ACCEPTED AND AN ISSUE WAS ADDED TO CONSIDER QUESTION OF DE FACTO CONTROL RESULTING FROM FINANCIAL INTERESTS NEWLY ACQUIRED BY ONE OF THE STOCKHOLDERS CONTRARY TO SEC. 310(B). ***CORNBELT B/CING CORP.*** 315
		A SHORT TERM AUTHORIZATION WAS GRANTED WHERE AN UNAUTHORIZED ASSIGNMENT OF A DOMESTIC PUBLIC RADIO SERVICE LICENSE WAS MADE IN VIOLATION OF SEC. 310(B) SINCE THE ASSIGNMENT DID NOT INVOLVE A SUBSTANTIAL CHANGE IN OWNERSHIP AND THE PUBLIC INTEREST REQUIRED THE SERVICE ***LIMA TELEPHONE CO.*** 792
311(C)	47USC 311(C)	REQUEST FOR APPROVAL OF MERGER AGREEMENT, DENIED. SINCE THE BOOK VALUE OF THE SHARES TO BE ACQUIRED BY MERGED APPLICANT EXCEEDS THE EXPENSES INCURRED BY THAT APPLICANT AND THUS REPRESENTS A WINDFALL CONTRARY TO SEC 311(C) ***WARWICK B/CING CORP.*** 1010
315	47USC 315	WHERE 2 MINUTES AND 50 SECONDS OF THE VIDEO PORTION OF A DEBATE WAS LOST DUE TO DEFECTIVE TAPING, THE LICENSEE SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF SEC 315 BY BROADCASTING THE AUDIO PORTION. ***STATION WISH-TV*** 47
		A CANDIDATE WHO SUBMITTED ITS REQUEST 16 DAYS AFTER THE INITIAL USE OF THE STATION BY A CANDIDATE FOR THE SAME OFFICE, BUT 4 DAYS PRIOR TO APPEARANCE BY A THIRD CANDIDATE, WAS HELD ENTITLED TO EQUAL OPPORTUNITY UNDER SEC 315 AND SEC 73.657(E) (SEVEN DAY RULE) ***SOCIALIST WORKERS PARTY*** 96
		A PRESS CONFERENCE WITH VICE PRESIDENT HUMPHREY, IN WHICH THE PROBLEMS OF A PARTICULAR CITY WERE DISCUSSED, WAS HELD NOT AN EXEMPT BONA FIDE NEWS INTERVIEW UNDER SEC 315(9) SINCE IT WAS NOT A REGULARLY SCHEDULED PROGRAM. ***SOCIALIST LABOR PARTY*** 98
		A BROADCASTER HAS A DUTY TO MAINTAIN A STANDARD OF FAIRNESS TO MAKE AN AFFIRMATIVE REASONABLE EFFORT TO PRESENT CONTRASTING VIEWPOINTS ON CONTROVERSIAL ISSUES, BUT THIS DOES NOT MEAN AN ABSOLUTE EQUALITY IN THE ALLOCATION OF TIME ***CHAMBERS, PAUL*** 386
		REFUSAL TO GRANT EQUAL TIME TO ONE CLAIMING TO BE A CANDIDATE FOR THE OFFICE OF GOVERNOR OF MARYLAND, TO BE ELECTED BY THE MARYLAND GENERAL ASSEMBLY IS NOT UNREASONABLE SINCE THIS IS NOT AN ELECTION BY THE VOTERS. ***POSNER, LESTER*** 807

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Section United States Code

FERENCE, FINANCIAL QUALIFICATIONS, SUBURBAN ISSUE, SUBURBAN 307 (B) ISSUE, TRANSMITTER SITE, AND ANTENNA PARAMETERS. ***SUNDIAL B/CSTG CO., INC.*** 58

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A PRESUMPTION OF NEED FOR A FIRST LOCAL TRANSMISSION SERVICE WAS FOUND TO BE OUTWEIGHED BY THE 307(B) PRESUMPTION OF SERVICE TO THE LARGER COMMUNITY (POLICY STATEMENT, 2 FCC 2D 190). ***NORTHERN INDIANA B/CERS, INC.*** 264

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MUTUALLY EXCLUSIVE APPL DESIGNATED FOR HEARING ON FAILURE TO DISCLOSE PR PROCEEDINGS, AVAILABILITY PRESENTATIONS, COMMUNITY BAN COMMUNITY 307(B) ISSU LLING PRAC ES. ***FAULKN***

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EEN TWO STOCKHOLDERS OF NOT WARRANT
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Section	United States Code	
315(A)	47USC 315(A)	A CHALLENGED PROGRAM WAS HELD TO BE A BONA FIDE NEWS INTERVIEW ENTITLED TO THE SEC. 315 (9) (2) EXEMPTION. IN ADDITION, COMPLAINANTS CONGRESSIONAL DISTRICT LIES OUTSIDE OF THE STATIONS COVERAGE AREA. ***DICHTER, DAVID*** 95
317(A)	47USC 317(A)	THE COMMISSION FOUND THAT APPLICANT HAD VIOLATED SEC. 317(A) (1) AND SEC. 73.119 IN THAT IT FAILED TO ANNOUNCE AN INDIVIDUAL OR AGENCY PURCHASING BROADCAST TIME AS SPONSOR, A REQUIREMENT REGARDLESS OF BENEFIT DERIVED BY PURCHASER. ***CONTINENTAL B/CING, INC.*** 120
319(B)	47USC 319(B)	APPLICATION FOR EXTENSION OF TIME TO COMPLETE CONSTRUCTION DESIGNATED FOR ORAL AUGUMENT TO DETERMINE WHETHER FAILURE TO COMPLETE CONSTRUCTION WAS DUE TO CAUSES BEYOND THE CONTROL OF PERMITTEE AND WHETHER FURTHER EXTENSION UNDER SEC. 319(B) AND 1.534(A) IS WARRANTED. ***CHANNEL 16 OF R.I., INC.*** 893
325(A)	47USC 325(A)	APPLICATION FOR A UHF TRANSLATOR STATION GRANTED SINCE A NEED WAS ESTABLISHED AND SINCE IT HAD THE REQUIRED REBROADCAST CONSENT (325(A)). A NONDUPLICATION CONDITION IS INAPPROPRIATE FOR UHF TRANSLATOR STATIONS. ***LEE ENTERPRISES, INC.*** 912
405	47USC 405	RECONSIDERATION OF DECISION DENYING CARRIAGE OF DISTANT SIGNALS, DENIED ON THE GROUNDS THAT PETITIONER FAILED TO PARTICIPATE IN THE EARLY STAGES OF THE PROCEEDING (1.106(B)) AND FAILED TO PRESENT NEWLY DISCOVERED EVIDENCE (1.106(C) & 405). ***MIDWEST TV, INC.*** 84
		PETITION FOR RECONSIDERATION OR FOR REHEARING OF MEMORANDUM OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION, DENIED ON GROUNDS THAT THE PETITION WAS FILED LATE, AND THE STATUTORY PERIOD OF JURISDICTION HAVING EXPIRED THE REVIEW BOARD IS WITHOUT AUTHORITY TO ACT. ***LORAIN COMMUNITY B/CING CO.*** 388
COMMUNICATIONS SATELLITE ACT OF 1962		
201(C)	47USC 721(C)	APPLICATION FOR TRANSFER OF THE OUTSTANDING CP AND THE OWNERSHIP INTEREST OF THE ANDOVER TRANSPORTABLE EARTH STATION FROM JOINT GRANTEES TO COMSAT, GRANTED TO PROVIDE TELEMETRY, COMMAND & CONTROL, MONITORING AND TRACKING SERVICES TO THE INTELSTAT III SERIES SATELLITES. ***COMSAT*** 65

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RULES AND REGULATIONS

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FEDERAL COMMUNICATIONS COMMISSION

0.371 — SEC. 0.371 WAS AMENDED TO AUTHORIZE THE CHIEF, OFFICE OF OPINIONS AND REVIEW TO ACT ON REQUESTS TO FILE PLEADINGS IN EXCESS OF THE RULE REQUIREMENTS WHEN SUCH REQUESTS RELATE TO PLEADINGS TO BE FILED IN HEARING PROCEEDINGS PENDING BEFORE THE COMMISSION EN BANC. ***AMENDMENT OF SEC. 0.371*** 678

1.65 — MUTUALLY EXCLUSIVE APPLICATIONS WERE DESIGNATED FOR HEARING ON ISSUES INCLUDING FAILURE TO DISCLOSE PRIOR BANKRUPTCY PROCEEDINGS, AVAILABILITY OF LOANS, MISPRESENTATIONS, COMMUNITY SURVEY, A SUBURBAN COMMUNITY 307(B) ISSUE, AND FRAUDULENT BILLING PRACTICES. ***FAULKNER RADIO, INC.*** 780

1.4(G) — GOOD CAUSE FOR AN UNTIMELY REQUEST FOR AMENDMENT OF APPLICATION SHOWN WHERE ISSUE WAS A DISQUALIFYING ONE, ONLY ONE APPLICANT WAS INVOLVED IN PROCEEDING, AND SLIGHT DELAY RESULTED FROM A MISUNDERSTANDING OF SEC. 1.4(G). ***WMID, INC.*** 295

1.65 — APPLICATION DESIGNATED FOR HEARING ON SEC. 1.65 (SUBSTANTIAL CHANGES), TRAFFICKING, FAILURE TO CONSTRUCT, AND EXTENSION 0OF TIME (SEC. 1.534) ISSUES. ***GROSS B/CING CO.*** 76

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	ISSUES WERE ENLARGED TO DETERMINE AVAILABILITY OF APPLICATION FOR PUBLIC INSPECTION SEC 1.526(A)(1), WHETHER SEC. 1.65 HAS BEEN COMPLIED WITH, AND WHETHER APPLICANT HAS 0INCLUDED PROFESSIONAL FEES IN ITS ESTIMATE OF CONSTRUCTION COSTS. ***NORTH AMERICAN B/CING CO., INC.*** 984
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	A CHANGE OF RESIDENCE OF AN APPLICANTS PRINCIPAL STOCKHOLDER IS NOT OF DECISIONAL SIGNIFICANCE AND DOES NOT HAVE TO BE REPORTED UNDER RULE 1.65. REQUEST FOR AN ISSUE CONCERNING ESTIMATED CONSTRUCTION AND OPERATING COSTS WAS HELD TO BE UNWARRANTED ***WARWICK B/CING CORP.*** 1015
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1.106(A)	REQUEST FOR WAIVER OF RULE 1.106(A) (RECONSIDERATION OF INTERLOCUTORY ORDERS) GRANTED. SINCE THE CITED ORDER WAS INITIATED ON THE BASIS OF A LETTER REQUEST ON WHICH PETITIONERS HAD NO OPPORTUNITY TO ADDRESS THEMSELVES ***AMER. TEL. & TEL.*** 29
1.106(F)	PETITION FOR RECONSIDERATION OR FOR REHEARING OF MEMORANDUM OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION DENIED ON GROUNDS THAT THE PETITION WAS FILED LATE AND THE STATUTORY PERIOD OF JURISDICTION HAVING EXPIRED THE REVIEW BOARD IS WITHOUT AUTHORITY TO ACT ***LORAIN COMMUNITY B/CING CO.*** 388
1.261	A MOTION FOR CORRECTION OF RECORD (1.261) ADDRESSED TO THE HEARING EXAMINER IS MISPLACED SINCE HE IS NO LONGER THE PRESIDING OFFICER AFTER FILING HIS INITIAL DECISION SINCE THE PROCEEDING IS BEFORE THE REVIEW BOARD IT WILL CONSIDER THE MATTER WITH EXCEPTIONS TO THE INITIAL DECISION ***CHAPMAN RADIO & TV CO.*** 897
1.276	THE GRANT OF A TV CONSTRUCTION PERMIT WAS REINSTATED AFTER AN INITIAL DECISION LIMITED TO A TRAFFICKING ISSUE UPON A CONCLUSION THAT THE PRINCIPAL CHARGED HAD NOT ENGAGED IN TRAFFICKING. THE COMMISSION CONCURRED AND THE INITIAL DECISION WAS PERMITTED TO BECOME EFFECTIVE ***SUNSET B/CING CORP.*** 347

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1.301 T — APPEAL FROM EXAMINERS ADVERSE RULING PURSUANT TO SEC. 1.301, DENIED, SINCE INTERLOCUTORY APPEALS ARE NOT FAVORED UNLESS THE RULING COMPLAINED OF IS FUNDAMENTAL AND AFFECTS THE CONDUCT OF THE ENTIRE CASE. ***WSTE-TV, INC.*** 1026

1.353 — REVIEW OF EXAMINERS RULING DENYING REQUEST FOR FURTHER EVIDENCE (SEC. 11.353), DENIED SINCE THE INQUIRY CONCERNING CONDUCT INVOLVED IN A NLRB HEARING WAS AUTHORIZED IN THE HEARING ORDER UNDER THE STANDARD COMPARATIVE ISSUE WHICH HAS CNOT YET BEEN REACHED IN THE HEARING PROCEDURE. ***KITTYHAWK B/CING CORP.*** 322

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1.522 — PETITION TO DELETE A SUBURBAN ISSUE DENIED SINCE NO EXTENUATING CIRCUMSTANCES WERE PRESENT. THE REQUIREMENTS SET FORTH IN THE MINSHALL CASE (11 FCC 2D 796) WERE ADOPTED MORE THAN 6 MONTHS PRIOR TO DESIGNATION FOR HEARING. ***NORTH AMERICAN B/CING CO., INC.*** 727

1.525 — A REIMBURSEMENT AGREEMENT WAS APPROVED SINCE SEC. 1.525 HAS BEEN COMPLIED WITH AND A NEW UHF SERVICE WILL BE EXPEDITED. ***LEWIS B/CING CORP.*** 36

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1.526(A) — ISSUES WERE ENLARGED TO DETERMINE AVAILABILITY OF APPLICATION FOR PUBLIC INSPECTION SEC

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